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RELIGION AND THE FIRST JUSTICE HARLAN: A CASE STUDY IN LATE NINETEENTH CENTURY PRESBYTERIAN CONSTITUTIONALISM

JAMES W. GORDON*

I. INTRODUCTION

The first Justice John Marshall Harlan was a deeply religious man. As a devout and life-long "Old School" Presbyterian, Harlan's religious convictions shaped his style as a judge. They also provided him with a concrete standard against which to measure the "rightness" or "wrongness" of the world he saw around him, a standard he often consciously or unconsciously applied in his public life.[1] Harlan's religious identity influenced the way he thought about his country, drove his political choices at critical moments, and shaped his home life. It was also central to his understanding of himself.

In this Article, I will argue that Harlan's religion and its values informed both his personal and his public life. Harlan's close personal friend, Justice Brewer, once commented on Harlan's personal attachment to the two "fundamental" documents in his life: the Bible and the Constitution. Justice Brewer suggested that Harlan had one hand on the Bible, and the other hand on the Constitution when he went

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1. As one important student of nineteenth century American politics observed:

> Religion . . . involves a rationale for existence, a view of the world, a perspective for the organization of experience; it is a cognitive framework constituting a matrix within which the human actor perceives his environment.
>
> . . . It penetrates all the [other] partial and fragmentary social worlds in which men participate; it organizes and defines how they perceive and relate to society in general.

PAUL KLEPPNER, THE THIRD ELECTORAL SYSTEM, 1853–1892: PARTIES, VOTERS, AND POLITICAL CULTURES 183–84 (1979) (citations omitted). Legal scholars have begun to discuss the influence of religious convictions on the conduct of judges and other public men. *See, e.g.*, KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 142–50 (1995); Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989).

to bed every night.[2] Although it is widely known that Harlan was a religious man, only recently has any scholar paid much attention to this fact.[3] No one has fully described the principles of Harlan's faith or made a sustained attempt to explore their influence on his public career. Religion was an important element in the makeup of the man and it deserves attention. However, it is less clear that it was Harlan's religious convictions that set him apart from his judicial colleagues. One who would argue that Harlan's Calvinism contributed to his "distinctiveness" as a judge must ground that argument on the unusual intensity of Harlan's beliefs rather than on their distinctiveness, or on the interaction of his religious convictions with the other elements of his character.

In our own secular and cynical age, it requires a self-conscious effort to appreciate the importance that religion played in the lives of most nineteenth century Americans. Today, when voices inject avowedly religious speech into our public political discourse, many of us become uneasy. Religious references often appear manipulative. Politicians mouth obligatory cliches, but when public figures make religion central to their programs, many of us think not of the moderate middle of American public life, but of its fringes. This is, at least in part, the result of our modern sensitivity to difference, and the well-founded fear that public religious speech inevitably includes some and excludes others. Since our ideal is an inclusive, pluralistic public life, religious speech often violates an important taboo.

This was not true of Harlan's America. Public discourse drew upon a largely Protestant culture and a common reservoir of ideas that persisted, indeed intensified, during the nineteenth century, in the face of immigration by large numbers of Catholics, Jews, and Asians. In the United States throughout most of the nineteenth century, Protestants

2. Interview by James B. Morrow with John Marshall Harlan, WASH. POST, Feb. 25, 1906, *in* JOHN MARSHALL HARLAN PAPERS, LIBRARY OF CONGRESS [hereinafter HARLAN PAPERS, LC]. Brewer and Harlan were close friends and Brewer was himself the son of Congregationalist missionary parents and a religious man. MICHAEL J. BROADHEAD & DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE, 1837–1910 (1994). Some years after Harlan died, his son Richard wrote an article entitled *Justice Harlan and the Game of Golf*. In it he confirmed at least part of Brewer's assertion. "It is true . . . that it was his nightly habit, after retiring, to light the candles near the head of his bed, and then to read his Bible until he was ready to fall asleep. He was a constant reader of the Scriptures, and he particularly enjoyed the Psalms." JOHN MARSHALL HARLAN PAPERS, UNIVERSITY OF LOUISVILLE [hereinafter HARLAN PAPERS, UL].

3. *See* LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 52–60 (1999).

dominated American public life.[4] In most parts of the country, professing Protestants, especially the male members of upper class denominations like the Presbyterians, took their political leadership for granted.[5] The first Justice Harlan was one of these men. In this respect, Harlan was a representative public man of the nineteenth century in America, though perhaps more intense and fundamentalist in his beliefs than many of his fellows.

Harlan, however, had "eccentric" ideas on many subjects, and during his thirty-four years on the Supreme Court bench, he had many more opportunities to honestly express them than most of his contemporaries.[6] This Article will describe the sources and depth of Harlan's religious beliefs and suggest some of the ways in which his Presbyterianism may have affected his private character and his public career, both in the political arena before he went on the bench and as a Supreme Court Justice.

The first Justice Harlan served as a member of the Supreme Court of the United States from 1877 until his death in 1911.[7] He wrote opinions on many topics, but he is most often remembered today for the passionate dissents he penned in cases involving the right of Black Americans to full citizenship.[8] Harlan's reputation among his contemporaries as an eccentric, however, was not based solely on these dissents.[9] He was also a supporter of national power and judicial restraint in a time when his brethren on the high bench were often hostile to both.[10] He read the Commerce Clause broadly, arguing that it

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4. *See, e.g.*, Ira C. Lupu, *The Institute of Bill of Rights Symposium: Religion in the Public Square Government Messages and Government Money*: Santa Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 775 & n.19 (2001). I do not mean to suggest that this was true everywhere. In many large cities, immigrants—especially Irish, Italian Catholics, and some Germans—played an important role in political organizations. It is a reflection of the dominance of Protestant culture that many of these organizations, labeled "machines" by their Protestant opponents, were generally viewed by outsiders as thoroughly corrupt. *See id.*

5. *See, e.g., id.* at 775–76.

6. Edward F. Waite, *How "Eccentric" Was Mr. Justice Harlan?*, 37 MINN. L. REV. 173 (1953).

7. *Id.* at 173.

8. *See, e.g.*, Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting); Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting); Berea College v. Kentucky 211 U.S. 45, 58 (1908) (Harlan, J., dissenting).

9. *See* Henry J. Abraham, *John Marshall Harlan: The Justice and the Man*, 46 KY. L.J. 449 (1958); Waite, *supra* note 6, at 175.

10. *See generally* TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN (1995); LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE (1992). *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 82 (1911) (Harlan, J.,

represented a great source of congressional power and could be used by the nation to restrain predatory capitalism.[11] The majority, during most of his tenure on the Court, disagreed with him.[12]

He favored reading the Civil War Amendments broadly, not only to protect the former slaves in the enjoyment of their hard-won freedom, but also to protect all Americans against their own state governments.[13] He repeatedly urged in dissents that the Due Process Clause of the Fourteenth Amendment incorporated the entire Bill of Rights, guaranteeing all of these fundamental rights against state encroachment.[14]

Harlan also argued against the creation of classes of citizenship.[15] When the United States seized the Philippines and Puerto Rico at the end of the Spanish-American War, Harlan urged that constitutional guarantees must apply fully in all territory held under American sovereignty.[16] In the language of the day, he argued that the Constitution "followed the flag."[17] He feared that anything less would diminish the Constitution, give the Congress powers nowhere bestowed, and endanger America's own republican government. In almost all of these doctrinal areas, John Harlan opposed the will of the majority of the Court upon which he sat. Yet, he maintained his position both publicly and privately when precedents mounted against him and the doctrine of *stare decisis* would have silenced a less confident voice.[18]

Recent scholars have tried to explain Harlan's views by emphasizing his Whig political roots,[19] his paternalism and republicanism,[20] his Civil War experiences,[21] and political expediency.[22] I have suggested

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dissenting); Pollack v. Farmers' Loan & Trust Co., 157 U.S. 429, 608 (1895) (Harlan, J., dissenting).

11. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 18 (1895) (Harlan, J., dissenting).

12. Waite, *supra* note 6, at 182.

13. *Id.* at 185–86.

14. *Id.* at 173.

15. *See generally* Waite, *supra* note 6.

16. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 347 (1901) (Harlan, J., dissenting).

17. *See* Waite, *supra* note 6, at 187.

18. *See* BETH, *supra* note 10, at 219.

19. *Id.*

20. PRZYBYSZEWSKI, *supra* note 3.

21. Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637, 637–46 (1957).

22. Thomas L. Owen, The Pre-Court Career of John Marshall Harlan (1970) (unpublished M.A. thesis, University of Louisville) (on file with author).

elsewhere that family influences and the existence of a possible black half-brother offer a partial explanation of Harlan's opinions on race.[23] Still, in his recent biography of Harlan, Professor Tinsley Yarbrough concludes that Harlan remains largely a "judicial enigma."[24]

If Harlan himself could speak, he would almost certainly tell us that his Presbyterianism was the most important lens through which he viewed the people and events of his life. He would assert that the Bible was a divinely revealed, inerrant, moral guide for human conduct and that he had tried to follow its commands. With his characteristic humor, he might add that his Presbyterian belief in the "right of private judgment" *preordained* his remarkable independence of mind on the crucial constitutional questions of his day. He might even add that the conviction with which he embraced the positions he took and the sometimes-fiery passion with which he asserted those positions also reflected his Calvinism. When blended with his family circumstances, border state background, and other life experiences, Harlan's Calvinism seems uniquely important and worthy of careful examination. He was not just a judge. Harlan was a *Calvinist* judge.

II. RELIGIOUS ROOTS

A. John Marshall Harlan's Youth and Education

John Harlan's American forebears were Scotch-Irish.[25] They had immigrated to America from Northern Ireland in the seventeenth century, settling first in Pennsylvania and then moving south into Virginia.[26] Although some Harlans had been Quakers for a time, John's immediate ancestors had been Presbyterians for generations when his grandfather (James the elder) moved west into Kentucky in the 1770s, becoming one of the state's earliest white settlers.[27] The homestead was adjacent to the Salt River near the early settlement of Harrodsburg, and not far from what was to become the bustling town of Danville.[28] John's father, James Harlan (the younger), was born at the homestead in 1800.

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23. James W. Gordon, *Did the First Justice Harlan Have a Black Brother?*, 15 W. NEW ENG. L. REV. 159 (1993). *See also* YARBROUGH, *supra* note 10, at 10–20.

24. YARBROUGH, *supra* note 10.

25. ALPHEUS H. HARLAN, HISTORY AND GENEOLOGY OF THE HARLAN FAMILY (1914).

26. *See id.*

27. *See id.*

28. *Id.* at 106.

He became a prominent lawyer and politician, and he was a close personal friend and loyal associate of Henry Clay and an admirer of Chief Justice John Marshall.[29] Like his son, James was a man of strong convictions.[30]

John Harlan was born in 1833, also near Danville, as the son of a prominent father and heir to a prominent family name.[31] By the time of John's birth, Danville was a thriving center of Presbyterian life in the West supporting a Presbyterian College Centre and a Presbyterian seminary.[32] John's family attended the Presbyterian Church in Danville until relocating to Frankfort, the state capital, in 1840.[33] John was seven years old when James moved his family to Frankfort to assume the office of Secretary of State. Once settled in Frankfort, the Harlans attended the First Presbyterian Church in that city. It still stands not far from the Old State House. Many years after her father-in-law's death, John's wife, Mallie,[34] wrote that although James himself did not formally become a member of the Frankfort church, he had "a great respect for religion, and was a regular attendant at the Sunday morning services."[35]

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29. In the course of a forty-year public career, John's father, James Harlan, served as the Commonwealth's Attorney (district attorney), as a member of the State House of Representatives, as a two-term United States Congressman, as Kentucky's Secretary of State, and as the state's Attorney General. During the Civil War, James also served as Lincoln's United States Attorney for Kentucky until his death in 1863. *Id.* at 274–75.

30. James Harlan went to the 1840 Whig Party national convention as a delegate pledged to his friend Henry Clay. When Clay's bid for the nomination was defeated and William Henry Harrison was nominated instead, James Harlan was the only delegate who refused to change his vote to Harrison in order to make the final ballot unanimous. He persisted in voting for Clay to the bitter end. HARLAN PAPERS, LC, *supra* note 2.

31. *See, e.g.*, HARLAN, *supra* note 25, at 658.

32. RICHARD C. BROWN, THE PRESBYTERIANS: TWO HUNDRED YEARS IN DANVILLE, 1784–1984, at 8–9 (1983).

33. A published history of the Danville church lists James as an "original owner" of a pew when a new church building was dedicated in 1831. CALVIN MORGAN FACKLER, A CHRONICLE OF THE OLD FIRST (PRESBYTERIAN CHURCH, DANVILLE, KENTUCKY) 1784–1944, at 34 (1946). For a fuller discussion of the Danville Presbyterian community, see BROWN, *supra* note 32, at 91–106.

34. John's wife, Malvina Shanklin Harlan, signed her letters "Mallie" and was always so addressed by John and her friends.

35. Malvina Shanklin Harlan, *Memoir, Some Memories of a Long Life: 1854–1911*, *in* 26 J. OF SUP. CT. HIST. 126 (2001). Mallie wrote this memoir of her life with John Marshall Harlan after his death.

Neither James's nor John's name appear on the membership lists of the Frankfort church, but many of John's immediate family do appear there. John's mother, Eliza Harlan, is listed as having become a member in 1842. John's sisters became members: Elizabeth in 1845, Laura in 1849, and Sallie in 1857. John's brother, Henry Clay Harlan, is listed as having become a member in 1846. W. H. AVERILL, A HISTORY OF THE FIRST PRESBYTERIAN CHURCH, FRANKFORT, KENTUCKY, TOGETHER WITH THE CHURCHES IN FRANKLIN

It was in this Frankfort church that John received his early religious education. In 1841, John and his brothers Henry Clay Harlan and James began attending the church's "Sabbath school."[36] The core of the curriculum was the memorization and recitation of Bible verses.[37] In addition, students also learned the Presbyterian "Shorter Catechism" and hymns. The school's chronicler proudly reported that between 1819 and 1831, students had learned and recited 542,500 verses of Scripture.[38]

John Harlan continued to read and study the Bible diligently for the rest of his life. He became so well-versed in the Bible that, from at least the age of twenty-three, he taught a Bible class at the Frankfort church.[39] Thereafter, he taught a men's Bible class in all of the churches to which he subsequently belonged, including the New York Avenue Presbyterian Church, which he joined when his appointment as an associate Justice of the Supreme Court took him and his growing family to Washington, D.C., in 1877.[40] At the time of his death, he was still teaching "a large class of middle-aged men in the Sunday School" of the church.[41] In 1915, almost four years after John's death, Mallie reported that the Bible class was "still called the 'Harlan Bible Class'" in his honor.[42]

Harlan quoted freely and frequently from Scriptures both in his public speeches and in his private correspondence. He considered himself an expert on the Bible, and, given the amount of time he spent in its study, he probably was. He took great pride in his command of the Bible, as a story recounted by Mallie makes clear. In 1885, the Harlans spent the summer in Winchester, Virginia, and John, having discovered that he had relatives in nearby Berkeley County, West Virginia, made a trip there to try to contact them.[43] John located and visited a cousin,

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COUNTY IN CONNECTION WITH THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA 248–252 (privately printed in 1901). Membership was not a matter of affiliation, but rather was the result of a conversion experience—the conviction of the receipt of Grace. *Id.* Female members of the Kentucky churches far outnumbered the men so the absence of James's and John's names from the lists is not surprising.

36. AVERILL, *supra* note 35, at 226.

37. *Id.* at 202–10.

38. *Id.* at 210. Harlan later served briefly (1866–1867) as interim "Superintendent" of the school. *Id.* at 225–26.

39. Harlan, *supra* note 35, at 127.

40. *Id. See also* R.L. Russell, *John M. Harlan: An Old Schoolmate Urges Him for the Vacant Chief Justiceship*, HOUSTON DAILY POST, Sept. 12, 1910, *in* HARLAN PAPERS, LC, *supra* note 2.

41. Harlan, *supra* note 35, at 127.

42. *Id.*

43. *Id.* at 169–70.

George Byrd Harlan, and discovered that he "was a great reader of the Bible."[44] In the course of their discussion, the cousin used a phrase that he asserted came from the Bible. "Very emphatically, [the Justice] replied that that was not in *his* Bible."[45]

The duo then resorted to the West Virginian's Bible to search for the phrase. When the cousin could not locate the quotation, John "boasted somewhat humorously as to his superior knowledge of the Scriptures."[46] Yet, when John returned to Winchester, he sought for the quotation in the "Concordance," which he apparently carried with him on vacation, though not on brief side-trips.[47] Upon "[finding] that the quotation *was* a Scriptural one," he immediately wrote to his West Virginia cousin and "backed down in the laconic confession, 'I find that *my* Bible is the same as *yours*.'"[48]

John received his primary and college preparatory education at private school under the tutelage of B.B. Sayre in Frankfort.[49] Sayre had a reputation of being strict; however, regionally, his teaching was regarded as top notch.[50] From fragments in a surviving student notebook in the Harlan family papers, it appears that among other things, John read American history, wrote essays on the lives of great men, and dreamed of earning immortal fame. In 1848, having finished his preparatory education with Sayre, John returned to Danville to enter as a junior at Centre College.[51]

Centre had been founded in 1819 and was the first college in America to be supported directly by the Presbyterian Church.[52] When Harlan attended Centre, it was dominated by the personality of one man, John C. Young, who was president of the college from 1830 until his death in 1857.[53] As with so many other people who influenced John Harlan's religious beliefs, Young had a connection with the conservative Princeton Theological Seminary, having graduated from the seminary in

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44. *Id.* at 171.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. YARBROUGH, *supra* note 10, at 21.
50. *Id.*; BETH, *supra* note 10, at 13.
51. YARBROUGH, *supra* note 10, at 21–22.
52. For an account of the founding and early religious conflicts over Centre College, see James H. Hewlett, *Centre College of Kentucky, 1819–1830*, 18 FILSON CLUB HIST. Q. 173 (1944).
53. *Id.* at 186.

1828.[54] While at Princeton, Young had made enough of a mark to receive the enthusiastic support of the famous theologian, Archibald Alexander, by the time Alexander was contacted in 1830 about filling the presidency of Centre.[55]

In addition to serving as Centre's president for almost thirty years, Young served as pastor of the Presbyterian Church of Danville. He was also instrumental in founding the Second Presbyterian Church of Danville, which was later known as "the College Church."[56] He was a man of strong conservative Presbyterian convictions,[57] ultimately serving as Moderator of the Old School General Assembly in 1853.[58] Young was reputed to have exerted great personal influence on his students, both through personal contact and powerful sermons, which the students were expected to attend.[59]

When John Harlan was a student at Centre, the course of study was classical; that is, students spent most of their time reading the works of classical authors in the original Greek and Latin languages.[60] However, it is clear that there was a religious agenda at the school as well. When, in 1830, Young was installed as president of the college, he made this other agenda explicit in his inaugural address:

> In a college, like ours, to which all denominations of Christians may send their sons for instruction, no sectarian dogmas should be inculcated; those truths only should be taught which are common to all—those general and clearly revealed truths which will draw forth the affections towards God, and cause us to walk in His ways. But for making . . . them feel their power, every means should be used. The Bible should be placed in the hands of all—it should be studied and recited. Besides, there should be a constant commixture of efficacious scriptural truth with the ordinary instructions in literature and science. An instructor has

54. *See* YARBROUGH, *supra* note 10, at 21–22.

55. Walter A. Groves, *Centre College—The Second Phase 1830–1857*, 24 FILSON CLUB HIST. Q. 314 (1950). Archibald Alexander was one of the theological fathers of nineteenth century conservative Presbyterianism. His famous student, Charles Hodge, was one of the most important contributors to the "Princeton Theology." For brief biographies of these two men, see Archibald Alexander, 1 DICTIONARY OF AMERICAN BIOGRAPHY 162 (Allen Johnson ed., 1928), and Charles Hodge, 5 DICTIONARY OF AMERICAN BIOGRAPHY 98–99 (Dumas Malone ed., 1932).

56. Groves, *supra* note 55, at 314.

57. For a description of what Old Schoolers believed, see *infra* text at Part III.A.

58. Groves, *supra* note 55, at 315.

59. *See generally* Groves, *supra* note 55.

60. BETH, *supra* note 10, at 15.

> daily opportunities of aptly and unobstrusively [sic] interweaving sanctifying truth into all the studies he directs; for religion is not a thing apart from life—it connects itself with every science and every permit.[61]

Many years later, in 1891, Harlan acknowledged Centre's importance in shaping his character when he spoke at the dedication of memorial plaques at the College in honor of President Young and others, and quoted Young's language.[62] Harlan summed up Young's influence by observing that Young had dedicated his life "to the cause of safe, sound, Christian education" and to teaching his pupils "that no one could live in this world, and escape responsibility for doing that which he ought not to have done, or for failing to do that which he ought to have done."[63] Harlan also showed the depth of his commitment to the school when, during the division of the Presbyterian Church in Kentucky into Northern and Southern churches in the years after the Civil War, he joined with other prominent Northern Church leaders in Kentucky to defend Northern Church control of the College against an attempted takeover by the Southern Church.[64]

In 1850, when James Harlan believed his son had been sufficiently prepared to begin law study, he enrolled John in the law school at Transylvania University. Located in Lexington, Transylvania University had also begun as a Presbyterian school, but its orthodoxy had been diluted through the influence of state politicians who supported the University with state money. Horace Holley, a Unitarian, became president of Transylvania in 1816, and by 1820, the more conservative Presbyterians shifted their support to Centre College where they were careful to maintain a majority of the Board of Trustees and, thus, orthodox control.[65] The "capture" of Transylvania by the state's secular authorities as a result of public funding may have offered John an early example of the importance of the separation of church and state.

Transylvania Law School flourished between 1820 and 1860, although it competed with law office apprenticeships as a means of

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61. Groves, *supra* note 55, at 320.

62. Justice Marshall Harlan, Remarks at the Unveiling of the Memorial Tablets of John C. Young, Lewis W. Green, William L. Breckinridge, and Ormond Beatty (June 10, 1891), *in* HARLAN PAPERS, LC, *supra* note 2.

63. *Id.* at 5.

64. For a discussion of the post-Civil War split among Kentucky "Old School" Presbyterians, see *infra* text at Part III.A.

65. LOUIS B. WEEKS, KENTUCKY PRESBYTERIANS 57 (1983).

training lawyers.[66] The professors at Transylvania when Harlan was a student were Judge George Robertson and Thomas F. Marshall. Both men were respected, politically active, lawyers, staunch Whigs, and, with certainty in Robertson's case, good Presbyterians.[67] In 1907, on a visit to Transylvania, Harlan looked back with great respect on both men and the law school.[68] After two years at Transylvania, John went into his father's law office in Frankfort to finish his preparation for the bar.

B. Marriage

On December 23, 1856, John married Malvina "Mallie" Shanklin[69] and brought his new wife home to Frankfort to live in his father's house. John had chosen a religiously appropriate bride. Mallie was raised in a devout Presbyterian household in Evansville, Indiana, and her family roots, like John's, were Scotch-Irish.[70]

Mallie's letters and memoirs show her to have been a deeply devout, religious person,[71] who clung to the "old" beliefs and ways as the world changed around her. Mallie was attracted not only to John's red hair and good looks, but also to his Presbyterian orthodoxy.[72] Many years into their happy marriage, Mallie said as much in a letter to her son James.[73] In it she confided that John had won her partly because he would provide a good Christian example for his sons to emulate.[74] Mallie and John were well-matched and had a good marriage which lasted almost fifty-five years, until his death in 1911. She provided John with a loving, even adoring family life. Upon her arrival in Frankfort,

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66. JOHN D. WRIGHT, JR., TRANSYLVANIA, TUTOR TO THE WEST 87–90 (rev. ed. 1980).

67. *See* GEORGE ROBERTSON, AN OUTLINE OF THE LIFE OF GEORGE ROBERTSON, WRITTEN BY HIMSELF, WITH AN INTRODUCTION AND APPENDIX BY HIS SON (1876); *See also* BETH, *supra* note 10, at 17.

68. The inventory of John Harlan's estate reveals that he had a picture of Thomas Marshall hanging in his house when John died in 1911. HARLAN PAPERS, LC, *supra* note 2.

69. *Distinguished Son of the Bluegrass*, LOUISVILLE SUNDAY MORNING, Dec. 22, 1906, *in* HARLAN PAPERS, LC, *supra* note 2 [hereinafter *Distinguished Son*].

70. Harlan, *supra* note 35, at 109, 113.

71. *Id.* at 126–27.

72. *See, e.g.*, YARBROUGH, *supra* note 10, at 26–27.

73. HARLAN PAPERS, LC, *supra* note 2. "I expect and hope a strong well rounded pure Christian manhood for all my boys—I have prayed for it—and have given them by God's good providence such a father as makes me sure of it." Letter from Mallie Harlan to James Harlan (Feb. 25, 1883), *in* HARLAN PAPERS, LC, *supra* note 2.

74. Letter from Mallie Harlan to James Harlan (Feb. 25, 1883), *in* HARLAN PAPERS, LC, *supra* note 2.

Mallie joined and became immediately active in the Frankfort church.[75] She was a Sunday school teacher, church organist, and "Choir-mistress."[76]

C. *Death's Shadow*

Death also played a part in the shaping of Harlan's religious consciousness. Premature death—the unexpected death of healthy young people from sudden illness or infection—was one of the tragic facts of life in nineteenth century America. This fact encouraged most Americans to embrace some conception of an afterlife.[77] They were faced with a stark choice. They could either surrender their loved ones to the earth with a final sad farewell or choose to believe that the parting was temporary and that a longed-for association would be renewed beyond the grave. John Harlan was dogged by the death of friends and kin throughout his life, and it may have been, at least partly, these encounters with death that quickened and renewed his intense religious commitment. We know that his losses did not destroy his faith, so it seems likely that his emotional needs intensified his belief in a theological system that promised a heavenly reunion.

Of the nine children borne by John Harlan's mother, three died before John left home.[78] One of his five brothers, George, died in infancy in 1837 when John was four years old. Another, Henry Clay Harlan (named after his father's famous friend, Henry Clay), died in 1849. John's oldest brother, Richard Davenport Harlan, died in 1854 at age thirty-two, when John was twenty-one.

Of these losses, it was almost certainly Clay's death from cholera at the family home in Frankfort in 1849 that most affected John. Clay Harlan was nineteen and already studying law when he was stricken.[79] John was particularly close to Clay.[80] For more than sixty years, John preserved a notebook he had shared with Clay in which the brothers had written both prose and poetry about the great men of their time and their own longings for fame.[81] John also preserved Clay's obituary and

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75. *See* Harlan, *supra* note 35, at 126; YARBROUGH, *supra* note 10, at 27.

76. Harlan, *supra* note 35, at 127.

77. *See, e.g., id.* at 209–10.

78. HARLAN, *supra* note 25.

79. *See* HARLAN PAPERS, LC, *supra* note 2.

80. The inventory of John Harlan's estate at the time of the Justice's death lists a photo of Clay Harlan hanging in a place of honor in the family dining room alongside a photo of John and Mallie's daughter Edith, who died in 1882. HARLAN PAPERS, LC, *supra* note 2.

81. *See* HARLAN PAPERS, LC, *supra* note 2.

letters of sympathy that the family had received when Clay died. The death of his talented brother and friend must have hit Harlan hard. Clay's death must also have weighed heavily on John's father. John Harlan outlived all of his siblings and his favorite nephew, Harlan Cleveland, the only son of John's sister Laura and a respected lawyer with whom Justice Harlan was particularly close.[82] Mallie also lived to see all of her brothers buried. She sadly wrote some years after the last of them had died that she still missed them and longed for their company.[83]

Undoubtedly, the worst blow of this kind for both John and Mallie was the death of their eldest child, Edith Shanklin Harlan.[84] Edith died of typhoid fever two days short of her twenty-fifth birthday, little more than one year after her wedding, and shortly after bearing John and Mallie a granddaughter.[85] The Harlans took their granddaughter, also named Edith, into the household and raised her as their own child.[86] Despite the consolation they derived from their faith in salvation and divine Providence, Edith's death affected both parents deeply.[87]

Mallie, who always expressed her personal feelings more easily than did her husband, wrote to her son James of her own grief and of her faith:

> I realize more and more each day what we have lost and the sorrow seems heavier....
>
> The grief comes with fresh vigor at bed time, when I realize that the days will come & go, but never bring dear sister back to us again, and then the comforting thoughts follow that we may go

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82. *See* HARLAN, *supra* note 25.

83. *See, e.g.*, Harlan, *supra* note 35.

84. *See* Letter from Wellington Harlan to John Marshall Harlan (Jan. 10, 1883), *in* HARLAN PAPERS, LC, supra note 2.

85. *See generally* HARLAN, *supra* note 25.

86. *See generally id.*

87. One of the Harlan family scrapbooks preserves a telegram from John Harlan to his son Richard, dated November 12, 1882, informing Richard of his sister's death earlier that day. On the facing page of the scrapbook are three pages from a calendar, dated November 13, 14, 15. At the bottom of each page appears the word "upwards" and a bible verse: "If ye then be risen with Christ, seek those things which are above." *Colossians* 3:1; "Here have we no continuing city, but we seek one to come." *Hebrews* 13:14; "Set your affections on things above, not on things on the earth." *Colossians* 3:2. Family Scrapbook, *in* HARLAN PAPERS, UL, *supra* note 2. Copies of Edith's obituaries and her funeral eulogy are also preserved. All praised her religious life, commented upon the mystery of death, and offered assurance of heaven.

there when all is over if like her we are faithful . . . .[88]

She closed the letter by urging James to think about the "life to come" and to "give it now our earnest and prayful attention."[89]

Two weeks after Edith died, John also wrote to his son James, and expressed himself more emotionally and openly than was his habit. This letter conveys the depth of Harlan's loss. "I find it difficult to realize that we are to see Edith no more in this life. The blow was so sudden & unexpected that I can scarcely recognize that she is gone."[90] He continued:

> I do not expect to be able ever to feel that she is away from us. Wherever I go, & whatever I may be doing; her presence will be recognized in its influence upon me. She was to me not simply child, but companion. I am quite sure no character more noble & elevated ever appeared on this earth.[91]

Shortly after Edith's death, John Harlan's cousin and boyhood friend, Wellington Harlan, wrote to John extending sympathy for their loss: "It seems a hard providence, indeed, that one so happy as she, and so capable of giving happiness to others, should be taken."[92] When Wellington's own daughter died two months later, he himself experienced the anguish of the stricken parents and wrote John of feelings, which to some extent, John and Mallie must still have been experiencing:

> It was bitter, bitter indeed to see that young life so full of hope and promise go out in darkness, not in darkness, but into God's eternal light . . . . I can not help asking the question why was not I taken instead of her. "Blessed are the pure in heart for they shall see God" and I know if kindred spirits have companionship in the bright hereafter Georgia and dear Edith are walking the golden streets together.[93]

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88. Letter from Malvina Shanklin Harlan to James Shanklin Harlan (Nov. 26, 1882), *in* HARLAN PAPERS, LC, *supra* note 2.

89. *Id.*

90. Letter from John Marshall Harlan to James Shanklin Harlan (Nov. 25, 1882), *in* HARLAN PAPERS, LC, *supra* note 2.

91. *Id.*

92. Letter from Wellington Harlan to John Marshall Harlan (Jan. 10, 1883), *in* HARLAN PAPERS, LC, *supra* note 2.

93. Letter from Wellington Harlan to John Marshall Harlan (Mar. 9, 1883), *in* HARLAN

Wellington's letter closed with an explicit allusion to the ways in which common, repeated contact with death and the loss of loved ones worked on the faithful: "I want to thank cousin Mallie for the kindness and consideration which she and dear Edith always showed me, and I want her to help me to live a purer life that I may be fit to join the dear ones gone before."[94]

There are a number of similarities between Wellington's and John's letters. Both communicated the anguish of a parent who has lost a beloved child. Both men were comforted by a religious faith that promised a future reunion, and both men were inspired to a renewed effort to live well by the hope that they would draw assurance of a heavenly reunion from their good conduct. Although there are similarities between John's and Wellington's letters, there was also a telling and important difference. Unlike Wellington—though surely the anguish of his loss was as great—John did not question, even momentarily, God's Providence. John accepted the decree. John and Mallie's religious faith comforted them by promising that they would see their child again in heaven. That faith also encouraged right behavior in the hope that such conduct would let them live in "assurance" of the eternal reunion. Thirty-five years after Edith's death, John Harlan, with sadness, would tell an interviewer: "I have had no sorrows except in the death of my kin here and there. We lost one child and only one. She died in 1882."[95]

At the Supreme Court's first public session following the sudden death of Chief Justice Fuller in 1910, Harlan, as the senior Associate Justice, read a brief statement in the Chief's memory.[96] Harlan and Fuller had been close friends and Harlan's words resonate with personal as well as public loss.

> [Fuller's] earthly career . . . was suddenly and unexpectedly terminated, and his spirit passed into the Life beyond the grave—not, as we believe, unattended, but supported by the loving presence of the Master. He obeyed the final summons without the fear of death, and, as we may know from his walk [sic] and conversation, in the faith, never shaken, that God, the

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PAPERS, LC, *supra* note 2.

94. *Id.*

95. *Distinguished Son*, *supra* note 69.

96. *See* John Marshall Harlan, Remarks on the death of Chief Justice Fuller (n.d.), *in* HARLAN PAPERS, UL, *supra* note 2.

Maker and Ruler of the earth, ordereth all things aright.[97]

Harlan's comments reflect a late nineteenth century, traditional Christian view of death.[98] For Harlan, these words were not cliches. He rarely said or wrote anything that he did not believe. Though saddened by his friend's death, John accepted death as part of divine Providence—as he had done so many times before. God's will be done. For Harlan, these words reflected the deeply held convictions of an old man who must have known that he was approaching the end of his own earthly career.

One year later, a few days before his own death, Harlan visited Grant's tomb in New York City for the first time.[99] It impressed him so much that he returned the next day to share the experience with Mallie.[100] As she recalled the occasion in her *Memories* in 1915, John had spoken of Grant's "great service to the country." Then John's thoughts had turned to the afterlife in which he and Mallie both firmly believed:

> [H]is thoughts running on to what were the occupations and interests of those in the "Great Beyond" (as was often his habit when speaking of those "upon whose day of life the night had fallen"), he wondered "whether the memories of their active life on earth entered into their thoughts in the life beyond the veil."
>
> ... [As John] talked upon these high themes, as we sat together in the quiet of this beautiful spot—so near to the great city with its noise and turmoil .... [John] seemed in imagination to have entered already into the peace and rest of the Great Hereafter.[101]

This passage is revealing because it illustrates both the concreteness and the depth of Harlan's faith. He had questions, but they were not the ones a skeptic would ponder. John Harlan wondered whether his loved ones would recognize him and know about his accomplishments on

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97. *Id.* Mallie expressed a similar faith in a poignant letter to her children a few weeks after her husband's death. Letter from Malvina Shanklin Harlan to "My Darlings" (Dec. 27, 1911), *in* HARLAN PAPERS, LC, *supra* note 2.

98. *See* SYDNEY E. AHLSTROM, THEOLOGY IN AMERICA: THE MAJOR PROTESTANT VOICES FROM PURITANISM TO NEO-ORTHODOXY 251–92 (1967). Ahlstrom excerpts Charles Hodge, whom he describes as the "architect of Princeton Orthodoxy." *Id.*

99. Harlan, *supra* note 35, at 209.

100. *Id.* at 186–87.

101. *Id.* at 187.

earth when he met them in Heaven. He wanted to know whether *he* would remember the accomplishments of his own life after he died.[102] It is not surprising that these questions should be inspired by Harlan's contemplation of Grant's greatness and of his monument. Both questions were important to Harlan because he had suffered the loss of so many friends and loved ones along the way, and because he *had* acquired fame—the object of his own and his brother Clay's childhood aspirations.[103] John expected to meet his departed loved-ones in Heaven. He wanted his brother and, especially, his father to know that he had lived up to their expectations.

One of Harlan's closest Louisville friends accurately captured Harlan's view of death in a memorial published shortly after Harlan's death, speaking words that could have been spoken by his deceased friend:

> I suppose that no man who thinks upon the matter at all can deny that it is through its loneliness that death holds the human soul in awe. No presentment of Judge Harlan would be complete without stating that he had a firm and abiding faith that this was not all. That which is set forth in figure by the Poet King of Israel and the no less deeply religious Poet of England was very real to him; on the one hand the valley of the shadow, and on the other the rod and the staff; on the one hand twilight and then the dark; and on the other the deep and soundless tide and the meeting Pilot just beyond the bar.[104]

D. Church participation

Wherever the Harlans went, they showed themselves devoted, church-going Presbyterians. Their participation in the Frankfort church has already been noted. When John moved the family to Louisville in

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102. While lecturing to law students in 1898, Harlan digressed to talk about why a man would seek a public life:

> I cannot tell, except from the feeling of the ambition that is planted in the breast of every man to live after he is dead and gone in the memory of his fellow citizens. I can understand why a man may be willing to give his whole life, and lead a life of poverty and self-denial if by so doing he can make a great name in his country.

John Marshall Harlan Law Lecture (Nov. 20, 1897), *in* HARLAN PAPERS, LC, *supra* note 2.

103. *See supra* notes 79–82 and accompanying text.

104. These words were part of the speech of Alexander P. Humphrey, a Louisville lawyer, printed in *Mr. Justice Harlan, An Impressive Memorial by the Bench and Bar of the Sixth Judicial Circuit*, 9 OHIO L. REP. 417, 421 (1911).

1867 in order to enlarge the scope of his law practice—and also, no doubt, seeking an atmosphere less hostile toward Union men than Frankfort had become[105]—they joined the College Street Presbyterian Church, which was located not far from their Broadway home.

When the Harlans moved to Washington, D.C., in 1877, they became members of the prominent New York Avenue Presbyterian Church. Many of the country's Protestant leaders attended this church, including Supreme Court Justices William Strong and Joseph Bradley, and President Benjamin Harrison.[106] Few members became so deeply involved in church affairs as did Harlan.[107] Justice Harlan served the New York Avenue Church from 1891 until 1900 as a Trustee and was President of the Board of Trustees from 1897 until 1902.[108] In 1900, he was elected a Ruling Elder of the church and continued in that position until his death in 1911.[109] The Harlans even occupied the same pew, number 121, for numerous years.[110]

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105. John and Mallie had actually lived briefly in Louisville shortly before the Civil War broke out, but in the summer of 1861, when John went into the Union army, Mallie went home to her parents in Evansville. She spent most of the period of John's military service there, out of the reach of the fighting that often erupted in central Kentucky where John's parents continued to live.

106. ONE HUNDREDTH ANNIVERSARY, NEW YORK AVENUE PRESBYTERIAN CHURCH, WASHINGTON, D.C., MEMORIAL VOLUME, 1803–1903, at 31, 55 (n.d.), *in* The Presbyterian Historical Society, Philadelphia, Pa. Collection [hereinafter ONE HUNDREDTH ANNIVERSARY].

107. *Id.*

108. *See id.*

109. Annual Report of the Session of the New York Avenue Presbyterian Church, 1890–1900, at 3; YEAR BOOK[S]: NEW YORK AVENUE PRESBYTERIAN CHURCH, 1901, 1902, 1903, 1904, 1905, 1906, 1907, all at 3; ONE HUNDRED AND FIFTH YEAR BOOK: NEW YORK AVENUE PRESBYTERIAN CHURCH 3 (1908); ONE HUNDRED AND SIXTH YEAR BOOK: NEW YORK AVENUE PRESBYTERIAN CHURCH 3 (1909); ONE HUNDRED AND SEVENTH YEAR BOOK: NEW YORK AVENUE PRESBYTERIAN CHURCH 3 (1910); ONE HUNDRED AND EIGHTH YEAR BOOK: NEW YORK AVENUE PRESBYTERIAN CHURCH 3 (1911). All of these Reports are in the Collection of the Presbyterian Historical Society, Philadelphia, Pennsylvania. *See also* Letter from Wallace Radcliff to John Marshall Harlan (Apr. 10, 1900), *in* HARLAN PAPERS, UL, *supra* note 2 (attempting to persuade Harlan to become an Elder of the church) (Radcliff was Harlan's minister at the New York Avenue Presbyterian Church in Washington, D.C.).

110. ONE HUNDREDTH ANNIVERSARY, *supra* note 106. The church's Yearbook for 1911 contains a prominent section: "What My Church Expects of Me." Under the heading is a list of five things:

> 1) To Read and Study The Bible, to observe daily prayers and to live among my fellows with a good conscience. 2) To Attend Church Service, Sunday morning, Sunday night, and Thursday night, unless providentially hindered. 3) To Contribute Through The Envelopes each Sabbath, as God may prosper me. 4) To Rent A Pew,

For many years, Justice Harlan and his family spent their summers at Pointe-au-Pic (Murray Bay) in the Province of Quebec, Canada. Harlan did some work there but spent most of his time playing golf and relaxing. At Murray Bay, the Harlans became active in a small church that was shared by the Episcopalians and the Presbyterians of the village. The denominations alternated services from week to week, with services held according to the forms and liturgy of the Episcopalians one week and according to those of the Presbyterians the next.

The Harlans gave themselves so completely to this little church that it was not long before Harlan was chosen as the trustee representing the Presbyterian part of the summer colony in matters of church administration.[111] Harlan served in this capacity from 1900 until his death in 1911.[112] He had an Episcopalian counterpart and, given the surviving correspondence about church business, Harlan seems to have managed his role in the church with tact and good will.[113] Harlan gave so much time to the Murray Bay Church that when a history of the congregation was published in 1919, the Harlans were mentioned prominently and with obvious affection.[114] The author remembered Harlan's "spirit of loving and happy devotion" to the Church.[115] She recalled Harlan's "tall, distinguished and venerable figure . . . as he

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or section thereof, if I am able. 5) To Engage In Some Form of Church Work, in the Sabbath Schools, Missions, or Societies of the Church.

ONE HUNDRED AND EIGHTH YEAR BOOK: NEW YORK AVENUE PRESBYTERIAN CHURCH 6 (1911). In his position as a Ruling Elder, Harlan was expected to set an example of faithfulness to the church and appears to have conscientiously fulfilled all of the obligations listed.

From the account of his son, Richard, written years after John Harlan's death, John read the Bible daily. As strict Sabbatarians, Mallie wrote in her *Memories*, that the Harlans reserved Sunday evenings for church attendance. Harlan taught a Bible class for men at the church for many years. Harlan, *supra* note 35, at 127. One must assume that the Harlans also made the expected weekly contribution. However, given Harlan's chronic financial problems, the pew rental and the weekly contribution at times must have pinched. Visible participation in the church was extremely important to the Harlan family.

111. *See* Susan B. Tibbitts, *The Murray Bay Protestant Church, 1867–1917*, at 7 (1919), *in* HARLAN PAPERS, LC, *supra* note 2.

112. *Id. See also* John Marshall Harlan's Reports to the Congregation as Trustee of the Murray Bay Church (Sept. 22, 1900; Aug. 5, 1907; Aug. 3, 1908; Aug. 2, 1909; and Aug. 8, 1910), *in* HARLAN PAPERS, LC, *supra* note 2.

113. For correspondence illustrating how deeply involved in church administration Harlan became, see, for example, Letter from John Marshall Harlan to E. B. McCagg (Mar. 3, 1906), *in* HARLAN PAPERS, LC, *supra* note 2. Letter from John Marshall Harlan to George M. Wrong (Mar. 9, 1906), *in* HARLAN PAPERS, LC, *supra* note 2; Letter from John Marshall Harlan to D. M. Stimson (Mar. 9, 1906), *in* HARLAN PAPERS, LC, *supra* note 2.

114. *See* Tibbitts, *supra* note 111, at 7.

115. *Id.*

stood on Sunday mornings under the birch tree near the door at the end of the church welcoming with his kindly, genial presence the entering congregation."[116]

Given the Harlans' chronic financial problems,[117] a more tangible and powerful illustration of the importance that the Harlans attached to the Murray Bay Church was Harlan's willingness to make himself responsible for an advance payment of money for a summer minister for the church,[118] and his $100 contribution to the Church's refurbishment fund in 1910.[119]

III. WHAT HARLAN BELIEVED

A. Harlan's "Old School" Presbyterianism

In the last year of his life, recollecting his political activities of the 1850s, Harlan wrote: "I was intense, as I am still, in my Protestantism."[120] Some of the content of his belief system emerges in his letters and speeches, but much must be reconstructed from an examination of the "Old School" theology that the Harlans cherished.

As descendants of Scotch-Irish ancestors, John's family identified with the more conservative "churchly" wing of Presbyterianism.[121] This wing emphasized doctrine and the sacraments over conversion and direct "religious experience."[122] During the late eighteenth and over the course of the nineteenth century, the conservatives clung to "precise theological formulation"; they sought to maintain an educated, professional ministry and an "orderly and authoritarian church government" in the face of revivalist enthusiasm and liberal attack seeking to simplify traditional Presbyterian theology.[123]

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116. *Id.* The author recalled a comment by Mallie Harlan that "she never felt so near heaven as when worshipping [sic] in our union church" and noted that Laura, Richard, John Maynard, Elizabeth (daughter-in-law), and Edith Harlan (granddaughter), all sang in the church choir. *Id.* at 16.

117. YARBROUGH, *supra* note 10, at 164–69.

118. Letter from John Marshall Harlan to George M. Wrong (Feb. 5, 1907), *in* HARLAN PAPERS, LC, *supra* note 2.

119. Letter from John Marshall Harlan to George M. Wrong (Aug. 2, 1910), *in* HARLAN PAPERS, LC, *supra* note 2.

120. John Marshall Harlan, *The Know-Nothing Organization*, *in* HARLAN PAPERS, LC, *supra* note 2.

121. LEFFERTS A. LOETSCHER, THE BROADENING CHURCH; A STUDY OF THEOLOGICAL ISSUES IN THE PRESBYTERIAN CHURCH SINCE 1869, at 1 (1954).

122. *Id.*

123. *Id.*; *see also* AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 275–

The Presbyterian Church into which John Harlan was born in 1833 was prone to theological disputes.[124] In 1837, the national Presbyterian church divided between adherents of a "New School" theology and an "Old School" religious conservatism.[125] The New School, influenced heavily by New England theologians Nathaniel Taylor and Samuel Hopkins, "sought... to improve the human condition by reforming persons and institutions."[126] They favored emotional revivalism and believed that regenerate people should join together, across denominational lines, to attack the evils they saw in the society around them.[127] The list of these evils eventually became quite long, but the most important political target was slavery. In the view of traditional Calvinists, like the Harlans, the reformers at the Yale and Andover seminaries were both wrong and dangerous.[128] These New England-based reformers championed theological innovations which produced a dangerous activism on slavery.[129] The conservatives became known as Old Schoolers, the group to which Harlan's family belonged.

In the first half of the nineteenth century, conservative Presbyterians

277 (1972); WALTER H. CONSER, JR., CHURCH AND CONFESSION: CONSERVATIVE THEOLOGIANS IN GERMANY, ENGLAND, AND AMERICA, 1815–1866, at 257–259 (1984); 1 CLAUDE WELCH, PROTESTANT THOUGHT IN THE NINETEENTH CENTURY, 1799–1870, at 194–196, 200–204 (1972); Ernest Sandeen, *The Princeton Theology*, 31 CHURCH HIST. 307 (1962); MARTIN E. MARTY, PROTESTANTISM IN THE UNITED STATES: RIGHTEOUS EMPIRE 191 (2d ed. 1986) (Harlan does not fit neatly into Marty's categories.).

124. *See* ERNEST TRICE THOMPSON, PRESBYTERIANS IN THE SOUTH, 1607–1861 (1963). The Presbyterian Church had already established a turbulent record in the Colonial period. *See* ALHSTROM, *supra* note 123, at 265–79. *See also* One Hundred Fifty Years of Kentucky Presbyterianism, 1802–1952: Sesqui-Centennial Celebration 18–23 (1951) (pamphlet distributed at a Danville, Kentucky celebration, Sept. 11–13, 1951, sponsored jointly by the Synods of Kentucky Presbyterian Church in the United States (Southern Church) and the Presbyterian Church in the United States of America (Northern Church)).

125. Ironically, the split was precipitated by the contentious Reverend Robert J. Breckinridge, a Kentuckian who was James Harlan's friend and fellow Whig, and a man of strong anti-slavery sentiments. Breckinridge, a theology controversialist, led the Old School forces in the 1837 General Assembly and later served as Moderator of the Old School General Assembly. He was one of the most important and contentious Presbyterian ministers in the history of Kentucky and of the national Church. He was an important principal in a number of controversies including the Presbyterian splits of 1837 and the 1860s. *See* ROBERT JEFFERSON BRECKINRIDGE, 3 DICTIONARY AMERICAN BIOGRAPHY 10 (1929); Will D. Gilliam, Jr., *Robert Jefferson Breckinridge, 1800–1871* (pt. 1), 72 REG. KY. HIST. SOC'Y 207 (1974); Will D. Gilliam, Jr., *Robert Jefferson Breckinridge, 1800–1871* (pt. 2), 72 REG. KY. HIST. SOC'Y 319 (1974); Will D. Gilliam, Jr., *Robert J. Breckinridge: Kentucky Unionist*, 69 REG. KY. HIST. SOC'Y 362 (1971).

126. WEEKS, *supra* note 65, at 68–69.

127. AHLSTROM, *supra* note 123, at 465–66.

128. *Id.* at 463.

129. *Id.* at 465–68.

had resisted the emotional revivalism of the Second Great Awakening and the New School's espousal of social reforms like anti-slavery, temperance, and women's rights.[130] The traditional Calvinist theology of the Old Schoolers, with its emphasis on the depravity of Man and his complete dependence on grace for salvation, rejected social crusades because these movements were founded upon a belief in the power of human beings to work toward salvation and to lift up their communities by their own efforts.[131]

Writing about antebellum Old School Presbyterians, one scholar observed that they were "[m]aterially comfortable and conspicuously oriented toward the leading groups in society."[132] "[R]epelled by Jacksonian pandering to the people, [Old Schoolers] regularly voiced uneasiness about the potential turbulence and anarchy of the lower orders if not contained by proper moral restraints."[133] When confronted with radical reform schemes like abolition, Old Schoolers acknowledged the existence of evil and the need for social progress, but they denied that human agency could be the means of that progress. Rather, the conservatives spoke out for "providential progress," which "affirmed the divine will and plan as the structuring agency of social gain."[134] Real progress would come from within, with the slow transformation of the human heart by means of grace. "These new men, in their normal capacity as citizens and leaders, would then gradually and silently nudge their society in a juster [sic] direction."[135] Justice, propelled slowly by the transforming effects of Christianity, would gradually erode injustice. It was almost certainly these beliefs, as much as political necessity, that led John and his father James Harlan to oppose the abolition of slavery in Kentucky, while at the same time acknowledging the evil of the

130. *Id.* at 462–71.

131. WEEKS, *supra* note 65, at 69. For a discussion of the Old School–New School split of 1837–1838, see GEORGE M. MARSDEN, THE EVANGELICAL MIND AND THE NEW SCHOOL PRESBYTERIAN EXPERIENCE: A CASE STUDY OF THOUGHT AND THEOLOGY IN NINETEENTH-CENTURY AMERICA 66–103 (1970). *See also* THOMPSON, *supra* note 124, at 377–412.

132. Theodore Dwight Bozeman, *Inductive and Deductive Politics: Science and Society in Antebellum Presbyterian Thought*, 44 J. AM. HIST. 704, 705 (1977).

133. *Id.* at 706–07. *See also* CONSER, *supra* note 123, at 258.

134. Bozeman, *supra* note 132, at 711. "[W]ho would be witless enough to allege that the Almighty's cleverness in shaping events to their intended ends required the tinkering assistance of man?" *Id.* Progress would proceed according to God's timetable, not man's. It would be slow, but orderly, "and only ruin could come from efforts to accelerate it." *Id. See also* Daniel Walker Howe, *The Evangelical Movement and Political Culture in the North during the Second Party System*, 77 J. AM. HIST. 1216, 1226–27 (1991).

135. Bozeman, *supra* note 132, at 712.

"peculiar institution."

Although Harlan once took a temperance pledge as a young man, he was suspicious of movements that focused on human uplift rather than on soul-saving. For Harlan, true religion expressed itself in the world through the struggle for each person's soul; in the effort to bring each human being to acknowledge the sovereignty of God, the depravity of man, and the necessity of accepting the "gift of grace." It was grace that transformed behavior, not political pressure. Especially for Southern conservatives,

> [s]alvation was an act, a transaction between God and the individual, that was separable from the life that followed. Those who had been born again were expected to practice Christian morality, to behave rightly in their own lives, and to work and pray for the conversion of others. Yet these expectations were never connected with any imperative to transform their culture in the name of Christ.[136]

For Harlan and other conservative Presbyterians, traditional creeds taught authentic Presbyterianism. It is in the Westminster Confession, and in the Larger and Shorter Catechisms, that one finds the core expressions of Harlan's Presbyterianism. Traditional Presbyterianism's theology was set out in these classic formulations. To fully understand what Harlan believed, it is necessary to study these fundamental documents in their entirety, but some of their parts find clearer expression in Harlan's personal characteristics and public pronouncements than others.[137] All three taught that: "The holy Scriptures of the Old and New Testaments are the word of God, the only rule of faith and obedience."[138] They forbade "making men the lords of our faith and conscience."[139] They taught belief in "Providence"; that "God, the great Creator of all things, doth uphold, direct, dispose, and govern all creatures, actions, and things, from the

136. KLEPPNER, *supra* note 1, at 186–87.

137. For the full text of these classic statements, see OUR CONFESSIONAL HERITAGE: CONFESSIONS OF THE REFORMED TRADITION WITH A CONTEMPORARY DECLARATION OF FAITH—RECOMMENDED FOR STUDY IN THE CHURCHES BY THE 117TH GENERAL ASSEMBLY–THE PRESBYTERIAN CHURCH IN THE UNITED STATES (1978) [hereinafter OUR CONFESSIONAL HERITAGE].

138. *Id.* at 111 (answering the question in the Larger Catechism: "What is the word of God?").

139. *Id.* at 124 (answering the question in the Larger Catechism: "What are the sins forbidden in the first commandment?").

greatest even to the least."[140] They taught that the elect would be "effectual[ly] call[ed]"; to be "justif[ied]" by faith, "adopt[ed]" by God, and "sanctif[ied]" by grace so that they would be enabled to live more righteous lives.[141] From these three gifts of grace, the elect received "assurance of God's love, peace of conscience, joy in the Holy Ghost, increase of grace, and perseverance therein to the end."[142]

Presbyterians were students not only of their own creed and of the New Testament; they also studied the Jewish Bible (the Old Testament) assiduously. Traditional Presbyterians believed that "The rule which God at first revealed to man for his obedience, was the moral law."[143] This law commanded strict observance of the Sabbath on Sunday[144] and promised that when the righteous die, "their souls are then made perfect in holiness, and received into the highest heavens, where they behold the face of God."[145] Believers were commanded to "subdu[e] all passions,"[146] and to do "diligent labor in [lawful] callings."[147] Further, believers were forbidden to have "more wives or husbands than one at the same time" or to indulge in "idleness" or "drunkenness."[148]

As one popular expositor of turn-of-the-century Presbyterianism wrote: "Whoever intelligently accepts the teachings of the Shorter

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140. *Id.* at 89 (quoting chapter 5, titled "Of Providence," *in* the Westminster Confession of Faith).

141. *Id.* at 143 (quoting pieces of the answers to questions 31, 33–35 of the Shorter Catechism). *See also id.* at 118–119 (similarly quoting pieces of the answers to questions 67, 70, 74–75 of the Larger Catechism).

142. *Id.* at 143 (answering the question in the Shorter Catechism: "What are the benefits which in this life do accompany or flow from justification, adoption and sanctification?"). *See also id.* at 120 (stating that part of the answer to the question in the Larger Catechism of "What is the communion in glory with Christ, which the members of the invisible church enjoy in life?" is to "enjoy the sense of God's love, peace of conscience, joy in the Holy Ghost, and hope of glory" (footnotes omitted)).

143. *Id.* at 144 (answering the question in the Shorter Catechism: "What did God at first reveal to man for the rule of his obedience?" (footnote omitted)). *See also id.* at 122 (stating in the Larger Catechism that the answer to the question of "What did God at first reveal unto man as the rule of his obedience?" is "The rule of obedience . . . was the moral law").

144. *Id.* at 145–46.

145. *Id.* at 121 (quoting the answer to the Larger Catechism question of "What is the communion in glory with Christ, which the members of the invisible enjoy immediately after death?").

146. *Id.* at 129 (responding to the question in the Larger Catechism of "What are the duties required in the sixth commandment?").

147. *Id.* (responding to the question in the Larger Catechism of "What are the duties in the Seventh Commandment?").

148. *Id.* at 130 (responding to the question in the Larger Catechism of "What are the sins of the seventh commandment?").

Catechism is a true Calvinist."[149] Since instruction in the Shorter Catechism was part of his early Sunday School training, Harlan would have learned it as a child. He would have studied the other, more complex, formulations as an adult. He carried them all with him, at least in a figurative sense, into the world.[150] Many of them formed the backdrop for his judicial opinions.

B. Harlan's Personal Religious Beliefs

1. In General

In 1906, an interviewer, seizing upon Justice Brewer's turn of phrase, asked Harlan whether it was true that he went to bed "with the Bible in one hand and the Constitution of the United States in the other?"[151] After observing that he could not remember ever going to bed precisely so encumbered and stating that he "did not profess to be a theologian," Harlan went on to respond to the question with a brief statement about his religious beliefs:

> I fully believe in both the Bible and the Constitution. . . . I believe that the Bible is the inspired Word of God. Nothing which it commands can be safely or properly disregarded—nothing that it condemns can be justified. No civilization is worth preserving which is not based on the doctrines or teachings

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149. EGBERT W. SMITH, THE CREED OF PRESBYTERIANS 13 (1901). Smith's "triumphantly orthodox" book, first published in 1901, has been described as having become by the 1920s, "much the most widely read book ever written in America on Presbyterianism." Robert Kelley, *Presbyterianism, Jacksonianism and Grover Cleveland*, 18 AM. Q. 615, 621 (1966).

150. Kelley, *supra* note 149, at 620. Because Harlan clung to Old School Presbyterianism does not mean that he was unaffected by "mainstream" American Protestantism. As Professor Ahlstrom has observed, the distinctions among the streams of American Protestantism should not obscure the fact that a common "tradition of American Evangelical Protestantism" was emerging:

> Theologically it was Reformed in its foundations, Puritan in its outlook, fervently experiential in its faith, and tending, despite strong countervailing pressures, toward Arminianism, perfectionism, and activism. Equally basic, and almost equally religious, was its belief in the millennial potential of the United States as the bearer and protector of these values.

AHLSTROM, *supra* note 123, at 470. The distinction of the Old Schoolers from this mainstream Protestantism was one of degree rather than of kind, and the Harlans' version of Presbyterianism must have been further complicated by the blending of Northern and Southern Old School ideas.

151. Morrow, *supra* note 2.

> of the Bible. No nation that habitually ignores or violates the rules prescribed by it for the conduct and government of the human race, can long last.
>
> . . . .
>
> . . . This country is, in a large sense, a Christian country, and its adherence to the fundamental doctrines of Christianity is becoming more and more every year a marked feature in American civilization.[152]

What Harlan and his contemporaries like Justice William Strong and Justice David Brewer meant when they spoke of America as a "Christian" country was that America was "Protestant."[153]

Brewer's earlier association of the Bible and the Constitution in Harlan's "hands," picked up by the reporter, is extremely revealing. Harlan believed that real liberty had come into the world with the Protestant Reformation, and he associated liberty, republicanism, and the United States with Protestant values.[154] Whether Harlan went so far as to conflate religion and patriotism, as did some of his contemporaries, is an open question. What is clear, though, is that his devotion to Presbyterianism was an important factor in his devotion to his country. The "civic religion" of late nineteenth century America involved more than belief in America as a Christian country.[155] Civic religion involved the belief that Providence had chosen the United States to be a Christian example to the world, and it promoted confidence in, and love of, all things American. If the United States was not yet perfect, it was

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152. *Id.* This article appeared in a number of newspapers. There are several copies of it, clipped from different newspapers, in the Harlan Papers.

153. Justice William Strong, who served on the Court with Harlan for little more than two years, was appointed by Grant in 1870 and resigned his seat on the Court in 1880. *See* Mark Warren Bailey, *Moral Philosophy, the United States Supreme Court, and the Nation's Character, 1860–1910*, 10 CAN. J.L. & JURIS. 249, 529 (1997). Strong was nationally known for his active Presbyterianism. *Id.* Brewer authored the famous statement in the *Trinity Church* case that America "is a Christian nation." Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892). It is worth noting that by the late nineteenth century the United States had a much more diverse population than these men ever acknowledged. Indeed, the strength of the anti-immigration movement was directly related to the surge in immigration that occurred in the last decades of the nineteenth century and the first two decades of the twentieth.

154. *See* John Marshall Harlan, *The Courts in the American System of Government*, 3 WIS. PRESBYTERIAN REV. 142 (1905) (response to a Toast at the Banquet of the Presbyterian Social Union of Philadelphia on March 28, 1905). Professor Przybyszewski shows how Harlan made this connection in her intellectual biography. *See* PRZYBYSZEWSKI, *supra* note 3, at 52–54, 62–72.

155. AHLSTROM, *supra* note 123, at 383–84.

working toward perfection under the guidance of Providence. Through the United States, God's plan for humankind was unfolding. In short, Harlan still believed with his Calvinist forebears that America was a city on a hill, intended to be a light to the world.

In an 1880 letter to his son James, Harlan revealed how literal and concrete his beliefs were. James, who was in his first year at Princeton as an undergraduate, was apparently experiencing the kind of fundamental intellectual self-examination that many freshman in college still undergo. James had been sufficiently agitated by conversations with a friend about divine punishment, that he was having trouble sleeping. In struggling to decide what to believe about the after life, he wrote his mother a letter that elicited a reply from his father.[156] Harlan believed, he wrote his son, that Heaven and Hell were real places, where divine rewards and punishments were meted out.[157] Harlan used proof texts from the Bible to justify his beliefs, concluding: "'There is nothing in the Bible... which justifies the belief that the... [impassible gulf between the two places] is ever passed.... The thing is not to get into the torment at all...."[158] The Bible, as divinely given ultimate authority, was conclusive.[159]

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156. Letter from John Marshall Harlan to James S. Harlan (Sept. 15, 1880), *in* BETH, *supra* note 10, at 150.

157. *Id.*

158. *Id.*

159. In 1903, at ceremonies celebrating the one hundredth anniversary of Harlan's Washington, D.C., church (the New York Avenue Presbyterian Church), the President of the Princeton Theological Seminary defended the authority of the Bible when he spoke about "A Century of Presbyterian Doctrine." Rev. Francis L. Patton, *A Century of Presbyterian Doctrine*, *in* ONE HUNDREDTH ANNIVERSARY, *supra* note 106, at 111. Princeton was the defensive heart of conservative Presbyterianism and, with Harlan almost certainly in the audience, the Rev. Francis L. Patton, D.D., LL.D. offered Princeton's defense against the higher criticism, evolution, the Social Gospel movement, and the "New Christianity" it had spawned. *Id.* The "Old Christianity" was "a supernatural revelation of a way of salvation from sin through the incarnation and bloodshedding of the Son of God." *Id.* Traditional Christianity, what Harlan meant when he spoke of the "ways of the fathers,"

> taught . . . morality in connection with the doctrine of sin and the doctrine of atonement, and the doctrine of God and the doctrine of incarnation, and the doctrine of a future state, and the doctrine of the schism in our nature between the good and the bad, and the doctrine of the help of the Holy Spirit. It was these great ... moral verities that constituted the great conception of the Kingdom of God, and it is that conception which has made this world moral... When you have given that up, and the body of doctrines and precepts which constitute it, you have absolutely nothing to stand in the way of appetite, and selfishness, and greed. After that it is only when passion dies and virtue itself becomes an appetite, that you can hope for a morality that will stem the tide of lawlessness.

However, Harlan went on to observe that such "subtle inquiries" were not answerable by mortals. Harlan believed that this was a good thing, given human vanity and the hubris that Harlan observed around him as late nineteenth century humans came to believe more in their own self-sufficiency and in science and its products, and to doubt the truth of Scriptures. Harlan wrote, "I do not bother my brain with these subtle inquiries—If we could solve them all . . . we would claim ourselves to have had some hand in creating the Universe."[160]

Harlan concluded his comments to his agitated son with some advice, which reveals much about the nature of his own approach to religion and other serious matters. He advised James not to "fall into the habit too common among young collegians of calling into question the fundamental ideas upon which all religion rests."[161] He continued, "You are not bound to accept blindly what the fathers have taught but you ought to be slow in striking down the old landmarks, or ploughing up the old ways."[162]

This fatherly advice explained how Harlan reconciled his belief in the infallibility of Scriptures with his fundamental commitment to the "sacred right of private judgment," which was a fundamental principle of the Presbyterian Church.[163] Doctrines created by human beings in *interpreting* the Bible were fallible, even if accepted by the Church courts. Nothing could replace private judgment, but that judgment must be informed by a respect for tradition. Departures from precedent should be carefully and reluctantly undertaken, but one person's judgment, if thoughtfully exercised, could be right and all others, even if supported by the judgments of the past, wrong. This attitude helps to explain Harlan's remarkable judicial independence and his willingness to stand alone in dissent. He was comfortably certain that his own view of the Constitution was correct even in the face of the sometimes determined intellectual assaults of his brethren.

Harlan's beliefs about God were conventional. In a letter to Mallie commenting upon a speech their son Richard was to give, Harlan suggested that Richard add "a statement of the omnipresence & omnipotence of God, the sense of which pervades all mankind. . . . [The]

Id. at 120–21.

160. Letter from John Marshall Harlan to James S. Harlan (Sept. 15, 1880), *in* BETH, *supra* note 10, at 150.

161. *Id.*

162. *Id.*

163. OUR CONFESSIONAL HERITAGE, *supra* note 137, at the Westminster Confession of Faith.

truth that there is a God, may for a time be obscured by ignorance & wickedness, but it cannot altogether be obliterated."[164]

Years later, when lecturing his George Washington University constitutional law class about the meaning of the religion clauses of the First Amendment, Harlan offered an extreme hypothetical to demonstrate that government had nothing to do with a man's religious beliefs.[165] In the process, he gave an outline of his own religious convictions:

> A man may say, and I may say here if I choose, that I have no religion and I do not believe in any religion. I may say if I choose—*of course I would not say it*—but if I did say it, no one has a right to call me to account under the law of Congress, that I do not believe in the *inspiration of the scriptures*, or that I believe it was a myth, or that I do not believe in the *divinity of the Saviour.* I may say, if I choose, that there is no *future life*, that when I die and my bones go into the ground that is the last of it. I have a right to say that so far as the law is concerned. *I may have no moral right, I may be responsible to a higher power than any on this earth for notions of this sort*, but I am not responsible to any human power. I have the right to have what religion I please, or I have the right to have no religion. That is the meaning of this [C]onstitution.[166]

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164. Letter from John Marshall Harlan to Malvina Shanklin Harlan (May 24, 1880), *in* HARLAN PAPERS, LC, *supra* note 2.

165. Harlan Law Lectures (Apr. 16, 1898), *in* HARLAN PAPERS, LC, *supra* note 2.

166. *Id.* (emphasis added). John Harlan, though a traditional Calvinist, was anything but a dour Puritan. He seemed to have enjoyed life and had a well-developed sense of humor that was well-known. His personal papers are full of examples of his zest and humor. It seems important, in describing Harlan's religious side, not to obscure the *man.*

For example, Harlan and William Howard Taft were friends and golfing companions, and much of their correspondence has survived. Harlan's playfulness sometimes extended even to his fundamental beliefs. In 1900, when Taft was pacifying the Philippines, Harlan wrote about contact with a common friend.

> [Tibbetts] wonders why I let you go to the Orient, where there was no golf, no ice—nothing but a boiling sun and hot weather. I reminded him of the Presbyterian avowsomes of "predestination" and "affectual calling," and said that he must take it for granted that you had been affectually called to the Philippines to give liberty and order to the allies and friends of the American [illegible] democracy—and that it had been "predestined" from the foundation of the world that you would enter upon the work.

Letter from John Marshall Harlan to William Howard Taft (July 16, 1900), *in* WILLIAM HOWARD TAFT PAPERS, LIBRARY OF CONGRESS. Sadly, Harlan and Taft's friendship ended in bitterness for the older man. One of Harlan's greatest disappointments was Taft's

Harlan's example of *irreligion* is practically a list of Harlan's own most cherished beliefs. It is also telling that even though he offered this hypothetical in a law class, he felt compelled to affirm his own faith to the young men he was teaching. He was a Christian and he was standing before a class of impressionable future lawyers who looked up to him. He needed to dispel any doubt about his own faith and set them a proper Christian example, just as he did for his own sons and for the young men of his Bible class.

The maintenance of America's Protestant hegemony depended upon leadership and moral example, not upon the coercive power of government. However, it is also worth noting that Harlan's affirmation of freedom of religion dealt only with belief and, like the Court upon which he sat, would differentiate belief from acts. *Belief* was no matter of public concern, but *action* was another matter, even if grounded in belief. The ends of Providence should be the ends of all good men. This congruence could be enforced by the state, not for sectarian or "religious" ends, not by prosecuting belief, but by punishing acts that endangered the "values" upon which the preservation of a moral political community were dependent. Harlan expected the country to continue Protestant and to fulfill its mission to the world because God willed it, not because man did. Yet, he consistently affirmed the right (and necessity) of the state to enforce moral standards of conduct under the police power.[167]

2. The Sabbath

Harlan was a strict Sabbatarian, keeping a "Puritan Sunday." He did no work on Sunday unless absolutely compelled to do so by the press of work on his judicial opinions.[168] He refused social engagements

failure as President to appoint the seventy-eight year old Justice to the Court's center chair when Fuller died in 1910. It is almost certainly to Taft that Harlan refers in a letter to Harlan's protégé and close friend, Augustus Willson of Louisville, after Taft promoted Justice White to Chief Justice: "He has gone out of my life entirely . . . ." Letter from John Marshall Harlan to Augustus E. Willson (Dec. 25, 1910), *in* AUGUSTUS E. WILLSON PAPERS (Filson Club, Louisville, Kentucky). For a fuller account of the break, see YARBROUGH, *supra* note 10, at 216–18. *See also* 9 ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–1921, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 3–9 (Paul A. Freund & Stanley N. Kute eds., 1984). *But see* Loren Beth, *Justice Harlan and the Chief Justiceship*, 1983 SUP. CT. HIST. SOC'Y Y.B. 73 (arguing that Harlan did not want the Chief Justiceship).

167. For a fuller discussion of Harlan's views of the police power, see *infra* Part IV.C.

168. Letter from John Marshall Harlan to William Howard Taft (July 22, 1901), *in* WILLIAM HOWARD TAFT PAPERS, LIBRARY OF CONGRESS.

on Sunday because, as he once wrote in refusing a Sunday evening invitation from the Attorney General, he had "a standing engagement... to meet his Pastor every Sunday Evening at the Church."[169] According to Mallie, the story of her husband's refusal was often told in Washington "as an evidence of [John's] keeping to the old-fashioned ways of the Fathers—which ways, as he always contended, had made our Nation what it is in the eyes of the world."[170]

For Harlan, the increasing desecration of the Sabbath was a measure of moral decline in America and one to be opposed. It represented a

> divergence from [the ways of the Fathers which] distressed and alarmed him to the very close of his life, for he felt that the removal of the barriers that protected Sunday as the "Day of Rest", and as a day specially sacred to the strictly home life, spelt danger and decadence for the coming generations.[171]

While lecturing his law class at George Washington University on the initial settlement of America, Harlan stopped to read "six momentous words"[172] written in the Mayflower journal: "'On the Sabbath day we rested.'"[173] He then digressed to say:

> Well I say that tells a great deal, and contains a principle which we might well take into our minds to-day [sic], for if in the experience of the last two or three hundred years you point me to any people anywhere on earth which have no sabbath, I will point you to a people that have the seeds of destruction in their social organization.[174]

In 1902, while serving on a committee of the Presbyterian Church in the United States of America and having been appointed to study a revision of the Confession of Faith, Harlan emphasized the importance he placed upon church doctrine concerning Sabbath observance.[175] He was concerned that, without serious effort to save the "American

169. Harlan, *supra* note 35, at 169.

170. *Id.*

171. *Id.*

172. *See* Harlan Law Lectures (Oct. 14, 1898), *in* HARLAN PAPERS, LC, *supra* note 2.

173. *Id.*

174. *Id.*

175. *See generally* Letter from John Marshall Harlan to Henry van Dyke (Feb. 4, 1902), *in* HENRY VAN DYKE COLLECTION, Presbyterian Historical Society, Philadelphia, PA.

Sabbath,"[176] the "enormously increased immigration from Continental Europe, where no proper account is taken of the Sabbath"[177] would destroy the day in America too. In a letter to the Reverend Henry van Dyke, the chair of the revision committee, Harlan argued that there

> should be a distinct Article on the Sabbath .... If the American Nation does not keep the Sabbath, God will not keep the Nation .... A nation that has practically no Sabbath, which is regarded as holy, rests upon very insecure foundations, and will perish from the earth .... It is time for all Christian churches to take a firm, open stand on this question, and do whatever can be done to educate the people in respect thereof. Only in that way can the tide of Sabbath desecration be stayed.[178]

Harlan offered language for such an article and requested that the revision committee endorse it in concept: "We believe that, by commandment of God, binding upon all peoples, the Sabbath Day must be kept holy unto the Lord for purposes of religious worship and contemplation, free from unnecessary labor, and from mere worldly employments."[179] Although noting that it might be objected that "there are other matters not embraced in the Statement in respect of which the command of God is as explicit as in the case of the Sabbath,"[180] Harlan believed that the fading Sabbath "endangers the safety of our social organism, to say nothing of the peril, in all this, to the general cause of Christianity."[181]

Harlan's convictions about the Sabbath are illustrative of the depth of his religious convictions. Overall, as a member of the Committee of Revision, Harlan opposed any change to the text of the Confession of Faith, arguing that the Church should put any clarifications of disputed matters into a "Declaratory Statement." But this does not mean that Harlan opposed all change in the traditional understanding of the Westminster Confession. In another letter to van Dyke, Harlan implied that some modern clarifications of church doctrine were necessary:

> I am afraid that some of our committee wish the present

176. *Id.* at 2.
177. *Id.*
178. *Id.* at 2–3.
179. *Id.* at 3.
180. *Id.*
181. *Id.*

> movement in our Church to fail altogether, and to that end they prefer a statement that will disgust the friends of the movement & induce them to abandon the struggle for reform, or for a better statement of our doctrines.[182]

But it is not altogether clear that Harlan favored doctrinal revisions on their merits rather than for tactical reasons. Harlan once wrote: "The moss-backs and ante-deluvians must be circumvented—else our church will cease to grow among the people at large, and at last consist mainly of those who are constrained to think that infants of very tender years may be saved."[183] However, it appears more likely that Harlan favored some moderate clarifications of church doctrine. This view is supported by van Dyke (who himself favored reform) in a letter to John Harlan praising him for mediating a compromise that ended in a unanimous report from the revision committee in favor of reform.[184]

3. Work

In some respects, there was much of the Puritan in John Harlan; he seemed to believe in what has been called the "Protestant work ethic." Hard work was sanctifying if accepted as a "vocation" or "calling." Harlan wrote his son James at Princeton, constantly encouraging him to spend his time in "serious, sober, constant work towards the development of the mind."[185] He urged both of his college sons, James and John, to make it a "rule of life ... to regard Every moment, not required for sleep, eating, exercise & necessary social duties, as so much

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182. Letter from John Marshall Harlan to Henry van Dyke (Feb. 23, 1902), *in* HENRY VAN DYKE COLLECTION, *supra* note 175.

183. *Id.* The emphasis in this letter is Harlan's, and refers to the debate over whether infants who died were "saved" or "damned." *Id.* It involved a careful analysis of Calvinist doctrines of original sin and predestination. *Id.*

184. *See id.* Harlan had exchanged letters with former President Benjamin Harrison, another member of the Committee, who died before the report was completed. From these letters it appears that Harrison and Harlan agreed that there should be only "limited revision" by means of a supplemental statement. *See* Letter from Benjamin Harrison to John Marshall Harlan (Feb. 8, 1901); Letter from John Marshall Harlan to Benjamin Harrison (Feb. 11, 1901), *in* BENJAMIN HARRISON PAPERS, LIBRARY OF CONGRESS. *See also* Letter from Benjamin Harrison to John Marshall Harlan (Feb. 22, 1901); Letter from John Marshall Harlan to Benjamin Harrison (Mar. 2, 1901). *Id.* This conclusion is further supported by another letter Harlan wrote to Dr. Henry van Dyke in 1902. Letter from John Marshall Harlan to Henry van Dyke (Feb. 23, 1902), Correspondence and Miscellaneous Papers Pertaining to Activities of the Commission of Revision of the Confession of Faith, 1900–1902, *in* HENRY VAN DYKE COLLECTION, *supra* note 175.

185. Letter from John Marshall Harlan to James Shanklin Harlan (Jan. 11, 1881), *in* HARLAN PAPERS, LC, *supra* note 2.

money, if utilized by study."[186]

In another letter, Harlan argued "there is no place, in the active strong civilization of this time, for a drone or a mere pretender. Labor, unremitting labor study, serious constant study, is essential to great success."[187] He believed that happiness could be found in effort, in application to one's work. "It is a wise dispensation of Providence," he wrote, "that labor and real happiness are inseparably connected in this life."[188] It was especially important that Harlan's sons attend to their father's lessons on this subject because, as he observed, "I think [my sons] will be compelled to make their own living."[189]

In an article published in 1888, John's oldest son, Richard, by then an ordained Presbyterian minister, taught his readers that "*all* business, the pursuit of the ordinary callings of life, . . . if done in the spirit of Christ, is Christian work."[190] Richard went on, in words that must have brought his father to mind, writing that some men are

> put by God in a conspicuous place in the world . . . [and they] render yeoman service to the Great Master by doing this divinely given work in an upright, dutiful, honest-hearted fashion . . . . [F]air flowers of Christian character may be seen far up amid the Alpine snows of politics and public affairs . . . . To the deeply devout man there is no such distinction as between secular and religious life. . . . [S]o all careers are, or may be, a ministry, an [sic] heavenly calling.[191]

Harlan's passionate belief that this was true of the profession of law and public service seemed to have passed to his son.

4. Self-Control: Alcohol and Tobacco

Despite his reputation as a passionate dissenter on the Supreme Court bench, John Harlan was a man who highly valued self-control. Mallie wrote that John "was always very shy and undemonstrative in

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186. *Id.*

187. Letter from John Marshall Harlan to James Shanklin Harlan (Nov. 23, 1880), *in* HARLAN PAPERS, LC, *supra* note 2.

188. Letter from John Marshall Harlan to James Shanklin Harlan (July 13, 1882), *in* HARLAN PAPERS, LC, *supra* note 2. This was more than surmise on Harlan's part since he spent most of his adult life irremediably insolvent.

189. *Id.*

190. Richard D. Harlan, *Algernon Sydney Sullivan*, N.Y. EVANGELIST, Dec. 20, 1888, *in* HARLAN PAPERS, LC, *supra* note 2.

191. *Id.*

expressing his feelings."[192] Self-control was a paramount virtue in the Harlan household, not only because it was important to maintain upper-class appearances, but more importantly, because restraint was essential to living a good Christian life. Harlan's devotion to the law and religion can be understood partly as a reflection of his beliefs about human nature. Both law and religion were necessary. They were also complementary in that both sought to control human passions, champion restraint, and, if self-control failed, threaten punishment.

Although not an advocate of total abstinence, Harlan did believe that the abuse of alcohol represented a danger to this necessary self-control.[193] Both Harlan and Mallie had seen the destructive power of alcohol up close in their families.[194] Harlan's brother, James, destroyed a promising career as a lawyer and a judge by his binge drinking. Harlan's nephew, Henry (James's son) followed in his father's ruined, alcoholic footsteps, losing jobs to his alcoholism and finally exhausting John's patience and willingness to help him.[195] Harlan's cousin and close childhood friend, Wellington Harlan, also wrestled with alcoholism.[196]

No doubt it was concern founded in experience that led John, in 1894, to write a letter to his youngest son, John Maynard Harlan, expressing concern over the younger man's apparent lack of apprehension about the use of alcohol:

> I do not mean to say that there are grounds now to suppose that you would ever become so fond of drink that you could not control yourself. But it is not wise to take any chances in such matters. I thought I observed, while you were here, that you could take whisky for a cold without the slightest apprehension that there was any danger in your doing so .... I have been disturbed by now and then observing that you had no fear of liquor when it seemed to you right or necessary to take it.[197]

Part of Harlan's concern was also grounded in his desire that his sons set a good example for their fellows and the public.[198] Harlan regretted

192. Harlan, *supra* note 35, at 173.

193. YARBROUGH, *supra* note 10, at 200–05.

194. *Id.* at 201–03.

195. *Id.* at 201.

196. *Id.* at 203.

197. Letter from John Marshall Harlan to John Maynard Harlan (Feb. 7, 1894), *in* HARLAN PAPERS, LC, *supra* note 2.

198. *Id.*

his own use of tobacco both because it was a "stimulant" and because it discouraged work. Harlan reflected, "I would give a great deal if I had never become used to tobacco, and I have made up my mind that I will give up smoking altogether. I doubt whether the condition of my health will admit of my ceasing to chew tobacco."[199]

Although Harlan's apprehensions about alcohol were rooted primarily in practical experience with the tragic effects of alcohol abuse on individuals and on society, he also entertained a very Protestant religious concern over the corrupting influence of drunkenness and its capacity to destroy families and souls.[200] Harlan never became a militant prohibitionist; he apparently drank whiskey himself and made gifts of Kentucky whiskey to some of his friends.[201] However, Harlan saw a great space between the moderate use of alcohol and the kind of excessive use he saw embodied in his brother James's self-destructive behavior.[202]

It seems that it was not the use of alcohol that Harlan opposed, but rather drunkenness and the destructive loss of self-control that accompanied it. Government regulation of access to alcohol was an important element in imposing restraints upon those who were unable to restrain their own drunken behavior. These attitudes account, at

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199. *Id.*

200. Over a thirty-five year period, John had watched his older brother James wage a losing struggle against alcoholism. YARBROUGH, *supra* note 10, at 201–05. James alternated periods of relative stability with alcoholic binges, often spinning out of control for days or weeks at a time. *Id.* In the 1880s, James also battled against an opium addiction. *Id.* at 201. James's letters to John painfully catalogue the miseries brought about by alcoholism. *Id.* at 203. James's son, Henry, was also an alcoholic, as was John's cousin Wellington Harlan. *Id.* It also seems likely that James's death—he was struck by a train while walking alone at night near the tracks—was either a suicide or occurred because he stumbled into the path of the train while intoxicated. *Id.* at 204. John did not renounce all alcohol—he liked to drink Kentucky Bourbon—but he insisted upon moderation and understood how weaker men could become intemperate and careen to destruction. See Harlan's opinions in *Mugler v. Kansas*, 123 U.S. 623 (1887) and *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465 (1888) (Harlan, J., dissenting).

201. *See generally* HARLAN PAPERS, LC, *supra* note 2.

202. It is important to note that although Harlan was a fundamentalist when it came to interpreting the Bible, one should not freight him with the social positions of modern-day fundamentalism. Charles Hodge, the Princeton theologian who provided the most widely-influential theological elaboration of Old School religious beliefs in his *Systematic Theology* (1873), was a moderate on the temperance issue. Since Scriptures acknowledged that Jesus had consumed wine, "[t]otal abstinence . . . could not be made an absolute principle of Christianity." William S. Barker, *The Social Views of Charles Hodge (1797–1878): A Study in 19th-Century Calvinism and Conservatism*, 1 PRESBYTERIAN 1, 8 (1975). It was consistent for Harlan, an Old School Presbyterian, to oppose the abuse of alcohol while not condemning its moderate use as a sin in itself.

least in part, for Harlan's tendency as a judge to read the state police power broadly when the regulation of alcohol was involved.[203] The great importance Harlan attached to these principles is illustrated by the fact that even when state anti-liquor legislation impinged upon interstate commerce in ways that could have evoked a nationalist response from Harlan, he permitted state regulation.[204]

IV. HOW HARLAN'S RELIGIOUS OUTLOOK INFLUENCED HIS CHARACTER AND WORK

A. Harlan's Winding Political Path

Many of Harlan's political choices from his earliest participation in public life reflect the commingled influence of his family, his border-state identity, and his religion. From his family's early Whig associations, through his induction into the American Party in the mid-1850s, to his drift toward the Republican Party after the Civil War, almost all of Harlan's important political choices were conditioned partly by his "intense Protestantism" and his connection to conservative Presbyterianism.

Harlan's father, James, was a leader of the Whig Party in Kentucky and a close friend of Henry Clay.[205] Both John and his father were strong nationalists, admirers of Chief Justice John Marshall's jurisprudence, and republican in ideology.[206] They favored economic development and were disgusted by the "enthusiasms" and emotional public displays of the Jacksonians.[207] They seemed to believe that self-discipline and social-discipline were essential to the peace and prosperity of human communities. The Whig Party was in favor of all of these beliefs. "'Whiggery stood for the triumph of the cosmopolitan and national over the provincial and local, of rational order over irrational spontaneity, . . . and of self-control over self-expression.'"[208] But religion also played an important part in reinforcing the Whigs' identity.

Over the last four decades, a "new" school of political historians has

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203. *Mugler*, 123 U.S. at 653 (Harlan, J., dissenting). *See also infra* Part IV.C.

204. *See Bowman*, 125 U.S. at 509 (Harlan, J., dissenting).

205. *See supra* Part II.A. and accompanying notes.

206. BETH, *supra* note 10, at 8–9.

207. Howe, *supra* note 134, at 1233 (quoting LOUISE STEVENSON, SCHOLARLY MEANS TO EVANGELICAL ENDS: THE NEW HAVEN SCHOLARS AND THE TRANSFORMATION OF HIGHER LEARNING IN AMERICA, 1830–1890, at 5–6 (Baltimore 1986)).

208. *Id.*

sought to study politics "from the bottom up." These historians have developed strong evidence that group political behavior during much of the nineteenth century was influenced heavily by ethno-cultural and religious identities. Some of these scholars have argued that these factors were the *most* important predictors of political behavior.[209] This may have been true for the Harlans.

The Harlans hated the Democratic Party. In nineteenth century America, "revivalism and democracy were interrelated phenomena. Each asserted popular claims against those of the elite, pluralism against orthodoxy, charisma against rationalism, [and] competitiveness against authority. . . ."[210] Jacksonian popular politics appeared to unleash the same emotionalism as the revival, to glorify passion in place of rationality, the natural against the refined. The Democrats were the political heirs of Jackson, whom the Harlans despised for his championship of state power against John Marshall's nationalism. The Democrats were the party of political emotionalism, immigrants, and Catholics, and cared too little for the preservation of the Union. The Democrats represented much of what the Harlans were against, and John Harlan's political choices were often colored by his life-long

209. In a provocative examination of the transition from the second party system to the third, Professor Joel Silbey wrote in 1967: "[A]n underlying influence on political behavior is the group identification of individual voters and their positive or negative reaction toward other social groups. In this country, the most pervasive group identification and rejection pattern involves ethnic and religious associations." JOEL H. SILBEY, TRANSFORMATION OF AMERICAN POLITICS, 1840–1860, at 8 (1967). Silbey, Kleppner, and other historians of the "new political history" have argued that ethno-cultural and religious identification were among the most important factors in determining party affiliation and political behavior during the second and third party systems. *See, e.g.*, RICHARD J. CARWARDINE, EVANGELICALS AND POLITICS IN ANTEBELLUM AMERICA (1993); KLEPPNER, *supra* note 1; PAUL KLEPPNER, THE CROSS OF CULTURE: A SOCIAL ANALYSIS OF MIDWESTERN POLITICS, 1850–1900 (1970); JOEL H. SILBEY, THE AMERICAN POLITICAL NATION, 1838–1893 (1991); JOEL H. SILBEY, THE PARTISAN IMPERATIVE: THE DYNAMICS OF AMERICAN POLITICS BEFORE THE CIVIL WAR (1985). For a discussion of some of the early literature, see Ronald P. Formisano, *Toward a Reorientation of Jacksonian Politics: A Review of the Literature, 1959–1975*, 63 J. AM. HIST. 42 (1976). *See also* RICHARD L. MCCORMICK, THE PARTY PERIOD AND PUBLIC POLICY: AMERICAN POLITICS FROM THE AGE OF JACKSON TO THE PROGRESSIVE ERA 89–140 (1986).

210. Howe, *supra* note 134, at 1217. Howe describes the southern Whigs as including "groups that identified with the cultural core of bourgeois British-American Protestantism but remained critical of evangelical didacticism, especially the crusade against slavery. . . . Princeton Old School Presbyterians provide examples of this cultural conservatism." *Id.* at 1230. Larger scale immigration of Irish Catholics cemented the Whig loyalty of Scotch-Irish Old School Presbyterian Whigs by providing them with a powerful negative reference group. *See* ROBERT KELLEY, THE CULTURAL PATTERN IN AMERICAN POLITICS: THE FIRST CENTURY 170–74 (1979).

struggle against the Democratic Party. In the eyes of the politically and religiously conservative Harlans, affiliation with the party of Andrew Jackson was unthinkable.

When the frenzy over slavery expansion tore the Whig Party apart in 1854, John and his father were left political orphans.[211] Amalgamation with the Democrats was unthinkable, but the Harlans found little appeal in the new Republican Party, which coalesced in part from the anti-slavery fragments of Whiggery. The Republicans appeared to have married secular politics to evangelical morality. Created to crusade against the expansion of slavery, the core of the Party was formed around the very New England theology that the Harlans, as Old School Presbyterians, rejected.[212] There was an Arminian odor about the Republican Party, which seemed to repulse the Harlans. Thus, their religious attitudes reinforced their fears about the explosive potential of anti-slavery agitation. The Harlans' position as border-state politicians in the 1850s also made embrace of the newborn Republican Party unthinkable, and so, both religion and geography argued against the Harlans' amalgamation with the Republicans.

Unable to join either the "radicals" in the Republican Party or their life-long political enemies and "negative reference groups" in the Democratic Party, the Harlans, like many Old School Presbyterians who were conservative former Whigs, turned to "Know-Nothingism" and the American Party.[213] The American Party was built upon anti-Catholicism and nativism, and for the sake of the Union, was determined to avoid agitation of the slavery question.[214] Members of the secret society behind the Party, the "Order of the Star-Spangled Banner," swore never

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211. For Harlan's political career before the Civil War, the best source is Louis Hartz, *John M. Harlan in Kentucky, 1855–1877: The Story of His Pre-Court Political Career*, 14 FILSON CLUB HIST. Q. 17 (1940). This topic is also covered well in BETH, *supra* note 10, at 21–52, and in YARBROUGH, *supra* note 10, at 23–46. For a more general description of these events in Kentucky, see E. Merton Coulter, *The Downfall of the Whig Party in Kentucky*, 23 REG. KY. HIST. SOC'Y 162 (1925). For a fuller treatment of these events nationally, see DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861 (Don E. Fehrenbacher ed., 1976).

212. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 83–84 (1970); POTTER, *supra* note 211, at 36–37, 246–48.

213. Coulter, *supra* note 211, at 166–69.

214. *Cf.*, TYLER ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S (1992). Anbinder argues that popular disgust in the North with both the Whigs and the Democrats over their refusal to stop the extension of slavery was an important source of strength for the American Party in 1854 and 1855. *Id.* He also argues that it was the American Party's attempt to build a broader-based party by tempering its opposition to slavery expansion that caused the Party to collapse in 1856. *Id.*

to vote for any candidate other than native-born Americans who owed no allegiance to any foreign power, secular or spiritual, including the Pope.[215]

His father's early involvement undoubtedly helped to draw John Harlan into association with the Know-Nothings, but Harlan's own "intense Protestantism" also played a role. The Harlans could not become Democrats. They were proud of their Scotch-Irish heritage and their conservative Calvinism, and they did not want to defend slavery. The Harlan's could not become Republicans either; that party's missionary politics and its stand against the expansion of slavery would mean political suicide. In either party, they would face the necessity of a choice on the slavery question. Such a choice would compel them, against private conscience, to embrace either the absolutism of the institution's Southern defense or the absolutism of slavery's Northern opponents. In addition, they were anti-immigrant and anti-Catholic in sentiment.[216] The American Party promised to crusade in defense of Protestant America, and John Harlan may have agreed with William Brownlow, who argued: "'the hand of God . . . is visible in this thing. Divine Providence has raised up this new Order to purify the land.'"[217] Unlike the anti-slavery Republicans, the American Party's goal was not to change America, but to preserve it. Equally important, the American

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215. DARRELL OVERDYKE, THE KNOW-NOTHING PARTY IN THE SOUTH 34 (reprint ed. 1968) (1950). Initiates of the secret society, whose members were known publicly as the Know-Nothings, took an oath upon admission to the order. *Id.* Those admitted to the first degree swore not to vote for or support for political office anyone but "an American-born citizen, in favor of Americans ruling America, nor if he be a Roman Catholic." *Id.* at 40. Those admitted to the second degree swore to

> support in all political matters, for all political offices, members of this order in preference to other persons; that if it may be done legally, you will, when elected or appointed to any official station conferring on you the power to do so, remove all foreigners, aliens, or Roman Catholics from office or place, and that you will in no case appoint such to any office or place in your gift.

Id. at 41–42. For the venerable treatment of antebellum anti-Catholicism, see RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE 1800–1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM (reprint ed. 1952) (1938). On the Know-Nothing Party in the South, see OVERDYKE, *supra*. For a detailed treatment of the Know-Nothings in Kentucky during the antebellum period, see SISTER AGNES GERALDINE MCGANN, NATIVISM IN KENTUCKY TO 1860 (1944). McGann describes John Harlan's father, James Harlan, as "an influential nativist." *Id.* at 49. For a modern thoughtful discussion of the Northern Know-Nothing Party that revises earlier studies, see ANBINDER, *supra* note 214. The section on the ideology of the Know-Nothings is especially useful. *See id.* at 103–26. *See also* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925 (3d ed. 1994).

216. *See supra* note pp.353–55.

217. CARWARDINE, *supra* note 209, at 219 (quoting KNOXVILLE WHIG, Oct. 7, 1854).

Party offered an alternative to the political suicide that juncture with the Republican Party would have entailed for the Harlans as Kentucky politicians in the 1850s. The Know-Nothings were a viable choice for the Harlans because they knew that support of the American Party allowed them to support the Union without attacking slavery, and to defend Protestant hegemony; that is, to reconcile conscience and political expediency.

In one of the autobiographical memoranda that Harlan wrote at the end of his life, he acknowledged being "uncomfortable" with, even ashamed of, his membership in the Know-Nothing society.[218] However, he minimized his own moral responsibility for having joined the party by describing how his father and all the other prominent Whigs in Frankfort were present as members at his induction ceremony. Their presence, he later wrote, "eased my mind" and permitted him to take the "offensive oath."[219] One wonders whether Harlan's recollections sixty years after the fact reflect a contemporaneous ambivalence or only an ambivalence he later wished he had felt at the time.

Anti-Catholic riots in Louisville during August 1855 probably had something to do with Harlan's later change of heart.[220] Violence against Catholics was no part of his philosophy, and his commitment to self-control and social stability made rioting—even in defense of Protestantism—anathema. His service with Catholic common soldiers during the Civil War also probably contributed to tempering his earlier

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218. Harlan, *supra* note 120.

219. *Id.* Harlan's uneasiness about Know-Nothingism was probably rooted in his republicanism, but even near the end of his life when this memorandum was written, the shadow of his anti-Catholicism remained. In explaining, he wrote:

> I know at that time that the Democratic party in fact pandered to and courted foreign influence, in order to get the votes of foreigners, and that in many parts of the country the leaders of that party were in league with Catholic priests—the latter, by their machinations with Democratic leaders, obtaining favors for their church . . . which were not accorded to Protestant churches.

Id. at 2. This also suggests that anti-Catholicism was an important factor in Harlan's hostility to the Democratic Party. Know-Nothingism failed, at least in part, because many came to believe that their "secrecy, their fanning of xenophobia, and their readiness to use the power of the state for proscriptive purposes was . . . 'no way to rear a nationality and perpetuate freedom.'" Richard Carwardine, *The Know-Nothing Party, the Protestant Evangelical Community and American National Identity*, *in* RELIGION AND NATIONAL IDENTITY: PAPERS READ AT THE NINETEENTH SUMMER MEETING AND THE TWENTIETH WINTER MEETING OF THE ECCLESIASTICAL HISTORY SOCIETY 463 (Stewart Mews ed., 1982) (quoting RISE, PROGRESS AND DOWNFALL OF KNOW-NOTHINGISM 29 (1856)).

220. For a description of the violence, see MCGANN, *supra* note 215, at 93–113.

anti-Catholicism.[221] However, his nativism and concern for the maintenance of America's Protestant culture persisted to the end of his life.[222]

The Harlans' staunch Unionism was also partly the product of their Old School Presbyterianism. During the sectional crisis of the 1850s, many conservative Old Schoolers sought to quiet America's "family quarrel" by arguing that "the Union represented more than a utilitarian political arrangement. It was the handiwork of God. It had originated not in flawed secular wisdom but in 'the special illumination of Divine Providence' .... There could be no greater calamity or impiety than the destruction of this Union ...."[223]

However, when the sectional debate over slavery expansion could not be stilled, the American Party disintegrated even more quickly than it had arisen.[224] The Harlans then became members of a loose conglomeration of former Whigs and Americans, calling themselves first the "Opposition Party" and then later, the "Conservative Union Party" in Kentucky.[225] This organization disintegrated in the aftermath of the Civil War when it became clear that political men must choose between the Democrats and the Republicans or face political oblivion. In the end, it was easier for John Harlan, a passionate Calvinist tainted with nativism, to feel more comfortable in the Republican Party rather than in the Democratic Party. Harlan was, at heart, a jovial Puritan. He also found the Republican stance on race more congenial. The withdrawal from the National Church of the Southern Synods and the post-War division of Kentucky Old School congregations also contributed to driving Harlan into the Republican Party.

Kentucky's Old School churches in the 1860s suffered from the internal conflicts that characterized all institutions in the border states when the Civil War broke out.[226] In May 1861, shortly after the shelling of Sumter, the national Old School General Assembly declared its support for the Union when it adopted the famous Spring Resolutions.[227] These Resolutions called upon all Presbyterians to rally to the support of the Union.[228] In response, almost all of the Synods and Presbyteries in

221. *See* Westin, *supra* note 21.
222. ANBINDER, *supra* note 214, at 103–09.
223. CARWARDINE, *supra* note 209, at 181.
224. ANBINDER, *supra* note 214, at 246–47.
225. BETH, *supra* note 10, at 29–39.
226. BROWN, *supra* note 32, at 41.
227. *Id.*
228. *Id.*

the seceding states withdrew from the national Church and formed the Presbyterian Church in the Confederate States of America.[229] The Kentucky Synod was badly split, but temporarily maintained its ties to the Northern church—the Presbyterian Church of the United States of America (PCUSA).[230]

The withdrawal of the Southern churches from the General Assembly[231] in 1861 was just part of the Southern attack on the unity of all national organizations, but for John Harlan, it must have seemed an attack on his Church. John's beliefs in American uniqueness, in the Union, and in America's providential role in the world reinforced his emotional and intellectual connections to the Northern Church and it was the Northern Church to which he remained loyal thereafter to the end of his life.

Harlan's decision to stay with the Northern Church was dictated largely by his Unionism. The final disintegration of the church in Kentucky was precipitated when the 1866 national General Assembly insisted on the expulsion of church leaders who refused to take an oath of loyalty to the national government.[232] Many Kentuckians refused, arguing that the Church should not involve itself in politics.[233] The dissidents sought to affiliate their congregations with the Southern Church, renamed the Presbyterian Church in the United States (PCUS) after the collapse of the Confederacy.[234] Harlan may have had private reservations about the political character of the Northern Church stance, but, if he did, he appears not to have expressed them. The Southern attack on the national General Assembly probably angered Harlan. It represented a revolt against the highest judicial body of the Church, whose organization, he believed, God had commanded. Men who could do such a thing were rebels against the Church's duly constituted ecclesiastical authority and this made them traitors to their Church as well as to their country.[235]

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229. *See id.* at 42.

230. *Id.*

231. *Id.*

232. *Id.*

233. *See id.*

234. *Id.*

235. Ironically, the leader of the Southern cause in the Kentucky churches was the Reverend Stuart Robinson. The Harlans knew him well since he had been their pastor at the Frankfort Presbyterian Church from 1847 to 1853. STUART ROBINSON, 16 DICTIONARY OF AMERICAN BIOGRAPHY 53 (Dumas Malone ed., 1935).

Many Kentucky churches were shattered.[236] Between 1866 and 1868, most Kentucky churches went South along with the state's political sympathies.[237] Only now, instead of battles occurring in the national and regional court judicatories, contending factions within individual churches tore their churches apart. These struggles for control of the Sessions, the congregational governing bodies, arose in the context of the appointment or continuance of ministers, or over control of church property. Some congregants wanted to maintain their ties with the Northern Church (PCUSA), while others wanted to link their churches with the renamed Southern Church (PCUS). These internal church conflicts gave rise to numerous lawsuits. Harlan represented the Northern factions in many of these cases and this brought him into close contact with Benjamin Helm Bristow and other Republican lawyers.[238]

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236. *See* BROWN, *supra* note 32, at 41–44; *see also* Harold M. Parker, Jr., *The Synod of Kentucky: From Old School Assembly to the Southern Church*, 41 J. PRESBYTERIAN HIST. 14 (1963).

237. *See* E. MERTON COULTER, THE CIVIL WAR AND READJUSTMENT IN KENTUCKY 388–400 (reprint ed. 1966) (1926); WEEKS, *supra* note 65, at 79–107; RONALD W. EADES, *WATSON V. JONES*: THE WALNUT STREET PRESBYTERIAN CHURCH AND THE FIRST AMENDMENT 5–51 (1982).

238. *See* WEEKS, *supra* note 65, at 99–105. The most famous of these cases involved the Walnut Street Presbyterian Church in Louisville. *Id.* In 1866, an argument over reappointment of a minister escalated into a fight over which of two conflicting groups had legal control over the church Session, and thus over church property. *Id.* at 102–03. The conflict generated lawsuits in state and federal courts. The state case originated in the Louisville Chancery Court as *Avery v. Watson*, and was before the Kentucky Court of Appeals three times as *Watson v. Avery*, 65 Ky. (3 Bush) 332 (1867), 66 Ky. (2 Bush) 635 (1868), and 2 Ky. Op. 240 (1868). Another case involving the same church was brought in federal court under diversity jurisdiction and ultimately reached the United States Supreme Court as *Watson v. Jones*, 80 U.S. 679 (1871). The Court's decision, rejecting state interference in the internal affairs of churches, was an important early decision defining the boundaries between church and state. WEEKS, *supra* note 65, at 103–04.

It seems clear that Harlan invested more, emotionally, in these cases than was required of a disinterested advocate. When the Supreme Court handed down its decision in *Watson v. Jones*, in favor of his clients, Harlan felt something like a religious triumph: "I am the happiest man in Christendom tonight. Our Presbyterian folks feel good all over." Letter from John Marshall Harlan to Benjamin Helm Bristow (Apr. 15, 1872), *quoted in* YARBROUGH, *supra* note 10, at 74. For a fuller treatment of Bristow's life and relationship with Harlan, see ROSS A. WEBB, BENJAMIN HELM BRISTOW: BORDER STATE POLITICIAN (1969). For the later split between Harlan and Bristow, see *id.* at 253–81. Harlan tells his side of the story in a memorandum in his papers. This "One-Day Diary, August 21, 1877" is published in David G. Farrelly, *John Marshall Harlan's One-Day Diary August 21, 1877*, 24 FILSON CLUB HIST. Q. 164 (1950). For a discussion of these conflicts within the Kentucky churches with particular focus on this most famous case, see EADES, *supra* note 237. *See also* Rev. Edward L. Warren, *The Presbyterian Church in Louisville: From Its Organization in 1816 to the Year 1896*, *in* THE MEMORIAL HISTORY OF LOUISVILLE 9–36 (1896); 6 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864–1888, THE OLIVER WENDELL HOLMES

These cases fed his anger at the Southern attack on his church and further alienated him from his Southern Presbyterian neighbors. These lawsuits must have seemed particularly illegitimate to Harlan since the dismemberment of these churches was so clearly the result of political, rather than theological, quarrels.[239]

During Reconstruction, Harlan also helped to turn back an attempt by the state legislature to transfer control of his alma mater, Centre College, from the Northern to the Southern Church. In testimony before the Judiciary Committee of the State House, Harlan argued:

> [T]his Legislature has nothing to do with churches. It is not your province, directly or indirectly, to regulate them.... [Kentuckians] insist that you shall not officiously meddle in their church matters, and shall not violate the chartered rights of a venerable institution of learning.... They say, hands off....[240]

This testimony anticipated the church-state separation arguments he later made to the Supreme Court in *Watson v. Jones* and to his students at George Washington law school.[241] Ironically, it was also a separationist argument that Southerners used to justify their withdrawal from the national Church. In their view, the Spring Resolutions had been an unwarranted and dangerous interference *by the Church* in political matters.[242]

By 1868, Harlan faced the choice in Kentucky of abandoning the political field to the rebel Democrats and their immigrant allies or joining the Republican Party. With the formal eradication of slavery and the "Slave Power," the Republican Party's evangelical zeal diminished. Moderates in the party focused their attention on economic development, protecting the freedman, and maintaining social order at

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DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 897–917 (1971).

239. For a general treatment of political affairs in Kentucky and the political chaos which followed the Civil War, see COULTER, *supra* note 237, at 257–311.

240. YARBROUGH, *supra* note 10, at 74 (quoting FRANKFORT SEMI-WEEKLY COMMONWEALTH, 22 Feb. 1867). Harlan made a related point in a speech. *See* John Marshall Harlan, *Religion in the Public Schools*, *in* Scrapbook, HARLAN PAPERS, UL, *supra* note 2.

241. *See* Watson v. Jones, 80 U.S. 679 (1871).

242. This argument was published in a "Declaration and Testimony" signed by many Kentucky ministers in 1865. WEEKS, *supra* note 65, at 89. This instrument repudiated the "erroneous doctrines" propagated by the Church since 1860. *Id.* In response, the General Assembly insisted that signers of this Declaration be excluded from Church courts. *See id.* at 91. This ultimately drove most Kentucky Presbyterians to join the Southern Church in 1867–1868. *Id.* at 97–99.

home. These were all policies John Harlan could support. In 1868, he became a Republican. Given his nationalism, his Unionist stand during the Secession Crisis and the Civil War, his sympathy for the former slaves, and his continuing concern for maintaining Protestant hegemony in the country, he could make no other choice.

Harlan immediately set about transforming the Republican Party in Kentucky. He was determined to broaden its base of support by moving the party in a conservative direction. He was an energetic Republican candidate for Governor in 1871 and 1875, although he lost both races.[243] As a result of these campaigns, Harlan became a nationally-known Republican and was asked to make a number of political speeches in neighboring states. He also made skillful use of national patronage in the state.[244] While Harlan worked at building the party in Kentucky, Bristow went to Washington, D.C., to serve President Grant as Solicitor General and then as Secretary of the Treasury.[245]

As a respected border state Republican, Harlan went to the National Republican Convention in 1876 to lead Bristow's bid for the presidential nomination.[246] When it became clear that Bristow could not be nominated, Harlan threw the support of the Bristow forces to Rutherford B. Hayes, earning the next President's gratitude and a plum future appointment.[247] Hayes later repaid his debt to Harlan by appointing the Kentuckian to the U.S. Supreme Court.

After he committed himself to Republicanism, Harlan never looked back. When questioned about his own prior opposition to the Republican Party during the War and for two years thereafter, Harlan replied: "Let it be said, that I would rather be right than consistent."[248] By the time Harlan left the state for the Supreme Court bench in 1877, Kentucky had a true two-party system again, although the Democratic Party continued to dominate state elections.

Religion had played a major role in Harlan's post-war political course just as it had shaped his pre-war road. In October 1877, Harlan's journey in the wilderness was over.

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243. *See* BETH, *supra* note 10, at 92–97.

244. *Id.* at 90–91.

245. For a description of Bristow's career in Washington, see WEBB, *supra* note 238, at 71–112, 133–212.

246. YARBROUGH, *supra* note 10, at 87–97.

247. *Id.* at 97–114; BETH, *supra* note 10, at 119–29.

248. LOUISVILLE COMMERCIAL (Nov. 1, 1877). *See* Hartz, *supra* note 211.

B. Harlan's Encounters with the Text and His Judicial Style

Since the Reformation, the Bible has been at the center of Reformed belief. Protestants are commanded to read the Bible, and they were empowered by Calvin, and others, to read and study it in their search for divine direction and faith. A central fact of Protestant life rested upon the assumption that the Bible was the revealed word of God.

Most of the Western world had embraced some version of rationalism during the sixteenth, seventeenth, and eighteenth centuries; therefore, the stage was set for the collision of the Bible and "reason." Although the perceived attack of science on Biblical religion is usually associated with the work of Darwin, a more important problem to those for whom Biblical truth was the foundation of religious belief was the "higher criticism" of Biblical texts and the advances made by historians in their understanding of the Biblical world.[249] Religious students and teachers of the Bible were confronted with evidence that progressively during the nineteenth century, challenged the accuracy of the Bible at every turn.

The Princeton Theological Seminary was at the intellectual forefront of the battle, waged by religious conservatives, in defense of the Bible.[250] The centerpiece of the Princeton response was the "doctrine of inspiration," which insisted that every word of the Bible was inspired by God and that its teachings were all true.[251]

John Harlan believed that the Bible was literally true and persisted in this belief throughout his life, searching in its pages for God's commands to the righteous.[252] This commitment to the "authentic" text was at the center of his faith in the Bible, and its influence crossed over to form the heart of his approach to the Constitution.[253] As one eulogist wrote when Harlan died: "Harlan thought in fundamentals, spoke in fundamentals, dealt in simple definition .... [H]e hung to fundamentals, read ordinary words and drew big, black, straight lines in between right

249. *See* AHLSTROM, *supra* note 123, at 763–74.

250. *See id.* at 769.

251. *See id.* at 812–15; CONSER, *supra* note 123, at 257–59; Sandeen, *supra* note 123, at 310–15.

252. "The whole counsel of God, concerning all things necessary for his own glory, man's salvation, faith, and life, is either expressly set down in Scripture, or by good and necessary consequence may be deduced from Scripture...." OUR CONFESSIONAL HERITAGE, *supra* note 137, at 86.

253. Professor Loren Beth observed in his recent biography that Harlan "always tended strongly to be a literalist in matters of interpretation, especially when this produced a result he found satisfactory." BETH, *supra* note 10, at 196.

and wrong."[254]

Justice Brewer understood this characteristic about his friend when he offered his comment about Harlan's habit of retiring at night with one hand on the Bible and the other on the Constitution. The juxtaposition of the two in Brewer's teasing remarks pointed to something fundamental in Harlan's approach to both the Bible and the Constitution. Harlan insisted on taking both texts seriously. He insisted upon searching out the "true" meanings of their authors.

This characteristic may partly explain why Harlan, alone among all of his colleagues on the Supreme Court, repeatedly and heatedly insisted that in construing the Thirteenth and Fourteenth Amendments the Court should give them their "true" meaning. Not only in the race cases, but in many of the Court's decisions involving extension of Fourteenth Amendment protection to economic activity, Harlan resisted the transformation of the Civil War Amendments at the hands of the Court. As a Kentucky politician during the War and Reconstruction, Harlan remembered quite clearly what the racist electorate knew those amendments to be about, and he was unwilling to distort them by following the lead of his judicial brethren.

The fact that Harlan often read the Constitution or statutes literally does not mean that he was necessarily trapped within their letter. He found layers in the Bible, and he accepted that understanding the Founders required that the words of the Constitution be reconciled with the purposes for which the Constitution was created. Although Harlan was prepared for a sophisticated analysis of a text, he was unwilling to abandon its words. Sometimes meanings were obscure, or the letter appeared to contradict the spirit or underlying purpose. When this happened, more effort was required to find the deeper connection that would make their reconciliation possible. The truth was not always obvious, but Harlan believed that both texts would yield understanding if studied seriously, with a commitment both to the words and their purpose. For Harlan, the subtext of the Constitution seemed to be the republican nationalism of Chief Justice John Marshall and the assumption that government must have the power to constrain evil and do good.

Harlan believed that it was possible to learn from Scriptures what was right and what was wrong, in an absolute sense. The Bible instructed human beings how to behave. Given the intellectual and

254. Congressman Victor Murdock, *Justice Harlan, The Great Commoner*, OREGON DAILY J. (Oct. 17, 1911), *in* HARLAN PAPERS, LC, *supra* note 2.

theological turmoil in the country in the late nineteenth and early twentieth centuries, Harlan's confidence in the conclusions to which his religious principles pointed was exceptional.

An interviewer once suggested to Harlan that "[i]t is said that it is impossible for you to see any middle ground between right and wrong, between truth and untruth."[255] Harlan replied: "There are some things so eternally wrong that duty to conscience compels one to condemn them, and not to tolerate half-measures. Such wrongs ought to be... suppressed and be destroyed utterly, and ought never to be condoned."[256] It may have been Harlan's willingness to confidently proclaim his legal conclusions and to cast them in absolute terms that strained Harlan's relations with Justice Holmes. Holmes's Unitarian world was adrift; it lacked Harlan's Biblical anchor and did not believe in Harlan's Old School Presbyterian absolutes. Some time after Harlan's death, Holmes, in a famous phrase, compared Harlan's intellect to "a powerful vise the two jaws of which couldn't be got nearer than two inches to each other."[257] For Harlan, there were some truths which the jaws of reason could simply not crush (today we might use the word "deconstruct").

Perhaps Holmes's analogy reflects the Bostonian's disapproval, not only of Harlan's moral absolutism, but also of the Kentuckian's habit of jumping from premises to conclusions. Harlan sometimes reasoned only so far before insisting that right, as he understood it, must be done. Harlan inhabited a natural law world, a place where Holmes would not, or could not, go. For Harlan, as for Holmes, law was not separate from life, but for Harlan, unlike for Holmes, law was not *just* about

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255. Morrow, *supra* note 2.

256. *Id.* One of Harlan's eulogists observed: "[Harlan] was always as absolutely convinced of the soundness and righteousness of his own opinion as Mr. Roosevelt, and he was always so perfectly frank and honest about it as in a way to make even wrongheadedness lovable." HARTFORD COURANT, Oct. 16, 1911, *in* HARLAN PAPERS, LC, *supra* note 2.

257. Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Jan. 7, 1910), *in* 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 8 (Mark DeWolfe Howe ed., 1941). Holmes expressed his low opinion of Harlan's analytic abilities in another letter to Pollock in which he wrote of his dissent from a Harlan majority opinion: "[A] very keen man might require a little further analysis than I thought expedient to go into as against old Harlan who simply rolled off the cases." 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 158 (Mark DeWolfe Howe ed., 1941). There can be little doubt that Harlan's traditional Calvinism would have seemed ridiculous to Holmes, and could have been a source of friction between them. For Holmes's views on religion, see G. EDWARD WHITE, OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 18–19, 27–28, 44–45, 73–74 (1993).

experience. For Harlan, law was also *religion.* Just as Scripture enabled man to know what God required of him, law embodied the divine order and purpose when rightly understood. Harlan was not a "legal scientist" but neither was he a sociologist. He was a preacher, and in studying his judicial style and opinions, this fact should not be overlooked.[258]

Arguably, it is also this element in Harlan's make-up that best explains his judicial individualism and his great dissents. Harlan always sought to apply the law so as to obtain morally correct and practically beneficial results. Because this was the judicial task, as Harlan understood it, he was almost never morally neutral. He was a passionate proponent of "the right" as he understood it, and he believed it was fundamental to the judicial role to attend to both the morality of decisions and to their practical effects. Would a decision promote the good or do evil? This was the critical question that concerned Harlan as a judge.

C. The Function of the Law and Government Power: The Police and Commerce Powers

Orthodox Calvinism assigned to the law a special place in its cosmology.[259] As Professor Sydney Ahlstrom, a leading historian of American religion, has written about Harlan's Puritan forebears:

> The law was dear to [the Puritan's] heart, and through the centuries he and his Reformed kindred have dwelt unremittingly

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258. Among the many notices of eulogies that family members collected when Justice Harlan died, one seems to capture this aspect of Harlan's judicial style better than any other. At a meeting of the Kansas City Bar Association, Judge John F. Phillips offered a eulogy, and behind the flowery language, one can clearly see the man Phillips was describing.

Phillips said that Harlan "displayed the tiger's heart." John F. Phillips, Justice John Marshall Harlan: Address at the Memorial Services Held by the Kansas City Bar Association, Nov. 4, 1911, *in* HARLAN PAPERS, LC, *supra* note 2. Phillips stated that:

> [Harlan] shrank not from combat where, to his mind, error lifted its ugly front; or where justice, *according to his* conception, demanded a champion. Moral courage was one of his certitudes. Somewhat like George Fox, he would do what he conceived to be right and a duty 'if the world were blotted out.'

Id. (emphasis added). Harlan, Phillips suggested, "avoided running into such refinements as would sacrifice concrete justice upon the sharp edge of a technicality." *Id.* Displaying "the qualities of the Covenantor in his convictions, and of a Maccabeean in devotion to a principle." *Id.* In commenting on Harlan's devotion to Presbyterianism, Phillips said Harlan "was as orthodox as John Calvin, with the humanity of Martin Luther, and the tolerance of Saint Augustine." *Id.*

259. *See* OUR CONFESSIONAL HERITAGE, *supra* note 137, at 98–99.

> on the value of the Law as teacher and moral guide.... He recognized that governments, constitutions, and laws were instituted to restrain man's sin and hence were truly of God.... He also found much specific guidance in the Scriptures, very often in the Old Testament, for the ordering of personal life, the regulation of society, and the structuring of the Church.[260]

For the righteous, law was a tutor and a spur, telling men what God wanted of them and driving them toward righteousness.[261] This positive attitude toward law contributed to the Harlan family genius for producing lawyers.[262] John's father, James Harlan, was a lawyer. John and his three brothers who survived to adulthood were lawyers. Two of John's three sons were lawyers and the son who was not became a Presbyterian minister.[263] Law, embodied in governments, was the means God had given men to restrain individual misconduct for the common good.

Harlan had rejected the "Perfectionism" of New School Presbyterianism before the Civil War because he did not believe that men could be coerced into salvation. However, he did not deny the government power to regulate bad behavior. This aspect of his intense Calvinism may have helped to make him receptive to the expansion of government power after the Civil War. When the state and national governments struggled to manage the wild new economic and social forces liberated by accelerating industrialization and the influx of "alien" immigrants, Harlan often seemed to be their ally. He

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260. AHLSTROM, *supra* note 123, at 130. *See also* Agnes Orsatti Armao, *Devout Legalists: Protestant Reliance on Law in Early Nineteenth Century America*, 26 AM. STUDIES 61 (1985); Mary Lane Potter, *The 'Whole Office of the Law' in the Theology of John Calvin*, 3 J. L. & RELIG. 117 (1985).

261. *See* AHLSTROM, *supra* note 123, at 129.

262. John Calvin wrote on the importance of the legal profession:

> The Lord has declared his approval of the offices of those who deal with civil rule. Accordingly, no one ought to doubt that civil authority is a calling, not only holy and lawful before God, but also the most sacred and by far the most honorable of all callings in the whole life of mortal men.

J. Philip Wogaman, *Keynote Address, Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 FORDHAM URB. L.J. 827, 828 (1999) (citing JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION, *in* 21 LIBRARY OF CHRISTIAN CLASSICS 725 (Ford Lewis Battles trans. & John F. McNeil ed., 1967)).

263. John, William, and James, all became lawyers. Clay was studying law when he died at age nineteen. John's oldest son, Richard Davenport Harlan, became a Princeton seminary-trained Presbyterian minister, but his two younger sons, John Maynard Harlan and James Shanklin Harlan, both became lawyers. YARBROUGH, *supra* note 10, at 117–18.

understood that these changes demanded government regulation in defense of the commonwealth.

In uniform and out, Harlan had experienced first-hand the chaos that the Civil War created in Kentucky, and he had seen the effects of armies marching and imposing their will where civilian law had been driven out. He also experienced the breakdown of law and order in Kentucky in the post-War years, speaking out against "night-riders" and the violence they directed against freedmen.[264] After Harlan went to Washington, he must also have been aware of the feuds and coal field violence that repeatedly swept the mountains of his home state. Harlan understood very well the need for government regulation of behavior, not because it could make men good, but because the evil to which men were inclined required restraint if they were to live peacefully together. Though government could not *remake* men, it must *restrain* them. Harlan's opinions on the Supreme Court make it clear that he believed strongly in the rule of law, the exercise of government power, and strict constitutionalism. It was, at least in part, this perspective that accounts for Harlan's affinity for the law and his fundamentalist defense of constitutional republicanism. Arguably for Harlan, the founding of the United States had been a special providence of God, and its product, the Constitution, became for Harlan a sacred text. It embodied, among other truths, the promise of "liberty regulated by law"[265] and the profound idea that in order safely to empower government to restrain private evils, government must first restrain itself.[266]

Since most of the direct governing of individuals had been left by the Constitution to the States through the exercise of their police powers, Harlan was compelled to read those powers broadly. He once observed that:

> [O]ur constitutional liberty depends as much upon the preservation of the states as upon the preservation of the national government, and that man is the best friend of the states who recognizes the just rights of the federal government, and that man is the truest friend of the national government who recognizes the just rights of the state governments.[267]

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264. *Id.* at 70–72.

265. Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905) (inner citations omitted); *see also* John Marshall Harlan, *James Wilson and the Formation of the Constitution*, 34 AM. L. REV. 481, 502 (1900).

266. *See* Harlan, *supra* note 265.

267. John Marshall Harlan Law Lectures (Dec. 11, 1897), *in* HARLAN PAPERS, LC,

Harlan's opinions on the police power often referred to the "common good." He usually preferred judicial deference to judicial activism and often urged his more activist brethren on the Fuller Court to defer to state legislative power.[268]

Paradoxically, given his low opinion of human nature, Harlan had confidence in the good sense of the community embodied in the political process.[269] This too reflects his Calvinism. Harlan believed in the collective wisdom of ordinary people not because they were good, but because the United States, with its divinely inspired Constitution, was God's instrument. Harlan's faith in Providence and his conviction that the United States was God's chosen vehicle for the liberation of mankind complemented his direct political experience. Because of this confidence, Harlan was more willing than his brethren to permit legislative experimentation as the states attempted to address the acute problems created by rapid industrialization, urbanization, and the consolidation of economic power.[270]

Where many of his fellow Justices saw state regulations as an intrusion on the individual's right to be left alone, Harlan saw the exercise of state power as necessary. For Harlan, state governments were not tolerable nuisances or threats to individual economic liberty. Rather, they were the positive embodiment of community, directed to promote the moral good of the community and to check the predatory and selfish conduct to which too many men were prone. The Spencerian universe of immutable laws, which would weave individual selfishness into a beautiful common tapestry, was alien to Harlan. The sum of the selfish acts of individuals could never create a "commonwealth;" only the action of the community embodied in laws could do that.

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supra note 2. *See also* Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465 (1888) (Harlan, J., dissenting).

268. *See, e.g.*, Patterson v. Kentucky, 97 U.S. 501 (1878); Plumley v. Massachusetts, 155 U.S. 461 (1894); Lochner v. New York, 198 U.S. 45 (1905) (Harlan, J., dissenting). Harlan noted: "If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation." *Lochner*, 198 U.S. at 68. Harlan believed that "the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States." *Id.* at 72–73.

269. "If any man has had anything to do with public life he will tell you that the average judgment of a mixed crowd anywhere in this country, and where they hear the question discussed, is a very sound one." John Marshall Harlan Law Lectures (Nov. 13, 1897), *in* HARLAN PAPERS, LC, *supra* note 2.

270. *See, e.g.*, *Lochner*, 198 U.S. at 65.

Harlan sketched the outlines of this perspective in *Patterson v. Kentucky*,[271] his first opinion concerning police power for the Court. Kentucky had a state statute forbidding the sale of any illuminating oil substance that would ignite at a temperature lower than 130 degrees Fahrenheit.[272] Patterson, the assignee of a patent for an oil that ignited at a lower temperature, argued that her patent, because issued by the federal government, gave her the right to sell her oil anywhere in the country free from state interference.[273] She argued that the Kentucky statute as applied to her was an unconstitutional interference with a right granted by the national government.[274] The Court, speaking through Harlan, rejected this argument and sustained the Kentucky statute.[275] The purpose of the police power, Harlan wrote, was the "protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights."[276]

In *Mugler v. Kansas*,[277] Harlan further developed this idea and made it clear that the police power could be used as an instrument for creating and sustaining a moral community. When the State of Kansas prohibited the manufacture, transportation, or sale of intoxicating liquors in the state, a group of brewers attacked the statute as a taking of their property without due process under the Fourteenth Amendment.[278] The Court sustained the prohibition statute, and Harlan, again writing for the Court, made it clear that the State had authority under the police power to regulate or ban the production of alcoholic beverages even when it meant the destruction of an ongoing business and the property connected with it.[279] Harlan asked:

> [B]y whom . . . is it to be determined whether the manufacture of particular articles of drink . . . will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, *regarding only their own appetites or passions, may be willing to imperil the peace and security of the many,*

271. 97 U.S. 501 (1878).
272. *Id.* at 502.
273. *Id.* at 503.
274. *Id.*
275. *Id.* at 509.
276. *Id.* at 504.
277. 123 U.S. 623 (1887).
278. *Id.* at 653–57.
279. *Id.* at 660–61.

provided only they are permitted to do as they please.[280]

It was obvious to Harlan and the Court that the abuse of alcohol was a problem amenable to a state legislative solution:

> [W]e cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that *the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil.... [One's constitutional rights of liberty or of property] are best secured... by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good.*[281]

For Harlan, Kansas had used the police power properly in *Mugler* to promote order and engender a moral community, as well as to protect public health and safety. The police power of the state gave Kansas the authority "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."[282] Quoting from *Stone v. Mississippi*, a case involving the State's power to revoke a lottery franchise, Harlan wrote: "[t]he supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and ... 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.'"[283]

Harlan believed that the Constitution empowered government, both state and federal, to meet immorality affecting the community with sufficient power to remedy the problem. In this, Harlan was true to his Calvinist ancestors' vision of a magistrate's duty. The governor and the judge should be divine instruments wielded for the common good, in support of Providential goals, in the furtherance of divine purposes. If Harlan had been more skeptical about government's capacity to use the collective power of society for the common good or about his own ability to distinguish good from bad, he might have joined his laissez-

280. *Id.* (emphasis added).
281. *Id.* at 662–63 (emphasis added).
282. *Id.* at 663 (citations omitted).
283. *Id.* at 669 (quoting Stone v. Mississippi, 101 U.S. 814 (1879)).

faire colleagues. These colleagues often resisted the expansion of legislative power in cases like *Champion*,[284] and Harlan passionately dissented from these colleagues in cases such as *E.C. Knight*,[285] *Lochner*,[286] and *Standard Oil*.[287]

Harlan further developed these themes in a series of lottery cases that came to the Court. In *Douglas v. Kentucky*,[288] writing for the Court, Harlan clearly articulated his vision of the police power. The case arose when the State of Kentucky revoked a lottery franchise after that franchise had been transferred to a third person as security for monies advanced to the original franchisee, a college.[289] The secured party argued that the revocation of the franchise violated the Contract Clause of the federal Constitution and asked the Supreme Court to hold in favor of its argument. Lotteries generally did not fare well before the Court and Harlan took the opportunity presented by the *Douglas* case to reiterate his own and the majority's disgust with raising money in this way:

> This court had occasion many years ago to say that the common forms of gambling were comparatively innocuous when placed in contrast with the wide spread pestilence of lotteries; that the former were confined to a few persons and places, while the latter infested the whole community, entered every dwelling, reached every class, preyed upon the hard earnings of the poor, and plundered the ignorant and simple.[290]

Lotteries, Harlan observed, again quoting Chief Justice Waite's opinion in *Stone v. Mississippi*, "disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what . . . might be 'awarded' to them from the accumulation of others."[291] This would not only be destructive of the republican ideal of virtue; it would also undermine the Calvinist principle that all men should serve God by following with intensity a

284. Champion v. Ames, 188 U.S. 321 (1903).
285. United States v. E.C. Knight Co., 156 U.S. 1 (1895).
286. Lochner v. New York, 198 U.S. 45 (1905).
287. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
288. 168 U.S. 488 (1897).
289. *Id.* at 499.
290. *Id.* at 496 (citations omitted).
291. *Id.* at 497 (quoting Stone v. Mississippi, 101 U.S. 814 (1879)).

"calling," by working wholeheartedly at whatever vocation they pursued. Preventing the states from exercising their police powers in this salubrious way, Harlan suggested, would mean that "honesty, health, morals, and [the] good order of the State would be cast to the winds, and vice and crime would triumph in their stead."[292]

In rejecting the Contract Clause argument, Harlan asked:

> Is a state forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results? Can the legislature of a State contract away its power to establish such regulations as are reasonably necessary . . . to protect the public morals . . .?[293]

Harlan's answer was a passionate no. "No legislature," he wrote, "can bargain away the public health or the public morals."[294] Later, in *Champion v. Ames*,[295] the most famous lottery case of all, Harlan observed that "the suppression of nuisances injurious to public health or morality is among the most important duties of Government."[296]

Harlan's convictions about the use of governmental power to foster and maintain a "good" community almost certainly explain his famous opinion in *Champion* where Harlan created a national police power by reading the interstate commerce power broadly. In *Champion*, two major threads of Harlan's jurisprudence converged: His desire to empower government to act for the common good reinforced his default nationalism so as to produce a truly radical opinion.

Champion had been indicted under a federal statute making it illegal for anyone to knowingly transport lottery tickets or cause them to be transported across state lines for the purpose of disposing of them.[297] After his arrest, Champion petitioned for a writ of habeas corpus, arguing that the federal anti-lottery statute was unconstitutional because carrying lottery tickets across state lines did not constitute interstate commerce.[298] Congress, Champion argued, had no power to criminalize

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292. *Id.* at 505 (citations omitted).
293. *Id.* at 496.
294. *Id.* at 497.
295. 188 U.S. 321 (1903).
296. *Id.* at 356.
297. *Id.* at 344.
298. *Id.*

his conduct.[299] After quoting extensively from *Phalen v. Virginia*,[300] Harlan concluded that Congress had the power to prohibit the "pollution" of interstate commerce "by the carrying of lottery tickets from one State to another."[301] "What clause [of the constitution] ... countenances the suggestion that one may, of right, carry or cause to be carried from one state to another that which will harm the public morals?"[302]

Harlan was making a very pragmatic argument, one which would lay the foundation for an activist, expansive, national government in the twentieth century. Just as the states must have the power to protect the public morals within their boundaries, so too must Congress have the power when the matter to be regulated reached across state lines. Congress, Harlan argued, must have the power to meet evils that are interstate in their dimensions and so beyond the power of the states to remedy on their own. This was the intellectual justification for Harlan's willingness to permit the exercise of the federal commerce power to create a national police power:

> [Congress] said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end.[303]

When the states could meet evil and vanquish it, Harlan read the state police power broadly. Where the States could not remedy an evil, the national government must be permitted by the Constitution and the Court to act. The historical reading of the commerce power as plenary, from *Gibbons v. Ogden*[304] on, meant the Commerce Clause was the logical place for Congress to go for the necessary power. If government had the responsibility for shaping the moral welfare of society, the level of government which had the practical potential to do so also had to be given the power to accomplish this end. This was a crucial element in

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299. *Id.*
300. 49 U.S. 163 (1850).
301. *Champion*, 188 U.S. at 356.
302. *Id.*
303. *Id.* at 357–358.
304. 22 U.S. (9 Wheat.) 1 (1824).

Harlan's jurisprudence and helps to explain his tendency to read state power broadly while, at the same time, permitting the national government to enter fields historically reserved to the states.

Perhaps Harlan's most famous discussion of this idea occurred in his dissent in *United States v. E.C. Knight Co.*,[305] the infamous sugar monopoly case. In *Knight*, the government used the new Sherman Anti-Trust Act to challenge the combination of companies controlling ninety-eight percent of the sugar refining capacity in the United States.[306] The majority of the Court distinguished manufacturing or production in one state from interstate commerce—"direct" from "indirect" effects on interstate commerce—and ultimately denied the national government power to reach the combination at issue in *Knight*.[307] In his dissent, Harlan argued, pragmatically, that the kind of interstate monopoly power represented by the company in *Knight* was effectively beyond the reach of state power.[308] "The common government of all the people," Harlan wrote, "is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which . . . cannot be adequately controlled by any one State."[309]

In *Knight*, Harlan also displayed a profoundly greater sensitivity to the deleterious effects of private concentrations of economic power than did his brethren on the Court.[310] His *Knight* opinion suggests that this sensitivity at least partly sprang from his concern for corporate amorality arising from the "soul-lessness" of corporations. Recognition of national power over these giants, Harlan argued, "would tend to preserve the autonomy of the States, and protect the people of all the States against dangers so portentous as to excite apprehension for the safety of our liberties."[311] Harlan continued:

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305. 156 U.S. 1 (1895).

306. *Id.* at 44.

307. *Id.* at 45–46.

308. *Id.* at 45 (Harlan, J., dissenting).

309. *Id.*

310. *Id.* at 11. Harlan expressed a related concern about the unbridled power of capital in his *Pollock* dissent. "[T]hat portion of the American people upon whom rests the larger part of the burdens of the government . . . ought not to be subjected to the dominion of aggregated wealth any more than the property of the country should be at the mercy of the lawless." Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 685 (1895) (Harlan, J., dissenting). In some of his opinions, Harlan appears to have considered predatory capitalists little different from the lawless "night riders" he had opposed in Kentucky in the 1870s.

311. *E.C. Knight Co.*, 156 U.S. at 44.

> [I]nterstate traffic, so far as it involves the price to be paid for articles necessary to the comfort and well-being of the people in all the States, may pass under the absolute control of overshadowing combinations having financial resources without limit and an audacity in the accomplishment of their objects that *recognizes none of the restraints of moral obligations controlling the action of individuals; combinations governed entirely by the law of greed and selfishness*—so powerful that no single state is able to overthrow them and give the required protection to the whole country, and so all pervading that they threaten the integrity of our institutions.[312]

Given Harlan's Calvinist view of the purpose of government, power over these "soul-less" giants was absolutely necessary. Harlan understood that economic decision-making was passing from individuals, who could be redeemed with effort, into the hands of corporations, who were artificial beings that were accountable to no moral calculus and were motivated, indeed created, solely for the purpose of pursuing money-making and money-getting. For Harlan, grasping corporations were the external embodiments of the sins that were internal in human beings: greed, arrogance, and the drive for power.

Harlan's antitrust opinions are conventionally explained as manifestations of his nationalism and a consistent desire to read federal power broadly when possible.[313] However, his support of the federal government's power to regulate interstate corporations under the commerce power is matched by a similar willingness to permit states to regulate corporations under the police power in the face of substantive due process and Contract Clause arguments made on behalf of corporations. Both positions are consistent with his Calvinist vision of government's purpose, but they also reflect his conviction that corporations were "soul-less." Corporations lacked moral awareness or conscience. The internal restraints that controlled the actions of most individuals were not only absent, but were perceived as irrelevant to the corporation's purposes and activities—the pursuit of profit. Unlike human beings, in whom motives were always mixed because of the tension between sin and salvation, corporations were creatures governed "entirely by the law of greed and selfishness."[314] Government

312. *Id.* (emphasis added).
313. BETH, *supra* note 10, at 193.
314. *E.C. Knight Co.*, 156 U.S. at 44.

alone could check predatory behavior by corporations. These checks were made even more essential by the vast scale upon which corporations had organized their affairs by the late nineteenth century. When corporations organized themselves on a national scale, the injuries they could inflict on individuals and the community at large became almost impossible to measure.

Harlan was not hostile to the acquisition of wealth, but he believed, with Robert Thompson, that "[t]he whole earth belonged to God. One's talents, treasures, and time were His, to be used wisely to advance His purposes."[315] Work "should fully express one's abilities, and become a chief source of spiritual, mental, moral, and bodily satisfaction rather than a purely mundane activity devoid of spiritual and moral purposes."[316] For devout Calvinists, work was not about the acquisition of wealth as an end in itself; rather, it was a kind of worship. The effort to acquire and the "stewardship" of wealth were means of glorifying God. "Private property belonged to individuals, but Christians must use their property for the common good."[317] Work and the economy could not be viewed by a devout Calvinist like Harlan as a subject of purely secular concern. Calvinist theology demanded that Christian principles infuse economic life. The Bible and the moral principles it taught, applied to economic enterprise and provided an absolute standard against which to measure behavior. In Harlan's eyes, most late nineteenth century business corporations failed to meet that standard.

How could an artificial being—a corporation—which lacked a soul and whose only purpose was the amassing of power and wealth for its managers and shareholders, fit into such a framework? The corporate form of business invited businessmen to free themselves from traditional moral constraints regulating commercial transactions between men. It brought out the worst elements of human nature freed from the constraints of private conscience and public reputation. The ends of commercial corporations were purely secular. They saw people not as Christian souls but as customers, employees, suppliers, or owners. The sole measure of a corporation's success was its profitability. Its function was not to produce profits for the glorification of God but for the glorification of managers and the enrichment of shareholders. The business corporation represented the antithesis of the Calvinist view.

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315. Gary S. Smith, *The Spirit of Capitalism Revisited: Calvinists in the Industrial Revolution*, 59 J. PRESBYTERIAN HIST. 481, 483 (1981).

316. *Id.*

317. *Id.*

When John Harlan wrote about "soulless corporations" in Commerce Clause opinions like *Knight* and police power cases like *Lochner v. New York*,[318] it was from this perspective.

Harlan reiterated this theme until the very end of his tenure on the Supreme Court. Indeed, his last dissent, in *Standard Oil Co. v. United States*,[319] expressed his fear of what these artificial giants could do not only to the soul of the country, but also to the liberty of his fellow citizens. The *Standard Oil* case arose when Theodore Roosevelt's Justice Department initiated an antitrust action under the Sherman Act against John D. Rockefeller's oil monopoly.[320] Harlan's views on corporations contrasted strongly with those of the majority of his brethren on the Court. Harlan argued not only that corporate consolidation threatened *economic* liberty; in his view, these giants also threatened republican liberty itself. He compared the power wielded by giant corporations to that of the slaveholder before the Civil War.[321] He contended forcefully that there was a "real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations."[322] In *Standard Oil*, Harlan's Calvinism and his republicanism converge and reinforce one another. This fact probably accounts for the hot energy of his dissent. In many ways, it is this opinion, delivered shortly before his death, that best reflects the power and depth of his convictions. When these deeply held convictions were both engaged in one case—as they were in *Standard Oil*—their contact closed an intellectual circuit and generated remarkable power. This fact about Harlan may have been part of what his now dead friend, Justice Brewer, had in mind when he had imagined Harlan going to bed in contact with both the Bible and the Constitution.[323] Harlan's greatest moments as a judge came when his religious convictions and his faith in American republicanism were both engaged by some legal question.

It is also noteworthy that the Court's conclusion in *Standard Oil*, that the Sherman Act was aimed only at "unreasonable" monopolies, challenged Harlan's statutory literalism.[324] In order to limit the statute

318. 198 U.S. 45 (1905).
319. 221 U.S. 1 (1911) (Harlan, J., concurring and dissenting).
320. *Id.* at 30.
321. *Id.* at 83–84.
322. *Id.* at 83.
323. *See supra* note 2 and accompanying text.
324. *Standard Oil*, 221 U.S. at 103.

in this way, Harlan argued, the Court had rewritten it. This he could not abide. "When Congress prohibited *every* contract, combination or monopoly, in restraint of commerce," Harlan declaimed, it meant what it said![325] To hold otherwise, Harlan urged, was "judicial legislation."[326]

Sometimes Harlan's moral engagement was straightforward in his opinions. Such was the case in *United States v. Bitty*.[327] Harlan, speaking for the Court, upheld the criminal indictment of Bitty for importing a woman into the United States for an immoral purpose.[328] The circuit court had dismissed the indictment on the grounds that the statute under which the charge had been brought covered prostitution but not concubinage.[329] Bitty, the indictment alleged, had imported an alien woman so "'that she should live with him as his concubine,' that is, [to have] illicit intercourse, not under the sanction of a valid or legal marriage."[330] Harlan asked: "Was that an immoral purpose within the meaning of the statute?"[331] For Harlan, the answer was decidedly yes. Prostitutes, Harlan declared,

> [were] women who for hire or without hire offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." Congress no doubt proceeded on the ground that contact with society on the part of alien women leading such lives would be hurtful to the cause of sound private and public morality and to the general well-being of the people.[332]

Pointing to the additional statutory language of "or for any other immoral purpose," and applying the rule *ejusdem generis*, Harlan concluded that Congress had intended the statute to cover concubinage as well:

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325. *Id.* at 102.
326. *Id.* See *supra* Part IV.B for discussion of Harlan's literalism in reading a text.
327. 208 U.S. 393 (1908).
328. *Id.* at 403.
329. *Id.* at 399.
330. *Id.* at 400–01 (quoting indictment).
331. *Id.* at 401 (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1908)).
332. *Id.* (citing and quoting *Murphy*, 114 U.S. at 45 (1908)).

> The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse. We must assume that in using the words "or for any other immoral purposes," Congress had reference to the views commonly entertained among the people of the United States as to what is moral or immoral in the relations between man and woman in the matter of such intercourse.[333]

The statute, Harlan reminded his readers, "was intended to keep out of this country immigrants whose permanent residence here would not be desirable or for the common good."[334] The common good here, as was often the case with the late nineteenth century courts, clearly was defined in terms of the Justices' own moral predilections.

Harlan's opinion for the Court in *Hennington v. Georgia*[335] offers perhaps the clearest case in which Harlan's religious opinions—specifically, his strong support for the preservation of a "Puritan Sabbath"—shaped his judicial position. Despite the obvious Commerce Clause implications of the decision, Harlan held that the State of Georgia could criminally prosecute the officers of any railroad that ran freight through the state on "the Sabbath day (known as Sunday)."[336] The defendant, an officer of the Alabama Great Southern Railroad, argued that the statute interfered with interstate commerce and for that reason was unconstitutional and void.[337] The train in question had been loaded in Tennessee with freight "destined for points outside and beyond the limits of Georgia."[338] It had run from Tennessee, through Georgia and Alabama, to Meridian, Mississippi.[339] The Georgia Supreme Court had upheld the statute as a valid police power regulation, holding that it was not a regulation of interstate commerce.[340]

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333. *Id.* at 402.
334. *Id.* at 403.
335. 163 U.S. 299 (1896).
336. *Id.* at 300 (quoting Code of Georgia, 1882, Sec. 4578).
337. *Id.* at 307–08.
338. *Id.* at 302.
339. *Id.*
340. *See id.*

Harlan's argument in support of the statute noted that Georgia and "many of the [other] original States" had statutes, dating from colonial times, prohibiting "all persons, under penalties, from using the Sabbath as a day for labor and for pursuing their ordinary callings."[341] The statute was not a regulation of commerce, he suggested, because it was not intended to regulate commerce, but to "prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State. It is none the less [sic] a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty."[342] Harlan suggested that the purpose of the statute was to assure a day of rest from labor:

> It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor.... If the [law making] power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government.[343]

On this basis, Harlan's opinion cites a number of cases that supported his conclusion. In a characteristic refrain, he argued that judges should exercise judicial restraint. They should not overturn legislative decisions lightly—certainly not because judges doubt the wisdom or expediency of the enactment, which, in this case, he certainly did not! He then went on to quote Blackstone as asserting that such a law was "of admirable service to a State considered merely as a civil institution."[344] Though religion commanded Sabbath rest, the legislature

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341. *Id.* at 303.

342. *Id.* at 304. For an overview of the nineteenth century Sabbath laws, see MORTON BORDEN, JEWS, TURKS, AND INFIDELS 103–129 (1984).

343. *Hennington*, 163 U.S. at 304.

344. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *63). The language Harlan lifted from Blackstone is somewhat misleading and out of context. The primary point the English commentator made in his note on "Sabbath-breaking" was that *though primarily supportable for religious reasons*, the Sabbath also served a beneficial civic purpose. Blackstone wrote:

> Profanation of the Lord's day, vulgarly (but improperly) called *sabbath-breaking*, is a ninth offense against God and religion, punished by the municipal law of England. For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day, in a country professing [C]hristianity, and the corruption of morals which usually follow [sic] its profanation, the keeping one day in seven holy, as a time of relaxation and refreshment as well as for public worship,

mandate enforced a "civil duty," not a religious one.

However, Harlan left no doubt as to how he felt about the wisdom of the law on religious grounds when he quoted Justice Field's earlier opinion in *Ex Parte Newman*[345] upholding California's Blue Laws protecting the Sabbath: "Its requirement is a cessation from labor. In its enactment, the legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well being of society."[346] Many religious obligations had their secular counterparts. The whole Ten Commandments, at least "those [which are not] . . . exclusively religious in their nature . . . . in so far as they involve conduct, as distinguished from mere operations of

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is of admirable service to a state, considered merely as a civil institution. It humanises by the help of conversation and society the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit: it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness: it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their maker.

4 WILLIAM BLACKSTONE, COMMENTARIES *63. Harlan could also have cited Thomas McIntire Cooley, but Cooley's discussion of Sabbath Blue laws would have undermined the Justice's argument. Cooley suggested that these laws could be justified on two grounds: either because an attack upon the Sabbath was a malicious attack upon religion and thereby an attempt to "sap[] the foundations of society and of public order," or because it is a social good for workmen to have a day of rest every week, for example, as a "sanitary regulation." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 580, 584 (6th ed. 1890) Cooley argued that a Jew, whose "conscience requires of him the observance of the seventh [day] also, may plausibly urge that the law discriminates against his religion, and by forcing him to keep a second Sabbath in each week, unjustly, though by indirection, punishes him for his belief." *Id.* at 584. Cooley continued:

> If sustained on the first ground, the view must be that such laws only require the proper deference and regard which those not accepting the common belief may justly be required to pay to the public conscience . . . ; but it appears to us that if the benefit to the individual is alone to be considered, the argument against the law which he may make who has already observed the seventh day of the week, is unanswerable. But on the other ground it is clear that these laws are supportable on authority, notwithstanding the inconvenience which they occasion[,] to those whose religious sentiments do not recognize the sacred character of the first day of the week.

Id. at 584–85 (citation omitted). It should be noted, that elsewhere in his treatise, Cooley states: "There can no longer be any question, if any there ever was, that [Sunday laws] may be supported as regulations of police." *Id.* at 725 (citation omitted).

345. 9 Cal. 502 (1858).

346. *Hennington*, 163 U.S. at 305 (quoting Justice Field in *Ex Parte Newman*, 9 Cal. 502, 519–20 (1858)).

mind or states of affections," can be legislated under the police power.[347]

Yet it is Harlan's uncharacteristic insensitivity to Georgia's genuine interference with interstate commerce that is the most revealing. When he finally turned to the Commerce Clause, Harlan concluded that the statute was a valid exercise of the police power in the absence of congressional preemption. Harlan analogized the statute in *Hennington* to state inspection and quarantine laws (interesting parallels defending the public health), and to the Delaware dam at issue before the Marshall Court in *Willson v. Blackbird Creek Marsh Co.*[348] In each of these cases, an exercise of the state police power was sustained even though it burdened interstate commerce. The Georgia statute was enacted to protect "the public health, the public morals and the public safety, and [is] not, within the meaning of the Constitution, . . .[a] regulation[] of interstate commerce."[349]

Although Harlan made skillful use of the precedents he discussed, they could be distinguished on their facts. What the Court did in all of these cases was balance the importance of the state interest affected by the statute, against relatively unimportant interferences with interstate commerce. In each case, when the Court found a powerful state interest it decided in favor of state power.[350] Given the great extent of the interference in *Hennington* with interstate commerce, the cases Harlan cited were only on point if the purposes for which the state's power was exercised were extremely important.

Neither did the test the Taney Court laid down in *Cooley v. Board of Wardens*,[351] which Harlan also discussed, fit the case well. In *Cooley*, the Court held that states could prescribe regulations for maritime pilots. *Cooley* involved the boundary between the police power and the interstate commerce power and divided matters needing local treatment (diversity) from those requiring a national rule (uniformity).[352] When the matter at hand required uniformity, the state statute gave way, and where Congress was silent and the matter could best be handled by permitting diversity, the state police power prevailed.[353]

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347. *Id.* at 307. For a discussion of Harlan's attitudes toward the Establishment Clause, see *infra* text at Part IV.F.

348. *Id.* at 310 (citing Willson v. Blackbird Creek Marsh Co., 27 U.S.(2 Pet.) 245, 251–52 (1829)).

349. *Id.* at 317.

350. *Id.* at 310–18.

351. 53 U.S. (12 How.) 299 (1851).

352. *Id.* at 314–15, 319.

353. *Id.*

Reading Harlan's analysis in *Hennington* in light of *Cooley* and the other cases he cited, it is clear that Harlan put a very great value on Sabbath rest. Had the case involved a state statute stopping interstate trains for an entire day for some reason other than to protect the Sabbath, it is hard to believe that Harlan would have reached the same result. The interstate shipment of freight was at the core of interstate commerce, and in many other cases Harlan was unwilling to permit the states to interfere with it. Indeed, if Harlan had not assumed that all states would make Sunday, the Christian Sabbath, the day of rest, even he would have recognized the extent of interference that *Hennigton* permitted.

What would Harlan, the nationalist, have written if he had contemplated other states choosing Saturday or Friday, or Monday or Tuesday, as their mandated day of rest? It was the association of Sunday with the Christian Sabbath which blinded Harlan to the theoretical difficulties posed by his opinion. This point is driven home by Chief Justice Fuller's dissent, in which he argued that national uniformity was needed on this question.[354] The reason Fuller's argument failed to deflect Harlan was that Harlan assumed that in a "Christian country" like the United States, the legislatures of all the states would choose the Christian Sabbath as the day to be subjected to the legislature's "secular" commandment: "Thou shalt rest."

D. Slavery and the Black Race

Harlan's views on race are well-known and Professor Yarbrough presents a well-balanced assessment of them in his biography of Harlan.[355] Some scholars have suggested that Harlan underwent a transformation in his race views.[356] Others have argued that his sometimes racist rhetoric when on the stump in Kentucky was a pose made necessary by the racist views of the voters he was courting.[357] My concern here is not so much to describe Harlan's race views, but to explain the way in which religious elements contributed to their construction and content.

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354. *Hennington*, 163 U.S. at 318 (Fuller, J., dissenting).

355. YARBROUGH, *supra* note 10, at 138–45. There is little doubt that Justice Harlan's views on race were ahead of his time. Although not completely free of the prejudice in which he was immersed both in Kentucky and in Washington, his passion for justice, his religion, and his personal experiences with African-Americans led him to reject most of the worst features of the pervasive racism of his time.

356. Westin, *supra* note 21.

357. Owen, *supra* note 22.

Harlan grew up in a household in which there were slaves.[358] His father opposed the institution on moral grounds but, as was the case with many other Southerners, too much of his wealth was tied up in his slaves to permit their uncompensated emancipation.[359] The source of Harlan's father's ambivalence about slaveholding is not explained in his few surviving letters; however, it seems likely that it was rooted, at least partly, in his Calvinism. For a man who took Christianity seriously, and who believed in divine justice and that human beings should strive to do justice to one another, the institution of slavery must have been very troubling. The commands of religion probably contributed in a significant way to the Harlans' paternalistic approach to their "servants" and to the relatively good treatment the family afforded them.[360]

The Presbyterian Church, nationally and in Kentucky, had always been openly troubled by the slavery question and willing to engage in formal discussion of the subject.[361] As the leading historian of Kentucky Presbyterianism has observed, "Presbyterians generally recognized the evil of the institution; [but] . . . were reluctant to deprive their families, or themselves, by emancipating those [slaves] they owned."[362] This was precisely the dilemma that John Harlan's father faced.

This ambivalence was clearly present in the antebellum pronouncements of the Kentucky Presbyterian Synod on the subject of slavery.[363] Many prominent Presbyterians attacked slavery on religious grounds.[364] In 1834, the year after John's birth, the Synod resolved that slavery was "repugnant to the principles of our holy religion, as recorded in the sacred [S]criptures, and that the continuance of the system, any longer than is necessary to prepare for its safe and beneficial termination is sinful."[365]

The prominent Kentucky Presbyterian minister, educator, politician, and Harlan family friend, Robert J. Breckinridge, was a determined critic of the institution, though, like most anti-slavery leaders in

358. *See* YARBROUGH, *supra* note 10, at 142–43.

359. *See id.*

360. PRZYBYSZEWSKI, *supra* note 3, at 14–27.

361. *See generally* ASA EARL MARTIN, THE ANTI-SLAVERY MOVEMENT IN KENTUCKY PRIOR TO 1850 (Negro U. Press 1970) (1918); ANDREW E. MURRAY, PRESBYTERIANS AND THE NEGRO—A HISTORY (1966). *See also* WEEKS, *supra* note 65, at 61–66; BROWN, *supra* note 32, at 13–34.

362. WEEKS, *supra* note 65, at 64.

363. BROWN, *supra* note 32, at 13–16.

364. *See, e.g.*, WEEKS, *supra* note 65, at 61–67.

365. *Id.* at 64 (quoting MINUTES OF THE SYNOD OF KENTUCKY 5, 50, 51 (1834)). *See also* MARTIN, *supra* note 361.

Kentucky before the Civil War, he favored compensated, gradual emancipation and colonization of the freed slaves. Charles Hodge, the principle spokesman for the Princeton Theology of the "Old School" Church, entertained similar views.[366]

Harlan's educational experience probably amplified and reinforced his father's opinion on these matters. When John Harlan came to Danville as a student at Centre College in 1848, he returned to the geographic heart of Presbyterianism and of anti-slavery thought in Kentucky. Slavery and the significance of race were constantly discussed in and around Danville in the Antebellum Period. The town was a prosperous intellectual center with its college and Presbyterian seminary, and it attracted a number of vocal anti-slavery men. Among these were James G. Birney,[367] Robert J. Breckinridge, and William C. Young, the president of the college who Harlan later eulogized as a mentor.[368] Young had chaired a Synod committee which in 1835 supported gradual emancipation and urged slaveholding Presbyterians to treat their slaves with kindness, educate them for their "moral and religious improvement" and "stimulate . . . [the slaves] to acquire those habits of foresight, economy, industry, activity, skill and integrity" to be made fit for eventual freedom.[369]

During Harlan's years at Centre he would have heard and participated in many discussions of the slavery problem. In 1848-1849, there was great agitation concerning the issue of slavery in Kentucky. The voters of the state had called a state constitutional convention, which was to sit in 1849. Ultimately, the anti-slavery forces failed to elect a single delegate to the convention, but the debates must have stimulated Harlan's thinking about the question.

Harlan's exposure to Young's educational system at Centre and to Young's sermons reinforced the attitudes Harlan learned at home.[370] Young was a gradual emancipationist who argued that the new state constitution of 1850 should include language that would cause slavery to gradually fade away in Kentucky.[371] Harlan must also have followed with interest, the national constitutional crisis over slavery which racked

366. Barker, *supra* note 202.

367. For a brief biography of Birney, see 2 DICTIONARY OF AMERICAN BIOGRAPHY 291–94 (Allan Johnson ed., 1927).

368. *See supra* notes 62–64 and accompanying text.

369. MARTIN, *supra* note 361, at 85–86. Martin notes that the report was published but never acted upon by the Kentucky Synod. *Id.* at 86.

370. *See* Gordon, *supra* note 23.

371. *See* WEEKS, *supra* note 65, at 66–67.

the country during 1849–1850. Therefore, at the very time when he was forming his mature ideas about slavery and race, Harlan learned two important lessons: First, a Kentucky politician who articulated anti-slavery or progressive race views must be prepared to adopt another career, and second, agitation of the slavery issue endangered the Union. As a result, even if Harlan's personal views were more progressive than his fellow Kentuckians,' Harlan's later political speeches in the post-Civil War years—the years when he aspired to political leadership in his home state—were sometimes tinged with racism.[372]

Even before his appointment to the Supreme Court liberated him to express his own progressive opinions on race, Harlan sometimes said things in his political speeches which suggested that he entertained enlightened views and hinted strongly at a connection between these ideas and his own religious convictions. In at least one speech he made during his hopeless Republican gubernatorial campaign of 1871, Harlan attacked his opponent for saying things on the stump that were calculated to inflame racial hatred. Harlan's characterization of the former slaves rested on a clearly religious base:

> Here they are, mortal beings, *with immortal souls like ours, fashioned in the image of their Maker....* They have sympathies, love their wives and children and the spot of their nativity as we do;.... [d]oes it accord with your feelings of justice that politicians should try to keep up in this Commonwealth... a feeling of bitterness and hate for all time to come?[373]

At other times, Harlan implied that, at least in matters of prayer and worship, Blacks should be fully the equals of Whites. During his second gubernatorial race, in 1875, Harlan defended the Civil Rights Act of 1866 and spoke out against violence directed at Blacks. In offering support for the extension to black citizens of the right to testify in court,

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372. *See* Hartz, *supra* note 211.

373. YARBROUGH, *supra* note 10, at 77 (quoting Harlan's speech at the Republican Convention (May 17, 1871) (emphasis added)). Even Presbyterian defenders of slavery acknowledged the humanity of the slave. As one such defender put it: "We are not ashamed to call him our *brother*.... The right which the master has is a right not to the *man*, but to his *labour*." MURRAY, *supra* note 361, at 73 (quoting J. H. Thornwell). This set devout Presbyterians apart from many other southerners who refused to acknowledge the humanity of Blacks. The assumptions articulated here must surely have made slavery morally troublesome for many southern Presbyterians even though it was legal. But once slavery—the right to a man's labor—was abolished, what could justify discrimination against Blacks by devout Presbyterian Whites?

he offered a telling hypothetical. Under pre-existing law that disabled Blacks in Kentucky from testifying against Whites, Harlan supposed:

> [A] ruffian could have entered a church in which colored people were worshipping [sic], marched up to the pulpit and shot down the minister in cold blood in the presence of his people, and yet there was no punishment for him under Democratic rule in Kentucky, unless some white man happened to see him commit the crime . . . .[374]

Harlan's primary purpose, clearly, was to speak out against the violence directed at Blacks and their White allies which plagued Kentucky and the rest of the South during the post-Civil War years.[375] However, in setting the described outrage in a peaceful Black church, Harlan must have hoped to elicit from his listeners the same response which the scene of Black Christian worshipers inspired in him. Harlan recognized in African-American Christians his brothers and sisters in faith. He hoped that his audience would see the connection as well. If Harlan could encourage Kentuckians to see African-Americans as Christians, he hoped it would be impossible for his White neighbors to see them as "niggers." Of course, implicit in Harlan's thinking was the assumption that African-Americans—as fully human as their White neighbors—felt the same call to Christianity, were as cherished by God as other men, and could receive God's grace, as fully as any White person. The reality of their connection to the "heavenly Father" he worshiped was a given for Harlan. Despite their social, economic, and

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374. YARBROUGH, *supra* note 10, at 83.

375. Harlan was, of course, also trying to take the issue of "race" away from his Democratic opponent. White attitudes toward Blacks and emancipation formed a substantial barrier to acceptance of the Republican party in Kentucky. For a description of this violence from a pro-Southern perspective, see COULTER, *supra* note 237, at 340–65. *See also* YARBROUGH, *supra* note 10, at 67. For an excellent modern treatment of issues like Southern violence during Reconstruction, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988). With regard to the prevalence of violence, see *id.* at 425–45. Of course, violence against African-Americans did not stop with the end of Reconstruction in the South. For a revolting example of the lynching murder of a black prisoner in 1906 in Chattanooga, Tennessee, see MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM (1999). Harlan was involved directly in this case, having issued a stay of execution on the ground that the defendant had not received a fair trial. In response to the Supreme Court's "interference" with local "justice," a mob broke into the jail (with the connivance of the Sheriff), tortured, and then hanged the defendant. United States v. Shipp, 214 U.S. 386, 403–05 (1909).

political differences, and despite the distance between the races in America, for Harlan, Blacks and Whites were children of the same Father, and so, inescapably, brothers and sisters. Although Harlan fell short of embracing the modern aspiration of complete social equality,[376] even that might have been derived eventually from this first, compelling premise. It was certainly an influence in his dissents in the *Civil Rights Cases*,[377] *Plessy v. Ferguson*,[378] and other race cases as well.

Long after he first argued for a "color-blind" Constitution, Harlan had an opportunity to make the same point within the counsels of the Presbyterian Church. In 1905, when the Cumberland Presbyterian Church sought reunion with the Northern Church, after almost a century of separation, reunion talks generated a serious debate over the issue of race.[379] The Northern Church was integrated at the level of all church bodies above individual congregations.[380] The Cumberland Church, whose members were located overwhelmingly in the South, sought to merge on a segregated basis. The Synods and Presbyteries of the Northern Church would have had to been split so as to recognize the color line. The overtures of reunion were referred to the Presbyteries for authorization of the merger.[381] Harlan was a ruling elder in his

376. *See* Civil Rights Cases, 109 U.S. 3, 59 (1883) (Harlan, J., dissenting) ("I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals."). However, Harlan's dissent in *Berea College v. Kentucky*, 211 U.S. 45 (1908), suggests that, at least in the matter of religious education and practice, Harlan was prepared to go a long way toward true equality. In dicta in his dissent, he argued that the state had no constitutional authority to command the separation of the races in Sabbath schools, in a house of worship, or at the communion table. *Id.* at 68. Indeed, Harlan seems to have argued that such voluntary association is a fundamental right. *Id.* at 60–70.

377. 109 U.S. 3 (1883).

378. 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting). Harlan observed:

> Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper.
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> ....
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> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its heritage and holds fast to the principles of constitutional liberty.

Id. at 558, 559.

379. Archibald H. Grimké, "The Presbyterian Fall," NEW YORK AGE, Apr. 20, 1905, *in* Henry J. Ferry, *Racism and Reunion: A Black Protest by Francis James Grimke*, 50 J. PRESBYTERIAN HIST. 77 (1972).

380. *Id.*

381. *Id.*

Washington, D.C., church and a member of the Washington City Presbytery when, in April, the issue came up for discussion.

When leading Black ministers objected to imposing segregation on the Northern Church as a condition of reunion, Harlan was one of the few White members of the Presbytery who spoke unequivocally against reunion on these terms.[382] With his usual passion, Harlan argued that Christianity "has *nothing* to do with race, but only with men. Let us stand in the way of the fathers, and say to the world that as far as our church is concerned, we *are* race blind and color blind."[383]

It is worth noting one other way in which Harlan's religious views may have shaped his ideas about race as a grown man. Harlan did not do things half-way. If he believed something, he believed it completely. He was never comfortable with ambiguity. After the Civil War, Harlan must surely have understood that it was slavery and race which had precipitated that War. It was race that had threatened to destroy the Union. It was race that did, indirectly, shatter his church. Since he believed the Northern Church was in the right on the issues that had led to the secession of the Southern churches, he would have believed that the position of the Southerners on race was wrong. Harlan was always pragmatic and he often evaluated principles by examining their practical effects. If racist principles led to such results, then the principles themselves must be wrong.

There can be little doubt that Harlan's acceptance of the Fatherhood of God impelled him to accept, at least in principle, the common brotherhood of man. Harlan made this point explicitly in public, at least once, although not in the context of a discussion of race. In a speech he delivered at a dinner given in his honor by his college fraternity, he said: "There is one God and [F]ather of us all.... We are, indeed, all brothers [as] man and man should be.... Whatever, therefore, concerns our fellowman[,] ought to be a matter of concern to us all."[384]

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382. *Id.*

383. *Id.* at 88 (emphasis added). Grimké later described Harlan as "one of the truest, squarest, noblest types of a Christian that the Presbyterian Church has produced in this country." PRZYBYSZEWSKI, *supra* note 3, at 111. It is ironic that John Harlan's assertion of God's color-blindness was rejected by a majority of his Presbyterian brethren just as it was by his brethren on the Court. Approximately one-eighth of the White Presbyteries agreed with Harlan. "By the first decade of the twentieth century, the majority of northern Presbyterians had come to accept the racial theories implied by the phrase, 'separate, but equal.'" MURRAY, *supra* note 361, at 202. This makes it clear that although his religious convictions influenced Harlan's attitude about race, they do not fully explain it.

384. *A College Fraternity Dinner in Honor of Justice Harlan*, WASHINGTON, D.C. EVENING STAR (n.d.), *in* HARLAN PAPERS, LC, *supra* note 2.

Having accepted this premise, the logic of his egalitarianism would then carry him far in the direction on race that he repeatedly articulated from the Supreme Court bench.

E. Harlan's Nativism, the Chinese Cases, and an American Empire

As noted earlier, Harlan's early political career was shadowed by his nativism.[385] He had been a prominent member of the American Party in Kentucky in the late 1850s and, although near the end of his life he wrote that he regretted his time as a "Know-Nothing," he never truly shed his nativist skin.[386] Although Harlan's anti-Catholic feelings softened,[387] his anti-immigrant feelings continued to surface from time to time. In 1898, while lecturing to his constitutional law class at George Washington University, Harlan's nativism was sometimes apparent. When speaking of national power over naturalization, he suggested that the way in which Congress had exercised that power was "the greatest farce in all the century."[388] He was particularly critical of the diversity found in America's large cities:

> In these large cities that are the source of most of the dangers that threaten our American civilization men are invested with the privilege of citizenship of the United States under these naturalization laws who have not the slightest idea about our institutions, who scarcely know our language, whose habits have been formed up and past manhood in other lands, under other systems of government, and who never do understand our civilization as we understand it who were born here, and our own doors are open practically to all the world, and the jails and penitentiaries of Europe are being emptied into this country, and large portions of them lodge in these great cities that are now becoming so large and so corrupt that they are substantially controlling the public policy of many of the states despite what the people out in the country and away from such scenes may want. If there is any one duty resting upon this country at this time that is supreme in my opinion it is the necessity to

385. *See supra* Part IV.A.

386. Harlan, *supra* note 96.

387. Westin, *supra* note 21.

388. John Marshall Harlan Law Lectures (Jan. 8, 1898), *in* HARLAN PAPERS, LC, *supra* note 2. *See also* Letter from John Marshall Harlan to Benjamin Harrison (Aug. 27, 1888), *in* BENJAMIN HARRISON PAPERS, LIBRARY OF CONGRESS (Harlan wrote: "[I]f Cleveland is reelected, the nation is in a fair way to become Europeanized, both in its population and in its policy....").

> reorganize that whole system and to see to it that American citizenship does not become as cheap in the future as it has been in the past.[389]

Elsewhere, Harlan suggested hopefully that immigration could be limited "to those people only who can understand our language, who can read our [C]onstitution in our own language, and we can exclude . . . paupers and criminals."[390] He went on to observe that "the nations of the earth are unloading upon this country all their criminals, or a good many of them . . . . We are having infused into our civilization here vast bodies of men that are disqualified to understand the duties of citizens and they are collecting in the great cities of the country."[391]

Harlan described his vision of America's role in the world in an address he delivered in 1900 at the dedication of a new law building at the University of Pennsylvania. He argued: "[A] destiny awaits America such as has never been vouchsafed to any people, and that in the working out of that destiny, under the leadings of Providence, humanity everywhere . . . will be lifted up."[392] For Harlan, America's mission was still to be a Christian "city on a hill" as it had been for America's first Calvinists, the early Puritans.

These beliefs, at least in part, explain Harlan's early history of anti-Catholicism and his concern that American culture avoid being overwhelmed or diluted by immigrants from countries carrying an alien culture. They also help to explain Harlan's intense opposition to the expansion of American sovereignty to Puerto Rico and the Philippines during the Imperialism debate after the Spanish-American War. Harlan feared both alternatives available to the United States in dealing with an overseas empire. He did not want to incorporate into the United States alien strangers from distant places "who never do understand our civilization as we understand it."[393] Neither did he want to see the American republic govern subject peoples in colonies, without their

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389. John Marshall Harlan Law Lectures (Jan. 8, 1898), *in* HARLAN PAPERS, LC, *supra* note 2.

390. John Marshall Harlan Law Lectures (Jan. 29, 1898), *in* HARLAN PAPERS, LC, *supra* note 2.

391. *Id.* Harlan would have agreed with much of what Josiah Strong wrote in his discussion of the destiny of, and challenges to, American civilization in his widely-read discussion of the topic in *Our Country*. JOSIAH STRONG, OUR COUNTRY: ITS POSSIBLE FUTURE AND ITS PRESENT CRISIS (Jurgen Herbst ed., 1963).

392. Harlan, *supra* note 265, at 503. *See also* STRONG, *supra* note 391.

393. John Marshall Harlan Law Lectures (Jan. 8, 1898), *in* HARLAN PAPERS, LC, *supra* note 2.

consent, denying them the rights of political participation and civil liberties, which distinguished American republicanism from other forms of government. Either alternative threatened to corrupt the American polity and to destroy the American example.[394]

Harlan made these points explicitly in an address to the General Assembly of the Presbyterian Church in 1905:

> There are more responsibilities upon this nation today than ever before. We have become, as Mr. Bryan will regret and I will regret with him, a world power. We have gone so far that a government founded on the right of human beings to be governed by their own consent, is governing millions of human beings, substantially by the sword, without their consent. We have tacked upon our republican system a colonial system, covering races who are practically our subjects—can never be our fellow citizens.... If we are so rich and strong that no man dares to lay hands on us, then let us... use our riches and our strength to spread the church of Christ all over the world.[395]

As a member of the Court, Harlan was forced to choose between his republicanism and his xenophobia. To his credit, he chose republicanism. In the *Insular Cases*[396] and in private correspondence, he argued that, given the annexation of the Philippines and Puerto Rico, the greater danger was in the corruption of American republicanism rather than in the ethnic dilution of American culture. It was better, he believed, to risk losing his cultural ascendancy than to imperil constitutionalism and the ideal of legal equality.

In *Downes v. Bidwell*,[397] the Court was asked to determine whether

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394. My reading differs somewhat from that of Professor Przybyszewski. In her intellectual biography of Harlan, she stresses his "imperialism" at the time of the Spanish-American War rather than his later disillusionment. *See* PRZYBYSEWSKI, *supra* note 3, at 118–35; Letter from John Marshall Harlan to Benjamin Harrison (Mar. 3, 1900), *in* BENJAMIN HARRISON PAPERS, LIBRARY OF CONGRESS. Harlan encouraged Harrison to oppose the Puerto Rico Tariff Bill: "In my judgment, that bill is one of the worst ever conceived by any statesman or politician." *Id.* Harrison replied: "When the Supreme Court shall establish Congressional absolutism in the territories I will abide—but, in the meantime I will not be guilty of the crime of assuming it." Letter from Benjamin Harrison to John Marshall Harlan (Mar. 12, 1900), *in* BENJAMIN HARRISON PAPERS, LIBRARY OF CONGRESS. Harrison was a vocal anti-imperialist.

395. John Marshall Harlan, Address to the General Assembly of the Presbyterian Church (May 25, 1905) (transcript available in THE INTERIOR).

396. Downes v. Bidwell, 182 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904).

397. 182 U.S. 244.

oranges imported into New York from Puerto Rico were subject to import duties imposed on produce entering the United States from foreign countries. Did all provisions of the Constitution apply automatically to territories controlled by the United States but not "incorporated" into it? The Court held that Congress could organize interim governments for the territories seized from Spain in the Spanish-American War and that not all provisions of the Constitution automatically applied to these territories.[398] Harlan objected passionately to the majority's notion "that Congress possesses powers *outside of the Constitution.*"[399] He rejected Justice White's view that "Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments."[400] "Surely," Harlan wrote, "such a result was never contemplated by the fathers of the Constitution."[401]

> The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.[402]

Harlan continued:

> Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their

398. *Id.* at 367–74.

399. *Id.* at 379 (Harlan, J., dissenting) (emphasis added).

400. *Id.* at 380.

401. *Id.*

402. *Id.* Harlan's impassioned defenses of the letter and spirit of the Constitution in *Downes v. Bidwell*, *Hawaii v. Mankichi* (190 U.S. 197 (1903)), and *Dorr v. United States* (195 U.S. 138 (1904)) offer good examples of his constitutional "fundamentalism." In *Bidwell*, in particular, he argued with absolute conviction that White's opinion for the Court betrayed both the letter and the spirit of the Constitution. 182 U.S. at 380. He was unwilling to depart from the words of the document penned by "the fathers" when he believed those words to be clear in their import. *Id.* at 380, 386. The Constitution resolved secular questions for Harlan in the same way that the Bible resolved spiritual ones. Each, in its sphere, was absolutely authoritative and must be read with an honest commitment to uncovering "'the fathers'" meaning rather than one's own. On this last point, see especially *Hawaii v. Mankichi*, 190 U.S. at 241, 247–48 (Harlan, J., dissenting).

> territory by treaty. A mistake in the acquisition of territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions.[403]

Harlan made this point again in his dissents in *Mankichi*[404] and *Dorr*.[405] In *Mankichi*, a criminal defendant had been tried for murder without a grand jury indictment, and convicted of manslaughter by a petit jury, which divided nine to three.[406] The Court upheld his conviction.[407] Harlan, in dissent, argued that the procedural protections of the Bill of Rights were fundamental and must apply to the inhabitants of all territories subject to American sovereignty.[408] He objected that Mankichi could not, constitutionally, be tried without indictment. Neither could he be convicted, under the Constitution, except by the verdict of a unanimous twelve-person jury. Harlan wrote:

> neither the life, nor the liberty, nor the property of *any* person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal, acting under its authority, by any form of procedure inconsistent with the Constitution of the United States.[409]

In *Dorr*, the question was whether denial of the right to a jury trial in a civil libel case conducted in the Philippines violated the Constitution. There, Harlan expressly chose the Constitution over race:

> In my opinion, guaranties for the protection of life, liberty and property, as embodied in the Constitution, are for the benefit of all, *of whatever race or nativity*, in the States composing the Union, or in any territory, however acquired, over the inhabitants of which the Government of the United States may exercise the powers conferred upon it by the Constitution.[410]

Harlan's hostility to foreigners and his commitment to republicanism

403. *Bidwell*, 182 U.S. at 384 (Harlan, J., dissenting).
404. 190 U.S. 197.
405. 195 U.S. 138.
406. *Mankichi*, 190 U.S. at 218.
407. *Id.*
408. *Id.* at 236–45.
409. *Id.* at 236 (emphasis added).
410. *Dorr*, 195 U.S. at 154 (emphasis added).

and the Constitution created strains when the rights of Chinese immigrants were involved. It is not surprising that he did not stand forth as a champion of civil rights for Chinese immigrants.[411] However, given his views about the fundamental nature of the Constitution and the requirement that civil rights be extended to all people governed by the United States, the Chinese Cases deserve separate consideration.

In a letter Harlan wrote to his son, James, in 1883, when the younger man was preparing to debate the Chinese immigration question at Princeton, Harlan suggested a line of argument against Chinese immigration.[412] Noting that a man's first duty is to his own household, Harlan suggested that "we owe to our country and people a higher duty than we owe to any other country or people."[413] The first inquiry concerning Chinese immigration, he suggested, should be "what is best for our country."[414] Protecting America's identity—preventing it from being overwhelmed by foreign cultures—was critically important for the benefit of the entire world because "[w]e have in our keeping, the destiny of republican institutions—that is, here is to be tested the stability of free institutions, based upon the consent of the people and under which all citizens are made equal before the law."[415] If the Chinese were to be admitted as immigrants, Harlan's republican values would require that they eventually be admitted to full citizenship. Once they became citizens, they must be extended the same rights as other citizens because "all citizens are made equal before the law."[416]

Harlan suggested that James should argue that the Chinese would not be fit citizens and so should not be permitted to immigrate. They were

> of a different race as distinct from ours as ours is from the negro—[s]uppose there was a tide of immigration... of uneducated African savages—would we not restrict their coming?... The Chinese are largely educated—but not those coming here. And if they were they... will not assimilate to our

411. *See* Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996). *See also* Earl M. Maltz, *Only Partially Color Blind: John Marshall Harlan's View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973, 999–1015 (1996).

412. Letter from John Marshall Harlan to James Harlan (Jan. 21, 1883), *in* HARLAN PAPERS, LC, *supra* note 2.

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

> people. If they come, we must admit them to citizenship, then to suffrage—What would become of the country . . . ?[417]

These themes were common in most of the anti-Chinese opinions of the late nineteenth century Court. They formed the basis of Justice Field's observations in his dissenting opinion in *Chew Heong v. United States*[418] in 1884. Chew Heong was a Chinese laborer who had made a trip from California to Hawaii and, upon his return, was denied re-entry into the United States.[419] He was denied readmission because he could not produce a residency certificate required by statute.[420] Harlan, writing for the majority, ordered his readmission, believing that it was required by an honest reading of the Chinese exclusion statute and treaties with China.[421] Field, in dissent, vehemently disagreed:

> [N]otwithstanding these favorable provisions [of the 1868 treaty], opening the whole of the country to them, and extending to them the privileges, immunities and exemptions of citizens or subjects of the most favored nation, they have remained among us a separate people, retaining their original peculiarities of dress, manners, habits, and modes of living, which are as marked as their complexion and language. They live by themselves; they constitute a distinct organization with the laws and customs which they brought from China. Our institutions have made no impression on them during the more than thirty years they have been in the country. . . . They do not and will not assimilate with our people . . . .[422]

Harlan may well have shared Field's views of Chinese immigrants. However, in *Chew Heong*, his prejudice was not strong enough to overcome his fidelity to the texts he was called upon to interpret. Harlan deferred, as he so often did, to the "clear" meaning of the statute.

Justice Field repeated these arguments in *Chae Chan Ping v. United States*[423] when he suggested again that the Chinese in California

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417. *Id.*
418. 112 U.S. 536 (1884).
419. Case of Former Residence by a Chinese Laborer, 21 F. 791 (C.C.D. Cal. 1884).
420. *Id.* at 791–94.
421. *Chew Heong*, 112 U.S. at 559–60.
422. *Id.* at 566–67 (Field, J., dissenting).
423. 130 U.S. 581 (1889).

"remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living."[424] These notions were echoed and enlarged by Justice Gray in *Fong Yue Ting v. United States*[425] in 1893, a case in which Harlan did not participate. Gray wrote that:

> After some years' experience under [the 1868] treaty, the government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests . . . [and so, modified the treaty].[426]

We cannot be certain that Harlan believed everything he wrote to his son in 1883, or what his colleagues wrote in the opinions that he joined. It appears, sadly, that he did believe most of it. Perhaps the only way he could reconcile his religious vision of America with his republican values was to keep the Chinese out. In his letter to James, Harlan did suggest that immigration restriction was the only effective way to maintain America's culture and institutions: "Our policy is to keep this country, distinctively, under American influence. Only Americans or those who become such by long stay here, understand American institutions."[427] Harlan could have written these same words in the 1850s at the time of his "lamented" embrace of the American Party, and he did express similar views to his constitutional law students

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424. *Id.* at 595. In this case, Justice Field also paraphrased the 1878 California Constitutional Convention's memorial to Congress which reported:

> The presence of Chinese laborers had a baneful effect upon the material interests of the State, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization . . . that they retained the habits and customs of their own country and in fact constituted a Chinese settlement within the State, without any interest in our country, or its institutions . . . .

Id. at 595–96.

425. 149 U.S. 698 (1893).

426. *Id.* at 717.

427. Letter from John Marshall Harlan to James Harlan (Jan. 21, 1883), *in* HARLAN PAPERS, LC, *supra* note 2.

in his 1898 law lectures.

Still, how could Harlan support civil rights for African-Americans and slam the door in the face of the Chinese? Harlan was not a modern day liberal who believed in pluralism. He was a nineteenth century man with an active conscience who had experience with Blacks and none with Chinese. Where Harlan had knowledge, he had a great capacity for understanding. Where he was ignorant, instead of being colorblind, he could be just blind.

It would be difficult to argue that Harlan was unaffected by the pervasive anti-Chinese sentiment at large in the country during his time, and the available evidence seems to implicate him as a racist. In one of his law lectures in 1898, noting that the Chinese Exclusion Act had failed to keep out all Chinese, Harlan observed to the class: "[T]hey all look alike."[428] However, given his progressive legal stance in regard to Black civil rights, it seems unfair to dismiss his largely anti-Chinese voting record on the Court as the product of simple racism.[429] His anti-Chinese votes on the Court were also rooted in his textual literalism and in his deference for legislative authority.

Harlan's letter to his son, analogizing Chinese immigrants "flooding the west" to "uneducated African savages," was written the same year as his *Civil Rights Cases* dissent.[430] How could the same man have written them both? How were "African savages" and the Chinese immigrants alike, and how were they both different from American Blacks? It could plausibly be argued that the distinction which was important to Harlan in his disparate treatment of these two minorities was the citizenship of one and the noncitizenship of the other. Harlan thought of all Chinese as noncitizens and of all Black Americans as citizens.

In each case, this construction rests upon positive law established by the highest authority with jurisdiction over the matter. The citizenship of Blacks was clearly and expressly spelled out in the Fourteenth Amendment. The legal exclusion of Chinese immigrants was explicitly

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428. John Marshall Harlan Law Lectures (Jan. 29, 1898), *in* HARLAN PAPERS, LC, *supra* note 2.

429. *See* Chin, *supra* note 411; YARBROUGH, *supra* note 10. However, Harlan's record even in the Chinese cases was not entirely consistent. He argued that Chinese domiciliaries, as "persons" under the Fourteenth Amendment, were entitled to direct protection by the federal government against violence if Congress extended it. Baldwin v. Franks, 120 U.S. 678, 694–701 (1887) (Harlan, J., dissenting).

430. Letter from John Marshall Harlan to James Harlan (Jan. 21, 1883), *in* HARLAN PAPERS, LC, *supra* note 2.

commanded by the Congress of the United States. In each case, Harlan deferred to constitutional authority. When read in this way, Harlan's justly celebrated dictum that the Constitution is colorblind, would apply only to *citizens* of any color.[431] This reading is consistent with Harlan's repeated emphasis in *Plessy* and his other race opinions on the fact that Blacks were citizens.[432] Harlan's tendency to read the Constitution literally would have made this distinction fundamental for him. It is noteworthy, though, that Harlan never addressed the fact that it was widespread anti-Chinese racism which, acting upon Congress, made it impossible for Chinese immigrants to become citizens.

It is probable that Harlan's anti-Chinese votes were also rooted in the darker side of his Calvinism. Harlan's cultural provincialism and his desire to maintain the Protestant character of American society made the stereotypical Chinese, described by Justices Field and Gray, dangerous to Harlan's America. Field's "Chinaman" brought to America not only an alien culture (which Chinese-Americans appeared determined to preserve), but also, as Gray observed, an alien religion.[433]

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431. Harlan seemed to make this distinction between *citizens* and *noncitizens* explicitly during one of his constitutional law lectures. In discussing whether a child born to Chinese parents in the United States was a citizen of the United States, Harlan, who had dissented against this view, suggested:

> Since that gentleman from China was adjudged a citizen of the United States . . . [the Fifteenth Amendment] says you shant deny him the right to vote, so that this gentleman is not only entitled to vote, but he is entitled to become president of the United States, so far as citizenship is concerned . . . .

John Marshall Harlan Law Lectures (May 7, 1898), *in* HARLAN PAPERS, LC, *supra* note 2.

432. See Harlan's emphasis on citizenship in his famous dissents in the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). Both dissents are largely a defense of the rights of freedmen, newly elevated to citizenship by the Thirteenth and Fourteenth Amendments.

> What the nation, through Congress, has sought to accomplish in reference to [African-Americans], is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more. . . . The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.

The Civil Rights Cases, 109 U.S. at 61 (Harlan, J., dissenting). Harlan repeatedly makes it clear that he was talking about the fundamental rights of citizenship.

433. United States v. Wong Kim Ark, 169 U.S. 649, 725 (1898). Harlan concurred in Chief Justice Fuller's dissenting opinion. In discussing whether a child born in the United States to noncitizen parents, was a citizen by birth, Fuller observed that the Chinese in the

The Chinese seemed to know nothing of the Protestant Bible which, for Harlan, formed the foundation upon which republican civilization and moral behavior rested. The absence of a Christian biblical foundation was an attribute shared by the Chinese laborers of Justice Field's stereotype and Harlan's imagined "African savages." African-Americans, in sharp contrast, had embraced the pole star of Harlan's America—the Protestant Bible. American Blacks, during their "long stay here," *had* embraced Protestant Christianity.[434]

These facts put the fundamental difference between the Chinese immigrant and the African-American citizen in high relief. Almost every Black American with whom Harlan had contact, and the stereotypical African-American of his imagination, was sincerely and deeply Christian.[435] American Blacks were as fervently Protestant and as attached to the Bible as Harlan himself. They clung to their churches

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United States "have remained pilgrims and sojourners as all their fathers were" and "except in sporadic instances, do not appear ever to have desired to [become citizens]." *Id.* at 726 (citation omitted). In his law lectures on March 19, 1898, Harlan discussed whether "a chinaman born in this country [could] be a citizen":

> We have for many years had the policy—I am now giving you the argument on one side—we have had the policy of excluding the Chinese from this country absolutely... and the power of the Government to do that no one disputes now or can dispute; it has been asserted time and again and we have done that upon the idea that this is a race utterly foreign to us and never will assimilate with us. *They are Pagans in religion*, so different from us that they do not inter-marry with us, and we don't want to inter-marry with them, and when they die, no matter how long they have been here, they make arrangements to be sent back to their Fatherland. That there is a wide gulf between our civilization and their civilization, and we don't want to mix.

John Marshall Harlan Law Lectures (Mar. 19, 1898), *in* HARLAN PAPERS, LC, *supra* note 2 (emphasis added). Harlan went on to ask his students:

> What would have been the condition to-day [sic] of the states of California, Oregon, Washington, Nevada, and Utah, and that western Pacific slope if we had had no restrictions whatever against the admission of Chinese in this country? If out of two or three hundred million that are in China, if out of that number fifty million had been here by this time... that whole Pacific slope to-day [sic] would have been dominated by that race; they would have rooted out in the American population that is there....

Id. After expatiating at length on the arguments against citizenship, Harlan paused, and then concluded: "Of course the argument on the other side is that the very words of the [Fourteenth Amendment] embrace just such a case." *Id.*

434. *See* CARTER G. WOODSON, THE HISTORY OF THE NEGRO CHURCH (3d ed. 1972). *See also* ALBERT J. RABOTEAU, SLAVE RELIGION: THE "INVISIBLE INSTITUTION" IN THE ANTEBELLUM SOUTH (1978).

435. *See generally* GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 106 (1971).

with equal tenacity. They had potential. The slaves in the Harlan household of his youth and the Black servants with whom Harlan had contact as an adult were largely Christian.[436]

Harlan's personal contact with Blacks throughout his life also diluted the power of racial stereotypes applied to them. It was no accident that when Harlan chose to describe hypothetical outrages committed against American Blacks he chose to set those outrages in church.[437] With the Chinese, Harlan had no such association. Without personal experience to dispel or at least to moderate the stereotype, he felt no compulsion to resist the Congress and the Court on behalf of the "pagan" Chinese. Rather than import alien immigrants or incorporate alien lands into an American empire, Harlan preferred to export American Christianity through missionary work abroad. The only battle involving the Chinese in which Harlan was interested was the battle for Chinese souls being waged by Christian missionaries on Chinese soil. Harlan wanted to Americanize the world, not to Europeanize or Orientalize America.

African-Americans might have been different from Harlan in many ways, but they were no threat to the America Harlan cherished.[438] Their intense Christianity was a source of strength to American Protestantism. Chinese culture, with its ancient sources and powerful alien mystique, was more problematic for Harlan than the attenuated and distant African culture of the former Black slaves. If Harlan was blind to the rights of the Chinese, the explanation for his blindness resides partly in racism, partly in his deference for Congressional power over immigration, and partly in his religious provincialism.

F. Church, State, and Mormonism

The Supreme Court had few opportunities to address the meaning of

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436. *See* Harlan, *supra* note 35, at 193. In describing John's servant, Jackson, Mallie wrote that: "Unlike most of his race, Jackson, when he first entered my husband's service, had little or no interest in Church-going." *Id.* Presumably under the Harlans' influence and with his help, Jackson became a "prominent figure" in a "coloured [sic] Methodist Church" in Washington and a teacher of Scriptures. *Id.*

437. *See supra* pp. 388–89.

438. *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting):

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

Id.

the religion clauses during Harlan's years on the Court. The cases in which the Court construed the Free Exercise Clause involved the Mormon Church.[439] Protestant America had been at war with the Church of Jesus Christ of Latter-Day Saints, the Mormon Church, since that Church's inception in 1830. The Mormons were hated primarily for their doctrine of "celestial marriage" (polygamy), which outraged the moral sensibilities of nineteenth century Americans. Mormon founder Joseph Smith claimed to have received a divine revelation supplementing the Bible and this was another factor in the violent opposition of American Protestants.[440] The Mormons had been driven from New York, Ohio, Missouri, and Illinois (where Smith and his brother were murdered by a lynch mob). Finally, in 1846 the Mormons trekked to Utah to create their own version of "Zion." But in 1849, at the end of the Mexican War, Mexico was forced to cede to the United States its territorial claims to Utah along with other territories that make up the modern Southwest.[441] As a result, the Mormons again found themselves within the territorial limits of the United States.

From that time until the 1890s, Protestant America tried to impose its values on the Mormons and the Mormons offered determined resistance. American Presidents repeatedly called for congressional action against the Mormons' economic and political stranglehold on the Utah territory.[442] In 1862, 1882, and 1884, the United States Congress passed acts directed at extending and consolidating national authority over the Mormons, and at eradicating polygamy in Utah and Idaho.[443] It was in this context that the Court first interpreted the religion clauses of the First Amendment. In these cases, the Court showed little concern for minority rights. Harlan, often sensitive to issues involving civil liberties in other contexts, remained silent in these cases, joining the

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439. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878).

440. *See generally* Paul Wake, Comment, *Fundamental Principles, Individual Rights, and Free Government: Do Utahns Remember How to be Free?*, 1996 UTAH L. REV. 661 (1996).

441. *Id.* at 672–73.

442. President Hayes, the man Harlan helped to elect and who appointed Harlan to the Supreme Court, made a trip to Utah in 1880. When he returned, he reported to Congress that the only way to suppress polygamy and to establish national authority in Utah was to break the political and economic power of the Mormon Church. To this end, he recommended "taking away the political power of the sect... [by confining] the right to vote, hold office, and sit on juries in the Territory of Utah" to non-Mormons. EDWIN BROWN FIRMAGE & RICHARD COLLING MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830–1900, at 160 (1988) (quoting 7 JAMES D. RICHARDSON, COMP., A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 606 (1896–1899)).

443. *See generally id.*

majority without ever writing an opinion.

The Court first addressed the Free Exercise Clause in 1878, in *Reynolds v. United States*.[444] In *Reynolds*, a Utah Mormon defendant was indicted for violating the federal antibigamy statute.[445] The defendant argued that because the Mormon Church sanctified "plural marriage," the First Amendment protected him against enforcement of the federal criminal ban.[446] Chief Justice Waite, writing for a unanimous Court, asked whether a "religious belief can be accepted as a justification of an overt act made criminal by the law of the land."[447] After a brief survey of the history of the Free Exercise Clause, the Court held that "Congress was deprived of all legislative power over mere *opinion*, but was left free to reach *actions* which were in violation of social duties or subversive of good order."[448]

The Free Exercise Clause did not exempt defendants from punishment under generally applicable criminal statutes. Calling polygamy "odious," Waite concluded:

> [I]t is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built . . . .[449]

Waite argued that the distinction between *beliefs* and *acts* is necessary to prevent the First Amendment from sheltering all kinds of abhorrent acts. Waite supported this position by offering the examples of human sacrifice and the burning of widows on their husbands' funeral

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444. 98 U.S. 145 (1878).

445. United States v. Reynolds, 1 Utah 226, 227 (1875).

446. *Reynolds*, 98 U.S. at 161.

447. *Id.* at 162.

448. *Id.* at 164 (emphasis added). The Court noted:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . .
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> . . . .
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> . . . [W]hen the offense consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made.

Id. at 166–67.

449. *Id.* at 165.

pyres.[450] Surely, these acts could not be beyond the reach of the police power, even if they were performed in the name of religion.

Upon initial examination, the Court's formulation seems to be a common sense approach. However, Chief Justice Waite failed to acknowledge that, in situations less extreme than his examples, it might be necessary to balance the free exercise interests of a minority against the values of the majority embodied in police power regulations. It is insufficient to say that the Free Exercise Clause protects only beliefs, because all religions call for the performance of some *acts* manifesting *beliefs*—religious beliefs shape actions. Where, as in *Reynolds*, a criminal statute so clearly enacts majority *religious* opinions into law, the Free Exercise Clause should, arguably at least, require analysis of the secular purposes underlying the regulation and of how those purposes are defeated by the acts of the defendant.[451]

Because the Mormons persisted in their polygamy and opposition to national authority, Congress passed the Edmunds Act[452] in 1882. It was the Edmunds Act, reinforced by the Edmunds-Tucker Act[453] of 1884, which launched the final, successful attack against polygamy. However, these acts did more than punish polygamy; they imposed an array of disabilities on Mormons, including preventing Mormons from serving on juries, from voting, and from serving in public office.[454] Enforcement of these statutes effectively ended Mormon control of the government machinery in Utah. The Edmunds-Tucker Act reaffirmed the abrogation of the Mormon Church's corporate charter[455] and commanded the United States Attorney General to seize the property of the Church. The forfeited land and personalty were to be applied for the benefit of the common schools of the territories where located. The only exceptions to these confiscations were for real estate occupied exclusively for the worship of God, parsonages, and burial grounds.[456] In court, the Mormons challenged the provisions of these statutes as well as others enacted for the territories. A number of these cases made their

450. *Id.* at 166.

451. *See supra* Part IV.C (containing material on Harlan and the police power).

452. Ch. 47, 22A Stat. 30 (1882).

453. Ch. 397 §§ 13–17, 24 Stat. 635, 637–38 (1887). For a discussion of the contents of the Edmunds Act and it effect, see FIRMAGE & MANGRUM, *supra* note 442, at 161–67.

454. Edmunds Act, ch. 47, 22A Stat. 30 (1882), Edmunds-Tucker Act, ch. 397 §§ 13–17, 24 Stat. 635, 637–38 (1887).

455. *Id.* Abrogation of the Church corporate charter had been enacted the first time in 1862. That act had proved ineffective and had never been enforced.

456. *Id.*

way to the United States Supreme Court. Although there were some voices raised against Mormon "persecution,"[457] sadly, Harlan's was not among them.

In *Murphy v. Ramsey*,[458] a case involving the disfranchisement of persons in bigamous or polygamous relationships in Utah, Justice Matthews read the powers of the national government broadly in relation to suffrage in the territories.[459] In the course of his opinion, he offered a clear picture of the Court's attitude toward Mormon polygamy:

> [N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the *holy estate of matrimony*; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end, no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.[460]

In *Davis v. Beason*,[461] the Court again was faced with Mormon free exercise of religion arguments. In *Davis*, the defendant was convicted of attempting to register to vote in violation of a statute of the Idaho Territory, which denied Mormons the right to vote or hold public office.[462] The appellant argued that the statute violated the Free Exercise and Establishment Clauses, and imposed a religious test for office-holding in violation of Article VI of the United States Constitution.[463] Justice Field's opinion for the Court was very blunt:

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457. *See* FIRMAGE & MANGRUM, *supra* note 442, at 163–64.

458. 114 U.S. 15 (1885). In *Murphy*, the plaintiffs sued Territorial election commissioners, who they alleged had "wilfully and maliciously" refused to register them as voters. *Id.* at 35.

459. *Id.* at 44–45.

460. *Id.* at 45 (emphasis added).

461. 133 U.S. 333 (1890).

462. *Id.* at 345–48.

463. *Id.* at 339 (argument for appellant).

> Bigamy and polygamy are crimes by the laws of all civilized and Christian countries.... They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. *To call their advocacy a tenet of religion is to offend the common sense of mankind.*[464]

Relying upon *Reynolds*, Field reiterated the distinction between beliefs and acts: "However free exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."[465] But, the Idaho statute went beyond acts. Appellants argued that it excluded from voting and office-holding all persons who *believed* in polygamy or associated with polygamists.[466] In effect, it denied all members of the Church of Jesus Christ of Latter-Day Saints basic political rights because of their Church membership. The Court dismissed these arguments and held that the statute imposed only "reasonable qualifications of voters and for holding office."[467]

Finally, in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,[468] the Court sustained the abrogation of the Church's corporate charter and the congressional mandate ordering the confiscation of Mormon property. Justice Bradley, writing for six justices, including Harlan, sustained the act over the objections of Chief Justice Fuller in a dissent joined by Justices Field and Lamar.[469] Bradley's scholarly history lesson on the *cy-pres* doctrine and his broad reading of congressional power over the territories of the United States are of less interest than his scorching denunciation of polygamy and the

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464. *Id.* at 341–42 (emphasis added).

465. *Id.* at 342–43. Field continued:

> Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

Id. at 343.

466. *Id.* at 344.

467. *Id.* at 346.

468. 136 U.S. 1 (1890).

469. *Id.* at 67–68.

Mormon Church. The religious uses of donations intended by Mormon donors included

> [t]he inculcation and spread of the doctrines and usages of the Mormon Church . . . one of the distinguishing features of which is the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. Notwithstanding the stringent laws which have been passed by Congress—notwithstanding all the efforts made to suppress this barbarous practice—the sect . . . perseveres, in defiance of law, in preaching, upholding, promoting and defending it. . . . [I]ts emissaries are engaged in many countries in propagating this *nefarious* doctrine, and urging its converts to join the community in Utah. *The existence of such a propaganda is a blot on our civilization.* The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. *It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.* The question . . . is whether the *promotion of such a nefarious system and practice*, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by sanction of the government itself; and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore, to the detriment of the true interests of civil society.[470]

The passion embodied in Bradley's language speaks for itself. This was not a matter of only earthly concern. It was a struggle for light and Christianity, against darkness and sin. Mormon sappers were undermining and tarnishing the quality of America's example to the rest of the world. It was probably similar concerns that distorted Harlan's thinking about these cases.

In his dissent, Chief Justice Fuller argued:

> no such power as that involved in the act of Congress . . . is conferred by the Constitution, nor is any clause pointed out as its legitimate source. . . . [A]bsolute power should never be conceded . . . [to any branch of the government]. The legislative power of Congress is delegated and not inherent, and is therefore limited.[471]

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470. *Id.* at 48–49 (emphasis added).

471. *Id.* at 67 (Fuller, C.J., dissenting).

Although the national government was certainly permitted to prosecute polygamy, Fuller argued that the government was "not authorized under the cover of that power to seize and confiscate the property of persons, individuals, or corporations, without office found, because they may have been guilty of criminal practices."[472] The majority's disregard for the property rights of the Church is striking, given the Fuller Court's routine defense of property rights against government interference in so many other settings.[473] Although Harlan was less concerned about the protection of property rights against government regulation than most of his colleagues on the bench, his silence is still striking in light of his strong objection to similar claims for unbridled congressional power in the *Insular Cases*[474] a decade later. Harlan's passionate Calvinism may have produced his silence in these cases.

The insensitivity the Court showed to minority free exercise interests in the Mormon cases was matched by its narrow reading of the Establishment Clause and was consistent with late nineteenth century attitudes concerning the relationship between law and religion. In his famous treatise on constitutional limitations on the police power, Judge Thomas Cooley both acknowledged the influence of Christianity on police power regulations and affirmed the majority's right to embody its morality in them. Cooley wrote:

> It is frequently said that Christianity is a part of the law of the land. In a certain sense and for certain purposes this is true. The best features of the common law—especially those which regard the family and social relations; which compel parent to support child, the husband to support the wife; which make the marriage-tie permanent and forbid polygamy[]—if not derived from, have at least been improved and strengthened by the prevailing religion and the teachings of its sacred Book.[475]

While explaining that the First Amendment precluded the establishment of a particular religion, Cooley wrote, government was not "precluded from recognizing... in the rules prescribed for the

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472. *Id.*

473. *See, e.g.*, Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890); United States v. E.C. Knight Co., 156 U.S. 1 (1895); Pollock v. Farmers Loan and Trust Co., 158 U.S. 601 (1895); Interstate Commerce Comm'n v. Cincinnati, N. O. & Tex. Pac. Ry. Co., 167 U.S. 479 (1897); Lochner v. New York, 198 U.S. 45 (1905).

474. *See supra* note 396 (citing 3 *Insular Cases*).

475. COOLEY, *supra* note 344, at 579.

conduct of the citizen, the notorious fact that the prevailing religion in the States is Christian."[476] Since the United States was a "Christian community,"[477] the states could "foster religious worship and religious institutions, as conservators of the public morals, and valuable, if not indispensable assistants in the preservation of the public order."[478] The states could also embody religious moral tenets in their criminal codes.

> The criminal laws of every country are shaped in greater or less degree by the prevailing public sentiment as to what is right, proper, and decorous, or the reverse; and they punish those acts as crimes which disturb the peace and order, or tend to shock the moral sense or sense of propriety and decency, of the community. The moral sense is largely regulated and controlled by the religious belief; and therefore it is that those things which, estimated by a Christian standard, are profane and blasphemous, are properly punished as crimes against society, since they are offensive in the highest degree to the general public sense, and have a direct tendency to undermine the moral support of the laws, and to corrupt the community.[479]

Given Harlan's views on the police power, he must have agreed with Cooley. Within this conceptual framework, Protestant-American culture could be embodied in police power regulations without violating the Establishment Clause. Christianity's moral teachings could be legislated, not in the name of religion, but in the name of public morality. Harlan and the Court upon which he sat were largely unconscious of this fact when faced with applications of laws supporting a Protestant world view, but free from an express sectarian endorsement.

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476. *Id.*

477. *Id.*

478. *Id.* at 578–79. Justice Brewer supported this view in his famous opinion in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

479. *Id.* Does a vagrancy law protect public safety or is it a codification of the Protestant work ethic? Do laws against bigamy, adultery, fornication, homosexuality, and pornography embody historical experience with the benefits of monogamy and traditional nuclear families or traditional Christian attitudes toward sexuality and sin? Do laws prohibiting the manufacture, sale, or consumption of alcohol reflect a fundamentalist reading of the Bible, a manifestation of the religious drive to control sin, or a secular concern for the destructiveness of drunken behavior? Because similar questions could be asked about almost all legal regulation of behavior, it is very difficult to identify particular cases in which Harlan's Presbyterianism was a controlling influence on his judicial behavior. These questions are, of course, still with us.

For Justices like Matthews, Bradley, Brewer, and Harlan, Protestant Christianity and American culture were so intertwined that proponents, like Harlan, of Protestant Christianity and America's mission, found it difficult to keep them separate. When Harlan and most of the members of his Court looked at America, they saw *their* country, and *that* country was almost indistinguishable from the *Our Country* described by Josiah Strong.[480] Most of them joined Strong in his belief that "Protestant America was God's special instrument in His great work, and so to be a Protestant Christian and an American patriot was one and the same."[481] Compounded from republicanism, liberalism, capitalism, and a generic Protestantism, America *was* a Christian country, but, for the Court, a nondenominational one.[482]

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480. A modern editor of Strong's book, *Our Country* (which was written in support of the home missionary movement in 1886), observed that this book "gauged correctly the mind and mood of Protestant America and, in the Quaker phrase, spoke 'to his readers' condition.' The book, consequently, mirrors the thoughts and aspirations of this dominant segment of American society towards the close of the nineteenth century . . . ." *See supra* note 391, at ix.

481. *Id.* at xi. In a family scrapbook preserved in the Harlan Papers, there is an undated newspaper clipping entitled "Judge Harlan on Public Schools," reporting on Justice Harlan's views concerning religion and the public schools. In it, Harlan expressed his opposition to connections between religious denominations and the public schools in strong language: "Government has nothing to do with the religion of the people. It cannot directly or indirectly aid in propagating the tenets of any ecclesiastical organization." HARLAN PAPERS, LC, *supra* note 2. The newspaper article, reporting Harlan's views, stated:

> The religious training of children is not a matter with which government can concern itself. Safety for the American system of popular education can be secured only by absolute non-interference by the church with the public schools and by absolute non-interference by government with church schools. The people should see to it that not one dollar raised by taxation is applied in any way to the support of schools maintained or controlled by a church. They should not tolerate any intermeddling, directly or indirectly, by the churches with the public schools. They should stand firmly by the principle that it is the right of government to provide for the education of all the children of the people, leaving the religious training of children where it belongs—to parents and to churches.

Id. The public schools, Harlan believed, were the "nurseries of patriotism. They are little republics, in which all are equal before the law." *Id.* Harlan's approach to this question seems very modern; however, Harlan was a man of his times, not of ours. His view of the question ignores the extent to which nondenominational Protestantism was embodied in the public school curriculum in the nineteenth century. It also ignores the fact that the push for an alternative formulation came largely from American Catholics who were more sensitive to the Protestant content of public education than was Harlan. See any of the McGuffy Readers so widely used in public schools at that time for support of this proposition.

482. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (Justice Brewer opinion). Harlan, along with the rest of the Court, silently joined in Brewer's assertion: "But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people." *Id.* at 465. Brewer

It is unfortunate that the Court first addressed the meaning of the religion clauses in the context of Mormonism—a radically disapproved minority in nineteenth century America, who appeared to many Protestants as an incarnation of evil.[483] Even worse, the cases involved polygamy, which for many upper-class Victorian Protestants raised the specter of uncontrolled sexual appetite. The intensity and persistence of the anti-Mormon campaign was grounded largely in the religious basis of family. Monogamy was commanded by Christianity, and was embodied, among other places, in the Presbyterian catechism Harlan had memorized as a boy.[484] The Mormon Church espoused this sin in its doctrine and persisted in it against all exhortation and obstacles. In short, Mormon polygamy was a direct challenge to both authorities Harlan treasured—his religion and his country. Many Americans found nothing religious about the Mormon Church except its name.[485] The

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quoted with approval, Chancellor Kent's assertion in *People v. Ruggles*, 8 Johns. 290, 294–95 (1811) that:

> The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the Constitution as some have strangely supposed, either not to punish at all, or to punish indiscriminately, the like attacks upon the religion of *Mahomet* or the Grand *Lama*; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of those imposters.

Id. at 470–71. Ultimately, Brewer concluded: "[T]his is a Christian nation." *Id.* at 471. Although Harlan agreed with Brewer, unlike his friend, Harlan did not go out making speeches in support of the passage of a Christian constitutional amendment. For the view that the Establishment Clause forbids only support for particular religions, see dicta in *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding federal contract with a Catholic Hospital in the District of Columbia to provide medical care for the poor against an Establishment Clause challenge; the purpose of the payments was not to support Catholicism but to provide medical care to the poor).

483. STRONG, *supra* note 391, at 107–08. *See also* Sarah Barringer Gordon, "*The Liberty of Self-Degradation*": *Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America*, 83 J. AM. HIST. 815 (1996).

484. *See supra* Part II.

485. In a speech, Senator John T. Morgan stated:

> In dealing with [the Mormon Church] or with its associated ecclesiastical organization I do not feel that I am dealing with a religious establishment. I feel that I am dealing with something that is entirely irreligious, that has no just pretension at all to be called a religion in a Christian country.

FIRMAGE & MANGRUM, *supra* note 442, at 203 (quoting Speech of Senator John T. Morgan, 509 CONG. REC. 17 (1886)). Morgan gave this speech during the debates over the Edmunds-

Mormons preached sin instead of salvation. Their determined exceptionalism and defiance of law, as well as their power in Utah and their geographic concentration, threatened Protestant solidarity and the continental integrity of the Union,[486] and neither could be tolerated. When coupled with the Mormon Church's accumulation of property, its rigorous control of its members' lives, and its hostility to outsiders, it would have been almost impossible to select a more hated champion for the religion clauses.

The Mormons also presented a paradox for one who believed in the separation of state and religion. While seeking to be left alone to follow their own consciences, free from external imposition, the Mormons created a community that many nineteenth century Americans considered theocratic. "In Utah," two scholars of the legal history of Mormonism have observed, "the Mormons founded a novel society. In it, secular and religious authority were intermingled; social, economic, religious, family, and political life were bound together under the doctrines of the church into a cohesive way of life. It was a society radically different from mainstream America."[487]

To outsiders like Harlan and his brethren on the Court, the Mormons seemed to have established a system under which church leaders controlled every aspect of their followers' lives. Consequently, when the Mormons objected to federal interference with their religious practices, their pleas seemed mired in hypocrisy. Mormons set up the Free Exercise Clause to prevent interference by the national government while they themselves established, *de facto*, a religious state. It was difficult for outsiders to disentangle the Church from the social and economic circumstances of the Mormon commonwealth. This also influenced Harlan and the Court in the Mormon cases. It is noteworthy

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Tucker Act, which became law in 1887. For a concise discussion of the Act, see *id.* at 197–209.

486. This was clearly on Justice Bradley's mind as well:

> It is unnecessary here to refer to the past history of the sect, to their defiance of the government authorities, to their attempt to establish an independent community, to their efforts to drive from their territory all who were not connected with them in communion and sympathy. The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to law on the part of the Mormons.

Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890).

487. FIRMAGE & MANGRUM, *supra* note 442, at 210. *See also* Gordon, *supra* note 483, at 827.

that it is upon this belief that some of the popular evangelical attacks on Mormonism were based.[488]

These same impressions supported another concern as Americans like Harlan and his court studied Mormonism from a distance. If Mormons vested both spiritual and temporal power in one man, or in a small group of leaders, how could Mormonism co-exist with republicanism?[489] Implicit in Mormonism as practiced in Utah, was a rejection of the core republican values of late nineteenth century Protestant America. To Harlan, for whom America's story was the story of the triumph of God's Providence—the story of the creation of an example of republicanism for the world—Mormonism and its fruits might well have appeared stubborn, noxious weeds in God's American garden.

Although he did not write an opinion, Harlan elsewhere spoke about the meaning of the religion clauses. A surviving transcript of his constitutional law class lectures shows that he addressed both clauses in his class.[490] He had little to say. Harlan's entire discussion of the Establishment Clause runs less than one page in the typed transcript of his class, and his discussion of the Free Exercise Clause, about two and one-half pages. He raised no questions about the law as the Court had articulated it in the Mormon cases, something he did do elsewhere in his lectures when he disagreed with the majority.

Harlan read the Establishment Clause narrowly, explaining that "[n]o man should be compelled to pay any tax to support any religion, [and] that all religions were to be alike under the [C]onstitution."

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488. When Josiah Strong wrote about the "Mormon monster," he attacked the church primarily for its "ecclesiastical despotism." STRONG, *supra* note 391, at 107–08.

> The Mormon Church is probably the most complete organization in the world.... The priesthood, of which [the President] is the head, claim the right to control in all things religious, social, industrial, and political.... Mormonism therefore, is not simply a church, but a state; an "*imperium in imperio*" ruled by a man who is prophet, priest, king and pope, all in one.....

Id. at 108–09.

489. Chief Justice Waite's opinion in *Reynolds* suggests that these kinds of concerns were in his mind. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878). "Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy." *Id.* One wonders whether nineteenth century American married women, struggling to obtain equal property and political rights with their husbands, would have agreed with Lieber.

490. John Marshall Harlan Law Lectures (Apr. 16, 1898), *in* HARLAN PAPERS, LC, *supra* note 2.

Congress could not "establish a religion . . . [or] reorganize one religion over another."[491] Harlan's formulation of the Free Exercise Clause made no reference to constitutional protection for *actions* meant to embody religious beliefs in personal conduct. His First Amendment, like the Court's, protected *profession* but not *practice.* In this respect, Harlan appears to have been in complete agreement with his colleagues on the Court. Perhaps Harlan's position in the Mormon cases can be explained sufficiently in these terms, but there was another important influence at work; after 1880, Harlan had a direct pipeline to conditions in Utah.

Among Harlan's closest political friends from his days in Kentucky was Eli H. Murray.[492] When Harlan's confirmation to the Court was challenged in 1877, he sent Murray to Washington and wrote to President Hayes that Murray was authorized to "'take such steps as he may deem proper for the protection of my good name.'"[493] In 1879, Murray sought and won appointment as Governor of the Utah Territory—the Mormon heartland.[494] Professor Yarbrough states that Harlan was "significantly involved . . . in [Murray's] nomination and confirmation as governor of Utah."[495] In Murray, Harlan had a close friend at the center of the conflict between the United States and the Mormon Church in the 1880s. Murray was "hostile to the Mormons and frustrated by their political obstructionism."[496] His surviving letters to Harlan prove that he was feeding the justice very negative "inside" information about the Mormons.[497] This may well have contributed to

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491. *Id.*; *see also* Maxwell v. Dow, 176 U.S. 581, 615 (1900) (Harlan, J., dissenting).

492. Murray, a native Kentuckian, was eleven years younger than Harlan, but like his older friend, he served as a Union officer and had risen to the command of a brigade during the Civil War. 4 APPLETON'S CYCLOPAEDIA OF AMERICAN BIOGRAPHY 467 (reprint ed. 1968). From 1866 to 1876, he served as United States Marshall in Kentucky. *Id.* at 467–68. In 1876, Murray became manager of the *Louisville Commercial*, the leading Republican newspaper in the state. *See id.* President Hayes appointed Murray governor of Utah in 1880 and Murray was reappointed by President Arthur in 1884. *Id. See also* MARK MAYO BOATNER III, THE CIVIL WAR DICTIONARY 576. Of course, this means that Murray could not have been feeding Harlan information when *Reynolds* was decided, but the same cannot be said for the later Mormon cases.

493. YARBROUGH, *supra* note 10, at 112–13 (quoting Letter from John Marshall Harlan to Rutherford B. Hayes (Oct. 31, 1877)).

494. APPLETON'S CYCLOPAEDIA OF AMERICAN BIOGRAPHY, *supra* note 492, at 467.

495. YARBROUGH, *supra* note 10, at 121.

496. FIRMAGE & MANGRUM, *supra* note 442, at 237.

497. On March 18, 1880, Murray wrote Harlan a long letter from Salt Lake City. Letter from Eli H. Murray to John Marshall Harlan 1–2 (Mar. 18, 1880), *in* RUTHERFORD B. HAYES PAPERS. Murray made clear his negative opinion of Mormons. He hoped to "unravel[] the mysteries of this peculiar people" and to eradicate the "infamies of [Mormon] law breaking

and law defying." *Id.*

> There are two classes of Mormons. Those who do and those who do not practice polygamy but in my opinion there can be little distinction properly given between a class that practice Polygamy and the other that defend, associate, and support those who do violate law and decency[.] The man that abets and conceals crime is about as bad as the active agents. . . .
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> The truth is that the Church seems to be a great big money making institution—making slaves of human beings in the name of the Lord, and generally receiving the tenth of all products and salaries to fatten the High Priests . . . .

Id. at 2, 4. Murray urged Harlan to use his influence with Kentucky Congressmen to support passage of anti-Mormon legislation through Congress, believing that passage of the bills would "do the country[,] civilization[,] humanity[,] and Christianity a great service." *Id.* at 3. Murray stated:

> Why should you drive the Indian out and the original owner of the soil, and allow people to occupy his lands who are daily violating the laws in open defiance and keeping the evidence in the Lords house of endowment, and a people further who in my opinion cannot be loyal to the Gospel of revelation in which they pretend to believe and the Government which has done everything to give and secure their homes—and I am ashamed to say has done so much to compromise with a great wrong and given strength to their continuing crimes.

Id. at 4–5.

By November of his first year in Utah, Murray was embroiled in controversy with the Mormons: "Do not be surprised to hear of a great tirade of Mormons about of [sic] me in the near future—I shall do my duty and let the future answer." Letter from Eli H. Murray to John Marshall Harlan (Nov. 19, 1880), *in* HARLAN PAPERS, UL, *supra* note 2.

When Democrat Grover Cleveland was elected President in 1884, Murray considered resigning his office as Governor, but did not want to go. He wrote Harlan that even some Democrats would regard it as

> a desertion of the cause of sound government which during my five years of service here, has been advanced, to what is deemed a definite determination in favor of National law which for many years before had been evaded and [n]ullified by Mormon leaders. . . . At this time when the Laws are being more effectually enforced than ever before, I am informed that Mormon agents against whom indictments are pending, are now in New York and Washington and in covert ways, seeking to mislead the new administration as to the condition of affairs here. . . . The condition of affairs exceptional and unlike those of any other State or Territory makes me the more free to present these matters through you. . . . I am sure the President will permit no compromise with [n]ullification and evasion of the laws.

Letter from Eli H. Murray to John Marshall Harlan 2, 4–6 (Feb., 1885), *in* HARLAN PAPERS, UL, *supra* note 2. *See also* letters from Eli H. Murray to John Marshall Harlan (Feb., 1885); (May 18, 1885); (Apr. 18, 1886), *in* HARLAN PAPERS, UL, *supra* note 2 (all including comments on the situation in Utah).

Whether Harlan did "present these matters through" him to the President, Murray was reappointed by Cleveland. More to the point for present purposes, it seems certain that Harlan brought all of this baggage with him to the Mormon Cases. This private "context," coupled with his Presbyterian abhorrence for polygamy may well have further deadened

Harlan's silence.

That the national government waged a "war" on Mormonism can scarcely be denied. In the course of this war, the government went far beyond prosecuting individuals for polygamy. Religious beliefs became the basis for disqualifying Mormon citizens from serving on grand and petit juries. National authorities withdrew authority for territorial self-rule in order to destroy Mormonism's ability to obstruct the exercise of federal power. Finally, Church persistence in propagating its doctrine of "celestial marriage" led to the dissolution of the Church's charter and the confiscation of Church property.[498] Whether this final blow was aimed at the Church for religious reasons or merely to break its political and economic power, confiscation forced the Church to abandon polygamy. The intensity of the crusade against Mormonism is well-illustrated by the fact that even Mormon arguments that such confiscation violated fundamental guarantees of private property and contract rights fell on deaf ears.[499]

In its first contact with the religion clauses, the Supreme Court—with Harlan's silent agreement—failed to thoughtfully engage the interests that those clauses were intended to protect. Rather, the Court viewed the questions raised through the lens of late nineteenth century Protestantism. The doctrine the Court formulated was theoretically justified. In practice, however, it would lead the Court to define the boundary between the sacred and the secular, between church and state, in a way that reflected a Protestant consensus so pervasive among decision-makers that they did not even know it was influencing them. Neither the Court nor the country thought seriously about the difficulties that would arise in applying this rule neutrally, in a progressively more diverse society.

Just as religion influenced Harlan's view of African-Americans and of the Chinese, so it affected his vision of the First Amendment. His silence in the Mormon cases illustrates an important fact about the "Great Dissenter" which is sometimes overlooked. Although he often dissented from the majority of the Court, much more often he joined it. Religion did exert a profound influence over Harlan's attitudes on the

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Harlan's sensitivity to the free exercise issues presented in the Mormon Cases. One can only wonder whether Harlan resisted presenting some of this "inside information" to his judicial colleagues in conference. Surely, having a private pipeline from Utah and learning of Murray's experiences there must have had some effect on Harlan's attitude toward the Mormons when their cases were heard later by his Court.

498. *See supra* Part IV.F.

499. *See supra* Part IV.F.

Bench. Religion was something Harlan had *in common* with his brethren on the Supreme Court. Without its influence, John Harlan might have been even more "eccentric."

V. CONCLUSION

John Harlan's Presbyterianism was an important influence on his character and helped to shape his conduct as a man, as a politician, and as a judge, but, as with so many other elements in the personality of this complex man, it is not always easy to ascribe particular conduct to particular influences. Still, it is possible to suggest some ways in which the influence of Harlan's Calvinism affected his private and public choices and contributed to his public work. Presbyterianism's respect for law and for its importance in public life may have partly conditioned Harlan's choice of profession. His religious sense of calling and desire to glorify God through his work undoubtedly contributed to his drive to achieve excellence in that profession.

Harlan's Presbyterianism also influenced his choice of political party in the antebellum years. Of course, he was following in his father's footsteps when he became a Whig, but it was partly religion that had made his father a Whig in the first place. Religion certainly contributed significantly to Harlan's nativist stand in the 1850s and his decision to join the American Party in its "Protestant Crusade." When Harlan became a "Know-Nothing," it was religion that suppressed his republicanism and allowed him to accept—even temporarily—classes of American citizenship. To some extent, Harlan never really threw off the influence of his "intense Protestantism." He was never really comfortable with America's developing pluralism, and he remained suspicious of immigrants to the end of his life.

Harlan's profound attachment to Old School Presbyterianism mixed with his nationalism and love of the Union to reinforce other influences conditioning his personal and political choices as the Civil War approached. Religion and disgust with the forces that had attacked both the Union and his church, attempting to tear apart the former and succeeding in dismembering the latter, certainly contributed to his decision to join the Republican Party in 1868.

Harlan's life-long habit of reading the Bible literally encouraged him to take a literalist approach to the language of the Constitution and to statutes. Harlan's intense Calvinism, his belief in the right of "private judgment" and in the Old School literalist approach to the Bible, contributed to his black-and-white judicial style and to his intellectual

independence. Once Harlan made up his mind about a question, he displayed remarkable persistence (some of his colleagues on the Supreme Court might have called it stubbornness) and a confidence in his own opinions that enabled him to stand alone, so often, in dissent. It was these sources, at least in part, from which Harlan repeatedly drew the courage to persist in defending his point of view long after the rest of the Court had repudiated it. Indirectly then, if not directly, Harlan's Presbyterianism helped to produce his repeated dissents in cases involving race, his determined defense of the Bill of Rights and Fourteenth Amendment incorporationism, his dissents in regard to corporations, and his persistence in arguing for a broad state police power and a strong national government. These influences also encouraged him repeatedly to defend the power conferred, and the limitations imposed, by the Founders in the document that was Harlan's secular Bible—the United States Constitution.

It also was Harlan's Calvinism that gave many of his best opinions their tone of righteous prophecy. He knew what he believed, and when he disagreed with his fellows, he was sure they were wrong and said so in language that was direct and sometimes almost brutal. He tested many of his opinions against an internal and, he believed, universal standard of right and wrong embodied for him in the Bible. Yet, he could excoriate his brethren on the Court for engaging in judicial legislation when they struck down statutes he believed the legislature had the right to pass. However, the worm of doubt did not gnaw much at Harlan. In these features of his personality, Harlan the Justice exhibited the confidence of a man of complete faith.

Harlan was also essentially an optimist about the future of the United States. He had a strong faith in progress. He believed that God's superintending Providence was directing the world upward according to an unfolding divine plan, and like many other Americans, Harlan believed the United States had a special place in that plan. In this respect, he was very like his Puritan forebears, his brethren on the Court, and other confident Americans of his time whose Protestantism was a constituent part of an American civil religion.

Harlan's famous race opinions were also influenced directly by his religious convictions. These convictions, born in his father's house, nurtured at Presbyterian Centre College, and expanded through his intimate contact with African-Americans, led Harlan to the view that all Americans (or at least all American Christians), Black and White, were children of the same Father. Religion had a decided effect on Harlan's views on race—both his insistence upon legal rights for Black

Americans, and on his far less admirable attitudes toward non-Christian, Chinese Americans.

Like many other upper-class Protestant Americans in the late nineteenth century, Harlan suffered from pride of race. He believed that the United States was an Anglo-Saxon, Protestant country, and he hoped it would stay that way. He favored religious missions to the non-Anglo-Saxon world, but he did not want their peoples coming to the United States. These ideas contributed to his intense nativism in his early life and partly explain the more muted hostility toward immigrants in his mature years. However, the fact that he entertained these views makes his judicial opinions in defense of the rights of African-Americans more, not less remarkable.

Yet, even such offensive ideas were surmounted when the plain language of the Constitution rejected them. When, late in his life, his nativism and his commitment to reading the Constitution as written came into conflict on the issue of the extension of American sovereignty to foreign lands, he argued that the Civil War Amendments meant what they said—that the Constitution must mean the same thing for everyone, Black or White, Filipino or Puerto Rican, not just Kentuckian or New Yorker. Harlan opposed the annexation of foreign territories occupied by alien peoples in the Caribbean and in the Pacific. Yet, he also loved the Constitution and republican government enough to recognize that once the United States annexed the Philippines and Puerto Rico, his country must surrender its ethnic purity or its ideals. He argued that if America extended its boundaries to foreign lands, no matter how alien their populations, the Constitution must follow the flag. He argued for republicanism and democratic government, even if that meant an ethnic pluralism he found troubling. Even his nativism gave way before his republican convictions and fundamentalist reading of the Constitution. For Harlan, the Founders had been actors in a divine drama and the Constitution that they crafted was a divinely inspired document. Its commands must be followed. If Americans insisted on building a political rather than an evangelical empire, then the Constitution must apply to their worldly possessions. The United States must guarantee everyone under American dominion the rights of free men embodied in the Constitution. As his dissents in the *Insular Cases* demonstrate, a majority of the Court upon which he sat disagreed.

Harlan's rejection of the idea that the United States Congress could rule colonies without the constraints imposed by the Constitution was also, in part, a reflection of his Calvinist view of man. It was his intense Calvinism, with its emphasis on man's fallen nature, which encouraged

him to view law and legal restraints as more necessary to ordered liberty than many of his less religiously committed colleagues on the Court. Law provided a necessary constraint on men and the Constitution imposed equally necessary restraints on government.

His core Protestant values and his family experience made Harlan a moralist on the bench. He was against liquor and lotteries; he supported traditional families and the work ethic. Many of Harlan's most important pronouncements on the state police power and the necessity for judicial restraint involved the exercise of that power to benefit public morals. For Harlan, part of the greatness of the Founders was their insight into human nature. He revered and defended the constitutional framework they had constructed for encompassing that nature and making it productive.

Unlike many of his brethren, Harlan worried as much about the evil inclination of the men who built and ran large "soul-less" corporations as about other threats to the common good. As a good Calvinist, he believed in hard work and the cult of success, but unlike Carnegie and his ilk, Harlan never became comfortable with the monster corporations these men built. Man's end was to read the Bible, seek grace, and glorify God through exemplary conduct, not to accumulate power or make money for its own sake. As fundamental changes occurred in American society as a result of changes in the economy, Harlan argued that government must be permitted to formulate practical responses to the new challenges these changes brought, even men of property needed external restraint.

It was, in part, these beliefs that made Harlan more tolerant of government regulation of business than most of his colleagues on the Supreme Court. Harlan favored economic development, but was suspicious of corporations and concentrated economic power. For him, they represented the principle of unalloyed greed. He believed large corporations were unfettered by the internal restraints on human conduct and argued repeatedly that governments, both state and national, must be permitted to exercise a salutary control over corporations' worst behaviors. He believed in judicial restraint and in deference to state legislative authority to provide for the common good. He believed in national power because it was part of the fabric of the American constitutional system and because there were some problems that could be solved only at the national level. Alternatively, he could vote to validate the exercise of the state police power or to vindicate national power when necessary to promote the common good.

Harlan believed in the theory of separation of Church and State, but

he embraced the simplistic dichotomy of his time between religious belief and religiously-based action. For Mormons and other contemporary religious outsiders who wanted to act on their religious beliefs, the Free Exercise Clause offered little real protection. At the same time, on the establishment side of the First Amendment, Harlan failed to understand the extent to which Protestantism defined the values and culture of mainstream America, something Catholic immigrants well understood when they insisted upon the creation of their own parochial schools. Harlan could lecture his law classes on the separation principle and yet defend legal protection of the Christian Sabbath from the bench. He could speak of free exercise, but vote to strip the Mormon Church of its charter and its property. In this, he was very much a man of his time.

Harlan's Calvinism and his faith in the Constitution complemented and reinforced one another as they did for many traditional Reformed Protestants in nineteenth century America. All that was needed for America to prosper was for leaders to do their duty—a duty articulated in the Bible and by the Founders in our written Constitution. Harlan really did go to bed, as another Justice said, with one hand on the Bible and one hand on the Constitution, and he slept soundly in the conviction that attention to both would guide him and his country to their pre-ordained ends.