JUSTICE JOHN MARSHALL HARLAN

and the

"COLOR-BLIND CONSTITUTION"

> In the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.
>
> — J.M.H. in Plessy v. Ferguson, 1896.

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PREFACE

Mr. Justice Harlan was the "Great Dissenter" to the complacent attitudes of The Gilded Age. His opinions ran against the attitudes held by his contemporaries: laissez-faire in economics; imperialism in international relations, and subjugation of the Negro. Although once considered the equal and precursor of Oliver Wendell Holmes, he has been largely forgotten. Yet his views toward the Negro, civil rights, powers of Congress, and the Thirteenth and Fourteenth Amendments have come to be exonerated today, not those of his contemporaries.

For these reasons we must look again at the life and judicial opinions of Justice Harlan, not as a resurrection of a dead figure, but as a reconsideration of a vital figure in the Supreme Court. His role as the "Great Dissenter" was an essential one, keeping alive the liberal, independent spirit that would be carried on by Justices Holmes and Brandeis.

Because of the radical changes in values, and because of the volatile nature of the subject of race relations; it is necessary to synthesize the older contemporary accounts with the few modern accounts of Justice Harlan by liberals, who resurrected him as their legal standardbearer in the controversy over the 1954 segregation cases. I have tried to avoid secondary sources, which

are often distorted by the writer's political bias, and attempted to remain close to the cases themselves. It is often true that the cases were actually more important for what they were thought to be, than for what they actually said.

PROLOGUE

John Marshall Harlan was born in 1833 to a strong Whig family of the Bluegrass region of Kentucky. His father James Harlan was an intimate friend and political ally of Henry Clay, the Crittendens and Breckenridge. These leading families were influential in swinging Kentucky over from Jeffersonian Republicanism into the Whig Party during the 1820's. James Harlan had run successfully for Secretary of State of Kentucky, and U. S. Congressman from his district, and had been a Lincoln appointee for State Attorney General. James Harlan named his son for the great Chief Justice whose principles he shared and in which he raised his son: national bank, national tariff, and a national law supreme over the states.

Young John Harlan entered Centre College in Danville, Kentucky, in 1847. While he was there, he was exposed to the rigid Presbyterianism of the institution which would remain with him throughout his life. Strict Sabbath observance, temperance and Bible study were emphasized at Centre, where "the moral and religious culture of the youth has always been regarded by the officers of the College as their most important object."(1)

In 1850 Harlan left Centre to study law at Transylvania University. His training led him into the works of Coke, Blackstone, Littleton, Kent and Story; and into the nationalistic tradition exemplified by his namesake the Chief Justice. In 1852 the famous Kentuckian, Judge George Robertson, spoke at Transylvania, condemning the "pernicious errors of the secessionists, and upholding the supremacy of the Constitution as Washington, Marshall and Clay had done. Young J.M. Harlan revealed his own political philosophy by signing at the head of the three names which petitioned to have the speech published— condemning "the monstrous doctrines of nullification and secession, which threaten, ere long, unless firmly resisted by the patriotic intelligence of the people, to undermine the fabric of our Government." (2)

When he was admitted to the Bar in 1853, Harlan was already to join the Party of his father, which was:

> ...about to begin fifteen years of wandering in a political wasteland, too nationalist to merge with the Democrats and too Southern to join the free soilers or Republicans. (3)

After the deaths of both Clay and Webster in 1852, the Party began to split into sectional groups. The Kentucky Whigs, caught in the middle, tried to evade the issue by creating a diversion— American nativism. The twenty-one year-old lawyer decided, somewhat hesitantly to join the new party devoted to this cause:

> I was asked by a friend to join the Know-Nothings, my friend observing that all the old Whigs in the city were members of it. Well, I agreed to join, and did join the society. On the evening of my initiation an oath...was administered to me which bound me to vote only for natural Americans, and, in effect, only for Protestants. I was very uncomfortable when the oath was administered to me. My conscience, for a time, rebelled against it. For the moment I had the thought of retiring; for...I did not relish the idea of proscribing anyone on account of his religion. But looking around the room...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. So I remained in it, upon the idea that, all things considered, it was best for any organization to control public affairs rather than have the Democratic party in power. That was the kind of political meat my father fed me as I grew up. (4)

Although James Harlan owned about twelve slaves, inherited from his own father, they were only used as house servants, not as field hands, so that the family was very close to them. As John Harlan's bride, Mallie, records the relationship during her first years in her new family's household:

> The close sympathy existing between the slaves and their Master or Mistress was a source of great wonder to me as a descendant of the Puritans, and I was often obliged to admit to myself that my former views of the "awful institution of Slavery" would have to be somewhat modified. (5)

The Harlan family, like Henry Clay, were all emancipationists, favoring the ill-fated efforts of the African Colonization Society. James Harlan manumitted several of his slaves and helped them to make a start as freedmen.

They were strongly opposed to the abolitionists, however, believing that sudden emancipation without previous education or preparation would be disastrous. Forced abolition was regarded as a violation of the sanctity of private rights. The abolitionists and their Kentucky allies like Cassius Marcellus Clay made the Harlan family increasingly committed to the defense of slave property in the new territories. James Harlan was himself accused of being an "abolitionist agent" for having instituted a suit on behalf of two free Negroes who were kidnapped and sold; he wrote to a friend concerning this charge:

> I have never since I commenced the practice of law sought employment either from black or white persons; but anything which may emanate from Negro traders or others will ever prevent me from instituting a suit for freedom if I believe the laws authorize it....He who applies [the term "abolitionist"] to me lies in his throat....I have the same opinion of an abolitionist that I have of a disunionist— Each deserves the gallows. (6)

Like his father, John Harlan defended the freedom of emancipated Negroes in the courts, as well as the rights of white slave owners to their slave property. At the same time he maintained the orthodox Southern constitutional and political doctrines towards slavery in general.

Harlan began his political career soon after joining the Know-Nothings. He became a stump speaker for the American ticket in the 1855 state elections, and canvassed the state for presidential nominee Millard Fillmore in 1856. He was a successful candidate himself in

1858 for judge of Franklin County. The tall (six-feet, two-inches) redheaded young lawyer became one of the most popular orators in the Bluegrass region— he was advertised as the "young giant of the American Party."(7)

Although they carried the state elections in 1857, the Americans failed to win Kentucky for Fillmore in the 1856 presidential race. In 1857-1858 they failed again, this time being decisively repudiated in the state elections. It was obvious that the Kentucky voters were shifting to the more radically pro-slavery position of the Democratic Party.(8)

Because of his rapid rise in the political ranks, John Marshall Harlan received the nomination for the Ashland Congressional seat in 1859. Running for the Opposition Party (the former Whigs, Know-Nothings and Americans), Harlan covered the district in a tireless campaign. He hammered at the waning Buchanan Administration for its "extravagance, corruption and inefficiency" in the management of revenues; for its "bankrupt project placing State corporations at the mercy of Federal courts"; and for the Democratic proposal to place $30 million in the President's hand, in advance, for the purpose of an eventual purchase of Cuba. The argument between Harlan and his Democratic candidate centered, of course, on the slavery issue— Harlan being more devoted to the protection of property in slaves than his opponent. He maintained that

the Dred Scott decision had "judicially settled" the question of slavery in the territories by holding that Congress had neither the power to exclude slaves from them, nor could deny the duty to protect them:

> 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-owner in the Territories, whenever the local legislatures shall either attempt to destroy his right by unfriendly legislation or shall fail to pass such laws as are necessary for his protection. (9)

This view, of course, denied the Freeport Doctrine of Stephen A. Douglas, and the other compromisers of the Democratic Party. Harlan thought the northern (Douglas) Democrats and their southern allies were conflicting with property rights under the Federal Constitution by allowing "squatter sovereignty". Harlan lost the Ashland Congressional election by fifty votes, in what was thought (by Harlan's friends) to be a case of ballot-stuffing by the Democrats. Harlan chose not to contest the election, and rejected an offer of a $10,000 donation to pay for a recount.

Given their views towards the Democrats and slavery, it was no surprise that the Harlans rallied to John Bell and his Constitutional Union Party slogan of "The Union, the Constitution and the Enforcement of the Laws." (10) John Harlan tried desperately to avert war after the inauguration of Lincoln, and he suggested a plan in a letter whereby Federal troops would be withdrawn from the seceding states, giving time for a pro-Union party to develop

within these states.(11)

The Union cause was a difficult one in Kentucky during these months. The elder Harlan worked to head off a bill in the legislature that would have been the first step to secession. Govenor Beriah Magoffin was openly sympathetic with the South, and Kentucky had many close ties to its sister slave states.(12) This required a great deal of maneuvering to keep Kentucky in the loyal. From May to July of 1861, Harlan and his fellow unionists hired bands and spoke in the streets of Louisville about the advantages of siding with the North. He wrote about his motives:

> During the summer of 1861 nothing was talked of in Kentucky except Union and disunion. The courts were virtually closed and there was but little business in my profession. We determined to defer decisive action until the Union men of the State obtained arms, and in the meantime educate the people as to the value of the Union and as to the horrors and dangers of a civil war, should Kentucky ally itself with the rebel forces.... The thing we had in mind was to stay the tide then apparently setting towards the rebel cause, and to hold the people in line until the friends of the Government in Kentucky could strike effectively for the Union. (13)

Harlan became Captain of the Crittenden Union Zouaves, formed to combat a threatened Confederate invasion, and he helped to smuggle in the "Lincoln Guns", which had been arranged by his father. The guns were shipped by ordinary mail boat from Cinncinnati, and were received by Harlan at the Louisville wharf, and carried

across town to the train depot of the Louisville and Lexington Railroad. At the depot, the Unionists fought a losing battle with the Confederates until four hundred calvarymen, from the Union base at Camp Robinson, arrived and drove off the rebels.(14)

By the fall, the younger Harlan realized that he must "join the Volunteer Union forces and become something more than a speaker for the Union cause in public halls or on the stump."(15) On September 29, 1861, Harlan published a proclamation in the Louisville Democrat, calling for volunteers for a regiment he was forming. He issued an eloquent call to arms:

> Come, then, let us gird the whole strength of our bodies and souls for the conflict.... For one I am unwilling to see the people of my native State overrun and conquered by men claiming to be citizens of a foreign government. (16)

Thus at the age of twenty-eight he became a Colonel in the 10th Kentucky Volunteers under the Virginia Unionist, General George Thomas.(17) Harlan was something of a local hero when he outwitted the Confederate Morgan's Raiders at Rolling Fork Bridge in Kentucky in September of 1861. He saved the Union railroad lives, and repulsed the attack, thus giving the Kentuckians greater confidence in the Union cause. Colonel Harlan's dispatches show him constantly pleading for shoes, socks or other elementary articles needed to sustain his men in the constant rain, mud and cold.(18)

The experiences of the Civil War affected Harlan deeply. The scion of an aristocratic Kentucky family had to be in close contact with the rough Kentucky mountaineers and German immigrants who formed the largest part of his regiment. This seemed to lessen his aristocratic outlook and strengthen his equalitarian instincts. He wrote of his soldiers that they had a "willingness, even eagerness, to endure any fatigue or make any sacrifice...."(19) When war menaced his state Harlan realized that it was the poor who came to its defense, and who "deserve the thanks of the country for the cheerfulness with which, with insufficient food and rest, they bore up under the severest privations...."(20)

At this time Harlan lost the anti-Catholic nativism into which he had fallen before the War. The natural valor of the "many Catholics in my regiment" convinced him that the Know-Nothings (about which he had had reservations anyway) were wrong.

James Harlan died in February of 1863, so the young Colonel had to return to civilian life (just as his name was before the Senate to be promoted to Brigadier General). Harlan gave his reasons in a memoir:

> At the time he died my father had the largest practice of any lawyer in Kentucky and the support of my Mother and the family depended on the right handling of the business left by him. My three oldest brothers were dead, and my only remaining brother had become incompetent for business. I...alone knew what was necessary to be done in order to preserve from loss or waste what he had fairly earned by hard work in his profession. So, in every just sense, I

> was compelled to return to civilian life. This was the view of all my brother officers, including Gen. Rosecranz and his chief of Staff, Gen. James A. Garfield. (21)

Harlan feared, however that this resignation might be misunderstood, since there were suspicious about everyone in the border states. As later events proved (when his nomination for the Supreme Court was being considered*), there were valid grounds for his fears. In his letter of resignation he makes quite clear that his sentiments were still loyal to the Union:

> It was my fixed purpose to remain in the Federal Army until it had effectively suppressed the existing armed rebellion, and restored the authority of the National Government over every part of the nation. No ordinary consideration would have induced me to depart from this purpose....
>
> If, therefore, I am permitted to retire from the army I bid the Commanding General to feel assured that it is from no want of confidence either in the justice or ultimate triumph of the Union cause. (22)

Harlan returned to Louisville in March of 1863, when the state election campaign of 1863 was about to begin. Almost immediately the Unionists approached him, offering the nomination for attorney general of the State. The aspiring young politician readily accepted:

> The suggestion was not disapproved by me principally because if elected I would be required to remove to the capitol of the State, where my father lived at the time of his death, and where I was compelled to be in order to wind up his business and estate.(23)

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*The Senate Judiciary Committee did find his resignation suspect while they were holding hearings on his Supreme Court appointment

At this time the Kentucky Unionists had accurately read the pulse of the voters in their state. Harlan joined in, making an attack on the policies of Lincoln the major issue of the campaign. Defending both slavery and Constitutional liberty, he attacked Lincoln's "illegal" acts— the Emancipation Proclamation, and the suspension of habeas corpus. Since the Kentucky Unionists as a whole did not support all of the policies of the Lincoln Administration, Harlan stuck a responsive note with this argument. The Peace Democrats were strongly defeated, and John M. Harlan won by 50,000 votes over his opponent.(24)

During the four year term as attorney general, Harlan occupied himself not only with his position, but also with family affairs and a private law practice with his brother James (this was allowed by local custom). As Attorney General he argued over sixty appellate cases for the Commonwealth,(25) among which were several that concerned slavery and civil rights. His political position necessitated a strong stand against pressures from the North to emancipate all the slaves (including those of loyal Kentuckians), without compensation. His position also made it impossible for him to support the Lincoln Administration, even if he had wanted to, because Kentucky was so strongly opposed to it. It was natural, therefore, for Harlan to support Genreal George B. Mc Clellan in the 1864 campaign. An anti-Lincoln speech on October 4, 1864, given at New Albany, Indiana, is a good summary of Harlan's

political outlook at this time:

> That [Republican] Party should never have triumphed, because it was based upon the single idea of hate and hostility to the social institutions of one section of our country; its candidate having been elected in accordance with the Constitution, he was entitled to be respected as President....
>
> But for what purpose did the people of the North rise as one man? It was to maintain the Union, and the Constitution which was the only bond of the Union. It was for the high and noble purpose of asserting the binding authority of our laws over every part of this land. It was not for the purpose of giving freedom for the negro....
>
> Mr. Lincoln has in disregard of the then declared purpose of the nation changed and perverted the character of the war. He is warring chiefly for the freedom of the African race. (26)

Harlan evidently felt that Linclon's course was prolonging the war because it created more hatred in the South, preventing the rise of peace party. He said General Mc Clellan was "the representative of that spirit of conservatism that respected the Constitution and the laws...."; while "Lincoln commenced with a united North and a divided South. He now has a divided North and a united South...." (27)

Harlan was later charged with being a turncoat and politically disloyal, because he chose Mc Clellan in 1864. It must be made clear that in every other instance but this, he supported the party that was running against the Democrats. Harlan made it clear why he supported a Democrat here, during a debate in 1875, with James B. Mc Creary,

Democratic candidate for Governor of Kentucky. Harlan was reported as saying that:

> . .he voted for General Mc Clellan not because he was the Democratic nominee but because of his letter of acceptance, in which he repudiated the platform upon which he stood, and boldly declared for the Union ...He [Harlan] had confidence in the patriotism of General Mc Clellan, and his belief at that time was that the election of General Mc Clellan would result in the speedy suppression of the rebellion and the restoration of national authority. (28)

The real issue to Harlan personally was the rights of property under a strict constitutional view; it was not slavery, as can be seen in Harlan's own experiences with slaves. At this time, he was not actually a slaveholder himself, but stood to receive (along with his mother and brother) one-third of his father's dozen slaves. Instead of accepting them, however, he gave all the slaves to his mother. His wife tells in her memoirs why he did this:

> He could not bear to think of them falling into other hands through the barter and sale of human beings that was still in vogue. Promptly. .he therefore made himself responsible to the Estate for the value of the rest of the slaves, and he actually paid for them after Lincoln's Emancipation Proclamation had set them free [she probably means after the Thirteenth Amendment]. (29)

Thus, in order to provide his mother with her accustomed comfort, he gave her all the slaves, including those that were to come to him. During the same year he and his wife set up a seperate household away from the family home; for help they bought a Negro cook, who did

not get along with Mrs. Harlan, and was set free. They bought another, who begged the Harlans "to buy her so that she would not be 'sold South' and seperated from her husband."(30) According to Westin these represented Harlan's only personal experiences as a slave owner.(31) It is plain, therefore, that slaves were incidental to Harlan's political views. He only wanted them protected because they were a piece of property guaranteed by the Constitution.

From 1865 to 1867 Harlan tried to steer the Conservative Union Party (yet another name for the same group) in a "middle course" between the Democrats (Confederates) and the Radicals.(32) In the 1865 state legislative elections the Conservatives came close to the Democratic position with regard to the Thirteenth Amendment, and Reconstruction policy within Kentucky. Harlan attacked [illegible] General John Palmer for enlisting Negroes in order to free them, and he opposed the operations of the Freedman's Bureau. He despised this sort of Federal coercion where Kentucky was denied the right "to effect the removal of the blacks to other localities or protect her white citizens from the ruinous effects of such a violent change in our social system."(33)

Harlan was strongly opposed to the Thirteenth Amendment, and warmly supported the state legislature in the defeat of its ratification. He said that he stood on principle and would be opposed "if there were not a dozen slaves in the State of Kentucky...."(34) He thought that the

Amendment gave dangerous and unconstitutional powers to the Congress. In its stead he proposed a gradual plan whereby Kentucky would voluntarily abolish slavery over a seven year period.(35)

The elections of 1865 showed that the middle of the road policy was running out of road: The Democrats won a sweeping victory. As a result, the Conservatives joined the Radicals and ran the Union general, E.H. Hobson, as their nominee for govenor in 1866. Harlan rejected this move, and remained aloof even after the Thirteenth Amendment was ratified by the states. The Conservatives were virtually dead by 1868, so the middle group had to decide which radical party they wanted to join— there was no longer any compromise. Most of them joined the Democratic Party, but Harlan chose the Radicals (Republicans). This choice was determined by a lot of factors, not the least of which was his move from the fiercely anti-Negro, Democratic Frankfort area, to the city of Louisville, closely tied to the neighboring Republican state of Indiana.

A second factor was Harlan's close allegiance to the Presbyterian Church— Having been favorable to the pro-Union course of the General Assembly of the Church during the war, Harlan opposed any attempt to move the Kentucky Church into the Southern Synod. In 1867 a pro-Southern group tried to instigate such a move by

means of a bill in the legislature to seize Centre College. Harlan led the fight allied with the Church's pro-Northern leader Reverend Robert Breckenridge. He argued the case in front of the Judiciary Committee of the legislature, and won it over to the northern side. He secured the defeat of the bill, and defended the northern cause in the courts when other attempts were made.(36) The Southern Synod sympathizers were defeated, and Harlan emerged from this battle with an intense dislike for the secessionists, (and now) heretical schismatics of the Democratic leadership in Kentucky.(36) His new associates in Louisville were Radicals, and he now began to associate more frequently with them. He formed a law partnership with one of their leaders, Benjamin Bristow.

A third factor influencing Harlan in his conversion to Republicanism was that he had more in common with that party than with the Democrats. He said: "I was an intense Nationalist [and the] great majority of the Democrats in Kentucky believed that their first allegiance was to the State...."(37) This choice was facilitated when Grant became the Republican presidential nominee. Harlan had met him during the war and he had the added advantage of not being connected with the War Amendments. Further, Grant stood for preservation of the Union victory against the resurgent Democratic Party. Thus, in 1868 Harlan stumped for the Republican

candidate for Governor of Indiana, Oliver P. Morton when he defended the War Amendments as a "fait accompli" which Kentucky must accept if it was ever to move forward again. Perhaps the most surprising change in Harlan's outlook was his defense of the Republican Party as the sponsor of the Thirteenth and Fourteenth Amendments. He began to realize, also, that the impending enfranchisement of the Negro could do much for the Republican Party and it was upon the Negro that the Party must impress itself.(38)

The first test of this hoped-for Negro support came in the guberatorial election of 1871. The Republicans looked for a new face that would attract the Radical pro-Negro vote, as well as the conservative former Whigs. Their gaze fell upon John M. Harlan, who was nominated in May at Frankfort. Harlan wrote later about his reaction:

> I did not seek the nomination [and] ...had no thought of it; for my purpose was to stick closely to the practice of my profession and make an estate for my young family. But that nomination seemed to be a call to duty and I accepted it, knowing that I could not be elected...(39)

Harlan campaigned for economic growth and supported a program to bring immigrants to Kentucky from Germany, so that the state's rich "agricultural, mineral and manufacturing resources may be developed."(40) This was quite a different line for a former Know-Nothing, and his opposition was quick to point this out. He criticized

the Democrats for their hampering of progress by race hatred, and for their support in the legislature for the monopoly given to the Louisville and Nashville Railroad. He further proposed to substitute an income tax to pay the state's Civil War debt, instead of the property tax supported by the Democrats. Related to this, he favored a general property tax for education rather than an assessment to the family for each child they enrolled in school. He praised the poor and said that their valiant efforts in the war were deserving at least of the reward of education.

This new interest in the poor and the Jacksonian opposition to banks, monopolies and unfair taxation, seem to have been a result of his war experiences, rather than a purely demogagic appeal to the mass electorate. Mrs. Harlan noticed that "The sturdy mountaineers, in particular, became an interesting study to him. He predicted a great future for them, because of the opportunity for education that was then opening to them...."(41)

His ideas about the Negro had already undergone a rapid change as noted above. The activities of the "Regulators", "Skagg's Men" and similar groups spread a reign of terror for the former slaves throughout the western parts of the state from 1868 to 1871, and the Democratic Administration failed to control the lynchings and floggings.(42) This more than anything convinced

Harlan that the freedmen would have to have their new constitutional rights recognized and protected. On July 26th, 1871, he expressed his new views toward the Negro in a speech at Livermore, where he supported fully the Negro's rights. This speech deserves to be quoted at some length, because it is a sincere explanation of his new position.

> It is true fellow citizens that almost the entire people of Kentucky...were opposed to freedom, citizenship, and suffrage of the Colored race. It is true that I was at one time in my life opposed to conferring these privileges upon them, but I have lived long enough to feel and declare...that the most perfect despotism on this earth was the institution of African slavery. It was an enemy to free speech; it was an enemy to a free press.... With slavery it was death or tribute. It knew no compromise, it tolerated no middle cause. I rejoice... that these human beings are now in possession of freedom, and that that freedom is secured to them in the fundamental law of the land, beyond the control of any state.

He goes on the support the War Amendments:

> I am now thoroughly presuaded that the only mode by which the nation could liberate itself from the conflicts and passions engendered by the war in connection with the institution of African slavery was to pass the Constitutional Amendments, and to place it beyond the power of any State to interfere with or diminish the results of the war now enobdied in these amendments. They are the irrevocable results of the war;

Harlan summarizes his thoughts in a succinct expression of his political creed:

> ...because the Republicans of the State of Kentucky now aquiesce in these Amendments

> or now declare them to be legitimate and proper, it is not just or candid to charge them with inconsistency. Let it be said that I am right rather than consistent. (43)

He attacked the Democrats for their opposition to the civil rights acts passed by Congress. Harlan defended the expediency of these laws, saying:

> Had the Federal Government, after conferring freedom on the slaves, left them to the tender mercies of those who were unwilling to protect them in life, liberty, and property, would have deserved the contempt of free men the world over. (44)

It is thus clear that Harlan objected to the laissez-faire attitude that was becoming common. Although he opposed uncompensated emancipation, he recognized it as an accomplished fact. The necessity for protecting the Negro by the power of the Federal Government is a necessary result of this fact— not to protect the Negro would be to allow violence and lawlessness.

During the campaign he violently attacked the outrages of the KKK Klux Klan, and supported the Federal Anti-Klan Act of 1875 designed to deal with this group. He did, however, "entertain some doubts as to the constitutionality of one of the provisions of the bill." (45)

The Democrats, as expected, ridiculed him even more than they had about his earlier Know-Nothing views in contrast with his later favoring of immigration. They found the new inconsistency with regard to the Negro even more ridiculous, calling him a "political weathercock", and charged that he was advocating "social equality"

between the races. Harlan denied this charge [expressing the same arguments used by Justice Brown in the Plessy Case, to which he objected so violently in his dissenting opinion]. Harlan answered his critics, in true legal fashion, by asking a question: "Do you suppose that any law of the State can regulate social intercourse of the citizen?.... No law ever can or will regulate such relations." He then went on to say that the Negro could have full legal equality without integration in the schools, and that it was "right and proper" to keep "whites and blacks separate." (46)

Harlan received only 89,000 votes to his opponent's 126,000 but even this was quite an accomplishment. As Coulter points out:

> The real beginning of an intelligent opposition to the Democrats was made in 1871..., and it was at this time that it can be truly said the Republican Party in Kentucky was born. (47)

Harlan had helped to build a strong and well-organized party, which from this time on, would play an important role in the political life of Kentucky, even though a Republican would not win the govenorship until 1896.

In 1872 Harlan was briefly considered as a favorite son candidate for Vice President, but this move never really gained momentum outside of Kentucky. During this campaign he accepted James G. Blaine's invitation to speak in Maine for the Republican ticket. While he was

there he met Frederick Douglass, and it is indicative of the personal outlook of Harlan that he said of the ex-slave— "he would have made a great Senator." (48)

After a brief time in 1873 as a special prosecutor (under the Attorney General of the U.S., George H. Williams) involved with prosecutions for violations of the Enforcement Acts of Congress,(49) Harlan was again the gubenatorial nominee of his party against his "earnest protest". The campaign this time was against the Democrat, James B. Mc Creary and again centered on the Negro question, especially the Civil Rights Act of 1875. In defending this act, he said that it did not (as the Democrats charged) confer upon the Negro superior rights to the white race, but only equal rights and privileges. He did, however, state that the Act only applied to interstate commerce, and had no authority over the acts of individuals within the states, since the Fourteenth Amendment applied only to actions by states which prohibited the civil rights of citizens:

> I do not believe that the Amendments to the Constitution authorize the Federal Government to interfere with internal regulations of theater managers, hotel keepers or common carriers within the states, in referance to the colored man, any more than it does in regard to white people....(50)

General Harlan was again defeated although he again succeeded in raising the Republican vote. He was defeated by the wave of hostility to the war measurers

and reconstruction policy, and because the voters were not yet ready for the advanced, liberal, economic program he had advocated— taxes according to one's ability to pay, advancement of public education with tax revenues, encouragement of immigration and a state anti-monopoly program.(51)

During 1875 and 1876 Harlan spent a great deal of time attempting to build up national support for his law partner, Benjamin Bristow. Appointed Secretary of the Treasury in Grant's Cabinet, Bristow was a prime candidate for the Republican nomination in 1876. Harlan gave the nomination speech at the convention. After the seventh ballot it became obvious that the trend was towards James G. Blaine. Preferring Hayes to the "Plumed Knight", Harlan swung the Kentucky delegation to him and began the drive that led to the nomination for Hayes. When he was elected it was obvious that Harlan had good reason to expect a political appointment. He expected the Attorney General's office, and would have accepted it if offered.(52) As head of a state Republican party, a national campaigner, and a major figure in the convention maneuverings, Hayes was obligated to him and this debt increased after his membership on the Louisiana electoral commission in the Spring of 1877.(53)

The situation in Louisiana was deplorable after Hayes withdrew the Federal troops, and two rival govern-

ments (and consequently two sets of electoral votes) opposed each other. Hayes could have settled the dispute by using the method Grant had used— i.e., by employing troops to back up the de jure government— but he decided that this was both unwise and impractial:

> It is not the duty of the President of the United States to use the military power of the Nation to decide contested elections in the States. He will maintain the authority of the United States and keep the peace between the contending parties. But local self-government means the determination by each State for itself of all questions as to its own local affairs. (54)

The Republican legislature, elected under carpet-bagger rule, sat in the state capital building, and was led by Govenor Packard. The Democratic legislature led by Nichols, claimed to be the legitimate body because the election had been "fixed" and because it expressed the will of the people. Since Hayes wanted to withdraw the troops who were guarding the safety of the Republicans in the state capitol, it was obvious that the de facto Democratic legislature might became the de jure one. If this happened, then not only would Republican govenor Packard be out of office, but the Republican electoral votes cast for Hayes might be questioned. As Woodward points out:

> ...Packard received a larger number of votes than some of the Hayes electors and therefore had a stronger claim to the govenorship of Louisiana than Hayes had to the Presidency of the United States....(55)

The Cabinet decided on March 20 to send a commission to Louisiana to take no action, but only to observe the situation and report to the President as to the best way of settling the dispute peacably. The commission soon realized that the only solution was to consolidate the two bodies into one legislature which would have a quorum of duly elected members. The commission came under fire from the press almost immediately, accused of both taking and dispensing bribes to the members of the Packard legislature to get them to allow some of the Democrats to take their places. Although money undoubtedly changed hands, the commission did not participate in the transactions.(56) Also many of the Republicans aquiesced voluntarily, sensing that the removal of Federal troops was imminent, and knowing that if they did not join the Democrats they would be out of jobs.

Whatever the actual methods were, the situation soon solved itself with the Democratic legislature emerging triumphant. Although this satisfied Hayes, it brought upon all the members of the commission the wrath of the Radicals. This would be demonstrated shortly thereafter when Harlan's appointment was being considered. It was inevitable that they would claim this appointment was a "reward"for "fixing" the Louisiana controversy.

When Justice Davis resigned from the Court in March of 1877 to become U.S. Senator from Illinois, Hayes

began to consider successors. He had discussed with Harlan the possibility of sending him to the Court of St. James'. He had asked the Kentuckian: "Would a first class foreign mission tempt your ambition?...the very best mission we have— the English Mission."(57) Harlan was not interested, but delayed three weeks in refusing, so "that I should not appear to treat his offer lightly."(58) Hayes, however did not think of Harlan at first when he began to consider a replacement for Davis.

The leading contender was William B. Woods of Alabama, since the President wanted a Southerner to dramatize the sectional reconciliation which was his desired policy.(Of the twenty-six names he considered for the post, only one, James Drummond, was from the North). Woods was a carpetbagger from Ohio who had become a judge for the Fifth Circuit in 1869. His supporters included James A. Garfield, together with the Republicans of the Deep South. He, however, was passed over and was eventually appointed in 1880.

Harlan was well known in Republican circles and had been a frequent correspondent with the Attorney General's office, having written on behalf of his law partner in his aspirations to the Court. Hayes seems to have rejected Bristow as his nominee (not suprisingly since he had just run against him the year before) because he feared Bristow's political ambitions might

lead him to use the Court appointment as a "stepping stone". In a letter dated May 6, Justice Miller described to his son-in-law, William P. Ballinger, an interview he had with Chief Justice Waite, during which the two judges had considered the merits of the four top contenders [William Hunt of New Orleans; Ballinger of Texas, the justice's brother-in-law, whose appointment he was probably urging; Bristow; and Harlan]. Miller said that Waite was "...decidedly opposed to all three of them. Thinks Hunt not up to the mark in ability; Bristow too much aspiring."

In the same letter, the justice tells of a talk with the President, during which Miller summed up the two Kentuckians, saying that:

> ...both were fully up to the standard required by native ability and professional attainments. That of the two, Harlan was probably a man of the most vigorous intellect, while Bristow was believed to be if any different of the soundest judgement.

Miller then recalled that Hayes had referred to "Bristow's presidential aspirations [which] were to be feared..."(59)

Hayes himself recorded in his diary that he intended to appoint neither anyone from the Cabinet of Grant, nor anyone with presidential aspirations.(60) The other candidates were thus eliminated either because they lacked the qualifications or they were distasteful to the President personally. On October 16,

1877 the President included the nomination of John Marshall Harlan as an Associate Justice of the Supreme Court in a list of nineteen appointees to sundry posts sent to Congress. The nomination of Harlan was referred to the Senate Judiciary Committee, where it unexpectedly remained for forty-one days, while the qualifications, integrity and ability of the man were ostensibly being considered.

Actually this was not the intention of the committee. They opposed Harlan because he was known to be "a Hayes man", and they were trying to discredit the President by attacking all his nominees, regardless of the man or the position. The Radicals in control, Edmunds, Conkling, Howe, were trying to frighten the President into submission by a show of their power. Hayes was confident, however, for he noted in his diary that his judicial appointments would bear the closest scrutiny.(61)

The three most frequent objections raised to the appointment of Harlan were: his participation in the Louisiana electoral dispute; the recent conversion to Republicanism, making his Party loyalty suspect; and the reasonable objection that it would be unwise to appoint another judge from the Sixth Circuit which already had two judges on the Court, while the Fourth, Fifth, and Seventh (the Deep South) Circuits had none, and were thus underrepresented on the Court.

Senator Beck of Kentucky solicited votes for Harlan, lining up a strong base of bipartisan support. The Senator was involved at this time with the Kellogg-Spofford (Republican-Democrat) dispute for the Louisiana Senate seat. This unseemly quarrel reflected on the work of the Louisiana electoral commission, and made Harlan, as one of its members, come under attack.

Beck was having trouble lining up the Radicals, so he solicited a long autobiographical letter from Harlan, answering the charges made against him as fully as he could(i.e., he answered the questions about his party loyalty and former opposition to the War Amendments, but he could not answer the question of geography). Beck turned the letter over to the Judiciary Committee, where it did little to speed the appointment, but it is interesting as an autobiographical account.

He begins by explaining his delayed conversion to Republicanism. He states that there had not really been a Republican Party in Kentucky before 1868, and that he had voted against the Democrats in all elections except 1864 (Scott, Whig, in 1852; Fillmore, American, in 1856; and Belland Everett, Constitutional Unionist, in 1860). As stated above* he voted for Mc Clellan because at the time he considered him the most likely man

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* See note 28

to end the war.

Second, he tells of his switch to Unionism in 1866 when he took the stump for Hobson (candidate for Clerk of the Court of Appeals), and in 1868 when he finally converted:

> In that year I announced my purpose to adhere to and sustain the Republican Party. I canvassed Kentucky and portions of Indiana for Grant and Colfax, defending the action of the Republican Party in passing the 13th and 14th Amendments. (62)

He then summarized his campaigns in 1871 and 1875, when he defended the War Amendments, the Civil Rights Acts, and the "KKK Klux Act". He also tells of his visit to Maine with Douglass and James G. Blaine.

He denied the charges made about the work of the Louisiana Commission, and says that he never condoned bribery as a means of shifting the balance of power over to the Democratic legislature:

> Any imputation of improper methods to the Commission or to any members of it, in connection with the Louisiana business, is unjust, and without the slightest foundation upon which to rest.(63)

Last, he defends his resignation from the Army in 1863.(64) He says that he did it not because of a lack of sympathy with or confidence in the Union cause, but only because he had pressing family matters, resulting from the death of his father, that he had to settle.

This honest and direct confrontation with the charges made against him should have silenced the opposition blocking his appointment. It did no such thing;

in fact the hearings dragged on for twenty-nine more days, while the committee heard slanderous testimony, of which the following excerpt is typical:

> Can you not postpone this confirmation until the regular session?.... Harlan is deficient in legal and professional education.... As for general scholarship or literary attainments, he has none.... and as sure as you and I live we will both see the hour when he will be the sycophantic friend and suppliant tool of the Democratic Party. (65)

These attacks which the committee heard for so long indicate that it was not really Harlan they objected to, but that they were trying to discredit the President by slandering his appointee. As one newspaper summarized it:

> Objection mainly comes from the Republican members of the committee, who say that while they have not made up their minds to vote for or against Harlan, still.... The Republican senators seem to cherish a sort of special grievance against not one but all the members of the [Louisiana] Commission...(66)

Justice Miller approved of Harlan, and chided the members of the committee for their obvious political motives:

> I also told him [Senator Christiancy] that if the Republican Party in Congress was going to have a rupture with the President they could not afford to inaugurate the fight by refusing to confirm such a man as Harlan. (67)

Eventually the fight was over. On November 29, 1877, the nomination was confirmed. On December 10,

1877 he was sworn in as an Associate Justice of the Supreme Court.

II LIFE AS A JUSTICE

This was the beginning of the third longest career on the Supreme Court (longer than any other justice except Field and Chief Justice Marshall). During his almost thirty-four years on the bench, Justice Harlan wrote 703 opinions for the Court, and more significantly, he dissented 316 times. Other than brief service as an arbitrator on the Bering Sea Tribunal in 1893, and as a professor of constitutional law at the Columbian (George Washington) University, from 1889 until his death; Justice Harlan spent all of his time on the duties of the Supreme Court.

He taught a Sunday school class for many years, an activity which was an integral part of his strong Presbyterian views, which were uncompromising and fundamentalist:

> In the Presbyterian Church he is a pillar....
> [In his Bible class he teaches]...the
> real meaning and intent of the scriptures.
> It may be noted that what he teaches is the
> good old solid religion minus the free-
> thinking tendencies of modern times.(1)

The stern Calvinist allowed himself no luxuries of the flesh, and permitted none to his associates. This is illustrated in the humorous story of Harlan playing golf:

> Harlan is the champion golfer in the
> Supreme Court and is as fond of the
> game as Taft is. He was playing one
> day with an Episcopalian bishop.
> The right reverend gentleman struck
> at the ball several times in succession,

> missing it each time and barking his episcopal shin. The bishop, however, said nothing. He couldn't afford to. He knew Harlan was watching and listening.... So the bishop took it out as far as possible in hiding his feelings. Justice Harlan nevertheless was shocked. Stepping up, he remarked in a voice of sorrowful rebuke:
>
> "Bishop, that is the most profane silence I ever heard."(2)

Justice Harlan was vigorous physically, as well as in his oratory and mental powers. He remained so until a four-day illness ended his life abruptly. The following story illustrates his legendary physical fitness.

> Not long ago...the spry young lawyers of Washington played a match game of baseball with the stately judges.
>
> "Harlan up!" called the scorer.
>
> The justice trotted to the plate, glared at the pitcher, gave his hat a few preliminary swings, and hit the first ball— When it dropped into a gulch about twenty yards behind the center-fielder, the mighty hitter was nearing second base. (3)

Harlan was by taste and temperament one of a dying breed, "the Southern gentleman". He lived graciously at his home in Washington on Fourteenth and Euclid Streets. The veteran journalist and raconteur Samuel Blythe describes the scene:

> Here you get the most charming of Southern welcomes; here, too, in the cozy book-lettered study on the second floor, you see the veteran justice in repose.... As you sit by the fire in this room and smoke stogies with the venerable judge—he prefers them to the finest cigars—you bask in the mellowing light of a full life. (4)

When Harlan was appointed, there were few who regar-

ded him as anything but another politician receiving his reward for services rendered to the new Administration. A small portion of this attitude is true, yet Harlan turned out to be one of the most forceful and active judges who ever sat on the bench. A typical comment by a surprised observer of the Court expresses this feeling.

> The appointment was unquestionably in payment of a political debt, but at the same time it proved by accident (the word "accident" is chosen deliberately in view of the character of Hayes' later appointments) to be one of the best ever made. (5)

His career as a politician had demonstrated his ability as an orator and organizer, but suggested little of his ability as a justice. The radical change in his attitude toward the Negro, states' rights, and the role of Congress under the Constitution, had shown a tenacity to principles (all but changing ones), but indicated little in the way of a stable, consistent judicial outlook. What is so surprising about his career is that this consistent outlook had been ingrained by this time, and that he kept it throughout his life:

> [At the time of his appointment] Harlan had achieved a synthesis of civil liberties, property rights, and state police powers which was beyond the ability of even Justice Miller, and though this synthesis was ultimately to break down, it lead... to many great judicial opinions; nearly always on the minority side. In his general philosophy, as well as his reputation as "The Great Dissenter", Justice Harlan was to be the direct predecessor of Justice Oliver Wendell Holmes. (6)

Although I deny the contention of this writer that the synthesis "was ultimately to break down," I think his tripartite analysis of the philosophy of Harlan is accurate. He was basically a Jeffersonian in political outlook, hence his upholding of both the rights of property and civil liberties:

> His feelings were enlisted on the side of what he believed to be popular rights, and his convictions were those of one who identified the liberties of the people with in preservation of certain early and primitive conditions of life. Although a Republican, there was much about his views that made them resemble those of Jeffersonian Democrat.(7)

This respect for civil liberties and property was tempered by his earlier experiences in Kentucky. The lynchings and whippings by the Klan, and the inability of the state to deal with them, convinced him of the need for strong police powers at both state and national levels. This caused a tension with his respect for human freedom and individuality, and forced him to find a judicial outlook which could reconcile these two conflicting principles.

Justice Harlan was often criticized because he was "unlegal", indulging in extraneous and impassioned opinions. This, together with his frequent disagreement with the trend of the Court's decisions, made him unpopular with the conservative press. One writer in The Nation, in an article entitled "Justice Harlan's Harangue", ridiculed him for his strongly- worded dissent in the

Income Tax Case (Pollack v. Farmer's Loan and Trust Co., 1895), and stated that:

> Turning the bench into a stump lowers the court in the public eye and lessens its authority. At no time in its existence ought its members more carefully divest themselves of every character but that of lawyers, to put on an air of more dispassionateness, and dryness, and abstraction, than when passing on the validity of an act of Congress....(8)

It is just this type of "dispassionateness" and "dryness" of lawyers which Harlan disliked and feared. He did not oppose legality, but only legalistic equivocation. He feared that the Court, by the use of legal precedent and complicated reasoning, might not only pass on the validity of laws of Congress and the states, but could actually legislate itself or so alter old laws as to make them unrecognizable. Harlan knew the ability of the Court to justify illegal or inequitable acts by legal methods—

> ...the Courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts... that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property....(9)

This distrust of pure legalism and casuistry led Justice Harlan to be simplistic on his opinions. He was, of course, criticized for this. Those who disagreed with him usually did so on the grounds that his opinions are off the subject, disregard precedent, or were extraneous. In this they were often correct, but

they missed his intention. This was to use the legal opinion to clarify a point of law, rather than to use it to obscure a point still further by clouding it with too many legal technicalities. As Chief Justice White put it:

> His method of thought, in disregard of mere subtleties or refined destinctions, led him to the broadest lines of conviction, and as those lines were by him discerned, and differences between himself and others became impossible of reconciliation, the warfare of mind with mind was carried on, not with adroit fence or subtle play of reason, but with a directness and entire disregard of all narrower points of view.(10)

The simplicity of his view of the Constitution stems from the almost religious respect in which he held that document. Justice Brewer once said of him— "He retires at eight with one hand on the Constitution and the other on the Bible, safe and happy in justice and righteousness."(11) By keeping his arguments simple and to the point, Justice Harlan sought to express what he thought was the intent of the writers (and amenders) of the Constitution, and to apply the spirit behind that intent to the case before him.

Once he had decided on his opinion in a case he was unmovable from it, because his opinions always took on the moral force of principles. He worked strenuously on these opinions so that they would be worthwhile:

When he is considering a case, he fastens

> himself up in his library, pulls down all the books bearing on the matter in hand, studies far into the night for many nights, and then makes up his mind. After that he is fixed, immovable, immutable. (12)

Harlan strongly opposed any intrusion by Federal Government into an area rightly belonging to the jurisdiction of the states; conversely, however, he had a strong sense of nationalism which he felt balanced the prerogatives of the states and bound them into a union. He felt the Constitution most suitably expressed and maintained this balance; but he did not fear changes as long as the people desired it. What he feared was that the courts, particularly the Supreme Court, would change the Constitution by interpretation, thereby bypassing the Congress: This is the key to all his great dissents, in the area of Negro rights, and in all other aspects of the law:

> If the Constitution is to be abolished it is to be done by the people, not by the Supreme Court. This is why he [Harlan] dissented to the denial of Trial by Jury to the Philipino, Jim Crow to the Negro, and denial of citizenship to the Indian.
>
> "The people of the United States who ordained the Constitution never supposed that a change would be made in our system of government by mere judicial interpretation."
> [J.M.H. from the Standard Oil opinion, 221 U.S. 106]

The judicial opinions of Justice Harlan towards other aspects of constitutional law other than civil rights are not within the scope of this study (such as his famous

dissent in The Knight Sugar Case, his opinion in the Northern Securities Case, and his last two dissents in the Standard Oil and American Tabacco Cases). One aspect of the law, however, is closely related to the civil rights issue, and was one of Justice Harlan's foremost concerns:

> there was an especial appeal to him in cases involving those rights of the individual which it was the purpose of the amendments to the Federal Constitution to secure, and he supported the national authority in its fullest scope as the sure means of maintaining those rights. (13)

Harlan was particularly steadfast in his resistance to the efforts of other members of the Court to limit the Fourteenth Amendment so much, as to render it impotent. The Court narrowed the protection afforded by this amendment in respect to due process of law by a series of decisions which held that in state procedure, the right to indictment by a grand jury, the right to trial by jury, and the right to be free from self-incrimination were not necessarily guaranteed by the Fourteenth Amendment. All of these rights were guaranteed in federal procedure by the Bill of Rights. The decisions by the Court in these cases [Hurtado v. California, 110 U.S., 516 (1884); Maxwell v. Dow, 176 U.S., 581 (1900); Twining v. New Jersey, 211 U.S., 78 (1908)] elicited a vigorous dissent from Justice Harlan in all three instances.

He felt that the Amendment guaranteed these rights explicitly in the procedural due process clause, and that the decision of the Court in these cases left the individual, particularly the Negro, vulnerable to arbitrary state action.(14) This brings us to a consideration of the role of the Negro in the Constitutional law of this period, and of Justice Harlan's view of the Constitution with regard to the new status of the Negro.

III - HARLAN, CIVIL RIGHTS, AND THE POST-WAR COURT:

When Justice Harlan joined the Court in 1877, the issues concerning the new citizenship of the Negro had already begun to be considered. The Court had already seriously limited protection to the Negro under the War Amendments and the civil rights laws. The first case, Blyew v. United States (1872),(1) had overturned a prosecution of white men accused of depriving a Negro of rights guaranteed in the civil rights acts. It disallowed the trial of the white man in a federal court because of the exclusion of Negro testimony in state courts. The second overturned a conviction resulting from a conspiracy attempt to disband a Negro meeting (United States v. Cruikshank, 1876),(2) United States v. Reese (1876),(3) was a third successful conviction of a white man disallowed by the Supreme Court. It denied a conviction for infringing of the right of Negroes to vote in state elections. All three of these denied that the points in question were included in the rights and privileges guaranteed by federal legislation.

The first case concerning civil rights which came up during Harlan's service on the bench was Hall v. De Cuir, (1878).(4) Clark* gives a detailed explanation

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* Clark, F. B. The Constitutional Doctrines of Justice Harlan. Baltimore: Johns Hopkins Studies in History and Political Science. Vol. 33 pp. 90-91 (1915).

why Justice Harlan did not dissent in this case, given his later record concerning the Negro and civil rights. The case itself was held invalid, a state statute which forbade the segregation of races on public carriers, in this case a Mississippi River steamboat. The Supreme Court held it invalid on the grounds that it was a burden on interstate commerce by a state, and therefore invalid. Justice Harlan did not dissent for the simple reason that although the decision was handed down after he ascended to the bench, the case had been argued before this time, so he was not eligible to participate. The Reporter's Memorandum makes this quite clear.* If Harlan had taken a part in this case, it is probable that he would have dissented, since he publicly supported equal treatment on public carriers, and would have held this to be constitutional. The next case illustrates his attitude toward accomadations for Negroes on public carriers in interstate commerce.

In Louisville, New Orleans and Texas Railroad Co. v. Mississippi(1890),(6) the Court declared valid a Mississippi law requiring the races to be seperated in railroad coaches. The railroad had violated the law by refusing to furnish seperate accomodations, and when it came before the Supreme Court on a writ of error it

* "Mr. Justice Harlan took no part in the decisions of the cases reported in this volume preceeding United States v. Fox," (5) Hall v. De Cuir occurs after United States v. Fox.

argued that this law violated the Constitution because it was a burden placed by a state upon interstate commerce. This case obviously was in direct conflict with the Hall v. De Cuir decision, but Justice Brewer explained this away in his opinion for the Court by declaring that the law affected commerce only within the state and therefore did not violate the commerce clause of the Constitution. He further stated that in Hall v. De Cuir "the steamboat was engaged in interstate commerce, but the plaintiff only sought transportation from one point to another in the State."(7) Whereas, in the railroad case, the company had violated a state law governing commerce within its borders.

Justice Harlan did not accept this distinction, since the two cases together seemed to tacitly imply that the U. S. Supreme Court would "hold statutes discriminating against colored persons constitutional rights if the state courts will uphold them."(8) He stated in his dissent that

> the Louisiana enactment forbade the seperation of the white and black races while such vessels were within the limits of that State. The Mississippi statute... requires such seperation of races, while those trains are within that State.... It is difficult to understand how a state enactment, requiring the seperation of the white and black races on interstate carriers of passangers, is a regulation of commerce among the States, while a similar enactment forbidding such seperation is not a regulation of that character. (9)

In other words, Justice Harlan rejected the tacit

statement of the Court that the ruling of the state courts would determine the ruling of the U.S. Supreme Court. He argued his case effectively, using the precedent in a more careful manner, than did the majority opinion of Justice Brewer. This case, is of course, a forerunner of Plessy v. Ferguson and had already decided some of the points involved in that later, more famous case.

Before preceeding to that case, it is necessary to consider first the Civil Rights Cases of 1883,(10) without which the Plessy case is meaningless.

THE CIVIL RIGHTS CASES

In contrast to the Mississippi railroad case, which was concerned with the validity of state segregation laws, the Civil Rights cases were the test case for the limits of Congressional power over private discriminatory acts. In a sense this decision was predetermined, since Blyew v. U.S., etc., had already seriously limited the protection offered to the Negro under the civil rights legislation. The Negro was no longer even protected from mob violence, because in U.S. v. Harris (1883),(1) the Court had declared unconstitutional the Ku Klux Act of Congress, with eight judges* taking the position that the Civil War Amendments did not provide Congress with authority to punish private individuals in conspiracy to deprive persons of their civil rights, but only to strike down state laws.(2)

The first four of the six cases were federal prosecutions of individuals under the Civil Rights Act of 1875, for denying because of their race, theater and hotel accomodations to Negroes. The story of one of these, U.S. v. Singleton, is illustrative of all of these cases.(3)

On November 22, 1879, the Grand Opera House in New York City was putting on a Saturday matinee of

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* This is the only instance, in the thirty-nine cases relating to the Negro, that Justice Harlan did not take a stand or express an opinion.

Ruy Blas by Victor Hugo, with the famous tragedian, Edwin Booth, in the starring role. William R. Davis, Jr., the business agent of the Negro newspaper, Progressive American wanted to attend, so his girl friend (described by the press as "a bright octoroon, almost white"), purchased tickets in the morning. At 1:30 p.m., Davis and the girl presented their tickets to the doorkeeper, Samuel Singleton, who told them that their tickits were no good, but that their money would be refunded at the ticket office.

Davis was probably conducting a deliberate test of the Civil Rights Act, since he had tried this same thing before, but had failed to get an indictment from a federal grand jury. This was not an uncommon occurence; indeed, there had been testing of the "equal benefits of the law" provided in the act of 1866, and state equal accomodations statutes in similar manner during the 1870's. The reactions to the act of Senator Sumner's of 1875 was similar.

Entitled "An Act to Protect all Citizens in their Civil and Legal Rights," it had been promulgated on March 1. Its preamble stated that:

> It is essential to just government [that] we recognize the equality of all men before the law, and... it is the duty of the government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political.

It entitled all persons within the jurisdiction of the United States to full and equal enjoyment of inns, public conveyances on land or water, theaters and other places of public amusement, subject only to the conditions established by law and applicable to all citizens, without reference to race and color. Discrimination would be a misdemeanor and the "person aggrieved" was given the right to sue in a civil suit for $500 damages. The act further provided that no person be denied on the basis of color from serving as a grand or petit juror in any state or federal court. This provision carried a penalty for any person, charged with the duty of selecting jurors, who excluded persons because of race.

This was the act which Davis was testing. He was convinced that the operators of the theater refused him because of "prejudice against his race", so he had a small boy purchase two more tickets. The lady was admitted, probably because Singleton mistook her for white, but Davis was again refused. Singleton ordered Davis out of the entrance, and ordered a policeman to remove him. On Monday, November 24, Davis filed a criminal complaint, and on December 9, Singleton was indicted. The judge referred the case to the Circuit Court, since the constitutionality of the act of 1875 was questioned by counsel for Singleton. The Circuit Court judges, Justice Samuel Blatchford of the

Supreme Court, assigned to this district, and District Judge William Choate, reached opposite conclusions, so the case was certified to the U.S. Supreme Court, "an division of opinion between the judges."

Other federal courts had been divided on the issue, and had been referred to the Supreme Court. By 1880 the six cases were on the docket, and the Solicitor General of the United States filed a brief defending the constitutionality of the act. The Court seems to have delayed longer than their docket load would have warranted, and seems to have preferred to put off the difficult question.

Four of the other cases were similar to Davis'. U.S. v. Stanley involved the refusal of Murray Stanley to serve a Negro at his hotel restaurant in Kansas in 1875. U.S. v. Ryan involved the refusal of Michael Ryan to admit a Negro named George M. Tyler to a Maguire's Theater in San Francisco. In U.S. v. Hamilton, the question of interstate carriers again arose when James Hamilton, a conductor on the Nashville, Chattanooga and St. Louis Railroad, refused a Negro woman with a first-class ticket to the ladies' car, and put her in "a dirty disagreeable coach known as the smoking car."

The sixth case was different from these, but was added to the others when it came before the Court, On May 22, 1879, a twenty-eight year-old Negro woman Mrs. Sallie J. Robinson, purchased two first-class

tickets at Grand Junction, Tennessee, for Lynchburg, Virginia, on the Memphis and Charleston Railroad. She and her nephew, a young Negro of light complexion, light hair, and light blue eyes, boarded the train and started into the parlor car. The conductor, thinking her a Negro prostitute with a white paramour, held her back, and pushed her roughly into the smoking car. A few minutes later the nephew, Joseph Robinson, informed the conductor who he was. The conductor was surprised, so he allowed them to ride in the parlor car until the next stop. They finished the whole ride there, but filed complaints with the railroad about their treatment and filed for $500 damages under the Act of 1875.

At the trial, counsel for the Robinsons rejected the conductor's testimony that he had thought them immoral persons likely to cause trouble in the parlor car. The railroad accepted the constitutionality of the Civil Rights Act, but contended that Reagin, the conductor, had acted on legitimate grounds, that they were travelling for "illicit purposes", and that he had not excluded them on the basis of race.

When these six cases reached the Supreme Court, Solicitor General Samuel F. Phillips filed an effective brief defending the civil rights laws. It summarized the civil rights laws since the Civil War, and concentrated on the public nature of the facilities which re-

50 next p.

quired that they be open for free access to all.

Justice Joseph Bradley delivered the opinion of the Court dismissing the Civil Rights Act of 1875 as being unconstitutional. He denied review of the Hamilton case on a point of procedure, and grouped the other five cases into his one decision. Bradley was a powerful intellectual force on the Court at this time, was a brilliant constitutional lawyer, despite his pre-Court activities as a leading counsel for railroads in New Jersey. A former Whig, he had worked for compromise in 1860-1861, then became a strong Unionist after the Firing on Fort Sumter. He had supported Grant, and spoken for the Thirteenth and Fourteenth Amendments, and his appointment had encountered no opposition from the Radicals.

His decision was simple and tightly reasoned. He referred to the very explicit language of the Fourteenth Amendment, and interpreted it narrowly. The Amendment says— "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". Bradley denies that this section of the Fourteenth Amendment can be used to justify the Civil Rights Act's provisions which cover the acts of individuals.

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment.... It does not invest

> Congress with power to legislate upon subjects which are within the domain of State legislation.... It does not authorize Congress to create a code of municipal law for the regulation of private rights; (4)

He proceeds to deny that the Thirteenth Amendment prohibition of slavery and involuntary servitude may be extended to a denial of equal accomodations and other activities in the social sphere:

> Can the act of a mere individual, the owner of the Inn, the public conveyance or place of amusement, refusing the accomodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant...?
>
> After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal had nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State, (5)

When Bradley finished reading this opinion,—thereby practically nullifying the Fourteenth Amendment—Justice Harlan, the former slaveholder, the Court's only Southerner, and a former critic of the War Amendments, announced that he dissented from the decision of the Court. After a brief oral diatribe expressing his dissatisfaction, Harlan stated that he would file a dissent later.

The decision of the Court was widely heralded in the press. After years of "Congressional excess" during the

Reconstruction era, they applauded the Court's restoration of "constitutional government".(6)

However, the Negro and his Republican allies did not find anything to applaud about. At a mass civil rights rally in Washington's Lincoln Hall on October 22, Frederick Douglass lashed out, saying the Southerners were gloating, having the Negro "just where they want him":

> They can put him in a smoking car or baggage car...take him or leave him at a railroad station, exclude him from inns,... without the least fear that the National Government will interfere for the protection of his liberty. (7)

At the same rally, Robert G. Ingersoll, the famous Republican orator and champion of minority civil rights, praised Harlan's oral dissent, urging that he be nominated for the 1884 presidential race.(8) Meanwhile, they all awaited Justice Harlan's coming dissent.

However, it was slow in coming. He sat down to write it, knowing its importance, but the words would just not come. At this point Mrs. Harlan intervened, by the restoration of "a certain historic inkstand."(9)

Two years after they had moved to Washington, the Harlans had visited with the Marshall of the Supreme Court, and spied a certain "old-fashioned and antique inkstand".(10) They learned that it had once belonged to Chief Justice Taney, and that he had used it to write all his decisions, including Dred Scott. The Marshall,

seeing Harlan's interest, wrapped it up and gave it to him.

At a party, the Kentuckian told this story to a kinswoman of Taney, the wife of Senator George H. Pendleton of Ohio. She expressed a desire to have "that little inkstand".(11) Always chivalrous, Justice Harlan promised to send it to her the next day. Mrs. Harlan, however, knew his attachment to it. She hid it in his study, and he had to write a note to Mrs. Pendleton apologizing for the inexplicable loss of the inkwell.

Mrs. Harlan tells of the labors he went through trying to write his Civil Rights Dissent: it—

> cost him several months of absorbing labor— his interest and anxiety often disturbing his sleep.... He felt that, on a question of such far-reaching importance, he must speak, not only forcibly but wisely.(12)

Mrs. Harlan devised a plan to break his mental stalemate-- so on a Sunday morning she sent him off to church.

> As soon as he had left the house, I found the long-hidden Taney inkstand, gave it a good cleaning and polishing, and filled it with ink.... I placed that historic and inspiring inkstand directly before his pad of paper; (13)

When he returned she told him what she had done, and her efforts had the desired effect:

> The memory of the historic part that Taney's inkstand had played in the Dred Scott decision, in temporarily tightening the shackles of slavery upon the negro race in anti-bellum days, seemed, that morning to act like magic in clarifying my husband's thoughts in regard to the

> [Sumner] law.... His pen fairly flew on that day and... he soon finished his dissent. (14)

It is readily apparent how much this recollection of Dred Scott influenced him. Justice Harlan began his dissent by stating that the majority opinion rested upon grounds "entirely too narrow and artificial," and that "the substance and spirit" of the War Amendments had been sacrificed through a "subtle and ingenious verbal criticism:" (15)

> 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. (16)

Harlan explained that the Thirteenth Amendment was intended to prohibit far more than the narrow, technical slavery Bradley had referred to, the ownership of one person by another. He stated that slavery should be considered a far broader concept based on a more human understanding of the "badges of slavery". He made the further point that those states which had fought to prevent the abolition of slavery were certainly not going to insure the enjoyment of fundamental freedoms to the newly emancipated Negro.

He stated that the Fourteenth Amendment should likewise be read in a broader manner, particularly it should

be read to include public places of business enterprises. He said that the fundamental rights of citizens should be free from violation by "any corporation or individual wielding power under state authority for the public benefit or the public convenience,"(17) not just from violations by states and state officials. For these reasons, Harlan maintained that the Thirteenth and Fourteenth Amendments provided a broad authority, which the Civil Rights Act merely put into force as the "appropriate legislation" provided for in the amendments. Finally, he violently opposed the majoirty's unwillingness to allow the regulation of public carriers, provided for in the Act, which was permitted under the power of Congress to regulate interstate commerce. He pointed out that this is what was involved in Mrs. Robinson's case (she was riding on a railroad). He further denied the jurisdiction of the Court to say what was "appropriate legislation" to put the amendments into effect:

> 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 excercise of its granted powers. (18)

He reminded the Court of the broad interpretation of the Constitution which it was willing to use before the Civil War to protect slavery:

> 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 masters of fugitive slaves. (19)

His closing statement was a peroration refuting Justice Bradley's statement that the recent legislation had made the Negro "the special favorite of the laws:"

> 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 that some other race will fall under the ban of race discrimination. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be in this republic, any class of human beings in practical subjection to another class. (20)

The Civil Rights Cases did have the disastrous results which Harlan envisioned and which the rest of the Court seemed content to ignore. The issue of protecting Negro rights being denied to Congress, the Republican Party was forced to desert this cause as part of its national program. The road was now open for Southern political leaders who wished to use anti-Negro politics as a strong appeal to the "poor whites", and on which they would ride to power. The peacable integration of facilities that had been progressing slowly through the 1870's and early 80's was now given a severe blow. (21)

However, the decision did not completely destroy all peaceful integration, for even in the South many public facilities were open to both races.

It was only acts of private discrimination which the Civil Rights Cases clearly allowed. Even though the Robinson Case had involved a public carrier in interstate commerce, and even though the Supreme Court in Louisiana, New Orleans and Texas Railroad v. Mississippi had given its approval to a state law requiring segregation, the issue was still cloudy. The railroad case had been accepted only because the Mississippi Supreme Court had specified that the segregation ordinance was limited to intrastate commerce.

Populism and the Democratic Party in the South used anti-Negro prejudice to put through laws in nine Southern states between 1887 and 1892 requiring railroads to seperate the races. It was only when the Supreme Court accepted the constitutionality of these laws in 1896 that the color line was firmly and irrevocably drawn in all aspects of life.

It has been alleged that Sumner's Civil Rights Act was "premature", and that segregation was "inevitable". This does not seem to be tha case— if the Court had taken the same laissez-faire attitude toward race relations that it took in economic affairs during these years— "voluntary integration would have survived as

a counter-tradition to Jim Crow, and would have made the transition of the 1950's less painful than it was." (22)

PLESSY v. FERGUSON (1)

The retreat of federal authority in the South from the onslaught of the "Redeemers" was rapid and complete. The Negro protested vehemently, but was able to do little in the way of organized resistance.

Until 1887, there had been segregation in the railroads of the South, but it was erratic and unenforcable. The practice was to allow Negroes and Caucasians to mix in the second class "smoking" cars, but to prohibit them in first class "ladies' " cars, even this was not enforced in some of the older seaboard states where Negroes could ride in first-class cars. (2)

The passing of segregation laws in Florida (1887), Mississippi (1888), Texas (1889), Louisiana (1890), Alabama, Arkansas, Georgia, Tennessee (1891), and Kentucky (1892), put an end to the lax attitude— Jim Crow was to be uniform and complete, touching every aspect of society.

When the Louisiana Jim Crow bill was introduced in the legislature, the cultivated, wealthy urban Negroes of New Orleans organized in opposition. On May 24, 1890, the legislature received "A Protest of the American Citizens' Equal Rights Association Against Class Legislation". The members of this colored group asserted that the bill was unjust, unconstitutional, and would be a "free license to the evilly-disposed that they might

with impunity insult, humiliate, and otherwise maltreat inoffensive persons... who should happen to have a dark skin."(3)

Despite this ineffectual protest, the bill was signed into law on July 10, 1890. The bill was called "An Act to promote the comfort of passengers,"(4) and required railroad companies carrying passengers in that state

> to provide equal, but seperate, accomadations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches so as to secure seperate accomadations: (5)

Almost immediately eighteen prominent colored men of New Orleans formed a "Citizens' Committee to Test the Constitutionality of the Seperate Car Law." They collected funds, and elected Albion Winegar Tourgée of Mayville, New York, as their counsel in the forth coming attempt to get the case into the federal courts.

Tourgée was an Ohio-born novelist, carpetbagger, judge and politician. He was born of a French Huguenot father and a German mother, and fought in the Civil War (wounded at the first Bull Run; reenlisted, wounded at Perryville; then captured at Murfreesboro, Tennessee), and became prominent during Reconstruction in North Carolina. After 1879 he had left for New York, and

had largely disappeared from the public eye, except for his romanticised novels of the Reconstruction era (for instance— Tourette, 1874, and A Royal Gentleman, 1881).(6) Tourgée suggested that they should test the law with a person nearly white, but his Negro associates informed him that those who were nearly white usually were allowed to pass even in segregated facilities. In addition, the darker members of the group thought that those of lighter hue were trying to pass for white, and were traitors to their race.

Once this problem was resolved, they then approached the railroads in the New Orleans area. A difficulty arose when the railroads, who were opposed to the law anyway because of the added expense, told them that they usually did nothing to enforce the Jim Crow law except posting the sign and providing the extra car required. The railroads offered to help get rid of the law; so they devised a plan whereby a white passenger should object to the presence of a Negro in the coach, the conductor would ask the latter to leave, he would refuse, and the white passenger would swear out an affidavit.

This plan was carried out on February 24, 1892, when Daniel F. Desdunes, a young Negro, boarded a train headed for Atlanta. All went according to schedule except that before the case came to trial, the Louisiana Supreme Court handed down a ruling on May 25, that

the Jim Crow law was unconstitutional in interstate public carriers. Since Desdunes was an interstate passenger, this case did not settle the real question of whether any state law could demand segregation of public facilities.

In order to have a case wholly within state limits, Homer Adolph Plessy boarded the East Louisiana Railroad on June 7, and took a seat in the white coach. Plessy was arrested for refusing to move from the white car, and came before the Criminal District Court of New Orleans. Judge John H. Ferguson ruled against his plea that the law was unconstitutional, so he obtained a writ for the State Supreme Court, and the case Plessy v. Ferguson was heard in November.

The court agreed with Plessy that the question in this case was only one of whether the state law, requiring seperate but equal accomodations, violated the Fourteenth Amendment. As expected, the constitutionality of the law was up held, but a writ of error was granted for appeal to the U. S. Supreme Court.

Tourgée submitted a brief on behalf of Plessy that "breathed a spirit of equalitarianism that was more in time with his carpetbagger days than with the prevailing spirit of the mid-nineties."(7) Basically, he contended that Plessy had been deprived of property ("the reputation of being white") without due process of law.

His case was that since Plessy was nearly white ("in the proportion of seven eights Caucasian and one eight African blood"(8)), his small portion of Negro blood had caused him to be deprived of wealth, prestige, and the "companionship of the white man" because of intense race prejudice. Thus, Tourgée's argument was not a plea on behalf of the Negro against discrimination by whites, it was a plea for protection of the light Negro against the inequity of being considered black.

Tourgée went beyond this, however, and showed how the segregation law was state action perpetreating "distinctions of a servile character", in direct conflict with the intent and statement of the Fourteenth Amendment. He stated that it violated the spirit of the Thirteenth Amendment, because:

> slavery was a caste, a legal condition of subjection to the dominent class, a bondage quite seperable from the incident of ownership. (9)

He made the further, more convincing point that the exemption of Negro nurses "attending the children of the other race" showed the insincerity of the law's pretensions of equality in facilities. The nurses were in an inferior condition because of their servile task, therefore did not have to be put in the Jim Crow car. The other Negroes might not be in such an inferior condition, so had to be humbled by the seperation into a seperate car. The act is therefore shown to be in-

tended to make the Negro inferior and dependant. He concludes with the statement— "Justice is pictured blind and her daughter, the Law, ought at least to be color-blind."(10)

When the Supreme Court finally got around to deciding the case, it spoke through the voice of Justice Henry Billings Brown of Michigan. It was ironic that the decision in this case was rendered by the Massachusetts-born Justice, son of a wealthy merchant, and educated at Yale (Class of 1859) and Yale and Harvard Law Schools.(11) Brown spoke for seven members of the Court (Justice Brewer did not participate in the case) in holding the doctrine that the Negro is not denied the equal protection of the laws by being compelled to accept "equal but separate" accommodations.(12) He based this assumption on the belief that the Louisiana law merely implied a legal distinction between the races. If the Negro took this distinction as a badge of servility or inferiority that was only his view of it. He stated that the "underlying fallacy of the plantiff's argument" to be:

> the assumption that the enforced seperation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it....(13)

Brown backed up his argument with a long list of federal and state precedents, which upheld the constitutionality of "laws permitting... their seperation...

[which] do not necessarily imply the inferiority of either race to the other."(14) The first of these was an opinion of the Chief Justice of the Massachusetts Supreme Court, the respected Lemuel Shaw, in an 1849 case(15) where he ruled against the counsel for the plaintiff (Mr. Charles Sumner), and held that "the general school committee of Boston had power to make provision for the instruction of colored children in seperate schools... and to prohibit their attendance upon the other schools."(16) However, as Tourgée pointed out, this case was twenty years before the Fourteenth Amendment, which should have altered its force as a precedent. Brown was more convincing when he noted that Congress, in its jurisdiction over the District of Columbia, had enacted similar school segregation laws since the Civil War.

He went on to differentiate between social equality and political equality. He stated that when the Fourteenth Amendment was written, its sponsors "could not have intended to abolish distinctions based on color, or to enforce social, as distinguished from political, equality."(17)

Although we can certainly doubt the historical accuracy of Brown's assessment of the intention of the Radicals in passing the Fourteenth Amendment, the argument was convincing in 1896. His socialogical statements were likewise very popular at this time, showing

the influence of Herbert Spencer and William Graham Sumner:

> If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits.... Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. (18)

He specifically denied the importance of how much Negro blood it took in each state in order to come under segregation laws. He allowed neither the contention by Tourgée that segregation was a form of servitude abolished by the Thirteenth Amendment, nor the principle that belonging to the white race was a form of "property" which Plessy had been denied by state actions. Brown conceded the possibility of Tourgée's conjecture that if a state had the power to segregate white and black, it has the equal power to segregate Protestant and Catholic, aliens and natural-born citizens. He said that this validity of segregation laws must be their "reasonableness", and that these extreme cases could not be allowed.

The Court was not surprised that Harlan was the lone dissenter to the opinion of Justice Brown, having already experienced his stinging dissents in similar cases. The irony of the situation— where Harlan, the only Southerner, was the only one opposed to segregation of the Negro—must have been lost on them. The dissenting

opinion in Plessy v. Ferguson was Harlan's finest* and foreshadowed the decision of the Court fifty-eight years later which would repudiate the majority opinion.

The powerful twelve-page dissent follows closely the brief submitted by Tourgée. He began by pointing out that the fiction of the law applying equally to black and white would fool no one— the intent was obviously to keep the Negro away from the white, not vice-versa— and "No one would be so wanting in candor so as to assert the contrary."(19) This prohibiting of occupancy in the same conveyance on a public highway— and a railroad is a public highway— is an infringement on the personal liberty of the persons involved.

If a state could prohibit travelling in the same railroad car, it might prohibit the use of the same side of the streets, or the joint occupancy of the same legislative hall or jury room.

Harlan said that the Court's answer to this question was not satisfactory. It was not enough to say such laws would be "unreasonable" and therefore invalid under the law. Further he stated that it was not for the courts to decide whether a statute passed by a legislative body was "reasonable" or not:

> I do not understand that the courts have anything to do with the policy or expediency of legislation.... There is a

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* Harlan, however, thought that his dissent in the Civil Rights Cases was his finest opinion.

> dangerous tendency in these latter days to enlarge the functions of the courts by means of judicial interference with the will of the people as expressed by the legislature.* (20)

He proceeds with a stirring plea for true equality under the law:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in wealth and in power. 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 any classes among citiznes. In respect of civil rights, all citizens are equal before the law. (21)

Justice Harlan goes on to prophesy that "the judgement this day gendered will...prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case."(22) He exploded the distinction made by Justice Brown between "social" as opposed to "political" equality, saying that this is ridiculous because social equality is not presumed to exist between two passengers travelling in the same railroad car. To Justice Harlan the intent of the Louisiana law was to create a "badge of servitude", inconsistant with "both the spirit and the letter of the Constitution".

He denies that evils will arise from the commingl-

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* Harlan was possibly referring here to the recent anti-trust case (U.S. v. E.C. Knight Sugar Co., 156 U.S. 1 (1895) where the Court, with Harlan dissenting, did not find the Knight Co's 98% of American sugar production a monopoly because it was manufactured but was not a monopoly of interstate trade or commerce.

ing of the two races, but if any such evils do arise they will not be as great as those that will eventually arise from segregation:

> 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 hatred to be planted under the sanction of law. What can more certainly arouse race hate... 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? (23)

The results of this landmark decision are well known. It did, as Harlan predicted, "encourage the belief that it is possible, by means of state enactments, to defeat the beneficient purposes which the people of the United States had in view when they adopted the recent amendments of the constitution."(24)

The country reacted to this decision by ignoring it. In contrast to the Civil Rights Cases, which aroused long editorial debate in the press, the Plessy v. Ferguson decision went largely unnoticed.(25) This is indicative of the change which had taken place in the country, and shows the extent to which Justice Harlan's radical idealism was out of step with the trend of American life.

The color line was drawn quickly after the 1896 decision. Virginia was the last state to enact a Jim Crow law for railroads, finally succumbing in 1900.

Woodward quotes the editor of the Richmond Times who expressed the spirit of the times:

> It is necessary that this principle be applied in every relation of Southern life. God Almighty drew the color line and it cannot be obliterated. The negro must stay on his side, and the sooner both races recognize this fact and accept it, the better it will be for both. (26)

IV LATER CIVIL RIGHTS CASES-

Although it was only segregation in the use of railroad facilities that was allowed by Plessy v. Ferguson, it was inevitable that it would become the bastion of segregation in other areas as well. This became apparent soon afterward in the field of education. The first case directly involving the constitutionality of states laws requiring "seperate but equal" facilities in education was one involving Justice Harlan's own state, in the case of Berea College v. Kentucky in 1908.(3)

In this case the Supreme Court upheld the constitutionality of a 1904 Kentucky statute making it unlawful "for any person, corporation or association of persons

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* Cumming v. County Board of Education, 175 U.S. 528 (1889), has been used as an example of the application of the 14th Amendment to compulsory seperation of the races in public schools; and it has been said that in speaking for the Court in this case, Justice Harlan "indicated that he saw nothing unconstitutional in segregated public schools".(1) Actually, this case did not involve the constitutionality of a segregation law, but only decided that the county school board, not the federal government, had the discretion to allot funds for maintainance of local schools. Harlan was careful to make this quite clear in his opinion:

> While all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of thier race, the education of people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of the Federal authority... cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land (2)

to maintain or operate any college, school, or institution where persons of the white and negro races are both received as pupils for instruction." Berea College was an incorporated private college founded in the 1850's by Kentucky abolitionists to educate nonslaveholding mountaineers.(4) It had been convicted and fined $1000 under this statute, and had challenged the constitutionality of the state law. The majority opinion written by Justice Brewer seperated the constitutionality issue from the case by maintaining that since the college was a corporation, it was under the jurisdiction of the state legislature. Brewer stated that the law here was not involved with individuals, so that the constitutionality was not an issue. Justice Harlan, as expected, attacked the casuistry of this opinion. He denied that the power of the state to amend the charters of corporations within its borders was the real issue. He said that the application of this law to corporations could not be seperated from its application to individuals, since the law obviously intended not to excercise state control over corporations, but to segregate schools. He stated that the law was an obvious invasion of the property rights guaranteed against state action by the Fourteenth Amendment. He concluded:

> Have we become so innoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions

> between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races? (5)

Justice Harlan soon became involved in the violation of rights of Negroes in other fields than segregation of public facilities. Issues arose where Negroes were allegedly disenfranchised and held in peonage. In the case of Giles v. Harris (6) in 1903, an Alabama Negro petitioned for himself and on behalf of "more than five thousand Negroes", asking that they, and all other qualified Negroes who were refused registration, be placed on the rolls for congressional elections. Further, he asked for a declaration that sections of the Alabama Constitution were unconstitutional. Justice Holmes, writing the majority opinion, refused to order the enrollment of the Negroes as voters, because if the Alabama voter registration processes were discriminatory than the Supreme Court would be a party to an unconstitutional scheme. Justice Harlan dissented, alleging that the federal courts had no jurisdiction in this case, but if they had, they would be able to support the petition of Giles.

The question of peonage arose in the South shortly after the Civil War, when plantation owners sought new ways to obtain Negro labor. Peonage is "a system whereby a person is held to involuntary servitude by a creditor in order to work off a debt, real

or pretended."[7] This new form of slavery arose in two cases. In the first, Hodges v. United States (1906)[8] Justice Harlan dissented, as was his custom, from the majority opinion. The convictions of white defendents, accused of conspiring to compel Negroes to desist from the performance of certain employment contracts, were set aside by the majority opinion. Harlan's dissent was based on his reading of the Thirteenth Amendment, which he said, applied in this case because the freedom to make contracts for labor is inherent in the prohibitions against slavery of this amendment. Therefore the federal law in this case he held to be valid, and the convictions to be correct.

The second peonage case, Bailey v. Alabama (1908),[9] concerned an Alabama statute which prohibited the taking of money under a written contract for labor, with intent to defraud the employer, and provided stiff penalties for its violation. The plaintiff, Bailey, had borrowed $15 and had contracted to work for one year at $12 a month of which he was to receive $10.75, the rest being applied to the debt. After little more than a month he left, was arrested and sentenced to 136 days at hard labor in lieu of a $30 fine he was unable to pay.

Justice Oliver Wendell Holmes wrote the Court opinion, which dismissed the appeal on a jurisdictional point with Justice Harlan dissenting. When it reappeared three years later,[90] Justice Harlan joined in

the decision, written by Charles Evans Hughes, which struck down the statute on the grounds that it was only a veneer of legality covering an attempt to treat as a criminal any laborer who simply refused to perform contracts for personal services in liquidation of a debt. The effect of this statute, the compulsion of laborers to preform contracts, was seen as a violation of the Thirteenth Amendment. Thus, Justice Harlan's dissent in the same case three years before was vindicated. Justice Holmes dissented.

The liberal outlook of Justice Harlan was not limited to the Negro. He sought to remedy injustice and inequity whenever he saw it being applied to a racial minority. He dissented against a decision of the Court which denied to an Indian the right of citizenship and the vote even though he lived apart from the reservation and was a taxpayer.(10) He wrote a dissent with Justice Field, in a Court decision(12) which reversed the convictions of a band of California men who had driven Chinese aliens from the places of businesses and homes in which they resided. Contending that the Civil Rights Act must be considered as guaranteeing to the Chinese the rights provided for them under the 1880 treaty, he warned that if the Chinese could be so persecuted just because they were aliens... it must equally be true as to citizens

or subjects of every other foreign Nation, residing or doing business here under the sanction of treaties with their respective governments. (12)

V LEGACY

These were the decisions which so altered the course of history for the nation in general and the Negro in particular. The effects of these decisions were many and varied. The Fourteenth Amendment was, of course, the first major casualty of the decisions by the post-War Court.

The Fourteenth Amendment was so limited by successive decisions that it became unrecognizable to the legislators who had written it.[1] The Slaughter-House Cases (1873) provided the doctrine of dual citizenship— state and national— that allowed the drastic reduction in meaning of that clause of the amendment forbidding the states "to make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." If the Court had, at this time, interpreted this clause in a broader fashion, it could have proved to be "the main bulwark of negro civil liberty."[2]

Secondly by its decision in the Civil Rights Cases the Court made it clear that Congress, in enforcing the provisions of the Fourteenth Amendment, could not punish private discrimination directed against the Negro by private citizens. Interpreting the language of the Amendment narrowly, the Court said that "no state" may abridge the rights of citizens, but that there was no mention of "no person" abridging such rights.

Thirdly, the series of segregation decisions, of

which Plessy v. Ferguson is the most famous, allowed that a state law enforcing segregation did not constitute a denial of the equal protection of the laws. In the Civil Rights Cases the Court ruled that the Fourteenth Amendment could not apply to individuals; in Plessy v. Ferguson it ruled that it did not apply to states, or in other words, did not apply at all.

Berea College v. Kentucky ruled that the state could validly forbid an institution or school to have integrated facilities. It did allow, however, that the facilities must be equal, so that the equal protection of the laws is not violated. According to Warren, the most orthodox of the historians of the Court:

> The practical effect of these decisions was to leave the Federal statutes almost wholly ineffective to protect the negro, in view of the construction of the Amendments adopted by the Court, the lack of adequate legislation in the Southern States, and the extremely limited number of rights which the court deemed inherent in a citizen of the United States, as such, under the Constitution. (3)

At this point one must ask whether it was either nesessary or inevitable that the War Amendments, and the legislation which carried them into effect, should have been so emasculated as to render them useless. It seems that neither from an historical nor a legal standpoint was it necessary that such a judicial outlook be maintained. The dissenting opinions of Justice

Harlan contain many valid alternatives to the construction which the Court put on the cases before it.

Although his dissent in the Civil Rights Case was Harlan's own favorite,(4) and one of the most famous he wrote, it contains many vulnerable constitutional arguments. His belief that the Congressional enforcement power given in the Fourteenth Amendments could be extended to private individuals is difficult to see, and is not held even today. Secondly, his argument that the Thirteenth Amendment's ban on slavery could be applied to private acts of discrimination in public accomodations, because of their being "badges of slavery", is difficult to hold.

However, other elements in his Civil Rights dissent could have been rightfully applied to the Court's decision in that case. His argument was correct when he pointed out that the Robinson case should have been upheld by the Court because it was interstate commerce. Secondly, it was correct in maintaining the essentially "public" nature of inns, railroads, and theaters, as instruments of the state," and that when owners of these accomodations discriminated, it was not as private citizens, but as public servants. This interpretation is almost universally held today, and is the basis for the Civil Rights Act of 1964's public accomodations sections. His arguments in Hodges v. United States that

the Thirteenth Amendment's ban on involuntary servitude could be extended to deprivation of Negroes from work on the basis of their race, are valid and accepted today. This was a more logical argument than that in his Civil Rights Cases dissent when he maintained that discrimination in public accomodations was a "badge of servitude" prohibited by the Thirteenth Amendment.

I think it is plain, therefore, that the Court's decision in the Civil Rights Case was not only open to other alternatives, but was clearly a definition of the War Amendments so narrow that it was equivocation and rationalization. The same is true of the "Plessy" decision.

As stated above, Woodward proves that the Civil Rights decision did not immediately inaugurate the segregation of all facilities in the South. It was only the Plessy v. Ferguson and Berea College v. Kentucky cases which did this. Both of these decisions could have been more justly and more legally interpreted using the principles Harlan laid down in his dissent, rather than by the principles Justice Brown laid down in his opinion for the Court. Woodward shows that the Jim Crow color line was not so much the result of rising low-class prejudice, as it was the capitulation of those forces which had operated to keep this prejudice in bounds-- the northern Republican Party;

the upper-class Southern "Bourbons"; and northern pro-Negro sentiment (which was defeated by the rise of imperialistic","white man's burden"philosophy). If the Supreme Court had held firm in the Plessy v. Ferguson case (on the basis of Harlan's dissent rather than Brown's opinion), it is quite possible the populist, racist forces of the South might have been held in check.

As noted above, Justice Harlan and Brown disagreed on the reasonableness of the Jim Crow Law. Brown admitted that if the law denied the Negro equality under the law, it was unconstitutional; he maintained that it did not. Justice Harlan maintained, however, that there was no distinction between "social" discrimination and legal or political discrimination, therefore the law was inherently denying the full equality under the law intended by the framers of the Fourteenth Amendment.

Harlan pointed out that the intent of the Louisiana law was not to provide equal accomodations— their intent was plainly to seperate the Negro, thereby making him feel inferiority. The exemption from the law of Negro nurses, already travelling in an inferior position, was proof of this intent. He went on to ridicule the law by projecting future possibilities for the Jim Crow idea— such as seperate jury rooms, courtrooms, debating halls, etc. Harlan thought that the

absurdity of these examples would illustrate the danger of the Jim Crow principle. He was proved correct, however, by the extension of Jim Crow into every aspect of southern life, even to seperate Bibles in Virginia courtrooms. In his own lifetime, Harlan lived to see the Jim Crow principle applied forcibly in his own state, in Berea College v. Kentucky. To Harlan this was the supreme indignity, not only because it occured in his native Kentucky, but because the law violated the principles of egalitarianism and property rights of corporations which had been sacred since the Dartmouth College case.(5)

Thus, it is plain that the judicial philosophy of Justice Harlan could have been used to bridge the broad gap between the radical idealism and racial egalitarianism of the Reconstruction era, and the new reconstruction of the decade of the 1950's. With the Supreme Court's ruling in the 1954 school desegregation cases(6) we have seen a resurrection of the same legal principles John Marshall Harlan laid down in 1883, 1896, and 1908. This was prophesied in 1912 when one writer said: "Some of them [his dissents] will doubtless become the basis of future legislation, and perhaps for a reversal by the Court itself."(7)

The segregation of railroads allowed by the Court in Louisville, New Orleans and Texas Railroad

Co. v. Mississippi (1890), was overruled by the Court's 1946 decision in Morgan v. Virginia.(8) The 1954 school desegregation decision declared that "seperate-but- equal" accomodations was "inherently unequal", and that Plessy v. Ferguson was discarded. This decision is a fitting monument to a man who, fifty-eight years before, had said the same thing:

> Seperate...facilities are inherently unequal .... the plaintiffs... are, by reason of the segregation complained of, deprived of the equal protection of the Fourteenth Amendment.(9)

FOOTNOTES

Part I

1. Catalog of the Officers and Students of Centre College, Danville, Ky., 1850. Pp. 14-14. In Westin, "John Marshall Harlan and the Constitutional Rights of Negroes: The Trnasformation of a Southerner", Yale Law Journal, Vol. 66 (April, 1957, p.639 (Here in after cited as Westin, "Transformation.")

2. Robertson, "Scrapbook on Law and Politics, Men and Times." (1855). p.245. In Westin, "Transformation", p.639.

3. Westin, "Transformation", at. p.639.

4. J.M.H. "The Know-Nothing Organization— My First Appearas a Public Speaker" [Political Memorandum]. In Westin, "Transformation," "The First Justice Harlan". A Self-Portrait from His Private Papers." Kentucky, Law Journal, Vol. 46 (1957), p.332. Here in after known as "Self-Portrait".

5. Mrs Malvina Harlan, "Some Memories of a Long Life, 1854-1911. (1915). In Westin (ed.), "Self-Portrait", p.331.

6. James Harlan to D.H. Smith, August 5, 1851 from Harlan papers. In Westin, "Transformation", p.643.

7. Louisville Daily Journal, July 28, 1856. In Hartz, "John M. Harlan in Kentucky, 1855-1877. The Story of His Pre-Court Political Career." Filson Club Historical Quarterly. Vol.14, p.19. (1940).

8. Cf. Kerr (ed). History of Kentucky. Vol.II by Connelly and Coulter, pp. 842-852.

9. "The Discussion on Thursday." The Western Citizen. (Paris, Ky.), June 10, 1859 (Harlan Papers). In Westin, "Transformation", p.643.

10. Coulter. Civil War and Readjustment in Kentucky. Durham, Univ. of North Carolina Press, 1926. Pp. 78-34.

11. Letter from J.M.H. to Joseph Holt, March 11, 1861. In Westin, "Transformation", p.644.

12. ef. Speed, The Union Cause in Kentucky, 1860-1865. (1907); and Stevenson. "General Nelson, Kentucky and Lincoln Guns." Magazine of American History, August, 1883, pp.115-139.

13. J.M.H. "The Union Cause in Kentucky in 1861". In Westin "Transformation", p.645.

14. J.M.H. "Union Cause"

15. J.M.H. "Autobiographical Letter", p.31.

16. Morning Louisville Democrat, September 24, 1861. In Westin, "Transfromation", p.646.

17. Cf. Official Records of the War of the Rebellion: Series I, vols. 7, 16, 20, 23; SeriesIII, Vol.1(1882). Also Johnson & Buell, Battles of the Civil War (1884-7).

18. Official Records, Series I, Vol. 16, Pt. 2 at 236; and Series I, Vol.20, Pt. 1, at p.136.

19. Official Records, Series I, Vol. 7, at p.90.

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20. Official Records, Series I, Vol. 20, Pt. 1, p.140.

22. J.M.H. to Sen. James B. Beck, Oct. 31, 1877. In : "Document: The Appointment of Mr. Justice Harlan", Indiana Law Journal, Vol. 29, p.67-8. (1953). Here in after cited as "Document."

23. J.M.H. "Autobiographical Letter." In Westin, "Transformation", p.649.

24. Coulter, Civil War, pp. 170-9.

25. Westin, "Tmansformation", p.649.

26. Typescript from Harlan Papers. In Westin, "Transformation" p. 651.

27. Ibid., p.652.

28. Daily Lousiville Commercial, June 19, 1875, p.1 In "Document" p.61.

29. Mrs. Harlan, "Memories", in Westin, "Transformation", p.652.

30. Ibid.

31. Ibid.

32. Coulter, Civil War, pp.257-284.

33. Letter from J.M.H. Col. John Combs, published in Lexington Observer and Reporter, June 1, 1865. In Westin, "Transformation", p.653.

34. Cincinnati Gazette, August 2, 1865, p.30. In Westin, "Transformation", p.653.

35. J.M.H. to Combs, supra., note 33.

36. Coulter, Civil War, pp.394-399.

37. J.M.H. "Political Memorandum", p.14.

38. Coulter, Civil War, p.422.

39. J.M.H. "Political Memorandum", p.15.

40. Louisville Daily Commercial, May 18, 1871. In Westin "Transformation", p.657.

41. Mrs. Harlan, "Memories," p.67. In Westin, "Transformation" p.658.

42. Coulter, Civil War, pp.359-361.

43. "General Harlan's Republicanism," [a summary of his campaign statements in the 1871 and 1875 elections]. Louisville Daily Commercial, November, 1877, pp.4-5. In Westin, "Transformation", pp 660.

44. Ibid.

45. Louisville Daily Commercial, July 29, 1871. In Westin, "Transformation", p.662.

46. Cincinnati Daily Gazette, June 3, 1871, p.35. In Westin, "Transformation", p.663.

47. Coulter, Civil War, p.433.

48. J.M.H. "Political Memorandum", p.16. In Westin, "Transformation", p.664.

49. Telegram from Williams to J.M.H., February 11, 1875. Harlan Papers. In Westin, "Transformation", p.664.

50. "General Harlan's Republicanism", Note 43, supra.

51. Connelly and Coulter, Vol.2 of History of Kentucky, p.1001.

52. Robert Cushman, Dictionary of American Biography, Volume VIII, p.272.

53. cf. Bone, "Louisiana in the Disputed Election of 1876," Louisiana Historical Quarterly, Vol. 14, pp.408. 549 (1931) and:
Williams, Life of Rutherford B. Hayes, Vol.II, pp.33-68. Here in after cited as Williams, "Life".

54. Williams, Diary and Letters of Rutherford B. Hayes, Volume III, p.429. Here in after cited as "Hayes-Diary".

55. Woodward, C. Vann, Reunion and Reaction, (1951), p.218.

56. Williams, "Life", p.59.
Woodward, "Reunion", p.220.

57. J.M.H. "Diary" [kept August 21-22, 1877]. In Westin, "Transformation", p.668.

58. Ibid.

59. Fairman, Mr. Justice Miller and the Supreme Court (1939), p.358.
and. Warren, Supreme Court in U.S. History, VolII, p.563-5.

60. "Hayes'-Diary", vol. III, p.419.

61. Ibid, p.467.

62. J.M.H. to Beck, in "Document" (see note 22 supra), p.62.

63. Ibid., p.66.

64. See p. 10, supra.

65. Letter of William Brown to Senator Edmunds, November 19, 1877. In "Document", p.71.

66. Indianapolis Sentinel, October 31, 1877, p.7.
in "Document", p.69.

67. Fairman, Justice Miller, pp.369-70.

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1. John Hay, Jr., "Justice Harlan-Dissenter", Cosmopolitan, vol. 55, p.535 (September, 1911).

2. Current Literature, Volume 51, p.36. (July, 1911).

3. "Justice" Harlan-Dissenter", p.535.

4. Current Literature, vol. 51, p.36.

5. Ernest S. Bates, The Story of the Supreme Court, Indianapolis, 1936, p. 196.

6. Ibid.

7. The Outlook, volume 99, p.441 (October 28, 1911).

8. "Justice Harlan's Harangue", The Nation, volume 70, pp. 417-18. (May 30, 1895).

9. Quoted in, Glendon A. Schubert, Constitutional Politics, New York, 1960, p.216.

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11. Quoted in Dictionary of American Biography, volume VIII, p.272, by Robert E. Cushman.

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13. "Remarks of Mr. Attorney General Wickersham," Proceedings on the Death of Mr. Justice Harlan, 222 U.S. p.X.

14. Robert Carr, Supreme Court and Judicial Review, p. 181.

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1. Blyew v. United States, 80 U.S. 581 (1872).

2. 92 U.S. 542.

3. 92 U.S. 214.

4. 95 U.S. 485.

5. 95 U.S. vi.

6. 133 U.S. 587.

7. Ibid, at 588.

8. Clark, Constitutional Doctrines of Justice Harlan, p.191.

9. 133 U.S. 594.

10. a) U.S. v Singleton 109 U.S. 3 (1883)
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4. 109 U.S. 11-12.

5. Ibid., at 24.

6. Quarrels, p. 138.

7. Ibid.

8. Westin, "Transformation," p.676.

9. Mrs. Harlan, "Memories", in "Self-Portrait", pp.346-349.

10. Ibid., p.347.

11. Ibid., p.348.

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13. Ibid., p.

14. Ibid.,

15. 109 U.S. 26.

16. Ibid.

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4. Statutes of Louisana, Acts of 1890, No.111, p.152.

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9. Woodward, "Louisiana Traveler", p. 152.

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13. 163 U.S. 551.

14. Ibid at 544.

15. Roberts v. City of Boston, 5 Cush. 198 (1849).

16. 163 U.S. at 544.

17. Ibid., 541.

18. Ibid., 551.

19. Ibid., 557.

20. Ibid., 558.

21. Ibid., at 558.

22. Ibid.,

23. Ibid., at 560.

24 Ibid.,

25. Woodward, "Louisiana Traveller", p.157.

26. Ibid., p. 158.

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3. 211 U.S. 45 (1908)

4. Westin, "Transformation", p.690.

5. 211 U.S. at 69.

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7. Cushman and Cushman, Cases in Constitutional Law, p.884.

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13. Ibid., at 694.

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