

1953

How Eccentric Was Mr. Justice Harlan

Edward F. Waite

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Waite, Edward F., "How Eccentric Was Mr. Justice Harlan" (1953). *Minnesota Law Review*. 1213.
<https://scholarship.law.umn.edu/mlr/1213>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

HOW "ECCENTRIC" WAS MR. JUSTICE HARLAN?

EDWARD F. WAITE*

A CONCURRING opinion in *Adamson v. California*,¹ contained the following statement: "Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court [1868-1937]—a period of seventy years—the scope of that Amendment was passed upon by forty-three judges. Of all these judges only one, who may be respectfully called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States." The allusion was to Justice John Marshall Harlan, who died in 1911 after thirty-four years of service. It is at least doubtful whether Justice Harlan would have agreed to identification by the statement that he viewed the Fourteenth Amendment as "a shorthand summary of the first eight Amendments," and the views he really held and expressed were not without support among his colleagues.

The writer's memory of Justice Harlan goes back to the early 'Eighties, when the noble face, commanding stature and resounding voice of "the Kentucky giant" made him, in the impressionable observation of a young law student, a conspicuous figure in the group of Supreme Court Justices. Better reasons for admiration developed later, and the language quoted was extremely distasteful to at least one reader. It seemed definitely disrespectful in spite of the casual disclaimer. Neither common usage nor the dictionary supplies a meaning of the word "eccentric" which does not involve disrespect when applied to a Justice of the Supreme Court of the United States. Surely neither emotional nor intellectual oddities have any proper place in that tribunal. If there could be any doubt about the personally critical import of the comment, it disappears when certain jurists selected from the forty-three are mentioned as "among the greatest in the history of the Court," who were "alert in safeguarding and promoting the interests of liberty and human dignity through law," but "also mindful of the relation of our federal system to a progressively democratic society, and therefore deeply regardful of the scope of authority that was left to the States even

*Judge of the District Court for the Fourth District, Minnesota, 1911-1941 (retired).

1. 332 U. S. 46, 62 (1947). .

after the Civil War. And so they did not find that the Fourteenth Amendment, concerned as it was with matters fundamental to the pursuit of justice, fastened upon the States procedural arrangements which in the language of Mr. Justice Cardozo 'only those who are narrow and provincial' would deem essential to 'a fair and enlightened system of justice.'"² It is of course very common to buttress a Supreme Court opinion with great names; but not often is it found necessary to add in effect that "only Justice So-and-so was on the other side, and he doesn't count." What, in particular, was the judicial solecism which called for this unusual type of argument? The *Adamson* case was an appeal from a judgment of the supreme court of California, affirming a conviction of murder. The issues and the Court's decision of them, insofar as they are here relevant, appear by the following quotations from Justice Reed's opinion: "It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.³ . . . The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection.⁴ . . . Specifically, the due process clause does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment.⁵ . . . A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment . . . *Palko*⁶ held that such provisions of the Bill of Rights as were 'implicit in the concept of ordered liberty' became secure from state interference by the clause. But it held nothing more."⁷ By these tests it was concluded that the procedure in the California court must be sustained as amounting to a fair trial.

These propositions were met by an elaborate argument by Justice Black in a dissenting opinion in which Justice Douglas

2. *Id.* at 62.

3. *Adamson v. California*, 332 U. S. 46, 50-51 (1947).

4. *Id.* at 53.

5. *Id.* at 54.

6. *Palko v. Connecticut*, 302 U. S. 319 (1937).

7. *Adamson v. California*, 332 U. S. 46, 53-54 (1947).

joined, and which Justices Murphy and Rutledge supported in a separate opinion.

If we are to consider the particular views held by Justice Harlan which were deemed to mark him as an "eccentric exception" among his colleagues, it is fair to look to his own expression of those views. These are found in his dissenting opinions in four cases:

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

O'Neil v. Vermont, 144 U. S. 323 (1892).

Maxwell v. Dow, 176 U. S. 581 (1900).

Twining v. New Jersey, 211 U. S. 78 (1908).

Hurtado was a prosecution for murder without indictment but upon information in compliance with the constitution and statutes of California. It was attacked under the due process clause of the Fourteenth Amendment. Said Justice Matthews for the Court: "The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that 'due process of law', when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States . . ."⁸ The Court's conclusion was to the contrary. Justice Harlan, the sole dissenter (Justice Field took no part in the decision), in a careful argument largely historical, reached an opposite result.

Whether Justice Harlan's position in the case is fairly stated in the "shorthand" phrase may be judged on the basis of what was claimed by the appellant and what was said by the Court (Matthews J.) and by Justice Harlan. The Court said: "It is maintained on behalf of the plaintiff in error that the phrase 'due process of law' is equivalent to 'law of the land', as found in the 29th Chapter of *Magna Charta*; that, by immemorial usage, it has acquired a fixed, definite and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists, and were transplanted and established in the fundamental laws of the State; that having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government brought into being by that instrument, it has

8. *Hurtado v. California*, 110 U. S. 516, 520 (1884).

now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury." "This view," the Court continued, "is certainly supported by the authority of the great name of Chief Justice Shaw."⁹ The Court does not seem to have found in this view any analogy to a stenographic short-cut. Serious argument was presented on the basis of the wording of the Amendments.¹⁰ The concluding words of Justice Harlan's dissent were these: "The Court in this case, while conceding that the requirement of due process of law protects the fundamental principles of liberty and justice, adjudges in effect that an immunity or right, recognized at the common law to be essential to personal security, jealously guarded by our National Constitution against violation by any tribunal or body exercising authority under the General Government, and expressly or impliedly recognized, *when the 14th Amendment was adopted*, in the Bill of Rights or Constitution of every State in the Union, is yet not a fundamental principle in governments established, as those of the States of the Union are, to secure to the citizen liberty and justice, and therefore is not involved in that due process of law required in proceedings conducted under the sanctions of a State. My sense of duty constrains me to dissent from this interpretation of the supreme law of the land."¹¹

The facts in *O'Neil* were complicated and need not be recited in detail. The case was dismissed on the ground that no Federal question was involved. Justice Field dissented, contending that the Court had jurisdiction under the Commerce Clause and that, the case being properly before the Court, the penalties imposed on the defendant ought to be held to be a "cruel and unusual punishment", forbidden to the state under the Eighth and Fourteenth Amendments. "While, therefore, the ten amendments [Bill of Rights] as limitations on power, and, so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the states, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution;

9. *Id.* at 521-522.

10. Justice Matthews, *id.* at 534-535; Justice Harlan, *id.* at 547 *et. seq.*

11. *Id.* at 557-558.

and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them.”¹² In a separate dissent, taking substantially the same ground, Justice Harlan said: “I fully concur with Mr. Justice Field, that since the adoption of the 14th Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier amendments of the Constitution.”¹³ Justice Brewer concurred “in the main” with this opinion.

In *Maxwell* the same question as in *Hurtado* recurred, with another—whether a conviction of robbery in Utah by a jury of eight was in violation of the Federal Constitution. The Court said—“That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment . . . there can be no doubt,”¹⁴ but held that the privileges and immunities of a citizen of the United States do not include the right of trial by jury in a state court for a state offense. Justice Harlan was again the sole dissenter, Justice Field being no longer in the Court. He did not discuss the first question, but stated that he adhered to his former view. The second he argued with much earnestness. “If the Court had not ruled otherwise,” he said, “I should have thought it indisputable that when by the Fourteenth Amendment it was declared that no state should make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, the People of the United States put upon the states the same restrictions that had been imposed upon the national government in respect as well of the privileges and immunities of citizens of the United States as of the protection of the fundamental rights of life, liberty and property.”¹⁵ And he concluded: “If I do not wholly misapprehend the scope and legal effect of the present decision, the Constitution of the United States does not stand in the way of any state striking down guaranties of life and liberty that English-speaking people have for centuries regarded as vital to personal security, and which the men of the Revolutionary period universally claimed as the birthright of men.”¹⁶

12. *O'Neil v. Vermont*, 144 U. S. 323, 363 (1892).

13. *Id.* at 370.

14. *Maxwell v. Dow*, 176 U. S. 581, 586 (1900).

15. *Id.* at 614.

16. *Id.* at 617.

The majority had intimated that in the application of due process in the 14th Amendment to the Bill of Rights there must be a distinction between matters of traditional procedure and ultimate rights, foreshadowing the doctrine that presently developed and still prevails, that the latter are thus protected against the state and the former not. Justice Harlan expressly repudiated this distinction¹⁷ and never afterwards assented to it.

Whether Justice Moody's conclusions in the *Twining* case¹⁸ were right or wrong his opinion shows a truly judicial mind operating on a high level. His references to Justice Harlan's dissents in *Hurtado* and *Maxwell* make it plain that they do not strike him as eccentric.¹⁹ The questions considered by the Court and the conclusions reached appear in the following quotations from the majority opinion. In the course of a discussion of the *Slaughter Houses Cases*²⁰ it is said: "The exact scope and the momentous consequences of this decision are brought into clear light by the dissenting opinions. The view of Mr. Justice Field, concurred in by Chief Justice Chase and Justices Swayne and Bradley, was that the fundamental rights of citizenship, which by the opinion of the Court were held to be rights of state citizenship, protected only by the state government, became, as the result of the Fourteenth Amendment, rights of National citizenship protected by the National Constitution." Quoting from Justice Field's dissent: "The Amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by state legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the Court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution, or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment. . . . With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new Constitutional provision was required to inhibit such interference."²¹ Justice Moody

17. See *id.* at 616.

18. *Twining v. New Jersey*, 211 U. S. 78 (1908).

19. See *id.* at 98, 99, 112, 113.

20. 16 Wall. 36 (U.S. 1873).

21. *Id.* at 95. Justice Swayne in his dissent was still more explicit, saying: "In the next category, obviously *ex industria*, to prevent as far as may be, the possibility of misinterpretation, either as to persons or things, the

interpreted this language, in connection with that found in *O'Neil*, as expressing the same construction of the Fourteenth Amendment which was argued in *Marxwell* by Justice Harlan, but considered it no longer profitable to examine "the weighty arguments" in its support:²² "There can be no doubt, so far as the decision in the *Slaughter House Cases* has determined the question, that the civil rights sometimes described as fundamental and inalienable, which before the war Amendments were enjoyed by state citizenship and protected by state government, were left untouched by this clause [privileges and immunities] of the Fourteenth Amendment."²³ In *Marxwell v. Dow*, where the plaintiff in error had been convicted in a state court of a felony upon an information, and by a jury of eight persons, it was held that the indictment, made indispensable by the Fifth Amendment, and the trial by jury guaranteed by the Sixth Amendment, were not privileges and immunities of citizens of the United States, as those words were used in the Fourteenth Amendment. The discussion in that case ought not to be repeated."²⁴ "The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination . . . was a denial of due process of law."²⁵ This claim the Court discusses at length, with a careful historical review and citation of many cases, again reaching a negative conclusion.

In disposing of the case the Court assumed without consideration of the facts that these amounted to an infringement of the privilege against self-incrimination if one existed.²⁶ Justice Harlan, once more the sole dissenter, urged that the proper course would have been to decide whether the facts in the case constituted a violation of the general privilege against self-incrimination, and thus, if the conclusion was that they did not, avoid what he regarded as an "academic" discussion of a very important Constitutional question. "But as a different course has been pursued in this case," he said, "I must of necessity consider the sufficiency of the grounds

phrases 'citizens of the United States' and 'privileges and immunities' are dropped, and more simple and comprehensive terms are substituted. The substitutes are 'any person', and 'life', 'liberty', and 'property', and 'the equal protection of the laws'. Life, liberty, and property are forbidden to be taken 'without due process of law' and 'equal protection of the laws' is guaranteed to all". *Id.* at 127. He declared with emphasis that due process had been violated in the case. That issue was presented and argued by plaintiffs in error, but was summarily dismissed by the Court.

22. See *Twining v. New Jersey*, 211 U. S. 78, 98 (1908).

23. *Id.* at 96.

24. *Id.* at 99.

25. *Ibid.*

26. See *id.* at 114.

upon which the Court bases its present judgment of affirmance." Accordingly in an opinion of moderate length and with some elaboration of his previous opinions cited above he argued that immunity from self-incrimination is protected against hostile state action, not only by the Fifth Amendment but by the privileges and immunities and the due process clauses of the Fourteenth.

Unless there was eccentricity in persisting in a Constitutional interpretation thoughtfully formed, carefully expressed, and deemed to be of extreme importance, even in the face of overwhelming and repeated rejection by his colleagues, the views of Justice Harlan on matters immediately before the Court in the *Adamson* case afforded no just ground for characterizing him as "an eccentric exception." However wrong he may have been he erred within the limits of sane and careful thinking.²⁷

Was he on the questions before the Court in these cases even an "exception" in any such degree as was implied? Similar views of the minority of four in the *Slaughter House Cases*, were recognized by Justice Moody, and Justice Field reasserted them 19 years later, Justice Brewer then agreeing "in the main," and it should be observed that the views condemned as eccentric were strongly supported by Justices Black, Douglas, Murphy and Rutledge in *Adamson*. The extent to which due process has been enlarged in recent years for the protection of personal rights, apparently to satisfy the conscience of the Court, and in other fields to serve the Court's solicitude for the general welfare, seems to make it probable that there will continue to be eminent lawyers, and even Justices of the Supreme Court, who will be convinced that justice may be done more directly than is now recognized by the Court, constitutionally and without questionable and perhaps dangerous exercise of the Court's discretion, by accepting the position advocated by Justice Harlan and some of his contemporary colleagues, and strongly supported after the lapse of half a century by the dissenting minority in *Adamson*.²⁸

Certainly Justice Harlan would not have been termed "an eccentric exception" because he was "the last of the tobacco-spitting judges," a circumstance which seems to have impressed Justice Holmes; nor could anyone have taken seriously the quip attributed to Justice Brewer, that "Justice Harlan retires at eight with one

27. Let any lawyer who doubts this spend a few hours with former Justice Roberts' little book, *The Court and the Constitution* (1951).

28. See the brief but highly suggestive opinions of Justices Black and Douglas in *Rochin v. California*, 342 U. S. 165 (1952).

hand on the Constitution and the other on the Bible, safe and happy in a perfect faith in justice and righteousness" nor merely because of strong language used in some of his opinions, for this has been matched repeatedly by other Justices. When deeply in earnest Justice Harlan's manner of delivering his opinions was spirited and sometimes vehement. This was perhaps a temperamental fault; but does it call for a permanent memorial in the records of the Court?²⁹ If the language this writer deems objectionable was justified it must be either because its subject's long persistence in the particular views again rejected in the *Twining* case reached the point of unreasonable pertinacity, or because of the general character of his judicial service.

Does Justice Harlan's judicial record as a whole show or remotely suggest that among his colleagues he was an eccentric exception? He was a man of marked individuality, with positive qualities of heart matching those of mind and body. His carefully formed opinions became convictions which could not be surrendered because he was outvoted, and no student of his judicial career can fail to observe that he held himself strictly to two guiding principles—that the function of the Supreme Court is to do justice within the full scope of its authority, and that even in the exercise of the broad latitude which must be permitted in the interpretation of the Constitution, judicial legislation is a seductive evil which should be jealously watched and avoided. In his address at the centennial celebration of the organization of the Court he declared as "vital principles" of Constitutional law:

"That while the preservation of the States, with authority to deal with matters not committed to general control, is fundamental in the American Constitutional system, the Union cannot exist without government for the whole.

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

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

That America has chosen to be, in many respects and to many

29. On two occasions Justice Harlan's manner evoked widespread criticism in the press,—the second *Pollock case*, 158 U. S. 601 (1895) and *Standard Oil Co. v. United States*, 221 U. S. 1, 55 (1911). The former is discussed with discrimination by David B. Farrelly in the February, 1951 issue of *The Southern California Law Review*. The *Standard Oil* outburst was in May, 1911, five months before Justice Harlan's death in his 79th year.

purposes, a nation, and for all these purposes her government is complete, to all these objects it is competent."³⁰ Perhaps these sentiments were platitudes in 1890, when they were uttered, but surely they were not marks of eccentricity.

Was he eccentric because he was "the Great Dissenter" of his day? The appropriateness of the title lay in the nature of his divergent views and the tenacity with which he held them rather than in the number of his dissents, most of which were without written opinions. They totaled somewhat more than 300, and in the great majority he was not alone. In 107 he was joined by three or more of his colleagues. Too unyielding? Perhaps, but hardly eccentric for this reason in view of the importance of the questions considered by the Court during the long and critical period of his service. The vigorous language found in many of his dissents was always aimed at legal propositions and in no instance personal. That the mere fact of dissent is in itself no mark of eccentricity need not be argued to readers of this article: the law's debt to the dissenters is too well known. Said Chief Justice Hughes, "Unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort. . . . A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day."³¹

After Justice Harlan's death his dissenting opinions were made the subject of careful study by able lawyers. To one of these especial attention is invited because of its sympathetic and discriminating tone.³² His retired colleague, former Justice Brown, wrote an elaborate review (1912) in which he said: "While judging from the past the dissents of Mr. Justice Harlan will probably share the general fate and will not result in many changes in the law, his learning and never failing patriotism can hardly fail to impress itself upon the popular mind, and have a wholesome effect upon the legislation of the future, as it has already done in what is known as his 'fellow servant' cases. . . . His dissents will always be referred

30. *Address of Mr. Justice Harlan*, 134 U. S. 755 (1890).

31. Hughes, *The Supreme Court of the United States*, 67-68. The writer ventures to add to these wise words of "little Hughes", his college classmate in 1876-1878, the suggestion that if the dissenter is a sound and industrious lawyer with a strong—even religious—sense of human dignity, to which he is able to subordinate his Federalist preconceptions, we may have a Harlan dissent in a *Lochner* case. If he is a brilliant philosophical jurist we may have a Holmes dissent in the same case. Both sowed the same seed and should share in grateful recognition when the harvest comes.

32. See Knight, *The Dissenting Opinions of Justice Harlan*, 51 Am. L. Rev. 481 (1917). See the brief discussion of the *Knight* and *Northern Securities* cases at 488-489 and the *Civil Rights Cases* at 499-500.

to with a respect due to their learning, their manifest patriotism and their careful exposition of the law. Some of them will doubtless become the basis for future legislation, and perhaps for a reversal by the Court itself. But whatever may be the opinion of posterity with regard to his work upon the Bench of the Supreme Court, he will long be borne in affectionate remembrance as a typical American citizen and an ornament to the Federal judicial system."³³ Justice Brown's estimate should be considered in the light of the fact that his opinion when he spoke for the Court in *Plessy v. Ferguson*³⁴ was the subject of a powerful dissent by Justice Harlan which has become a classic in the literature of civil rights under the Constitution.

If the time has come for an adequate appraisal of Justice Harlan's work in the Supreme Court the present writer is not qualified to make it.³⁵ This article discusses it, and that only in very summary fashion, in but a single—though representative—field, the interpretation of the war Amendments as applied to Negroes and other racial minorities. It is appropriate to consider at the outset some aspects of the national situation when he took office, Dec. 10, 1877. The Federal Government was confronted in all its branches with important and difficult questions growing out of the Thirteenth, Fourteenth and Fifteenth Amendments, each the product of civil war and fierce political strife, and all adopted within hardly more than a decade after the *Dred Scott* decision. Six cases³⁶

33. See Brown, *The Dissenting Opinions of Mr. Justice Harlan*, 46 Am. L. Rev. 321, 352 (1912).

34. 163 U. S. 537 (1896). Although this case has never been expressly overruled, it has been whittled down close to the point of insignificance. *Sweatt v. Painter*, 339 U. S. 629 (1950); *McLaurin v. Oklahoma State Board of Regents*, 339 U. S. 637 (1950); *Henderson v. United States*, 339 U. S. 816 (1950). And see *Segregation and the Equal Protection Clause*, 34 Minn. L. Rev. 289 (1950), a brief in the *Sweatt* case by the Committee of Law Teachers. See *The Constitutional Doctrines of Justice Harlan*, Johns Hopkins Univ. Studies in Historical and Political Science, Vol. 33. This was published in 1915, and since then there has been much judicial activity in the fields covered by Justice Harlan's opinions.

36. *United States v. Avery*, 13 Wall. 251 (U.S. 1872); *Bleyew v. United States*, 13 Wall. 581 (U.S. 1872); *The Slaughter House Cases*, 16 Wall. 36 (U.S. 1873); *Alexandria & Washington R. R. v. Brown*, 17 Wall. 445 (U.S. 1873); *United States v. Reese*, 92 U. S. 214 (1876); *United States v. Cruikshank*, 92 U. S. 542 (1876); (*Hall v. DeCuir*, 95 U. S. 485 (1877) was argued before Justice Harlan came to the Court and decided in January, 1878. Since it is not noted that he did not take part in the decision it is assumed that he concurred.) A chronological analysis of these cases, and of all other decisions of the Supreme Court involving constitutional rights of Negroes down to and including 1945 may be found in Waite, *The Negro in the Supreme Court*, 30 Minn. L. Rev. 219 (1946). In Waite, *The Negro in the Supreme Court: Five Years More*, 35 Minn. L. Rev. 625 (1951) the study is carried forward to include *Shepherd v. Florida*, 342 U. S. 50

had come before the Court which involved, or might have been considered as involving, interpretation of the war Amendments in their application to the negro race. On the basis of these decisions the interpretation of the Amendments stood as follows: There had been no important interpretation of the Thirteenth Amendment, but in his dissenting opinion in *Bleyew*³⁷ Justice Bradley used language as to the protection which that Amendment affords which was clearly suggestive of Justice Harlan's position in the *Civil Rights Cases*³⁸ in 1883. Justice Swayne concurred. The Fifteenth Amendment had been limited in *Reese*³⁹ to negative significance, merely prohibiting State discrimination affecting the right of franchise on the ground of race, color or previous condition of servitude. In the *Slaughter House Cases* the Court had faced a staggering dilemma: either the Fourteenth Amendment must be so interpreted as to greatly diminish the effect which was certainly intended by those who were responsible for its presentation and adoption, or else, in the view of the majority, the way would be opened for supervision of the states by Congress and the Supreme Court to a degree likely to be destructive of the traditional autonomy of the states. The Court chose the former course, declaring the doctrine of dual citizenship, citizenship of the United States and citizenship of the states, and discriminating between the two with respect to the "privileges and immunities" protected by the Amendment, the former being so protected and the latter not. In *Cruikshank*⁴⁰ the right of assembly otherwise than for redress of grievances, bearing arms for lawful purposes, being secure from unlawful violence and voting at state elections were placed in the latter category.

The new Justice came of a Kentucky family which had held slaves but voluntarily freed them. He had served in the Union army and taken an active part in state politics. He was a supporter of Bell and Everett in 1860 and later a leader in the Republican party, though not in sympathy with the radical element which was most active in securing the war Amendments. After the withdrawal of Federal troops in 1877 the South became more and more determined and ingenious in its effort to keep the emancipated Negroes

(1951). While Justice Harlan was a member of the Court, there were 38 such cases, of which he took part in all but one, writing the prevailing opinion in seven, a dissent in eight, and dissenting without opinion in five.

37. 13 Wall. 581 (U.S. 1872).

38. 109 U. S. 3 (1883).

39. 92 U. S. 214 (1876).

40. 92 U. S. 542 (1876).

as close as possible to their former status, and it was evident that the field left open by the Supreme Court would be sedulously worked. Where would the new Justice stand? It was two years before a test came. In *Strauder v. West Virginia*⁴¹ a Negro had been convicted of murder by a jury selected under a state statute which made only white men eligible for jury service. The Court held that he was thus denied the equal protection of the laws guaranteed by the Fourteenth Amendment. Justice Harlan was with the majority of seven who concurred in the following language of the decision (Strong, J.): "What is this [i.e., the quoted language of the 14th Amendment] but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to a subject race. . . . The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law as jurors, because of their color, though they are citizens and may be in all other respects fully qualified, is practically a brand upon them, affixed by law, an assertion of their inferiority and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."⁴² It was held that the broad protection thus granted could be, and had been in the case at bar, secured by Congress through appropriate legislation. How different would have been the history of civil rights in the United States if the Supreme Court had abided by these views! Justice Harlan *did* abide by them strictly and courageously. To what extent there has been a belated recognition of their wisdom and justice by our people and their Court of last resort, the limits of this article do not permit inquiry. Lovers of liberty find it an interesting—and,

41. 100 U. S. 303 (1880).

42. *Id.* at 307-308.

looking to the future, encouraging—study.⁴³ If for a Kentucky ex-slaveholder, an opponent of Lincoln in 1860 and of Reconstruction radicalism, when laden with the responsibilities of a Supreme Court Justice, to prove himself throughout a third of a century an uncompromising champion of human rights and liberties under the Constitution as he interpreted it, and on such grounds as he accepted in the *Strauder* case and himself expressed in the *Civil Rights Cases* and *Plessy v. Ferguson*—if that be eccentricity let the critics make the most of it.

That John M. Harlan, as man and jurist won and retained the respect and even affection of the legal profession and of his colleagues there can be no doubt. Seldom if ever has Washington seen so impressive a tribute paid to a public servant as was the dinner given in his honor on the 25th anniversary of his accession to the Court.⁴⁴ Making due allowances for the kindly exaggerations of such occasions, who can read the memorial proceedings of the Bar of the Supreme Court on October 16, 1911, the address of Attorney General Wickersham before the Court on January 12, 1912, and the response of Chief Justice White,⁴⁵ and believe that these words were spoken of “an eccentric exception”?

Justice Harlan's judicial career was briefly reviewed by Robert T. McCracken in 60 *Pennsylvania Law Review* 297 (1912). As against the characterization which has evoked the present study the writer places this summary estimate by a contemporary legal scholar whose name must command general respect: “His mind was essentially simple in its workings, free from delight in subtle distinctions, resorting rather to direct and vigorous logic. He was prone to follow authority, and was never so well satisfied as when he could succeed in bringing a given set of facts under the operation of some recognized adjudication. . . . All through his work runs a current of reliance upon the established judgments of the court. So, too, he adhered closely to the precepts of the Constitution, combating at every turn attempts to strain its interpretation in order to solve particular exigencies. In the construction of a statute he endeavored to ascertain the intent of the legislative body which was responsible for its enactment, and in the absence of any guide to such intent, it was his custom to accept the words of the act as they are used in the ordinary affairs of life. A sincere patriot, he was proud and

43. Such a study was recently made. See Watt and Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 Ill. L. Rev. 13 (1949).

44. Washington Post and Star, December 10, 1902.

45. 225 U. S. App. I.

jealous of the integrity of our time-honored institutions and resented all attempts to alter them by 'judicial legislation.' If there is criticism of his work it lies in his readiness to carry his convictions to their logical result, regardless of particular hardships, or even of political and social upheaval. Yet he was a wise and sane statesman, ever willing and anxious to uphold salutary legislation.

It has been said since his death that he was not among the intellectual giants who have exalted the bench on which he sat. Perhaps that is true, yet it can safely be asserted that none has filled the office with greater dignity, integrity or sincerity of purpose, or with a purer patriotism. His affection for the Constitution and the institutions existing under it amounted to a religious fervor. His was a long and honorable term of service, and his death a national loss—a loss which is tempered only by the splendid monuments he has left behind, to be handed down for the guidance of posterity.”⁴⁶

46. *Id.* at 309-310.