Spring 3-1-1997

One Lone Voice: John Marshall Harlah and the Constitutional Rights of African Americans

Diana Jean Werkman
Western Kentucky University

One Lone Voice: John Marshall Harlan and the Constitutional Rights of African Americans

A Thesis for the Honors Program

by

Diana Jean Werkman

Spring, 1997

Approved by

Patricia H. Minter 3/27/97

Walter Ludwig

Marvin B. Lucas

James M. Farland 3/27/97

Dedication

This paper is dedicated to the memory of my teacher, mentor, and friend, Ms. Estella Jones.

All teachers impart educational lessons. Some teach valuable lessons about life. A rare few change the lives of their students. You will be sadly missed by all who knew you.

ACKNOWLEDGMENTS

I would like to thank everyone who was involved in this project. Special thanks go to Dr. Patricia Minter, who was brave enough to direct this thesis. Thank you also to Mr. Walker Rutledge who taught me how to use commas and possessives. God bless everyone at Inter-Library loan. Without their assistance this paper would not have been possible. Thank you also to my sisters and my parents who had to live with me while I was working on this thesis. I promise there will be no more 2 a.m. nervous breakdowns. I am grateful to my best friend and other 'sister,' Allyson, who helped me keep my sanity for the last eight months.

Abstract

John Marshall Harlan, a Kentuckian who served on the United States Supreme Court from 1877 to 1911, was often the only Justice who supported the civil and political rights of African Americans. His jurisprudence was interesting because it combined traditional elements of the Court's Gilded Age views and fundamental ideas of mid-twentieth-century judicial race philosophy. The events that reshaped Harlan's race philosophy illustrate how he made the transition from slave owner to defender of individual rights. Significant to his judicial ideology was his interpretation of dual federalism and the intent of the framers of the Civil War Amendments. While the majority of the Court defined these concepts very narrowly, Harlan used a more liberal approach. By addressing the criticisms of his record, by investigating his pre-Supreme Court days in Kentucky, and by surveying his record in cases involving African-American rights, one can readily conclude that Harlan deserves his reputation as a champion of civil rights.

Contents

One Lone Voice: John Marshall Harlan and the Constitutional Rights of African Americans

Preface

Few events in American history have transformed the political, social, and judicial landscape of the country the way the Civil War and Reconstruction did. Out of the ashes of the South rose a new social structure the Confederates had fought four long years to prevent. Blacks and whites were suddenly equal in the eyes of the law. The nation had amended its Constitution three times to ensure the civil rights of African Americans. The Thirteenth, Fourteenth, and Fifteenth Amendments freed African Americans from slavery, established their citizenship rights, and enfranchised the black male population. However, for thirty-four years, from 1877 to 1911, one lone voice on the United States Supreme Court sought to uphold the rights guaranteed by these Amendments to the Constitution. That voice belonged to Justice John Marshall Harlan.

The record of John Marshall Harlan has undergone a historical reevaluation unlike that of any other Justice. Harlan's contemporaries criticized him for abandoning the ideals of the Gilded Age. Many saw him as a notorious figure because of his radically different judicial philosophy. After his death in 1911, he was seemingly forgotten for forty years until many of his liberal ideas became the laws of the United States. Of all those who served on the United States Supreme Court from the mid-nineteenth to mid-twentieth century, Justice Harlan has gained the most noted

reputation for protecting the constitutional rights of African Americans. Scholars and historians have furnished Harlan with this distinction in the wake of the Brown v. Board of Education decision in 1954. It was the Brown case that made Harlan's ideas legendary. His record was suddenly thrust from the depths of nineteenth-century obscurity to the forefront of mid-twentieth-century jurisprudence. Harlan was no longer viewed as an "enigma" or as "an eccentric exception."[1]

In some ways, 'notorious' is a good description of John Marshall Harlan. It is a categorization Harlan himself would have appreciated. He stood over six feet tall with a head of fiery red hair that turned snow white in his late years. He had a booming voice no one could fail to miss, and he used his vocal abilities often when he disagreed with his brethren. He was infamous for pointing and crooking his finger at fellow justices and poor young attorneys who did not agree with him. Yet, he was a very likable man, and despite his disagreements with the rest of the Court, no Justice who served with Harlan ever reportedly disliked him. In fact, Justice Oliver Wendell Holmes once said, "I do not venture to hope that Harlan and I will ever agree on an opinion, but he has a place in my heart."[2]

In the late twentieth century, legal scholars and historians have debated whether or not Harlan deserves his reputation as the great champion of civil rights. The Harlan revival of forty years ago has brought to light serious questions concerning his commitment to African-American issues. Some of these concerns are limited to individual tactics Harlan employed in specific cases. However, other criticisms are more general and condemn the majority of the Harlan record. In many ways, these critics, once again subject Harlan to categorizations such as "judicial enigma." Harlan's record as a whole is less than impressive to these scholars. His landmark civil rights dissents are seen as the exceptions.

The revival of John Marshall Harlan coincided with both the Brown decision and the reevaluation of Reconstruction. As historians began to reassess the successes and failures of Reconstruction, they also started to reevaluate Harlan's pledge to civil rights. Both the reassessments of Reconstruction and Harlan's record related directly to the citizenship rights blacks were finally able to exercise for the first time since the end of Reconstruction.

Nineteenth-century criticisms of Harlan were general attacks on his decision to support African-American rights. These criticisms were rooted in the popular prejudices of the day. Most critics accused Harlan of writing his own personal beliefs into law and charged him with being inconsistent in his reasoning. Harlan admitted that judges make law. He could be considered a pseudo-formalist at best and this is why his contemporaries saw him as a renegade.

The reevaluation of the Harlan record began in the mid-twentieth century. Historians in the 1950s and 1960s, such as Alan F. Westin and Barton J. Bernstein, praised Harlan's overall approach to civil rights but questioned his use of specific judicial tactics. In the 1970s, after two continuous decades of violence toward African Americans, scholars such as J. Morgan Kousser and Richard Kluger began to question Harlan's commitment to civil rights.[3] Many writers in the 1980s and 1990s, including Linda Przybyszweski, Tinsley Yarbrough, and Loren P. Beth, have evaluated the Harlan record using a more balanced approach. These scholars maintain that Harlan deserves his reputation but question his consistency and reasoning in certain cases.

In his lifetime, John Marshall Harlan viewed a fundamental reordering of society. During his thirty-four years on the Court, he witnessed incredible changes in law. What he saw in his pre-Supreme Court days in Kentucky profoundly affected him and caused him to transform from slave

owner to defender of individual rights. His background did not suggest the man he would become or the case record he would accumulate.

To assess accurately the Harlan record, one must look at all thirty-nine cases that concerned the rights or status of African Americans. Harlan did not uphold civil rights in all of these cases. Generally, he favored African-American rights, and in most cases he sought to uphold the guarantees of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. However, in some cases, Harlan believed other issues of law were more significant. Furthermore, Harlan's judicial decisions were affected by his strong sense of republicanism that was sometimes clouded with naiveté. Harlan's definition of *republicanism* was similar to that of the founding fathers. He believed that political power was derived from the people and that the success of government depended on the citizenry. There were certain state procedures that were fundamental and were reserved exclusively to the states. Republicanism, to Harlan, meant that the federal government could not interfere with these policies. Harlan also assumed that most of society shared his vision of a republican form of government. It was difficult for him to accept that individuals in society would thwart theses noble intentions for the sake of maintaining the status quo.

John Marshall Harlan's reasoning in civil rights cases was not always consistent. In fact, Harlan once said of himself that he would rather be "right" than "be consistent."[4] He employed several different kinds of judicial reasoning in deciding civil rights cases. Oddly enough, he used the concept of dual federalism both in support and against black plaintiffs.* Certain facts in these individual cases mitigated his use of dual federalism. Harlan also used the concepts of original

* Dual federalism was the nineteenth century legal doctrine that enunciated there were two spheres of citizenship rights. One sphere was reserved to the states and the other belonged to the federal government. Neither the state nor the federal government should intrude upon the province of the other.

intent, *stare decisis*, federal interstate commerce powers, equal application of the laws, and public interest concerns in deciding cases. Judicial rationales such as standing, mootness, jurisdiction, and lower court errors further factored in his opinions and dissents. The easiest approach to viewing the Harlan civil rights record is to first address the cases chronologically and then to examine the reasoning employed. His dissents will show that the greatest difference between Harlan and his brethren was the scope each used in interpreting dual federalism and the intent of the framers of the War Amendments. The majority of the Court defined these concepts very narrowly when applied to civil rights, while Harlan took a more liberal approach.

John Marshall Harlan's tenure on the Court witnessed a transformation from the policies of the Gilded Age into the ideals of the Progressive Era. Formalistic doctrine, with its reliance on dual federalism, was replaced with other schools of thought that emphasized individual rights and responsibility for individual action. Harlan was a Justice who did not precisely fit into either era. His judicial philosophy encompassed the ideas of formalism, sociological jurisprudence, and realism. His beliefs could not be categorized into any one school of thought. It is more correct to assess him as a bridge figure who accepted the tenets of different philosophies of judging.

Some scholars have called Harlan a man before his time. Others see him as a throwback to a more egalitarian day. In truth, Harlan was both. He embraced concepts of civil rights that would not be realized until the twentieth century. His chief reason for defending those rights was his spirit of republicanism, which was similar to that of the founding fathers. By addressing the criticisms of John Marshall Harlan's record, by investigating his pre-Supreme Court days in Kentucky, and by examining his record in cases dealing with African-American rights, one may prove that he deserves his reputation as a champion of civil rights.

Chapter 1:

Criticisms of John Marshall Harlan and His Civil Rights Record

The record of John Marshall Harlan in cases dealing with African-American rights has been subjected to a great deal of criticism--both during his lifetime and in the decades since his death. Contemporary and modern critiques of Harlan each take a different approach in examining the Harlan record, but both suffer from similar flaws. Nineteenth-century critics often focused on his civil rights record and philosophy in general, while twentieth-century scholars point to more specific judicial tactics when assessing him. Writers, historians, and political observers from both centuries often question Harlan's commitment to African-American rights because of cases in which he ruled against black plaintiffs. He has most often been charged with being inconsistent in both his judicial opinions and reasoning while on the Court.

Harlan was involved in thirty-nine cases dealing with civil rights issues during his thirty-four years on the Court. The fact that African Americans were citizens with equal rights to whites created a new, perplexing arena of law in the nineteenth century. The Supreme Court did not have any precedents in how to deal with cases involving rights for a newly freed black population. There were few pre-Civil War cases dealing with freed blacks, and those individuals involved had not been protected by three constitutional amendments and several federal civil rights laws. Several cases addressing African-American rights came before the Court between the adoption of the War Amendments and the beginning of Harlan's service. The most significant of

these were the Slaughter House Cases in 1873 in which the Court ruled the Fourteenth Amendment protected only those rights guaranteed by the Federal government. It further held that there were, in effect, two spheres of citizenship rights: one federally guaranteed and one given by the states. It was the province of the states to ensure and to protect those rights individuals had because of their state citizenship.[5] The federal government could not interfere with state citizenship rights. In this case and the other pre-Harlan decisions, the Court was experimenting with civil rights issues, particularly in relationship to the War Amendments. In many ways, this 'experiment' continued throughout Harlan's tenure. The entire Court, not just Harlan alone, was guilty of inconsistencies during the early era of civil rights decisions.

In cases involving black civil rights before the Court in Harlan's tenure, the issue of those rights was not always paramount in the eyes of Harlan or the other Justices. There was not a single case in which civil rights, segregation, and discrimination were the only issues involved. Harlan had thoughts on how a justice should rule in cases dealing with dual federalism, interstate commerce, federal due process, and other legal questions. Sometimes his decisions in cases in which he seemed to go against his strong pro-civil rights beliefs were motivated by an equally strong commitment to other issues.[6] His civil rights opinions further combined his understanding of the blacks' plight, his broad interpretation of rights granted by the Civil War Amendments, his personal ideology, and his desire to see law achieve the correct result.[7] The last of these was particularly important to him because Harlan truly believed that correct constitutional reasoning was pointless unless it achieved the right outcome. His thinking was also altered because the laws around him changed.[8] As a judge, he was heavily influenced by the dictates of the republican system.

John Marshall Harlan was extremely committed to a republican form of government. He felt that this system directed his Supreme Court decisions. The War Amendments, in his opinion, had put the country a step closer to realizing the dreams of equality many of the founding fathers had envisioned.[9] Harlan even feared that individuals in government and in society were attempting to take the power of the government out of the citizens' hands.[10] Harlan's belief in civil rights was due in part to his perception of republicanism. The white race was not naturally superior because a republican form of government did not allow one race to be superior.[11]

The philosophy of judging that predominated during Harlan's tenure on the Court was formalism. This school of thought held that judicial decisions were based on a higher standard of law and was committed to the idea that judges discover, not make, law. John Marshall Harlan's judicial philosophy did incorporate some ideas of formalism, but it also embraced legal rationales that would come to dominate the Court in the twentieth century. While on the Court, Harlan was often chastised by his critics for accepting sociological reasoning. This type of logic did not conform with formalistic dogma. However, it was his fellow Justices who were guilty of this charge. Despite denials by the rest of the Court, the Supreme Court decisions of the late nineteenth century made a place in law for the sociological prejudices of the day.[12] Though they claimed to "discover" law, in fact, they were activists who wrote their racial biases into law. They ignored the intentions of the War Amendments in an attempt to maintain the status quo. Harlan did not allow the racially prejudicial tendencies of his brethren to affect his belief that the Fourteenth Amendment allowed the central government to protect the rights of all citizens, regardless of how one group in society might view another.[13] The dicta within many of his opinions and dissents were in the interest of aiding society[14] and seeing it progress as the War Amendments intended. Though he was not completely without prejudice, he did maintain that the

races were equal before the law. Harlan was committed to a color-blind Constitution, and his decisions were motivated by an egalitarian sentiment.

Nineteenth-century critics of John Marshall Harlan also accused him of judicial activism. In a speech in 1907, Harlan acknowledged the force of judicial activism when he said, "The power of the Supreme Court for good, as well as for evil, can scarcely be exaggerated. It can not actually shape the destiny of our country, [but] it can exert a commanding influence in that direction."[15] Harlan believed that influence should be as limited as possible. He was, in truth, a strong advocate of judicial restraint, and his decisions reflected this belief. There was a proper role for the Supreme Court to play.[16] He felt strongly that the Court should not act as a "super-legislature." The Court's job was not to interject its own moral policies of right and wrong into legislators' decisions, but to protect the citizen from aggressive state and national legislatures.[17] When he did cross the boundary between judicial restraint and activism, it was in the interest of civil rights.[18] Harlan's contemporaries have charged him with being an activist, but these criticisms are tainted because of hostile attitudes toward civil rights in the nineteenth century.

Harlan's philosophy of judging was, in many ways, contradictory. It was paternalistic but rejected judicial activism. It was nationalistic, while still upholding some elements of state sovereignty. It combined elements of formalism, sociological jurisprudence, and realism. Most criticisms of Harlan in both the nineteenth and twentieth centuries arise because of his ideological inconsistencies. While one scholar will damn him for advocating dual federalism, another will condemn him for being too nationalistic and not properly interpreting the meaning of the War Amendments. In his day, he was deemed far too liberal. By late twentieth-century standards he is chastised for being conservative. However, writers such as Kluger and Kousser who charge him with not being radical enough make the mistake of judging him by twentieth-century standards. It

is not proper to evaluate the Harlan record by modern standards of liberalism and conservatism. To do so employs historical relativism. Criticisms by his contemporaries were also flawed because these individuals were too close to the issues of the day to adequately assess the Harlan record. To best understand Harlan and to properly pass judgment on his record, one must evaluate him in hindsight by the contemporary standards of his day.

Other modern critics who feel Harlan's record is at best mixed on the issue of civil rights, are guilty of incorrectly categorizing civil rights in the nineteenth-century context. Today, civil rights are all encompassing, but in the decades after the Civil War 'civil rights' could be divided into three categories: civil, political, and social. Harlan took strong stands on upholding civil and political rights. However, he never advocated equal social rights for African Americans; indeed the idea was as inconceivable to him as it was to the majority of nineteenth-century society, both black and white. Even a great African-American spokesman such as Booker T. Washington did not advocate for a nineteenth-century society in which blacks and whites were social equals. It has only been in the twentieth century that such a wonderful dream has been envisioned and has been slowly realized. Many critics of Harlan do not evaluate his record from a nineteenth-century civil rights interpretation; thus they condemn him because of his record on social rights, an area of rights legislation neither he nor the Radical Republicans ever imagined. In fact, Harlan was radical for his time. He was often the lone dissenter in African-American rights issues, and his civil rights beliefs were contrary to the popular opinion of the late nineteenth century. He did not seek the path of the majority, who at every turn thwarted the intent, the wording, and the spirit of the War Amendments--even in nineteenth-century historical review.[19]

While nineteenth-century critics of Harlan focused on his civil rights record as a whole, modern critics have found fault with individual judicial tactics Harlan used in his reasoning. Even

writers, such as Westin, Przybyszewski, and Beth, who believe Harlan deserves his reputation as a defender of African-American rights, occasionally question the legal justification he utilized in specific cases. Harlan is once again chastised for being inconsistent by these twentieth-century scholars. All his critics point to individual cases in which Harlan seemed to waffle on the idea of civil rights. Many writers, including Westin and Bernstein, point to specific inconsistencies in Harlan's reasoning, particularly in landmark decisions. John Marshall Harlan is most often condemned for his use of the concept of dual federalism and for his record in African-American jury cases.

The concept of dual federalism was the idea that there is a sphere of rights reserved to the states and a sphere of rights belonging solely to the Federal government. Neither the states nor the Federal government should intrude upon the province of the other.[20] This idea was as old as the nation itself and was critical in the framing of the Constitution. In many respects, the Civil War was a battle between those who believed in dual federalism and those who believed in State sovereignty.[21] The framers of the War Amendments accepted this balance of powers and were, to some extent, attempting to preserve dual federalism. It was the intent of the Radical Republicans that the States would primarily protect the rights of citizens. The War Amendments were an attempt to ensure that the States safeguard the rights of all citizens equally.[22]

The Supreme Court of Harlan's tenure, rooted in formalistic doctrine, accepted dual federalism. The Court used this concept more than any other reasoning in striking down federal laws designed to protect the guarantees on the Thirteenth, Fourteenth, and Fifteenth Amendments. The Court's main objection to federal civil rights legislation was that those acts punished individuals for civil rights violations. It was the view of the Court, in their interpretation of dual federalism, that such persons were subject to the jurisdiction of the states.[23]

John Marshall Harlan did accept dual federalism to some extent, but his interpretation of dual federalism was different from that of the rest of the Court. Harlan believed that when state governments were unable or unwilling to protect African-American rights, the Federal government should step in and do so.[24] This idea was more in keeping with the sentiments of Congress which, after seeing how the Southern states allowed continued racial discrimination against African Americans in the years immediately following the Civil War, passed three Enforcement Acts in 1870 and 1871 to ensure the guarantees of the War Amendments. These laws were in direct response to the failure of the states to live up to their end of the dual federalism bargain.[25] The Enforcement Acts made it a criminal offense for individuals to discriminate against blacks or to prevent African Americans from enjoying their citizenship rights. The majority of the Court would find parts or all of these acts unconstitutional during Harlan's tenure. They based their decisions on the concept of dual federalism. Harlan dissented in every one of these cases.

Other evidence that Harlan was not completely committed to dual federalism was his record in cases dealing with state economic issues. He permitted federal laws that regulated the economy, but opposed such measures passed by states.[26] Economic issues, he felt, fell in the federal sphere of rights. If the states became involved in such regulations then conflicts of interest over such matters as interstate commerce could have arisen.

The majority of the Court applied dual federalism to Thirteenth Amendment questions. Harlan never did because of his tendency to interpret the Constitution literally.[27] The Amendment nationally forbade all forms of slavery and, thus, Harlan believed no state could engage in activities that conferred any form of slavery, involuntary servitude, or badges of slavery upon its citizens. Harlan also believed Congress could protect the rights of citizens under the first clause

of the Fourteenth Amendment, which defined citizenship. He believed it was not necessary to categorize citizenship rights into federal and state spheres.[28] Harlan felt that the Court often hid behind the dual-federalist doctrine and in doing so chose to ignore egregious violations of civil rights.[29] What beliefs John Marshall Harlan held about dual federalism were often outweighed by his stronger commitments to nationalism and republicanism. These two concepts were the driving force behind all of his pro-civil rights opinions and dissents.

Directly related to Harlan's idea of dual federalism was his stance in cases involving African-American jurors. Those cases represented the bulk of civil rights cases before the Court during Harlan's tenure. Harlan has been most criticized by twentieth-century scholars for his record in those decisions. Both those writers who support his reputation as a champion of civil rights and those who question his commitment to African-American rights address his record in jury- selection cases. The jury cases involved black plaintiffs who alleged discrimination by states and trial courts in the assembly of grand and petit juries. Eighteen jury cases came before the Court between 1880 and 1911. In twelve of those suits, Harlan took an anti-civil rights stand. In all of those cases, the reasoning the court employed was that of dual federalism.*

Though critics charge Harlan with using dual federalism in the jury cases, he was only partially motivated by that concept in his reasoning. Harlan was equally inspired in those decisions by his belief in republicanism.[30] Harlan felt that nothing was more essential to a republican system of government than states deciding for themselves how jury issues should be decided.

His decisions in the jury cases were further dictated by a two-part test he used in deciding all civil rights suits. In deciding if individual, state, or federal actions were in violation of the War

* See Appendix.

Amendments, Harlan addressed whether or not those acts infringed upon the color-blind rule he established in his famous Plessy v. Ferguson dissent in 1896 and whether or not the intent of the statute or action was racist.[31] The color-blind rule assessed the ability of the act or law to be equally applicable to persons of all races. The second half of his test evaluated the statute's or action's intentions. If Harlan believed the action had a racist purpose, then he found it to violate the Civil War Amendments. In regard to the later prong of the test, Harlan required that black plaintiffs provide solid legal evidence that racial exclusion had occurred.[32] In most of the jury cases, plaintiffs were unable to provide enough affirmative proof to meet Harlan's standards. Further, Harlan and the Court did not look at the jury cases from an equal protection standpoint but from a due-process view. The due process interpretation meant the Court was emphasizing a guarantee to a fair trial, not the citizenship rights that equal protection ensured. By looking at the jury cases from a due-process rationale, both the Court and Harlan would conclude that African Americans could receive a fair trial by an all white jury.[33] Beginning in 1900, Harlan and the Court held that racial exclusion was a violation of due process but that all-white juries were not *prima facie* evidence of inequality. It had to be proven that deliberate racial discrimination had occurred and that such prejudicial actions had violated the individual rights of the defendant.

John Marshall Harlan's thoughts on jury issues were expressed best in a letter he wrote to attorney C.P. Barrett in August 1896. That letter illustrates his commitment to true equal applicability of the law. It also demonstrates his belief that juries should not be racially organized to benefit any defendant. Harlan wrote:

> The Constitution of the United States does not secure to a black man the right to be tried by a jury composed in whole or in part of men of his race, nor does it secure to a white man the right to be tried by a jury composed in whole or in part of men of his race. The Constitution only secures to each person the right to be tried by a jury from which is not excluded because of his race, any citizen, otherwise qualified, or the same race as that of the accused.[34]

In some ways, Harlan's commitment to republicanism in the jury cases was based on a naïve belief that those who assembled juries shared his belief in a republican system of government. It was difficult for him to believe that such overt racism could occur in a country he loved so dearly because of its egalitarian ideals. Those who choose to attack his record in jury cases because they feel those decisions contravene the rest of his civil rights record misread his intentions. Harlan was not truly inconsistent in those decisions involving jury issues. He used reasoning he employed in all other civil rights cases and based his opinions on the same two-part test. If Harlan is to be criticized for the jury cases, then critics should address his naiveté and not his reasoning.

Also directly related to Harlan's decisions in the jury cases was his strict interpretation of jurisdiction. His failure to dissent in several cases was grounded in the logic that the Court did not have the necessary jurisdiction to review the cases. Those actions illustrated his defined standard of dealing with cases only in which civil rights violations were clear and jurisdiction was apparent.[35] All cases in which he dissented on jurisdictional grounds were motivated by his need to see justice served.[36] Justice failed when the Court considered issues that it did not have the jurisdiction to review. African Americans were often denied their civil rights in cases in which jurisdiction was not evident by the facts. For example, by deciding the case of Giles v. Harris (1903) on its merits and not sending it back to the circuit court for revision of the record, the Supreme Court's majority denied Giles any relief for being denied his right to vote. In this case Harlan dissented on jurisdictional grounds and chastised the Court for failing to address the constitutionality of the actions against Giles.

Harlan has also been criticized by twentieth-century critics for his use of original intent as a guiding doctrine. He strongly favored a literal interpretation of both the Constitution and the intent of the framers of the War Amendments.[37] He was often critical of his fellow Justices when they did not take the same approach to the Constitution.[38] The entire original intent argument can best be summarized in his dissent in the Civil Rights Cases (1883), although Alan Westin believes that Harlan ventured from the phrasing of the Fourteenth Amendment and the original intent of the framers of the War Amendments in that case.[39] In his 1883 dissent, Harlan thought the War Amendments conferred upon African Americans all rights associated with citizenship, and those Amendments gave Congress the ability to ensure that racial discrimination was unconstitutional.[40] He disagreed emphatically with the rest of the Court that the first section of the Fourteenth Amendment was simply a sequence of restrictions upon the States. The fifth section of the Amendment, in his opinion, gave Congress the broad powers of ensuring that citizenship rights were protected.[41]

It is clear that Harlan did understand the original intent of the War Amendments' framers and that he properly applied that knowledge in his civil rights decisions. Harlan knew that many of the same men who wrote the War Amendments framed the Civil Rights Act of 1875. If those individuals had not believed the Amendments conferred upon them the power to protect African-American rights, then they would not have undertaken the 1875 Act.[42] Harlan's original intent beliefs, particularly in the Civil Rights Cases (1883), were also motivated by his decision to address the "legal effect" the Amendments had.[43] Monte Canfield has said in regard to Harlan's reasoning, "If the effect, in fact, acts to subordinate one person to another, then the argument comes to a definition of slavery."[44] Harlan's interpretation of the Amendments' original intent was that they prohibited not only slavery but badges of slavery as well. It is apparent he

considered discriminatory laws, such as those involved in the Civil Rights Cases (1883), to be badges. The majority of the Court in the Civil Rights Cases (1883) was guilty of inventing original intent to make their point. They failed to evaluate properly original intent because it was congressional radicals who originally proposed the War Amendments.[45] If Harlan is to be deemed guilty of misconstruing original intent, then both he and the Court were equally guilty of searching out arguments to sustain their convictions.

One area for which Harlan has been criticized for breaking away from his literal interpretation of the Constitution is that of substantive due process. Scholars such as Loren P. Beth question his use of substantive due process over his use of literal interpretation of the Constitution in several cases.[46] The Fifth and Fourteenth Amendments require that laws should be fundamentally fair, reasonable, and reasonably related to their purpose. Harlan explained his reliance on substantive due process in a law lecture in 1898:

> Since the adoption of the Fourteenth Amendment there has been a great many decisions in the country as to what constitutes due process of law, and you will never hear the last of that phrase as long as this is a free country because there are varying circumstances arising and the judges are put at their wit's end to know whether this, that or the other act transcends the provisions of the Constitution.[47]

Harlan used substantive due process as a means of ensuring African-American civil rights. He found that several state laws were fundamentally unfair and were not reasonably applied to their purpose. Such laws arbitrarily deprived citizens of life, liberty, and property. Critics of his use of substantive due process simply address his decision to employ it and fail to see that he used it as an means to an end. It was often a more effective tactic than literal interpretation of the Constitution because it required state laws to be clear in their purpose. Many of those who criticize his use of substantive due process subscribe to theories of judicial philosophy that do not believe in the esoteric concept of substantive due process.

John Marshall Harlan is most famous because of his use of dissent.[48] He is occasionally criticized for dissenting for the sake of dissent alone.[49] However, in every case in which Harlan dissented, he had clear and compelling reasons for doing so. In his decisions he gave constitutional reasons for every action he undertook. His opinions and dissents, though often wordy, were never vague or superfluous. In civil rights cases his dissents had a specific purpose, to illustrate that the Constitution could not be used as an instrument preserving racial discrimination so long as he sat on the Supreme Court.

Harlan has left one legacy in history he would not have favored. Some critics charge that the color-blind doctrine enunciated in Plessy v. Ferguson (1896) is partially responsible for a backlash against affirmative action in the twentieth century.[50] Many individuals who fought against segregation but who oppose affirmative action rely on Harlan's color-blind Constitution theory.[51] Those who advocate a color-blind Constitution do not favor any color-conscious legislation. But one could counter that not all color conscious laws are necessarily bad.[52] Many, such as those pertaining to busing and equal opportunity in employment, actually prevent discrimination and arguably fulfill the promise of the Fourteenth Amendment's equal protection language. Some followers of Harlan's color-blind theory feel that the Plessy dissent would never have justified any form of action policy in regard to race law. There is no evidence that the color-blind doctrine was intended to be absolute.[53] Any thoughts on where Harlan would stand on modern-day affirmative action would be pure speculation. Segregationists in the twentieth century have latched onto Harlan's theory of a color-blind Constitution to fight integrated schools and mandatory busing. Based upon his dissents in Plessy v. Ferguson (1896) and Berea College v. Commonwealth of Kentucky (1899), it is clear that Harlan would have opposed any person who would use his theory in this way.[54]

Nineteenth-century critics of John Marshall Harlan focused on his civil rights record as a whole. They attacked his overall commitment to African-American rights and criticized him for several inconsistencies. In truth, those inconsistencies can be explained by his belief in the republican system, his acceptance of several different philosophies of judging, his rejection of judicial activism, and his understanding of civil rights in the nineteenth-century context. Twentieth-century scholars have criticized Harlan for specific tactical inaccuracies. These critics are guilty of historical relativism and of assessing reasoning in individual cases without applying the effects of that judicial logic to Harlan's civil rights record as a whole. His decisions were equally motivated by commitments to dual federalism, republicanism, and nationalism. When the jury cases are evaluated more closely, it is possible to see that Harlan's decisions in those cases were inspired by several factors, including dual federalism, original intent, and jurisdiction. In fact, jury cases were the one area of civil rights jurisprudence in which the Court did the most for African Americans. In six of those cases the Court found state laws and actions by individuals unconstitutional. These criticisms of Harlan's record are all general comments on his civil rights decisions. The reasoning he used in civil rights suits is best addressed, evaluated, and repudiated in the framework of the cases.

Chapter 2:

The Making of a Great Dissenter: John Marshall Harlan's Pre-Supreme Court Days

John Marshall Harlan's heritage and early political career shaped the man he was to become. Many people and events--including his family, education, military service, and political career in Kentucky--helped frame his judicial philosophy and attitude toward African-American civil rights. Any discussion of Harlan would be incomplete without some reference to those factors.

Harlan was born in Boyle County, Kentucky, on June 1, 1833. He was the fifth son of a noted Kentucky Whig attorney, James Harlan.[55] The elder Harlan named his son after the great Chief Justice of the Supreme Court, John Marshall. The Harlan family, particularly James Harlan, was committed to the same political ideologies as Marshall.[56] The judicial opinions and beliefs of Marshall would significantly affect his namesake throughout his life.

The Harlan family owned several slaves, all of whom were house servants reportedly well-treated and close to the family.[57] Stated differently, Harlan grew up in an affluent ante-bellum life style. However, those slaves were inherited, and the family never engaged in the buying or selling of slaves. In fact, the family viewed the sale of slaves to be barbaric.[58] It was a matter of honor in the Harlan family that they did not sell their slaves. John Marshall Harlan, on one occasion, bought a black woman to keep her from being separated from her husband.[59] Harlan once said of

the slave trade that anyone who would "[call] himself a man" would not engage in the practice.[60] This hatred of the slave trade showed that in his early life Harlan, unlike many of his Southern counterparts, believed that slaves were human beings.

Both John and James Harlan were disgusted with the abuses some masters heaped upon their servants.[61] One particular occurrence of slave mistreatment especially affected a young John Marshall Harlan. While walking to church one Sunday with his father, the two observed a group of slaves being savagely beaten by their master. James Harlan was so enraged that he went up to the man and shouted, "You are [a] damned scoundrel. Good morning, sir."[62]

Another incident in October 1858 further demonstrated Harlan's belief that slaves were more than mere property. While the family was packing to move to town for the winter, one of the young slave girls fell asleep near a candle. Somehow that candle overturned and caught her dress on fire. Harlan heard the girl screaming, grabbed her, and patted out the flames. His hands were severely burned in the effort, and he was scarred for life.[63]

Despite the family's paternalism toward slaves, the Harlan family opposed abolition. Because of Southern state laws which forbade educating blacks, the family feared simply freeing slaves. The Harlans feared what might happen to both the South and the black race if millions of uneducated blacks were suddenly left to their own devices. The family did support progressive emancipation but felt immediate forced emancipation violated the property rights of citizens of the United States.[64] As a result, John Marshall Harlan and his family opposed the reelection of President Lincoln and the Emancipation Proclamation.[65] They instead favored the African Colonization Plan as a way of removing slavery from the United States.[66] As the Civil War approached, the Harlans were strongly pledged to states' rights concerning slavery, the property rights of slave owners, and, as they saw it, the federal government's duty to safeguard the

property rights of slaveholders in the territories.[67] His modified definition of dual federalism had its roots in this property rights view of slavery.

For all the family's humanitarianism regarding slaves, John Marshall Harlan's early contact with slavery alone would never have caused him to become a defender of civil rights. Many factors during the first third of his life caused him to transcend the barriers of his heritage.

Harlan's early political philosophy was shaped by both his father and his education. He attended college at Centre College in Danville, Kentucky, and studied law at Transylvania University in Lexington. Of all the political parties of the mid-nineteenth century, the one most committed to nationalism was the Whigs. John Marshall Harlan followed in his father's footsteps and joined the party early in his career. However, by the 1850s the party was waning in influence and dying out. This led Harlan to join the new politically influential Unionist party, which solidified his nationalistic beliefs.[68] As well as being nationalistic, both parties did not believe in treating slaves harshly or extending the current slave system. Harlan, as both a Whig and a Unionist, was willing to tolerate the necessary evil of slavery, as he saw it,[69] to keep the Union together.[70]

Harlan's commitment to both nationalism and preservation of the Union led him to join the United States Army in 1861. Prior to his military involvement in the Civil War, he had taken steps as an influential member of the Union Party to keep Kentucky loyal to the North. This was done in defiance of a Kentucky governor who was a known Confederate sympathizer.[71] His valor in battle earned him several commendations and the post of brigadier general. He never accepted the position, however, because in February of 1863, Harlan retired from military service. He was needed at home to handle the family law practice after the death of his father.[72] He remained active in his support for the Union and made efforts to prevent Southern raids in Kentucky.[73]

The area of the South in which Harlan spent the majority of his life shaped who he was to become. Harlan's life, both in action and experience, led to his conversion from a staunch supporter of property rights of slave owners to a deep believer in black civil rights.[74] Perhaps his transition from slave holder and defender of the old order into a spokesman on the Supreme Court in defense of the Freedmen's rights was due in part to the way he saw blacks treated in Kentucky after the Civil War was over.[75] Violence toward African Americans was very common in the South. The old Southern order was defeated, but it was not gone. It would have its revenge, and the recipients of that hostility would be the Freedmen.

At their inception in the 1860s, John Marshall Harlan had opposed the Civil War Amendments. His belief in dual federalism caused him to view the Amendments as abhorrent to his concept of states' rights. However, his strong devotion to the Constitution along with his hatred for racial violence led him to accept the Amendments and their implications for African-American rights.[76] Eventually Harlan came to believe in the same Congressional intent that inspired the Civil Rights Acts and the War Amendments. He believed that the purpose of the Amendments and acts in combination was to prevent African Americans from living in a condition of involuntary servitude, to ensure citizenship rights, and to ensure the right to vote.[77] The ultimate goal of the actions by radical Republicans, Harlan came to believe, was protecting the dignity of the individual.[78]

Another factor that undoubtedly affected Harlan's beliefs concerning the institution of slavery, its evils, and later his judicial opinions and dissents was his mulatto relative. Robert Harlan was either James Harlan's illegitimate mulatto son or half brother.[79] The controversy over his exact blood relationship to John Marshall Harlan stems from the dispute over the exact date of Robert's birth. He began his life a slave, but, as was his family's habit of doing, he was allowed to

work and earn his freedom. Shortly after purchasing his freedom, Robert moved to Europe, where he lived for several years. He eventually returned to the United States and spent the majority of the remainder of his life living in Ohio.[80] John Marshall Harlan's contact with his brother was limited. However, his relationship with Robert did cause Harlan to be more understanding of the horrors of slavery and discrimination. Several of Harlan's personal letters included references to Robert.[81] As a result, Harlan was more committed to upholding the constitutional guarantees of equality, at least where the law was concerned.[82]

Perhaps the most significant decision John Marshall Harlan made which shaped his later judicial philosophy and illustrates his transition in thinking was his joining the Republican party in 1868. In 1867, Harlan moved his law practice away from Democratic-dominated Frankfort to the more Republican city of Louisville. This move coincided with the sound defeat of the conservative Union party. His party's defeat convinced Harlan that nothing could be achieved politically by a third party in the state. He also realized he was living in a time when affiliation with a leading party was necessary to a successful practice of law.[83] Alan Westin has said that "Harlan's conversion to Republicanism was the most significant political choice he ever made. . . ."[84] However, it was not politics alone which persuaded Harlan to join the party. He himself said he chose the Republican party over the Democrats because "the general tendencies and purposes of the Democratic party were mischievous, while the theme of the Republicans were [sic] the better calculated to preserve the results of the War. . . ."[85] The results of the War he was perhaps referring to were the rights constitutionally guaranteed to the Freedmen.

In 1863 Harlan was elected Attorney General for the Commonwealth of Kentucky, and in 1873 he was made an assistant United States Attorney General by Attorney General George H. Williams. He was assigned this position to prosecute violations of the Enforcement Acts passed

by Congress in 1870 and 1871, respectively. Most of these cases dealt with civil rights suits from Kentucky Federal District Court.[86] During his service, he compiled a less than impressive record in African-American rights cases. Time and time again Harlan convinced the federal courts of Kentucky to side with whites and hold that the state sphere of influence was superior to the laws of the Federal government. In the most infamous of those cases, Bowlin v. Commonwealth (1866), Harlan persuaded the Kentucky Court of Appeals to overturn the sentence of a white man convicted for larceny because of the testimony of a black witness.[87] At the time, Harlan argued that Kentucky laws forbidding black testimony against white defendants was superior to the Federal Civil Rights Act of 1866. The Kentucky Court of Appeals agreed and overturned the conviction on the grounds the Civil War was over and state laws were once again superior to the National Legislature.[88]

Between 1868 and 1875, as a Republican, Harlan twice ran unsuccessfully for governor of Kentucky and once for the United States Senate. By the time of those elections Harlan had realized he had been incredibly wrong in the Bowlin case and had reversed his position. He now chose to defend the Civil Rights Act of 1866 and criticized the State legislature for declining to permit black testimony against white defendants.[89] He also began denouncing the Ku Klux Klan and other terroristic groups in Kentucky for their actions against African Americans. It was groups such as the Klan and their actions that aided in Harlan's transition from his stance in Bowlin. He abhorred violence, especially violence aimed at preventing people from exercising their constitutional rights.

In all three elections his emerging support for black civil rights was used against him by his Democratic opponents.[90] He lost all three contests but continued to defend his commitment to civil rights. At a rally in Livermore, Kentucky, in July of 1871, he said, ". . . I have lived long

enough to feel and declare, as I do this night, that the most perfect despotism that ever existed on this earth was the institution of African slavery."[91] His hatred of slavery eventually transformed into a commitment to equal rights for African Americans. In a speech at the Republican National convention in 1876, Harlan expounded his beliefs that black children should have equal opportunity to education in Kentucky.[92]

Some historians have suggested that Harlan's conversion to the Republican party was solely related to politics. A few, such as Westin, have gone so far as to argue that he first embraced the idea of African-American rights because he knew the black vote was necessary for victory and for maintaining a Republican stronghold in Kentucky.[93] Such an assertion, however, is unjustified. Kentucky was in the mid 1800s, as it is now, strongly supportive of the Democratic party. If John Marshall Harlan had kept large political goals in mind exclusively, then he would have aligned himself with the Democrats and against civil rights.[94] The freed black population in Kentucky was not significant enough to turn the tide in the Republicans' favor. Furthermore, persecution and intimidation against black voters was strongest in the border states in the years directly following the Civil War because there was no military occupation. He also detested the open racial terrorism many Democrats used against African Americans. Harlan knew all of this when he made his decision. His defense of black civil rights was more deeply genuine than expressly political.

Another element that certainly helped determine his pledge to civil rights was his relationship with Frederick Douglass. The noted advocate of African-American rights met Harlan at a dinner at the home of James G. Blaine during the Presidential campaign of 1872.[95] After their initial introduction at that party, Harlan and Douglass met privately on a few other occasions as well as corresponded by letters.[96] On October 16, 1883, Harlan received a letter from Douglass

thanking him for his stirring dissent in the Civil Rights Cases.[97] In another letter dated November 7, 1883, Douglass once again commented on the case saying, "I am glad sir, that in this day of compromise and concession where it is so much easier to drift with the currents [and] to sacrifice conviction for the sake of peace, that you have been able to adhere to your convictions and this I owe your soul."[98] Harlan was often criticized by Democrats for his relationship with Douglass. However, he remained supportive of Douglass, even saying about his speaking abilities, "He would have made a great Senator."[99]

Harlan's relationships with African Americans were not limited to Douglass. When Harlan joined the Court, he was assigned, as was the custom, a black messenger to assist him with some of his more subservient duties. James Jackson was given the position as Harlan's aide, and the two developed a friendship that lasted the remainder of Harlan's life. Malvina Harlan once recounted that the two were devoted to one another and were often inseparable.[100]

Harlan's judicial philosophy was also affected by his religious beliefs. Both John Marshall Harlan and his wife Malvina Harlan were strong Presbyterians. That Presbyterian heritage undoubtedly helped him in his transition from anti-emancipator to great dissenter.[101] The Christian ideal that all people are equal before God affected his political beliefs and led him to accept that all people were equal before the eyes of the law. While serving on the Supreme Court, Harlan also served as an elder at his church. He fought against a proposal that would have allowed individual churches to limit themselves to one race.[102] Harlan felt that the Constitution itself was only second in importance to the Bible. Oliver Wendell Holmes once said of Harlan that "[He] retires at night with one hand on the Constitution and the other on the Bible, safe and happy in a perfect faith in justice and righteousness."[103]

John Marshall Harlan was nominated to the Supreme Court by President Rutherford B. Hayes in 1877. Harlan had been a Republican delegate at the party's convention in 1876. He was originally pledged to another candidate, his law partner Benjamin Bristow, but eventually threw his support and the Kentucky delegation to Hayes when it became clear Hayes was the party's likely nominee. Prior to supporting Hayes, Harlan made a nominating speech for Bristow that illustrated many of Harlan's views concerning African-American rights. The speech expressed commitments to schooling for black and white children, support for the Civil Rights Act of 1875, and called for laws restricting the Ku Klux Klan.[104] That support earned Harlan his own nomination to the Court because if Harlan had not swayed his fellow Kentuckians and several other state delegations, Hayes might well have lost the nomination to James G. Blaine.[105] His pro-slavery and anti-civil rights stance before the Civil War nearly cost him the confirmation. However, strong support from friends in the Judiciary Committee led to his unanimous conformation by the Senate.[106] On that day no one could have guessed that over the next four decades he would write some of the most significant civil rights opinions and dissents in American judicial history.

In the number of dissenting opinions Harlan has no equal on the Supreme Court. He wrote 316 dissents during his service. He was involved in 14, 226 cases while on the high Court and was commissioned to write a total of 1, 161 opinions. This too is a Supreme Court record. He was the third longest tenured Justice, with only John Marshall and Justice Stephen Field serving longer terms.[107]

The shining moments of Harlan's life and the ultimate expression of his commitments to civil rights were his great dissents. The two most significant of these dissents, both historically

and personally for Harlan, were his dissents in the Civil Rights Cases in 1883 and in Plessy v. Ferguson in 1896.

In the thirty-one years since the end of the Civil War, the Supreme Court had not looked favorably on the issue of black civil rights. Many cases came before the Court that allowed the majority to establish a precedent that the Fourteenth and Fifteenth Amendments' guarantees of equal protection and due process were only applicable to state action.[108*] Such decisions continually allowed private individuals to discriminate against African Americans. John Marshall Harlan dissented in every one of these cases.[109]

Perhaps the best expression of the totality of Harlan's conversion can be found in a letter written to Benjamin Bristow in 1895 in which Harlan said, "My whole nature responds to the principles of equality of all men before the law. . . ."[110] The cases that concerned the rights of African Americans during his tenure reflected his commitment to equality.

* See Plessy v. Ferguson (1896) and the Civil Rights Cases (1883).

Chapter 3:

The Civil Rights Cases of John Marshall Harlan's Tenure

John Marshall Harlan's case record on African-American rights involved thirty-nine cases directly addressing those rights and two related cases that clearly expressed Harlan's ideas concerning citizenship. Those cases can be divided into ten categories, each based upon the reasoning Harlan used in joining with the majority or dissenting. The easiest approach to viewing the Harlan record is to examine each case individually and chronologically within the various subject groupings. The cases in this discussion will be divided according to the most prominent reasoning that was employed. Though collectively all forty-one cases pertained to civil rights, there were five types of cases that came before the Court during Harlan's tenure. These types included jury cases, voting cases, involuntary servitude cases, segregated school and transit cases, and citizenship rights cases. It would be difficult to understand the Harlan record without some discussion of the civil rights precedents established by the Court in the years prior to Harlan's arrival.

When John Marshall Harlan arrived at the Supreme Court in 1877, he faced a series of precedents and a group of Justices who had not favored civil rights. In several cases before the Court between 1872 and 1878 the Court had interpreted the War Amendments very narrowly and had failed to protect civil rights. These cases were also significant because they established a precedent for dual federalism that the Court would use consistently throughout the late-nineteenth and early-twentieth centuries.

In Blyew v. United States (1872), the Court had overturned portions of the Civil Rights Act of 1866. The Court found that the part of the act which mandated the transfer of all racial discrimination cases from state to federal court was unconstitutional. It determined that transferring all cases in which the Fourteenth Amendment's equal protection guarantee was in question violated the concept of dual federalism and was procedurally unfeasible.[111] The states had initial jurisdiction in all suits involving state laws even if the constitutionality of procedural operations was involved. It would clog the federal system to automatically remove discrimination cases to federal court.

The Slaughterhouse Cases in 1873 established that there were two spheres of citizenship rights. One group of rights was protected by the state governments while the other was guaranteed by the Federal government. The Court determined that the Thirteenth and Fourteenth Amendments only protected those rights of citizenship within the federal sphere. The Amendments did not make any guarantees pertaining to state citizenship rights.[112]

Two cases in 1875 also denied African Americans due process and equal protection as promised by the War Amendments. In United States v. Cruikshank (1875), the Court struck down Section Six of the Enforcement Act of 1870, which made it a federal offense for disguised individuals ". . . to injure, oppress, threaten, or intimidate any citizen. . . ."[113] In effect, the Court was furthering its position in The Slaughterhouse Cases. The Thirteenth, Fourteenth, and Fifteenth Amendments only protected individuals from state infringement of federal rights and did not safeguard citizens against civil rights violations by individuals.[114] Cruikshank's companion case, United States v. Reese (1875), limited Congress's power under the Fifteenth Amendment to protect the voting rights of blacks.[115] The Court held that two provisions of the Enforcement Act of 1870 were unconstitutional. These sections prohibited individuals from racially discriminating

against any citizen attempting to exercise his right to vote.[116] The Court determined that the provisions failed to limit the motivations of violators to discrimination because of color, race, or previous condition of servitude.[117] Congress could not protect individuals from racial discrimination in elections because it was within the states' sphere of citizenship rights to determine who had suffrage.[118]

Another case decided in 1878, but argued before Harlan's arrival, addressed a Louisiana law which prohibited public carriers from segregating black and white passengers on intrastate steamships and railroads. In Hall v. DeCuir (1878), the Court struck down the act as a violation of interstate commerce.[119] In a reversal of the typical application of dual federalism, the Court found that the Louisiana law infringed upon the rights of Congress. Initially the ruling benefited African Americans because by implication the ruling also prohibited states from passing laws requiring segregation. In reality, this decision would not have that effect, and in Louisville, New Orleans and Texas Railway Company v. Mississippi in 1890 the Court would hold that state laws mandating separate but equal accommodations did not burden interstate commerce. Harlan was very critical of the Court's reversal of position in 1890. He believed that civil rights were sacrificed to uphold states rights..

The legal reasoning used most frequently by Harlan and the Court in African-American civil rights cases was dual federalism. In all five types of cases, this doctrine was used both to uphold and strike down laws involving civil rights. Harlan himself employed this concept in both contexts.

The first case during Harlan's tenure that used dual-federalist reasoning was Strauder v. West Virginia (1880). This case involved whether or not a West Virginia statute prohibiting

qualified black citizens from serving on juries violated the equal protection clause of the Fourteenth Amendment. Though Harlan and the Court would use dual federalism against civil rights in most jury cases, the concept was used in the Strauder case to strike down the West Virginia law. The Court determined that state laws, in accordance with the Fourteenth Amendment, should be the same for black and white citizens. Justice William Strong, who wrote the majority opinion, concluded that the purpose of the Fourteenth Amendment was to insure that African Americans had the same rights as whites.[120] Harlan joined in this judgment. What made this case different from other jury cases was the plaintiff's decision to target a specific state law prohibiting black jurors. He did not claim he was a victim of racial discrimination by individual court officials. The federal government could prevent racial discrimination by states but could not, under the concept of dual federalism, regulate individual action. The Slaughterhouse Cases and United States v. Cruikshank precedents made cases which alleged racial discrimination by individuals extremely difficult to win.

In Ex parte Virginia (1880), the Court and Harlan used dual federalism against civil rights in another jury case. This case involved a federal court judge, who, acting under the provisions of the 1870 Enforcement Act, refused to release two African-American male defendants into state custody. The two men had been twice convicted in state court for the murder of a white man. They had argued at trial that their case should have been removed to federal court because they could not receive a fair trial in accordance with the equal protection guarantee of the Fourteenth Amendment. Their equal protection rights were being violated because all potential African-American jurors were discriminated against by court officials.[121] The Supreme Court ordered the judge to remand the men to state custody because the 1870 Act only protected individuals from hostile state action by agencies, not individuals.[122] The Court further held that accusations of

discrimination by individuals must be proven in state court and that such acts were punishable only by state law.[123]

Harlan's decision to join with the majority in this case demonstrated his commitment to dual federalism, republicanism, and his two-part test for determining civil rights violations. In Ex parte Virginia he accepted the dual-federalist argument that the Federal government should interfere in state judicial proceedings on a limited basis only. His reliance on republicanism left him with a naïve belief that blatant racial discrimination had not occurred in this case. The second prong of his two-part test, that black plaintiffs must provide solid legal evidence that racial exclusion had occurred, was not met.

In a case announced the same day as Ex parte Virginia, the Court denied a writ of *habeas corpus* to a Virginia trial judge convicted in federal court of racially excluding potential African-American jurors. Ex parte Virginia and J.D. Coles (1880) investigated whether or not a portion of the Civil Rights Act of 1875 violated the Constitution. The Court did not accept Judge Coles' or the State of Virginia's argument that section four of the Act enforcing the equal protection guarantee of the Fourteenth Amendment in jury trials violated the concept of dual federalism. Justice Strong concluded that the law did not interfere with the rights of states.[124] This case differed from Ex parte Virginia because the trial court had determined as a matter of fact that enough evidence existed proving racial discrimination had occurred. In all cases, the Supreme Court has accepted findings of fact by trial courts unless the Court believed such findings were clearly erroneous.

In 1881, John Marshall Harlan wrote a majority opinion in which the Court struck down a Delaware law that prohibited African Americans from serving on juries. In Neal v. Delaware (1881), Harlan determined that the law violated the second prong of his two-part test. He

accepted as affirmative evidence of discrimination the fact that the State had never summoned a black juror since the passage of the Fourteenth Amendment.[125] The state law alone had not been clear evidence of discrimination, Harlan ruled, because the Fifteenth Amendment removed from all state constitutions those provisions allowing for only the enfranchisement of white males.[126] Delaware, like most States, organized their jury rosters from voter registrations. This case was also notable because Harlan first enunciated his belief that many cases involving equal protection claims could have been avoided if the framers of the Fourteenth Amendment had been more "explicit" in their wording of the Amendment.[127] As he said, "Much has been left by the legislative department to mere construction."

In addition to reasoning based upon his two-part test, in Neal v. Delaware, Harlan used trial court error logic. He believed that the motion to indict Neal, granted by an all-white grand jury, would have been quashed by the trial court if that court had given Neal proper time to prove allegations of discrimination.[128]

In 1883 Harlan was involved in three civil rights cases in which dual federalism was the primary logic employed by the court. The case of United States v. Harris (1883) involved the controversial Ku Klux Klan Act of 1871. Section Two prohibited the activities of "two or more persons . . . [to] conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws . . . ."[129] Harris had been convicted in federal court of violating that provision. The majority struck down the Act as a violation of the War Amendments. It determined Congress did not have the necessary authority under the enforcement provisions of any or all the War Amendments to pass the Act.[130] Once again the majority was

bowing to the dual-federalist argument. The Fifteenth Amendment, they argued, did not enfranchise anyone. It was the province of the states, in their sphere of rights, to determine who did and who did not have suffrage.[131] The Fourteenth Amendment only conferred upon Congress the ability to protect from hostile state action—not action by an individual. The Ku Klux Klan Act clearly referred to action by individuals.[132]

Harlan dissented in Harris but did not issue a separate written dissenting opinion. It is unclear why Harlan did not undertake a separate opinion in this case. Considering his reasoning in other cases, one may conclude that he believed the Ku Klux Klan Act was completely within Congress' enforcement powers under the Fourteenth and Fifteenth Amendments. In several other civil rights cases, particularly those involving the Enforcement Acts, Harlan employed his modified interpretation of dual federalism. He believed that the federal government had the ability to enforce the provisions of the War Amendments even if it meant federal regulation of individual action. He also did not accept a clear line distinguishing state citizenship rights and national citizenship rights. From many of his opinions it is apparent that he thought the two spheres of rights overlapped. This altered concept of dual-federalist theory would be used in almost all of his civil rights dissents.

The case of Bush v. Commonwealth of Kentucky (1883) involved two separate Kentucky statutes that prohibited African Americans from serving as jurors. Harlan wrote the opinion for the Court, which found the two laws in violation of the equal protection clause of the Fourteenth Amendment. Though enough evidence of discrimination was provided to satisfy Harlan's criteria, he did enunciate that lower courts should assume that officers entrusted with selecting juries did their duty and followed all state and federal laws and court orders.[133]

The preeminent African-American rights decision of 1883, and some would say of Harlan's career, was the Civil Rights Cases. It originated as five separate suits that were combined into one decision. The cases initiated in Kansas, California, Missouri, New York, and Tennessee. At issue were sections one and two of the Civil Rights Act of 1875. The law, designed to enforce the guarantees of the War Amendments, prohibited the denial of equal accommodations at inns, on public conveyances, and at places of amusement.[134] The black plaintiffs in each case alleged that racial discrimination by individuals connected with such institutions had violated their civil rights. The majority, Harlan alone dissenting, struck down the Act. In an opinion firmly enunciating the Court's dual-federalist beliefs, Justice Bradley found the law unconstitutional because Congress had no authority under the Thirteenth or Fourteenth Amendments to pass or enforce such legislation. Bradley determined that the Fourteenth Amendment was "prohibitory in its character, and prohibitory upon the States."[135] The Amendment's enforcement provisions gave Congress the right to pass only legislation that would enforce other provisions of the Amendments and applied only to legislation prohibiting discriminatory actions by States, not individuals.[136] To allow legislation pertaining to all forms of rights would break down the dual-federalist system. Legislation passed by Congress enforcing the Amendment must be "corrective" in nature and not protective legislation.[137] Anti-discrimination laws belonged to the jurisdiction of the states and not the national government. The first and second sections of the 1875 Civil Rights Act were held to be corrective. "It is primary and direct," Bradley said in reference to the Act.[138]

Bradley and the majority employed the state action doctrine in the case. State action refers to situations in which the challenged action, although committed by individuals, is sufficiently related to the state as to constitute action by the state itself. In the Civil Rights Cases

(1883), the Court determined that racial discrimination by individuals at public accommodations and facilities was not state action. Bradley said, ". . . it is proper to state that civil rights, such as are gurantied [sic] by the Constitution against state aggression, cannot be impaired by the wrong acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings."[139]

The Court also believed that Congress did not have the power to enact the law under the Thirteenth Amendment. The Enforcement provisions of the Thirteenth Amendment only gave Congress the power to do away with slavery. An individual's right to refuse accommodations or service to another person, even if the refusal was predicated on race alone, did not constitute slavery.[140] With regard to all civil rights legislation and perhaps as an omen of things to come Bradley wrote,

> When man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation where he takes the rank of mere citizen and ceases to be the special favorite of the law . . . .[141]

John Marshall Harlan was outraged by the contentions of his brethren. He issued a long and stirring dissent which enunciated his belief that the law was constitutional on original intent, *stare decisis*, and public interest grounds. In the second sentence of his dissent he illustrated his feelings regarding the majority's decision when he said, "I cannot resist the conclusion that the substance and spirit of the recent Amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."[142]

Harlan believed the Court had ignored the original intent of the framers of both the War Amendments and of the Civil Rights Act. The Federal government was not trying to regulate how public accommodations and transit systems were operated, he argued, but were solely trying

to ensure that institutions did not discriminate because of race.[143] Congressman George Franklin Edmunds, one of the Civil Rights Act framers, had sent a brief to Harlan during arguments as to the legislative intent of the radical Republicans.[144] Harlan was able to assess Congress' intentions based upon that brief and form his own interpretation of their purpose.

Harlan further thought the Court had ignored years of *stare decisis*[*] in their decision. In the Sinking Fund Cases (1878), the Court had pointed out the dangers of dual federalism. In Prigg v. Commonwealth of Pennsylvania (1842), the Court had upheld the 1793 Fugitive Slave Law, which prohibited individuals from harboring fugitive slaves. In that case, the Court had ignored the argument of the State Attorney-General, who had said it was solely the authority of a state and its courts to determine whether or not one was a freeman or a slave.[145] Harlan also relied on the more recent precedents of United States v. Reese and Strauder v. West Virginia. Those cases had established the Federal government's ability to ensure the guarantees of the Constitution, and Harlan chastised the Court for abandoning that doctrine.[146] The ability of Congress to protect all rights which derive from the Constitution had always been upheld by the Court.[147]

No other case better illustrates Harlan's idea of dual federalism than the Civil Rights Cases. It is apparent he believed in the concept but not to the extent that the majority did. His original intent and *stare decisis* arguments in the Civil Rights Cases show that he believed federal legislation in enforcement of the War Amendments could extend to actions by individuals. He argued that the Fourteenth Amendment gave Congress the power to "enforce" all the provisions of that Amendment. It did confer upon the National legislature the right to enact laws that prohibited certain state actions. Blacks were given both national and state citizenship grants by

[*] *Stare decisis* is the policy of the courts to stand by precedent and apply those precedents to future cases.

the Fourteenth Amendment and were subject to the protection by Congress that all guarantees of national citizenship were ensured. Though the Court had never defined what rights encompassed state or national citizenship, Harlan believed that state laws, individuals, or corporations acting in the interest of the public who discriminated against African Americans violated the guarantees of citizenship.[148] It is evident from his Fourteenth Amendment argument that Harlan felt there was no clear delineation between state and national citizenship.[149]

Harlan also used a type of reasoning in the Civil Rights Cases that would not come into vogue until the twentieth century. He believed that the Civil Rights Act of 1875 was designed to protect rights enjoyed in activities invested with a public interest. Relying on the precedent of Munn v. Illinois (1877), Harlan determined that railroads were "public highways" and subject to state regulations. As such, discrimination, even by individuals, was state action.[150] Rex v. Ivens* had established that inn keepers, by trade alone, could not refuse service to anyone so long as the inn had rooms available.[151] Places of amusement, Harlan said, had to have a state license to operate. Therefore, discrimination at such places was clothed with hostile state action.[152] By arguing that the operation of railroads, inns, and places of amusement could be defined as state action, Harlan was allowing Congress to regulate such institutions under the enforcement provisions of the Thirteenth and Fourteenth Amendments.

In response to Bradley's infamous comment about African Americans and the law, Harlan said, "It is, I submit, scarcely just to say that the colored race has been the special favorites of the laws. Today, it is the colored race which is deemed, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship."[153] Because the Thirteenth Amendment gave powers to Congress to abolish slavery, a fact the Court upheld, it also gave

* Harlan did not cite a date for this case in his dissent. The date for the case was unavailable in an extensive search of the electronic database WestLaw.

Congress the right to abolish all state laws and prohibit individual actions that discriminated against blacks. Congress had the power to ensure that African Americans were afforded the same rights and privileges as other citizens.[154]

The Civil Rights Cases is a good example of Harlan's attitude regarding civil rights. He struggled with the dissent for weeks, and the result was a comprehensive line of reasoning he would apply to other civil rights cases. He made it clear that dual federalism could not be used as an excuse for striking down federal legislation in the face of other overwhelming evidence. The case further illustrated Harlan's belief that the War Amendments should not be interpreted narrowly.

In 1884, another case involving the Ku Klux Klan Act of 1871 came before the Court. Ex parte Yarbrough involved nine Klan members who were convicted in federal court of preventing an African-American male from voting in Georgia. The defendant claimed the 1871 Act violated the Constitution because Congress had no authority under the enforcement provision of the Fifteenth Amendment to enact the law. John Marshall Harlan joined the majority opinion of Justice Miller, who determined the enforcement provision of the Fifteenth Amendment gave Congress the authority to protect the fairness of federal elections.[155] It was Congress' duty and responsibility to ensure that citizens could exercise their right to vote free from threat of violence.[156] The 1871 Ku Klux Klan Act properly enforced Congress' constitutional authority and responsibility.

Four more jury decisions in which Harlan and the Court used dual federalism against African-American rights were handed down in 1895 and 1896. Andrews v. Swartz (1895), Gibson v. Mississippi (1895), Murray v. Louisiana (1896), and Smith v. Mississippi (1896) each involved black male plaintiffs who claimed their Fourteenth Amendment equal protection

guarantee was violated because potential African-American jurors were racially excluded at trial.[157] In Gibson, Murray, and Smith the Court refused to grant *habeas corpus* because the defendants failed to prove that discrimination by court officials had occurred. The Court applied the principle of dual federalism again because hostile actions by individuals were subject only to state laws and courts. Harlan wrote the majority opinion in two of those three cases. In addition to the use of dual federalism, he maintained that the defendants had not provided solid evidence that discrimination had occurred. The second standard of Harlan's two-part test was not met. In Andrews, Harlan used jurisdictional grounds as well as dual federalism in denying the petition. A "mere error" by a state trial court was not sufficient evidence for a federal court to issue a writ. The State had jurisdiction in the case because Andrews had violated a state law, and he should have petitioned the State Supreme Court for *habeas corpus* and not the federal court.[158]

The case for which John Marshall Harlan is best known came before the Court in 1896. Plessy v. Ferguson originated in Louisiana and was heard by the Supreme Court on appeal. Noted African-American lawyers Albion Tourgee and James Walker contended that their client, Homer Plessy, who was one-eighth black, was denied his right to sit in an all-whites' railroad car. The attorneys argued that the Louisiana Separate Car Act of 1890, which mandated "equal, but separate" seating accommodations for white and black passengers, violated their client's rights as guaranteed by the Civil War Amendments. Specifically they charged the law offended the Fourteenth Amendment's promise of equal protection and due process.[159] The equal protection argument had been used in several civil rights cases while the due process grounds had been employed successfully in several cases involving property rights. To deny Plessy the right to sit in the whites-only car, Tourgee and Walker reasoned, denied him the property of being white in violation of the Fourteenth Amendment.[160]

The Supreme Court, with Harlan the lone dissenter, held the Act did not violate the Constitution. Justice Henry Billings Brown, who delivered the majority opinion, initially dismissed Plessy's Thirteenth Amendment argument. The express purpose of the Amendment was to abolish slavery.[161] The Act did not "impos[e] a badge of slavery . . . upon the applicant . . ."[162] Brown next addressed the Fourteenth Amendment claims made in the case. In true dual-federalist fashion, he dismissed the Fourteenth Amendment argument by saying,

> [The Amendment's] purpose was to establish the citizenship of the Negro; to give definitions of citizenship of the United States and of the states, and to protect from hostile legislation of the states privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states.[163]

Brown's Thirteenth Amendment argument ultimately hinged on a difference between "distinction" and "discrimination."[164] It was not unreasonable and, therefore, not unconstitutional for state laws to require a distinction among the races. Acts mandating this distinction were not discriminatory and did not confer a "badge of slavery" upon the African-American race. However, Brown's analysis fell short because he never qualified what constituted *distinctions* as opposed to *discrimination.*[165]

Brown's Fourteenth Amendment argument was rooted in substantive due process. The law, in his opinion, was fundamentally fair because it was equally applicable. It also fit the Court's definition of reasonableness, and the law was reasonably related to the issue in question. The decision was partially based on the common-law doctrine of reasonableness--that acts are legal so long as they uphold the customs and traditions of the people they affect. The Court found segregation to be such a custom. As evidence, Brown cited Roberts v. City of Boston (1849), a pre-Civil War case in which a free state had required separate schools for black and

white students.[166] This argument was extremely weak, however, because that case was decided before the adoption of the War Amendments.

Brown also failed to accept Plessy's property argument. Simply because Plessy was one-eighth black did not entitle him to a reputation of being white. Therefore, he could not claim any loss of property he never actually owned.[167] Plessy's lawyers had also used the "parade-of-horribles" reasoning to show that state statutes could require blacks and whites to have homes or vehicles of different colors. "Parade-of-horribles" reasoning was a popular nineteenth century legal device that applied court rulings to hypothetical situations in an attempt to demonstrate how absurdly some decisions could be construed. In response to their the Court said, "Every exercise of the police powers must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[168] In conclusion, Brown determined the statute did not "stamp 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."[169]

Unlike his response in the Civil Rights Cases (1883), Harlan's dissent was short and to the point. He attacked both the Louisiana statute and the reasoning of his fellow Justices. He made every attempt to uphold the meaning and the spirit of the Civil War Amendments.

Harlan began the Plessy dissent by illustrating that many whites would lose services mainly performed by blacks because of this decision.[170] If, for example, a white man or woman were ill, neither would be allowed to travel with a black nurse or companion.[171] He has been criticized for taking this approach. However, he was trying to make his fellow Justices realize that the law would prohibit even them from traveling with their black companions.[172]

Harlan's initial constitutional argument was that the Act violated the Fourteenth Amendment because railroads and their power of eminent domain functioned in the public interest. Therefore, "In respect of civil rights, common to all citizens, the Constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights."[173] The Fourteenth Amendment also conferred upon African Americans equal citizenship rights as whites and ensured that blacks could equally exercise those rights.[174] He further found that the statute violated the rights associated with being a national citizen and the "personal liberties" one had by virtue of the fact he or she lives in America.[175] By *personal liberties*, Harlan was referring to the privileges and immunities guarantee of the Fifth and Fourteenth Amendments which ensures that citizens of different states have the same citizenship advantages.

The Thirteenth Amendment was applicable in this case, Harlan believed, because the statute sought to impose upon citizens of the black race "burdens" which were consistent with the institutions of slavery.[176] The Amendment, in conjunction with the Fourteenth Amendment, ensured all citizenship rights.[177]

Harlan's response to Brown's racial distinction argument was that laws requiring a distinction amongst the races were fundamentally unfair and unreasonable. He reasoned that such laws violated personal liberty, a right protected by all three War Amendments either explicitly or by implication. He directly addressed the issue of reasonableness of the law in his opinion.[178] "Statutes must always have a reasonable construction," Harlan said.[179] He did clarify this statement to avoid charges of judicial activism. He believed that the ultimate goal of any court was first to decide if a legislative body had the authority to enact the law in question. If that power existed, then the court could not pass judgment on the reasonableness of the law unless the

law was not reasonably related to the issue at hand.[180] In regard to the Louisiana Separate Car Act, Harlan determined, "It cannot be justified upon any legal grounds."[181] Ultimately, Harlan's conclusion, that the courts' concern should be over the states' power to enact laws, was to prevent the courts from establishing themselves as super legislating bodies.[182]

Charles Lofgren believes that whether or not the states have the power to pass such legislation is the real question Harlan should have addressed. Harlan's reasonableness argument is "an oversimplification" and is weakened by later analysis in the dissent.[183] What Lofgren fails to address in his criticism is Harlan's reliance on judicial restraint. Harlan never intended to be construed as meaning judges should not be concerned with whether laws were reasonable. He would have denied both his sociological and political ideology in saying such. What Harlan was attempting to do was express his commitment to the Constitution and chastise the Court for side-stepping the true issues in the case. Furthermore, Harlan's nationalistic ideology and literal interpretation of the Constitution suggest a personal vernacular in which *unconstitutional* and *unreasonable* were synonymous.

Harlan's dissent itself was devoted to challenging the reasoning of the majority. Brown's fundamental idea in his opinion was that the Act was reasonable and constitutional. Harlan was attempting to show how unreasonable the law was presently and how far unreasonable interpretations of it could be carried. Harlan's definition and concept of reasonableness was also affected by his practical knowledge of what was happening to blacks in the South.[184]

As Tourgee and Walker had done in their brief, Harlan employed in his dissent the "parade-of-horribles" reasoning. He argued that upholding the Louisiana law was the first step in promoting radical racial, social, and religious segregation. Harlan felt other states would take the Plessy precedent and expand it. He maintained that the decision could be interpreted to allow

segregation of blacks and whites not only in railroad cars but also in public places, court rooms, and perhaps even on the street.[185] The decision could also be construed to allow for legal segregation amongst persons of different religious affiliations and/or different social classes.[186] The idea of segregation being legitimized by law and extended to other minorities was not new. This line of thinking had originated in his dissent in the Civil Rights Cases. J.D. Pole has said that in that dissent "he correctly anticipated the advent of new forms of segregation."[187]

Harlan believed that the Louisiana law violated the Fifteenth Amendment as well. He cited the majority's belief "that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equally before the laws of the states, and, in regards to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by the law because of their color."[188] Harlan maintained that the Fifteenth Amendment guaranteed political equality for African Americans and that the Louisiana Separate Car Act abridged that equality.[189] The law had placed blacks in a legally inferior position.[190] The Court had previously found the Fifteenth Amendment to mean that blacks could not be discriminated against legally or socially by the states.

Despite pages of constitutional and commonsense reasoning, one particular sentence of the Plessy dissent has significantly impacted modern legal thinking. "Our Constitution is color blind," Harlan said, "and neither knows nor tolerates classes among the citizens."[191] He used both constitutional history and sociological evidence to build this part of his argument. As constitutional evidence, Harlan used the Thirteenth, Fourteenth, and Fifteenth Amendments. Sociologically, he was dismissing the reasoning of his brethren whose argument was littered with social Darwinistic underpinnings.[192] Perhaps Harlan saw the Plessy decision and the Louisiana law for what they were—class legislation. If the majority of the Court was to interpret the

Constitution to be convoluted and allow segregation based upon race, Harlan would ensure that document would not be manipulated to allow discrimination based upon class.

John Marshall Harlan's dissent in Plessy was the ultimate expression of his championing civil rights. He was ashamed both of the decision and the reasoning of his fellow Justices and adequately dismissed their arguments. Proof of his disappointment with his brethren can be found in his comparing the opinion of the Court in Plessy to another infamous decision and its ramifications. Harlan said, "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."[193*]

The Plessy dissent, in combination with Harlan's dissent in the Civil Rights Cases (1883), demonstrates his commitment to civil rights and illustrates the constitutional methodology he used to uphold those rights. The Thirteenth Amendment protected citizens from slavery and all badges of involuntary servitude. The Fourteenth Amendment conferred upon African Americans equal citizenship rights to whites, and guaranteed that those rights could be equally enjoyed. The Fifteenth Amendment reaffirmed the Fourteenth Amendment and ensured to blacks equal political opportunities. Harlan's modified concept of dual federalism led him to believe that those rights were protected from hostile actions by individuals and by states.

After the Plessy decision in 1896, the Court did not rule in an African-American rights case for two years. Subsequent civil rights suits during Harlan's tenure were impacted by Plessy. Harlan had enunciated his color-blind constitutional theory, and he would apply it in conjunction with his evidence-of-racial-exclusion standard in all remaining African-American rights cases. He would quote directly from the language of Plessy in many of those cases.

---

* Dred Scott v. Sandford, 60 U.S. 393 (1857) nullified the Missouri Compromise of 1820 and prohibited Congress from deciding whether or not slavery was permissible in the territories. It further held that the Constitution did not extend citizenship rights to African Americans.

Williams v. Mississippi in 1898 saw the Court take its usual dual-federalist stance in a jury case. The Court held that a state law requiring potential voters to pay a poll tax and pass an oral examination was not unconstitutional. Williams had contended that such procedures allowed individuals to disenfranchise virtually every black male in the State. Because jury rolls were assembled from voting rosters, he argued, he could not receive a fair trial in accordance with the equal-protection guarantees of the Fourteenth Amendment.[194] It was common in Southern states with Jim Crow laws for only white potential voters to "pass" such exams. Williams was accusing the state registrars and court officials of discrimination in violation of the Fourteenth Amendment. Mississippi's argument satisfied both elements of Harlan's test. The law was color-blind, and enough evidence of discrimination was not provided. The Court determined that the Fourteenth Amendment only protected against hostile actions by states, not individuals. Finally the Court held that the law was equally applicable to members of all races and was not solely designed to disenfranchise African Americans.[195]

The one case that has most often caused scholars to question Harlan's commitment to civil rights came before the Court in 1899. In December of that year, the Supreme Court delivered one of its first opinions upholding the constitutionality of segregated schools in Cumming v. County Board of Education. John Marshall Harlan delivered the unanimous opinion in that case. His stance in Cumming came as a surprise to many African-American rights advocates who had come to expect a Harlan dissent in such suits. Though his performance in the jury cases had been decidedly mixed, he had consistently upheld African-American rights in all other types of cases. Why had the great champion of civil rights suddenly reversed himself? It is necessary to look

briefly at the history of the case and the arguments of the plaintiffs to ascertain an answer to that question.

In 1872, the Georgia state legislature had passed a bill establishing a county wide school system in Richmond County. Section Ten of that bill authorized the Richmond County School Board to provide high schools using taxpayer money. In 1880, the Board opened Ware High School for black students. In the summer of 1897, the Board voted to close Ware and reappropriate the funds to open several new black elementary schools. The black community objected to this decision. They claimed the move was unconstitutional under the equal protection clause of the Fourteenth Amendment because it left the community without a black high school while it still maintained several for whites. The families of the school children brought two cases forward in Georgia to challenge the School Board: Cumming v. County Board of Education and Blodgett v. School Board. By the time the cases reached the Supreme Court level, the families' main attorney, George Edmunds, was concentrating on the relief sought in Cumming and had decided not to follow up on Blodgett.[196]

Edmunds' main argument before the high Court was that if the Court were to follow the precedent of "separate but equal" it established in Plessy, then it must rule that equal opportunity for education must be enforced in Richmond County. He also contended that closing the black high school was a violation of the black children's equal protection rights under the Fourteenth Amendment.[197]

With the Plessy decision three years earlier and Harlan's record on the Court, Edmunds must have felt he had a solid case. However, Harlan sided with the school board. On the surface, this decision by Harlan seemed to contradict his previous stand. Several factors suggest why he sided with the majority in this case.

Despite Edmunds' reliance on the Plessy decision and the Fourteenth Amendment, he never presented in his brief to the Court that segregation in education was a question in this case.[198] That was a fatal flaw by the plaintiffs. Harlan was not an avid practicer of dictum and rarely ever dealt with matters not directly before him in a case. What Harlan did address in this case was the fact that the Supreme Court was not and had not yet ruled if separate schools for whites and blacks were unconstitutional.[199] Harlan noted that the plaintiffs were not challenging the constitutionality of separate schools but were only asking that the tax money be used proportionally for high schools and elementary schools for children of both races.[200]

Another reason Harlan chose to side with the majority in Cumming was because of the type of relief the plaintiffs requested. Unlike Plessy, the plaintiffs sought both an injunction--to reopen Ware--and a writ of mandamus--demanding the tax money be appropriated equally. This type of relief would have required the Court to go outside "the framework of the case" and was something the Court did not make a habit of doing until the Warren Court of the 1950s.[201]

Perhaps the most significant reason Harlan disagreed with the plaintiffs in this case was because the issue of civil rights was only a small part of this case. Other issues to which Harlan was equally committed were involved. If the plaintiffs had presented this case from a strictly civil rights standpoint or had addressed the constitutionality of segregated schools, Harlan might have sided in their favor. Addressing this case from a taxpayer standing position was where the plaintiffs erred. In all his years on the Court, Harlan never gave any indication that he thought taxpayer dollars had to be distributed equally. In fact, in the Cumming opinion he said, "It is impracticable to distribute taxes equally."[202] As an example, Harlan addressed the all-female white high school funded by the Board. If the plaintiffs' argument had any validity, then taxpayers in the county with only male children could sue the Board for discrimination.[203] Furthermore, he

maintained if he ordered the white high schools closed until funding was provided for a black high school, then he would have punished white students without helping the black students obtain an education.[204]

Harlan also employed his definition of dual federalism in the case:

> We may add that while all admit the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of the Federal authority with the management of such schools cannot be justified except in the case of clear and unmistakable disregard of rights secured by the supreme law of the land.[205]

It is clear Harlan believed no hostile actions by the state or by individuals had occurred. Equal distribution of state tax money fell in the state sphere of rights.

The Court was restricted in its decision because the plaintiffs never alleged the Board discriminated on the basis of race. Harlan insinuated in his opinion that if the families had claimed racial exclusion than perhaps the State court would have ruled differently. No blatant discrimination was present in the case he determined.[206] In Strauder v. West Virginia (1880), the black plaintiff also did not allege racial discrimination by individuals, but he won his case. The difference between Strauder and Cumming was that in the former case Harlan believed a specific state law prohibiting blacks from voting was an impermissible use of dual federalism. In the latter suit the Board's actions did not violate the concept. The nineteenth-century distinction between political and social rights figured prominently in those two decisions. The right to vote fell into the political sphere which Harlan felt the Constitution protected. The right to a high school education was more of a social right which the Court would not uphold until the mid-twentieth century.

Harlan also strongly identified with privileges and immunities guaranteed under the Fifth and Fourteenth Amendments. In Plessy he had determined the Louisiana Separate Car Act violated such rights. Those basic rights of citizenship must not be offended by either hostile state or individual actions. Harlan believed that equal distribution of taxes did not fall in that category of rights.[207]

The Cumming case cannot be viewed as a dark spot on Harlan's record of defending civil rights. Harlan exercised judicial restraint in this case, and that is what a justice is supposed to do. The plaintiffs never argued their case from the standpoint that segregated schools were unconstitutional. They requested relief that the Court was not in the habit of giving. Finally, other issues were involved in this case besides civil rights. Harlan's commitment to those other issues was equally as strong.

The turn of the century did see the Court slightly amend its dual-federalist approach in jury cases. In Carter v. Texas (1900), the Court held that it was a violation of a defendant's equal protection rights when court officials discriminated against potential black jurors because of their race.[208] Defendants were required, however, to prove such racial exclusion allegations. The majority had accepted the second prong of Harlan's two-part test. In future Supreme Court cases it proved difficult for defendants to satisfy that requirement.

The first case in which the new Carter doctrine was applied was Brownfield v. South Carolina (1903). In this case, the Court ruled that alleged discrimination by jury officials had not occurred. Not enough evidence was provided that racial exclusion had transpired. Brownfield's Fourteenth Amendment rights were not violated by an all-white jury in that case.[209] Despite the Carter precedent, the Court would rule against black plaintiffs in jury cases for the remainder of

Harlan's term. Dual federalism was the prevailing reasoning in the remainder of those cases. Harlan's commitment to republicanism also factored in his decisions in those cases. It was difficult for him to advocate federal intervention in states' jury selection processes because he viewed such procedures as fundamental to the states existence and exclusively reserved to them. Only when racial exclusion of jurors was apparent could grand jury indictments and petit jury convictions be overturned on equal protection grounds. Otherwise, the Supreme Court interfered with state judicial proceedings that were inherent in the powers and character of the state.

Between 1903 and 1904, the Court used dual-federalist reasoning in two jury cases. In James v. Bowman (1903), the Supreme Court struck down Section Four of the 1870 Enforcement Act, which made it a criminal offense to intimidate, threaten, or bribe any citizen exercising his right to vote.[210] Bowman had been convicted of intimidating several black voters in the 1898 Kentucky congressional election[211] Citing the language from Minor v. Happersett (1875), a case that denied the extension of voting rights to women, the Court said, "The Fifteenth Amendment does not confer the right of suffrage upon anyone."[212] States determined who was and who was not enfranchised, and only states could be held accountable for discrimination in elections.[213] The Court reversed its earlier position in Ex parte Yarbrough and determined that the Fifteenth Amendment did not confer upon Congress the authority to control actions by individuals.[214] Harlan dissented but did not issue a separate opinion.

In another voting case in 1904 Harlan joined the majority in upholding an Alabama constitutional amendment requiring special verification testimony by whites in order for blacks to register to vote. Giles v. Teasley (1904) differed sharply from other voting rights cases because the Court maintained it did not have jurisdiction to review the case.[215] The State Supreme Court had determined no federal question existed in the case. Ironically, the Supreme Court itself

became a victim of dual federalism because it could not rule in a state case when the state court of last resort had not addressed the constitutionality of the issues involved. Giles was the last voting rights case the Court heard during Harlan's tenure. This was the only case of its type in which Harlan sided with the majority against African-American rights. His decision to do so was directly related to his strict definition of jurisdiction. In this case, Harlan's commitment to jurisdiction superseded his pledge to civil rights.

In Hodges v. United States (1906), the Supreme Court struck down two additional provisions of the 1870 Enforcement Act. Hodges and several of his coworkers had been convicted of intimidating and threatening several black employees at a lumber mill in Arkansas.[216] The federal government maintained that the actions not only violated the Enforcement Act but also infringed upon the Thirteenth Amendment's guarantee prohibiting badges of slavery. [217] Applying dual-federalist theory, the Court once again determined that the War Amendments only gave Congress the ability to regulate hostile state action.[218] Congress could not pass legislation designed to protect African Americans from actions by individuals. The Court further enunciated that the defendants' threats did not constitute badges of slavery within the purview of the Thirteenth Amendment.[219] The Court said that ". . .it was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man, and yet justified in a condition of slavery."[220]

Harlan dissented in the Hodges case . He believed the Thirteenth Amendment accorded Congress the power to ensure that badges of slavery were not conferred upon the citizens.[221] This authority extended to regulating actions by individuals.[222] Harlan believed a deliberate conspiracy had been orchestrated against the black laborers. That conspiracy sought to deprive them of their citizenship rights and reduce them to an inferior position.[223] That position

constituted a badge of slavery. In closing and in response to the majority's Thirteenth Amendment argument, Harlan said, "The interpretation now placed on the Thirteenth Amendment is, I think, entirely too narrow, and is hostile to the freedom established by the Supreme Law of the land."[224]

Between 1906 and 1911 Harlan and the Court used dual federalism against African-American civil rights in the five final jury cases of his tenure. In each of those decisions the Court reiterated its belief that the Civil War Amendments did not ordinarily protect defendants from hostile actions by individuals.[225] Only when blatant racial exclusion by court officials had occurred did defendants have a right to have their trials moved to federal court. In accordance with the second prong of Harlan's two-part test -- that discrimination had to be clearly proven--the Court found that the state courts had correctly determined that racial exclusion had not occurred.

Berea College v. Commonwealth of Kentucky (1908) was the second school segregation case the Court decided during Harlan's tenure. The case involved a 1904 Kentucky statute, the Day law, which forbade "domestic corporations" from educating black and white students in the same schools and at the same times.[226] Berea College had been convicted of violating the act and fined one thousand dollars. The School was organized under an 1854 Kentucky act which was amended in 1856 to allow the State to change all charters created by the initial Act. The 1856 law contained a provision that allowed the General Assembly of Kentucky to alter charters only if the modifications did not "substantially impair" the purpose of the corporation.[227] Berea claimed the 1904 Kentucky law did impair its ability to educate students because it had been an integrated facility since its inception.

The Supreme Court held that the 1856 Act gave Kentucky the right to modify Berea's charter. Under the 1904 law Berea was permitted to educate black students at other times or at other facilities separate from white students. As a result, the Court ruled that the law did not substantially impair Berea's purpose.[228] Though the majority cited over thirty precedents in support of its decision, only one of those cases, the obscure Giles v. Teasley (1904), had involved African-American rights. The Court cited Giles in an attempt to establish jurisdiction and did not refer to its civil rights content.[229] The Court did not determine or even address whether or not the 1904 law violated the Fourteenth Amendment.

John Marshall Harlan was angered by the decision of his brethren, who he felt deliberately avoided all of the constitutional questions involved. He believed the 1904 act violated the due process clause of the Fourteenth Amendment.[230] "The manifest purpose [of the act] was to prevent the association of white and colored persons in the same school," Harlan said.[231] His definition of dual federalism would not allow him to accept state interference in the education of students at private institutions. State authority of any kind could not be allowed to regulate individual action unless that individual action sought to deprive citizens of their civil rights. The Fourteenth Amendment prohibited states from interfering in private actions except in situations where police powers were warranted.[232] State police powers were certainly not in question in this case. Harlan said,

> If pupils, of whatever race, . . . choose, with the consent of their parents or voluntarily, to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether Federal or state, can legally forbid their coming together, or being together temporarily, for such an innocent purpose.[233]

The decision, Harlan also believed, violated the property rights of Berea. Their right to educate any student they chose was a form of property because the School charged tuition. The

1904 Kentucky law was an unjust taking of that tuition, i.e., property, without due process of law in violation of the Fourteenth Amendment.[234] Harlan once again employed "parade-of-horribles" reasoning as he had done in Plessy. He illustrated that the majority opinion in Berea could be construed by states to forbid whites and blacks from voluntarily attending any private institutions, including churches.[235]

The Berea dissent, in many ways, vindicated Harlan's opinion in Cumming. It was one thing for an individual school board to engage in questionable practices against African Americans but it was quite another for a state law to mandate segregated schools. Berea's case was also more effectively presented than the Richmond County parents' argument. Berea specifically attacked the constitutionality of segregated schools. It was apparent from his Berea dissent that Harlan believed state mandated segregation in private schools was unconstitutional. No other segregation in education cases came before the Court in his tenure. It would be speculation to conclude where Harlan would have stood on segregation in public schools.

The final dual-federalist case of Harlan's career was United States v. Powell (1909). The majority issued a mere *per curiam* decision based on Hodges v. United States(1906); In contrast, Harlan issued a *per curiam* dissent in the Powell case based upon his Hodges dissent.[236] It is unfortunate that the great dissenter issued such a dissent in this case. It would have been interesting to have seen him take the dual-federalist reasoning of the majority to task one last time.

All of the dual-federalist opinions of Harlan's tenure had one element in common—the majority of the Court established that the War Amendments did not protect citizens from hostile actions by individuals. In most of the jury suits, Harlan subscribed to this idea because black

plaintiffs could not satisfy his requirement that racial exclusion had occurred. However, his dissents in the Civil Rights Cases (1883), Plessy v. Ferguson (1896), and Berea College v. Commonwealth of Kentucky (1908) illustrated that he had a modified concept of dual federalism. In those cases, he made it clear that he would not allow states to engage in overt racial discrimination. Harlan participated in twenty-seven cases where dual federalism was the main issue. He dissented in seven cases in which the majority used a states' rights argument against African Americans. In seven other cases he and the Court used dual-federalist grounds to uphold civil rights. In the remaining thirteen cases in which Harlan found against civil rights, other issues were involved. Overall, the dual-federalist cases illustrated Harlan's commitment to African-American rights.

Although dual federalism was the predominant reasoning used by the Court in civil rights cases during Harlan's tenure, it was not the only logic exercised. Twelve cases were decided by the Court principally on other grounds. Dual federalism was involved in a few of those cases but it was not the Court's main reasoning.

The Supreme Court used interstate commerce reasoning in two civil rights cases. Louisville, New Orleans, and Texas Railway Company v. Mississippi (1890) involved a Mississippi statute mandating separate but equal accommodations for black and white passengers on railway cars. The railway company argued that the law violated Congress' authority to regulate interstate commerce. It did not attack whether or not the act violated the Fourteenth Amendment's equal protection guarantee as Homer Plessy would. Mississippi countered the company's analysis by saying the law applied only to interstate carriers. The Court determined

that this case involved intrastate commerce, and based on Hall v. DeCuir in 1878, Congress' interstate commerce powers were not burdened.[237]

John Marshall Harlan dissented in the Louisville case. He believed the statute attempted to regulate interstate commerce, a power constitutionally reserved to Congress. The railway company was involved in interstate commerce, and based upon Hall v. DeCuir (1878), he argued that interstate carriers were not subject to state statutes mandating separate but equal accommodations.[238] He chastised his brethren for making the commerce distinction between Hall and Louisville. "I am unable to perceive how the former is a regulation of interstate commerce, and the other is not," Harlan said.[239] Harlan generally believed the commerce clause of the Constitution gave Congress very broad powers. That attitude, combined with his literal interpretation of the Constitution, led him to use the commerce clause in favor of civil rights.[240]

A second interstate commerce case came before the Court in 1900. Chesapeake & Ohio Railway Company v. Kentucky involved another state statute mandating separate but equal accommodations. In that case, the railway company attacked the law on interstate-commerce and Fourteenth Amendment equal-protection grounds. The Court determined that the commerce involved was intrastate and that the statute did not burden Congress' authority to regulate interstate commerce.[241] Citing the Plessy decision, the Court further maintained the law did not violate the Fourteenth Amendment.[242] Harlan dissented in the case but did not issue a separate opinion.

As he did in both interstate commerce cases, Harlan dissented in two citizenship cases involving the 1871 Ku Klux Klan Act in 1884 and 1887, respectively. Neither Elk v. Wilkins (1884) or Baldwin v. Franks (1887) directly involved African-American rights. However, these two suits typified both Harlan's and the Court's view toward citizenship issues. In both cases the

Court held the 1871 Act could not be used as grounds for charging individuals who violated the rights of non-citizens.[243] Non-citizens were not subject to the protections of the War Amendments. Harlan dissented in both cases, insisting that the word "citizen" was a vague term with many connotations. Non-citizens were subject to the same laws as citizens and, therefore, entitled to the same protections.[244]

In three voting-rights cases, the Court addressed questions of mootness. All three cases concerned black plaintiffs who were denied the right to register to vote in their home states. The Court determined that the issue involved in each case was moot because the elections in which the plaintiffs wished to vote in had already been contested.[245] They dismissed the appeals without ruling on the constitutionality of the issues presented.

The Court used trial/appeals court error as the reasoning in two cases during Harlan's tenure. In Rogers v. Alabama (1904), the Court quashed the murder indictment of an African-American male. The trial court had refused to allow evidence asserting racial exclusion of jurors by court officials and by the Alabama Constitution. Based on Carter v. Texas (1900), the Supreme Court determined the trial court had erred in its decision.[246] In Clyatt v. United States (1905), the Court reversed the conviction of a defendant found guilty under the Federal Peonage Act of 1901. The Court upheld the Act as constitutional but determined Clyatt had not returned two African-American males into a condition of peonage.[247] Harlan concurred in part and dissented in part. He agreed the Federal Peonage Act was constitutional. However, Harlan believed Clyatt was guilty under the law and that his conviction should have been affirmed.[248]

Equal application of the laws played a predominant role in the case of Pace v. Alabama (1883). The Supreme Court unanimously upheld an Alabama law prohibiting interracial fornication and/or marriage. The Court determined the statute did not violate the Fourteenth

Amendment because it applied equally to citizens of every race.[249] It was perhaps Harlan's religious convictions, not a lack of commitment to civil rights, that caused him to join the majority in Pace.[250] His fundamentalist Presbyterian faith considered sex outside of marriage a sin. In all other cases in which a law's equal application had been in question and in which religious issues were not involved, Harlan had determined the law was designed solely to prohibit African-Americans from exercising their rights.

In Giles v. Harris (1903), the Supreme Court dismissed a bill of equity in a voting rights case on *stare decisis* grounds. As precedent the Court cited Green v. Mills (1893), a federal court case in which it had been decided that suits of equity were not the proper remedy in cases involving political wrongs.[251] Harlan dissented in this case on the principle that the Court did not have jurisdiction to hear the case. If it had possessed jurisdiction, Harlan believed, then Giles would have been entitled to relief.[252]

Bailey v. Alabama in 1908 was dismissed by the Court because of lack of evidence. The Court determined Bailey's petition for *habeas corpus* could not be sustained because there was not enough evidence in the record of facts to support the writ.[253] Bailey had been arrested for violating a 1907 Alabama act which prohibited workers from entering into contracts with the intent of injuring or defrauding their employers. He maintained the act constituted peonage in violation of the 1901 Federal Peonage Act and of the Thirteenth and Fourteenth Amendments. In his dissent, Harlan upheld Bailey's contentions and determined the writ of *habeas corpus* should have been granted.[254]

In 1911, both Harlan and Bailey were vindicated. Bailey had eventually been convicted in Alabama and appealed that conviction on Thirteenth and Fourteenth Amendment grounds. In Bailey v. Alabama (1911), the Court overturned his conviction and struck down the statute as

unconstitutional. In their view, the law constituted involuntary servitude in violation of the Thirteenth Amendment.[255]

The case record of John Marshall Harlan in civil rights suits demonstrates he deserves his reputation as a champion of African-American rights. He dissented a total of fourteen times in cases in which the Court found against civil rights. In eight other decisions, he and the Court upheld the guarantees of the Civil War Amendments. Other issues to which Harlan was more committed were involved in cases in which Harlan seemed to go against his strong civil rights stance. The vast majority of those anti-civil rights decisions were jury cases in which Harlan and the Court were not satisfied by the evidence that discrimination had occurred. Harlan, in such suits, was blinded by his commitment to republicanism and his limited obligation to dual federalism. In cases in which dual federalism was not the predominant reasoning of the majority, Harlan found against civil rights in only four instances. Three of those suits involved questions for which actual cases or controversies no longer existed. Pace v. Alabama (1883) saw Harlan side with his religious convictions over his commitment to civil rights. In all other case types besides jury suits Harlan was consistent in his support of African-American rights.

Conclusion

John Marshall Harlan has suffered unjustly from criticisms of his civil rights record. He was a great defender of African-American rights. He was not always consistent, but he was dealing with a new area of law. Despite his reliance on formalism and despite his heritage he was able to bridge the gap between nineteenth- and twentieth-century jurisprudence.

Harlan accepted the Civil War Amendments as a radical reordering of law and society. He used the spirit and meaning of those Amendments to uphold civil rights. In some respects, he agreed fervently with the staunchest Congressional supporters of civil rights, contending that the Thirteenth, Fourteenth, and Fifteenth Amendments conferred upon blacks the same political and civil rights whites enjoyed. Those guarantees had to be protected. He would not allow the guise of equal application to be used against African Americans.

Criticisms of Harlan unfairly discredit his civil rights record as a whole because of specific cases and judicial tactics. Nineteenth- and twentieth-century critiques fail to address his commitment to other issues--including judicial restraint, republicanism, *stare decisis*, and jurisdiction. Tactically, he used a modified concept of dual federalism in favor of civil rights in cases in which his brethren would use traditional dual-federalist theory against those rights. Critics of Harlan also underestimate the significance of his two-part test for determining the color blindness of a law and ascertaining if racial exclusion had occurred.

In light of his heritage and pre-Civil War stance toward African Americans, it is incredible that Harlan compiled the case record he did. He brought a spirit of nationalism to the law after an era in which secessionism had divided the nation. His family's humanitarianism and his religious beliefs taught him to value all people. His relationships with Robert Harlan, Frederick Douglass, and James Jackson illuminated his insight concerning how blacks were truly treated in the South and in the nation. He was outraged at the violence directed toward African Americans. The process which transformed him from slave owner to supporter of civil rights prepared him for his tenure on the Supreme Court.

John Marshall Harlan's record in cases involving civil rights was unprecedented for his time. In fact, no other Justice until the Warren Court era could claim even a vaguely similar African-American rights record. He upheld the constitutionality of every act designed to enforce the provisions of the Civil War Amendments. He stood against state laws designed to separate the races or enforce peonage upon the black race. Though his jury case record is mixed, it was in jury cases that Harlan most often convinced his brethren to side with African-American rights. He was the lone voice of dissent in the vast majority of cases in which the Court held against civil rights.

Harlan's dissents alone are legendary. The Supreme Court's reasoning in cases such as Brown v. Board of Education (1954) were decided on the logic Harlan employed in the Civil Rights Cases (1883), Plessy v. Ferguson (1896), and Berea College v. Commonwealth of Kentucky (1908). However, the first instance after his death in which his reasoning was used came in the 1920s. In Moore v. Dempsey (1923), his limited interpretation of dual federalism was used by the Supreme Court to protect voting rights in federal and state elections.[256] In the 1930s and 1940s his opinion in Neal v. Delaware (1881) was applied to prevent jury

discrimination.[257] His opinions and dissents were an inspiration to the Warren Court and to many civil rights leaders in the 1950s and 1960s.[258] He was the only Justice prior to the mid-twentieth century who recognized that freedom from discrimination was necessary to the definition of federal and state citizenship; Congress had not only the power but also the duty to protect citizenship rights.[259]

John Marshall Harlan's defense of individual rights was not limited to African Americans. He believed that the states should not be allowed to infringe upon the constitutional rights of any citizen. In Hurtado v. California (1884), he enunciated that the entire Bill of Rights should be incorporated to the states through the equal protection clause of the Fourteenth Amendment.[260] After Harlan's death in 1911, Chairman of the Supreme Court Bar Mr. James Wilson best summarized the man, the record, and the legend when he said, "No man in all our history, not even Abraham Lincoln, was, in the best spirit of the expression, more truly a man of the people. . . ."[261]

Appendix

Reasoning	Cases in which Harlan wrote or joined the majority opinion. (Pro-civil rights)	Cases in which Harlan wrote or joined the majority opinion (Anti-civil rights)	Cases in which Harlan dissented. (Majority's reasoning)	Cases in which Harlan dissented. (His reasoning).
Dual Federalism	Ex parte Virginia & J.D. Coles(1880) Strauder v. West Virginia (1880) Bush v. Commonwealth of Kentucky (1883) Ex parte Yarbrough (1884) Carter v. Texas (1900) Bailey v. Alabama (1911)	Ex parte Virginia (1880) Andrews v. Swartz (1895) Gibson v. Mississippi (1895) Murray v. State of Louisiana (1896) Smith v. State of Mississippi (1896) Williams v. State of Mississippi (1898) Cumming v. County Board of Education (1899) Brownfield v. South Carolina (1903) Giles v. Teasley (1904) Martin v. Texas (1906) Thomas v. Texas (1909) Marbles v. Creecy (1909) Franklin v. South Carolina (1910) Woods v. Brush (1911)	*U.S. v. Harris (1883) Civil Rights Cases (1883) Plessy v. Ferguson (1896) *James v. Bowman (1903) Hodges v. U.S. (1906) *U.S. v. Powell (1909) Berea College v. Commonwealth of Kentucky (1908)	Hodges v. U.S. (1906) Berea College v. Commonwealth of Kentucky (1908)
Original Intent				Civil Rights Cases (1883)
Stare Decisis		Thomas v. Texas (1909)	Giles v. Harris (1903) *James v. Bowman (1903)	Civil Rights Cases (1883) Giles v. Harris (1903)
Interstate Commerce			Louisville, New Orleans and Texas Railway Company v. Mississippi (1890) *Chesapeake & Ohio Railway Company v. Kentucky (1900)	Louisville, New Orleans and Texas Railway Company v. Mississippi (1890)

Moot Point		Mills v. Green (1895) Jones v. Montague (1904) Seldon v. Montague (1904)		
Trial/Appeals Court Error	Neal v. Delaware (1881) Carter v. Texas (1900) Rogers v. Alabama (1904)		Clyatt v. U.S. (1905)	
Lack of Evidence		Cumming v. County Board of Education (1899)	Bailey v. Alabama (1908) Clyatt v. U.S. (1905)	Bailey v Alabama (1908) Clyatt v U.S. (1905)
Non-Citizens			Baldwin v. Franks (1887) Elk v. Wilkins (1884)	Baldwin v. Franks (1887) Elk v. Wilkins (1884)
Equal Application		Pace v. Alabama (1883)	Plessy v. Ferguson (1896)	Plessy v. Ferguson (1896)
Invested with the Public Interest				Civil Rights Cases (1883) Plessy v. Ferguson (1896)

Jury Cases
Voting Cases
Involuntary Servitude Cases
Segregated Schools/Transit cases
Citizenship-rights cases
*No written Dissent

Endnotes

[1] Felix Frankfurter in Adamson v. California, 332 U.S. 19 (1947).

[2] Oliver Wendell Holmes quoted in Florian Bartosic, "The Constitution, Civil Liberties and John Marshall Harlan," Kentucky Law Review 46 (1958), 413.

[3]Richard Kluger, Simple Justice (New York: Vintage Books, 1975), 81 ;J. Morgan Kousser, "Separate But Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools," In Black Southerners and the Law 1865-1900 vol. 12, edited by Donald G. Nieman (New York: Garland Publishing Inc., 1994), 210.

[4] G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges (New York: Oxford University Press, 1976), 133.

[5] The Slaughter House Cases, 83 U.S. 36 (1873).

[6] Alan F. Westin, "John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner," In The Age of Jim Crow: Segregation from the End of Reconstruction to the Great Depression, edited by Paul Finkelman. (New York Garland Publishing Inc., 1992), 621-622. First published in the Yale Law Journal 166 (April 1957).

[7] White, 139.

[8] Westin, 637.

[9] Linda Przbyszewski, "The Republic According to John Marshall Harlan: Race, Republicanism, and Citizenship" (Ph.D. diss., Stanford University, 1989), ix.

[10] Ibid., xii.

[11] Ibid., 81.

[12] J.D. Pole, The Pursuit of Equality in American History (Berkeley: University of California Press, 1978), 193.

[13] Ibid., 194.

[14] Floyd Barizilia Clark, The Constitutional Doctrines of Justice Harlan (Baltimore: The John Hopkins Press, 1915), 15.

[15]Speech by John Marshall Harlan at a banquet given by members of the Bar of the U.S. Supreme Court to Justice Harlan in Washington D.C. December 9, 1902. Reprinted in Kentucky Eloquence, Edited by Col. Bennett H. Young (Louisville: Ben L.A. Bree Jr., 1907).

[16] Westin, 621.

[17] Ibid., 624.

[18] Ibid., 625.

[19] Loren P. Beth, John Marshall Harlan: The Last Whig Justice (Lexington: The University Press of Kentucky, 1992), 238.

[20] Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," In The Supreme Court Review 21 (1979), 41.

[21] Ibid., 46.

[22] Ibid., 48.

[23] Ibid., 61.

[24] Przybyszewski, "The Republic According to John Marshall Harlan," 2.

[25] Benedict, 50.

[26] White, 30.

[27] Linda Przybyszewski, "John Marshall Harlan," In The Supreme Court Justices, edited by Melvin Urofsky (New York: Garland Publishing Inc., 1994), 206.

[28] Benedict, 76.

[29] Richard F. Watt and Richard M. Orlikoff, "The Coming Vindication of Mr. Justice Harlan," Illinois Law Review 40 (1949), 32.

[30] Przybyszewski, "The Republic According to John Marshall Harlan," 174.

[31] Ibid., 175.

[32] Ibid., 179.

[33] Beth, 226.

[34] Letter to C.P. Barrett, August 24, 1896. Fuller Papers, Library of Congress. In Przybyszewski, "The Republic According to John Marshall Harlan," 180.

[35] Monte Canfield, "Our Constitution is Color-Blind: Mr. Justice Harlan and Modern Problems of Civil Rights," University of Missouri at Kansas City Law Review, 32 (1964), 308.

[36] Clark, 172.

[37] Kluger, 81.

[38] Beth, 223.

[39] Westin, 628-629.

[40] Watt, 28-29.

[41] Ibid., 29.

[42] Przybyszewski, "The Republic According to John Marshall Harlan," 101.

[43] Canfield, 317.

[44] Ibid.

[45] Beth, 231.

[46] Ibid., 270.

[47] Przybyszewski, "John Marshall Harlan," 212.

[48] Kluger, 81.

[49] Canfield, 297.

[50] Bernard R. Boxill, Blacks and Social Justice (Totawa: Rowman & Allenheld, 1984), 10-11.

[51] Ibid., 1.

[52] Ibid., 11.

[53] Ibid., 10.

[54] Ibid., 52.

[55] Beth, 1.

[56] Ibid.

[57] Westin, 570.

[58] Przybyszewski, "The Republic According to John Marshall Harlan," 10.

[59] Ibid., 13.

[60] Ibid.

[61] Westin, 570.

[62] Przybyszewski, "The Republic According to John Marshall Harlan," 10.

[63] Beth, 27-28.

[64] Westin, 570.

[65] Louis Filler, "John Marshall Harlan," The Justices of the United States Supreme Court 1789-1969, vol. 2, edited by Leon Friedman and Field L. Israel (New York: Chelsea House Publishers, 1969), 1282.

[66] Westin, 570.

[67] Ibid.

[68] Przybyszewski, "John Marshall Harlan," 205.

[69] Beth, 11.

[70] Westin, 573.

[71] Ibid.

[72] Ibid., 576.

[73] Filler, 1282.

[74] Kluger, 81.

[75] Westin, 587.

[76] Ibid.

[77] Lewis Isaac Maddocks, Justice John Marshall Harlan: Defender of Individual Rights (Ph. D diss., Ohio State University, 1959), 52.

[78] Ibid., 54.

[79] Beth, 12.

[80] Ibid., 13.

[81] Harlan Papers, microfilm edition (Special Collections: University of Louisville Archives, Louisville Kentucky).

[82] Beth, 141.

[83] Westin, 582.

[84] Ibid.

[85] Ibid., 584.

[86] Ibid.

[87] Bowlin v. Commonwealth, 65 KY (2 Bush) 570 (1866).

[88] Westin, 578.

[89] Ibid., 588.

[90] Ibid., 593.

[91] Ibid., 587.

[92] Kousser, 210.

[93] Westin, 584.

[94] Beth, 141.

[95] Westin, 592.

[96] Tinsley E. Yarborough, Judicial Enigma: The First Justice Harlan (New York: Oxford University Press, 1995), 210.

[97] "Letter from Frederick Douglass, October 16, 1883," Harlan Papers, microfilm edition, (Special Collections, University of Louisville Archives, Louisville, Kentucky).

[98] "Letter from Frederick Douglass, November 7, 1883," Harlan Papers.

[99] Westin, 592.

[100] Przybyszewski, "The Republic According to John Marshall Harlan," 68.

[101] Maddocks, 109.

[102] Przybyszewski, "John Marshall Harlan," 208.

[103] Oliver Wendell Holmes quoted in Bartosic, "The Constitution, Civil Liberties and John Marshall Harlan," 413.

[104] Westin, 595-596.

[105] Ibid., 596-597.

[106] Ibid., 597-598.

[107] Filler, 1284

[108] Przbyszewski, "John Marshall Harlan," 206.

[109] Charles Lofgren, The Plessy Case (New York: Oxford University Press, 1987), 29.

[110] Westin, 626.

[111] Blyew v. United States, 13 U.S. 581 (1872).

[112] The Slaughterhouse Cases, 83 U.S. 36 (1873).

[113] 16 United States Statutes at Large, 141.

[114] United States v. Cruikshank, 92 U.S. 545 (1875).

[115] United States v. Reese, 92 U.S. 214 (1875).

[116] 16 United States Statutes at Large 141.

[117] United States v. Reese, 92 U.S. 214 (1875).

[118] Ibid., 111.

[119] Hall v. DeCuir, 95 U.S. 485 (1878).

[120] Strauder v. West Virginia, 25 L. Ed. 665 (1880).

[121] Ex parte Virginia, 25 L. Ed. 668-669 (1880).

[122] Ibid., 669.

[123] Ibid., 670.

[124] Ex parte Virginia and J.D. Coles, 25 L. Ed. 679 (1880).

[125] Neal v. Delaware, 26 L. Ed. 573 (1881).

[126] Ibid., 571.

[127] Ibid.

[128] Ibid., 573.

[129] 17 United States Statutes at Large, 13.

[130] United States v. Harris, 27 L. Ed. 293-294 (1883).

[131] Ibid., 293.

[132] Ibid.

[133] Bush v. Commonwealth of Kentucky, 26 L. Ed. 358 (1883).

[134] 18 United States Statutes at Large, 336.

[135] Civil Rights Cases, 27 L. Ed. 839 (1883).

[136] Ibid., 840.

[137] Ibid.

[138] Ibid., 842.

[139] Ibid., 841.

[140] Ibid., 843.

[141] Ibid.

[142] Ibid., 844.

[143] Ibid.

[144] Kousser, 205.

[145] Civil Rights Cases, 27 L. Ed. 845 (1883).

[146] Ibid., 847.

[147] Ibid., 852.

[148] Ibid., 851.

[149] Canfield, 307.

[150] Civil Rights Cases, 27 L. Ed. 848-849 (1883).

[151] Ibid., 849.

[152]Ibid.

[153] Ibid., 855.

[154] Ibid., 848.

[155] Ex parte Yarbrough, 25 L. Ed. 277 (1884).

[156] Ibid.

[157] Andrews v. Swartz ,156 U.S. 273 (1895); Gibson v. Mississippi, 162 U.S. 569 (1895); Murray v. Louisiana, 16 S. Ct. 990 (1896); Smith v. Mississippi, 16 S. Ct. 900 (1896).

[158] Andrews v. Swartz, 156 U.S. 276 (1895).

[159] Lofgren, 152-153.

[160] Pole, 195.

[161] Plessy v. Ferguson, 163 U.S. 543 (1896).

[162] Ibid., 542.

[163] Ibid., 543.

[164] Lofgren, 176.

[165] Ibid.

[166] Plessy v. Ferguson, 163 U.S. 544 (1896).

[167] Ibid., 549.

[168] Ibid., 550.

[169] Ibid., 551.

[170] Ibid., 552.

[171] Plessy v. Ferguson, 163 U.S. 553 (1896).

[172] Przybyszewski, "The Republic According to John Marshall Harlan," 72.

[173] Ibid., 554.

[174] Ibid., 555.

[175] Ibid.

[176] Ibid.

[177] Ibid.

[178] Ibid., 558.

[179] Ibid.

[180] Ibid., 559.

[181] Ibid., 562.

[182] Westin, 620.

[183] Lofgren, 193.

[184] Westin, 636.

[185] Plessy v. Ferguson, 163 U.S. 558 (1896).

[186] Ibid.

[187] Pole, 200.

[188] Plessy v. Ferguson, 163 U.S. 556 (1896).

[189] Ibid., 555.

[190] Ibid., 560.

[191] Ibid., 559.

[192] Barton J. Bernstein, "Plessy v. Ferguson: Conservative Sociological Jurisprudence," in Black Southerners and the Law 1865-1900, vol 12. Edited by Donald G. Niemen (New York: Garland Publishing Inc., 1994),10. First published in Journal of Negro History, 48 (1963), 196-205.

[193] Plessy v. Ferguson, 163 U.S. 559 (1896).

[194] Williams v. Mississippi, 18 S. Ct. 584 (1898).

[195] Ibid., 587.

[196] Kousser, 199 and 201.

[197] Ibid., 207.

[198] Beth, 234.

[199] Westin, 617.

[200] Cumming v. County Board of Education, 20 S. Ct. 200 (1899).

[201] Beth, 234.

[202] Cumming v. County School Board, 20 S. Ct. 200 (1899).

[203] Ibid.

[204] Ibid.

[205] Ibid., 201.

[206] Ibid.

[207] Ibid., 200.

[208] Carter v. Texas, 177 U.S. 477 (1900).

[209] Brownfield v. South Carolina, 47 L. Ed. 883 (1903).

[210] 16 United States Statutes at Large, 141.

[211] James v. Bowman, 47 L. Ed. 980 (1903).

[212] Ibid., 982.

[213] Ibid.

[214] Ibid., 981

[215] Giles v. Teasley, 24 S. Ct. 364 (1904).

[216] Hodges v. United States, 27 S. Ct. 6 (1906).

[217] Ibid., 7.

[218] Ibid., 8.

[219] Ibid., 9.

[220] Ibid.

[221] Ibid., 15.

[222] Ibid., 17.

[223] Ibid.

[224] Ibid.

[225] Martin v. Texas, 20 S. Ct. 338 (1906); Thomas v. Texas, 29 S. Ct. 394 (1909); Marbles v. Creecy, 30 S. Ct. 34 (1909); Franklin v. South Carolina, 30 S. Ct. 642 (1910); Woods v. Brush, 11 S. Ct. 741 (1911).

[226] Kentucky Acts (1904), chapter 85, 181.

[227] Berea College v. Commonwealth of Kentucky, 29 S. Ct. 35 (1908).

[228] Ibid.

[229] Ibid., 34.

[230] Ibid., 39.

[231] Ibid.

[232] Ibid.

[233] Ibid., 40.

[234] Ibid., 39-40.

[235] Ibid., 40.

[236] United States v. Powell, 29 S. Ct. 690 (1909).

[237] Louisville, New Orleans, and Texas Railway Company v. Mississippi, 33 L Ed. 785 (1890).

[238] Ibid., 286.

[239] Ibid.

[240] Beth, 194.

[241] Chesapeake & Ohio Railway Company v. Kentucky, 179 U.S. 391-392 (1900).

[242] Ibid., 390.

[243] Elk v. Wilkins, 28 L. Ed. 646 (1884); Baldwin v. Franks, 30 L. Ed 770 (1887).

[244] Baldwin v. Franks, 30 L. Ed. 775 (1887).

[245] Mills v. Green, 159 U.S. 653 (1895); Jones v. Montague, 194 U.S. 653 (1904); Seldon v. Montague, 194 U.S. 153 (1904).

[246] Rogers v. Alabama, 24 S. Ct. 258 (1904).

[247] Clyatt v. United States, 25 S. Ct. 432 (1905).

[248] Ibid., 433.

[249] Pace v. Alabama, 24 S. Ct. 258 (1904).

[250] Pole, 194.

[251] Giles v. Harris, 189 U.S. 486 (1903).

[252] Ibid., 503.

[253] Bailey v. Alabama, 29 S. Ct. 142 (1908).

[254] Ibid., 143.

[255] Bailey v. Alabama, 31 S. Ct. 151 (1911).

[256] Moore v. Dempsey, 261 U.S. 86 (1923).

[257] Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Pierre v. Louisiana, 306 U.S. 354 (1939); Norris v. Alabama, 294 U.S. 587 (1935).

[258] Yarborough, 229.

[259] Pole, 191.

[260] Hurtado v. California, 110 U.S. 516 (1884).

[261] Proceedings of the Bar and Officers of the Supreme Court of the United States in Memory of John Marshall Harlan December 16, 1911 (Washington D.C.: 1912), 7.

Bibliography

Cases: Adamson v. California, 332 U.S. 19 (1947).
Andrews v. Swartz, 156 U.S. 272 (1895).
Bailey v. Alabama, 29 S. Ct. 141 (1908).
Bailey v. Alabama, 31 S. Ct. 145 (1911).
Baldwin v. Franks, 30 L. Ed. 766 (1887).
Berea College v. Commonwealth of Kentucky, 29 S. Ct. 33 (1908).
Blyew v. United States 13 U.S. 581 (1872).
Brownfield v. South Carolina, 47 L. Ed. 882 (1903).
Bush v. Commonwealth of Kentucky, 26 L. Ed. 354 (1883).
Carter v. Texas, 177 U.S. 442 (1900).
Chesapeake and Ohio Railway Company v. Kentucky, 179 U.S. 387 (1900).
Civil Rights Cases, 27 L. Ed. 836 (1883).
Clyatt v. United States, 25 S. Ct. 429 (1905).
Cumming v. County Board of Education, 20 S. Ct. 197 (1899).
Elk v. Wilkins, 28 L. Ed. 643 (1884).
Ex parte Yarbrough, 25 L. Ed. 274 (1884).
Ex parte Virginia 25 L. Ed. 668 (1880).
Ex parte Virginia and J.D. Coles, 25 L. Ed. 676 (1880).
Franklin v. South Carolina, 30 S. Ct. 640 (1910).
Gibson v. State of Mississippi, 162 U.S. 567 (1895).
Giles v. Harris, 189 U.S. 475 (1903).
Giles v. Teasley, 24 S. Ct. 359 (1904).
Hall v. DeCuir 95 U.S. 485 (1878).
Hill v. Texas, 316 U.S. 400 (1942).
Hodges v. United States, 27 S. Ct. 6 (1906).
Hurtado v. California, 110 U.S. 516 (1884).
James v. Bowman, 47 L. Ed. 980 (1903).
Jones v. Montague, 194 U.S. 147 (1904).
Louisville, New Orleans, and Texas Railway Company v. Mississippi, 33 L. Ed. 784 (1890).
Marbles v. Creecy, 30 S. Ct. 32 (1909).
Martin v. State of Texas, 26 S. Ct. 338 (1906).
Mills v. Green, 159 U.S. 651 (1895).
Moore v. Dempsey, 261 U.S. 86 (1923).
Murray v. State of Louisiana, 16 S. Ct. 990 (1896).
Neal v. Delaware, 26 L. Ed. 567 (1881).
Norris v. Alabama, 294 U.S. 587 (1935).

Pace v. Alabama, 27 L. Ed. 207 (1883).
Pierre v. Louisiana, 306 U.S. 354 (1939).
Plessy v. Ferguson, 163 U.S. 538 (1896).
Rogers v. Alabama, 24 S. Ct. 257 (1904).
Seldon v. Montague, 194 U.S. 153 (1904).
The Slaughterhouse Cases 83 U.S. 36 (1873).
Smith v. State of Mississippi, 16 S. Ct. 900 (1896).
Smith v. Texas, 311 U.S. 128 (1940).
Strauder v. West Virginia, 25 L. Ed. 664 (1880).
Thomas v. Texas, 29 S. Ct. 393 (1909).
United States v. Cruikshank 92 U.S. 545 (1875).
United States v. Harris, 27 L. Ed. 290 (1883).
United States v. Powell, 29 S. Ct. 690 (1909).
United States v. Reese 92 U.S. 214 (1875).
Williams v. State of Mississippi, 18 S. Ct. 583 (1898).
Woods v. Brush, 11 S. Ct 738 (1911).

Acts: 1870 Enforcement Act 16 United States Statutes at Large, 140-146.
1871 Ku Klux Klan Act 17 United States Statutes at Large, 13-15.
1871 Second Enforcement Act 16 United States Statutes at Large, 433-440.
1875 Civil Rights Act United States Statutes at Large, 335-337.
1904 Kentucky Acts 1904, ch. 85, 181.

Bibliography: Secondary Sources

Bartosic, Florian. "The Constitution, Civil Liberties and John Marshall Harlan," Kentucky Law Review (1958): 407-447.

Benedict, Michael Les. "Preserving Federalism. Reconstruction and the Waite Court. Supreme Court Review, 21 (1979), 39-79.

Bernstein, Barton J. "Plessy v Ferguson: Conservative Sociological Jurisprudence." In Black Southerners and the Law 1865-1900, vol. 12, edited by Donald G. Nieman. New York: Garland Publishing Inc., 1994. First Published in Journal of Negro History 48 (1963), 196-205.

Beth, Loren P. John Marshall Harlan: The Last Whig Justice. Lexington: The University Press of Kentucky, 1992.

Boxill, Bernard. Blacks and Social Justice. Totowa, New Jersey: Rowman and Allanheld, 1984.

Canfield, Monte. "Our Constitution is Color-Blind: Mr. Justice Harlan and Modern Problems of Civil Rights." 32 University of Missouri at Kansas City Law Review 292-321, 1964.

Clark, Floyd Barzilia. The Constitutional Doctrines of Justice Harlan. Baltimore: The Johns Hopkins Press, 1915.

Filler, Louis. "John Marshall Harlan." The Justices of the United States Supreme Court 1789 -1969, vol. 2, edited by Leon Friedman and Field L. Israel. New York: Chelsea House Publishers, 1969.

Harlan Papers. Microfilm edition. Special Collection, University of Louisville Archives, Louisville, Kentucky.

Kentucky Eloquence. Edited by Col. Bennet H. Young. Louisville: Ben L.A. Bree Jr., (1907).

Kluger, Richard. Simple Justice. New York: Vintage Books, 1975.

Kousser, J. Morgan. "Separate But Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools." In Black Southerners and the Law 1865-1900, vol. 12, edited by Donald G. Nieman. New York: Garland Publishing Inc., 1994. First Published in Journal of Southern History 46 (1980), 17-44.

Lofgren, Charles. The Plessy Case. New York: Oxford University Press, 1987.

Maddocks, Lewis Isaac. "Justice John Marshall Harlan: Defender of Individual Rights." Ph.D diss., Ohio State University, 1959.

Pole, J.R. The Pursuit of Equality in American History. Berkeley: University of California Press, 1978.

Proceedings of the Bar and Officers of the Supreme Court of the United States in Memory of John Marshall Harlan, December 16, 1911. Washington DC: 1912.

Przybyszewski, Linda. "John Marshall Harlan." The Supreme Court Justices, edited by Melvin Urofsky. New York: Garland Publishing Inc., 1994.

_____. "The Republic According to John Marshall Harlan: Race Republicanism, and Citizenship." Ph.D. diss., Stanford University, 1989.

Watt, Richard F. and Richard M. Orlikoff. "The Coming Vindication of Mr. Justice Harlan." 44 Illinois Law Review 13-40, 1949.

Westin, Alan F. "John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner." In Race, Law, and American History 1700-1990, vol. 4, edited by Paul Finkelman. New York: Garland Publishing Inc., 1992. First Published in The Yale Law Journal 66 (April, 1957) 636-710.

White, Edward G. The American Judicial Tradition. New York: Oxford University Press, 1976.

Yarbrough, Tinsley E. Judicial Enigma: The First Justice Harlan. New York: Oxford University Press, 1995.