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JUSTICE HARLAN.

The death of the late Justice Harlan removed one of the most noteworthy figures, not only of the American Judiciary, but of our national life. Few men in the history of the Republic have for so long a period held a position of great public trust and responsibility, and fewer still have discharged the duties devolving upon them so consistently and well. Born in the year 1833, in what was then almost the frontier-land of Kentucky, educated at the little Centre College in his own state, he was admitted to the bar in the early fifties, and as early as 1858, when only twenty-five years of age, he was elevated to the office of county judge. The following year he ran for Congress on the Whig ticket from the Ashland district, but was defeated. When the war broke out he enlisted on the side of the Union and served until 1863 in the Tenth Kentucky regiment, rising to the rank of colonel. He retired to civil life in that year to assume the onerous duties of Attorney-General of the state, which office he held until 1867, when he moved to Louisville and resumed the private practice of the law.

First a Whig and later a Republican in politics, he was twice the unsuccessful nominee of his party for Governor, once in 1871, and again in 1875.

In 1872 the Republican delegation from Kentucky presented his name at the national convention for Vice-President, but here again his cohorts were unable to achieve for him a victory.

Unsuccessful by reason of local conditions in active political campaigning, he was nevertheless a large figure in the ranks of his party, and this, together with his high reputation as a lawyer, led President Hayes to appoint him to the Supreme Bench, when a vacancy occurred upon the resignation of Justice Davis. He was appointed November 29th, 1877, and took his seat as Associate Justice on December 10th of the same year. From that time until the week of his death, which occurred on October 14th, 1911, he was continuously engaged in the performance of the high duties to which he had been called.

It is almost impossible to form a conception of the variety and the gravity of the problems presented to the court for solution during the period of Justice Harlan's incumbency. With the exception of Marshall and Story, it is, perhaps, safe to say that no member of that court has taken part in so many decisions which vitally affect the national welfare, or which have had so potent an influence on the future of our institutions. During the early years of the century the Federal Government was taking form and shape under the masterly touch of Marshall and his associates, and a period of so great moment to the nation will in all probability never again occur. But second in importance to this only, were the closing quarter of the nineteenth century and the first decade of the twentieth, fraught, as they were, with the serious and far-reaching questions which resulted from the amazing growth of the Republic, its expansion beyond the natural confines of its territory, introducing it upon the stage as a world power of the first magnitude, and the manifold and complex problems involved in its industrial life.

It would, of course, be hopeless to attempt, in an article of this length, to even summarize the work of Justice Harlan in its entirety. All that can be accomplished is to point out a few of the more striking, and perhaps the most important, of the decisions to which he gave voice, in the hope that from such a survey some idea may be gained of the character of his judgment and the weight of his authority.

Perhaps the best estimate of the bent of Justice Harlan's judicial mind can be obtained from his treatment of the cases

arising under the Fifth and Fourteenth Amendments—those dealing with the phrase 'due process of law." In the interpretation of this doctrine he exhibited consistently a policy of sound common sense and regard for the welfare of organized society as opposed to the technical rights of a citizen as such, which policy never swerved him, however, from his adherence to what he deemed the fundamentals of personal liberty. So we find him consistently upholding legislation looking toward the shortening of the hours of labor in state or municipal work, and even in private employments, which are in their nature difficult or dangerous,[1] as well as laws enacted for the preservation of the health of the community. Thus in delivering the opinion of the court in *Atkin* v. *Kansas,* he said:[2]

"It cannot be deemed a part of the liberty of any contractor "that *he* be allowed to do public work in any mode he may "choose to adopt, without regard to the wishes of the State. On "the contrary, it belongs to the State, as the guardian and trustee "for its people, and having control of its affairs, to prescribe "the conditions upon which it will permit public work to be done "on its behalf, or on behalf of its municipalities. No court has "authority to review its action in that respect. Regulations on "this subject suggest only considerations of public policy. And with "such considerations the courts have no concern."

And in *Jacobson* v. *Massachusetts,*[3] we find this language:

"We are not prepared to hold that a minority, residing or "remaining in any city or town where smallpox is prevalent, and "enjoying the general protection offered by an organized local "government, may thus defy the will of its constituted authori- "ties, acting in good faith for all, under the legislative sanction "of the state. If such be the privilege of a minority then a like "privilege would belong to each individual of the community, "and the spectacle would be presented of the welfare and safety "of an entire population being subordinated to the notions of a "single individual who chooses to remain a part of that popula- "tion. We are unwilling to hold it to be an element in the liberty "secured by the Constitution of the United States that one person,

[1] Atkin v. Kansas, 191 U. S. 207 (1903); Jacobson v. Mass., 197 U. S. 11 (1904); Lochner v. N. Y., 198 U. S. 45 (1904).

[2] 191 U. S. 207, 222 (1903).

[3] 197 U. S. 11, 37 (1904).

"or a minority of persons, residing in any community and enjoy-
"ing the benefits of its local government, would have the power
"thus to dominate the majority when supported in their action by
"the authority of the State."

He was a firm believer in legislative authority, and was willing at all times to resolve doubts in favor of the will of the people as expressed through their representatives, except where such expression came in conflict with some clearly defined constitutional limitation. In a powerful dissenting opinion in *Lochner* v. *New York*,[4] we find these sentiments:

"If such reasons exist that ought to be the end of this case,
"for 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 Constitu-
"tion of the United States. We are not to presume that the
"State of New York has acted in bad faith. Nor can we assume
"that its legislature acted without due deliberation, or that it did
"not determine the question upon the fullest attainable informa-
"tion, and for the common good. We cannot say that the State
"has acted without reason nor ought we to proceed upon the
"theory that its action is a mere sham. Our duty, I submit, is
"to sustain the statute as not being in conflict with the Federal
"Constitution, for the reason—and such is an all-sufficient rea-
"son—it is not shown to be plainly and palpably inconsistent
"with that instrument."

On the other hand, he was not an upholder of confiscatory legislation, even when enacted to meet a popular demand. Thus in *Chicago, Burlington and Quincy Railroad* v. *Chicago*,[5] a case interpreting a statute of Illinois which provided a method for the taking of property by a railroad, he held, with the majority of the court, that the verdict of a jury of view was not an adequate remedy; and in *Smyth* v. *Ames*,[6] he took the position that an act regulating railroad rates which resulted, upon a fair showing, in a net loss per year to the railroads affected, was unconstitutional, as taking property without due process of law.

Let the Act of the legislature infringe a provision of the Bill

[4] 198 U. S. 45, 72 (1904).
[5] 166 U. S. 226 (1896).
[6] 169 U. S. 466 (1897).

of Rights and he was vehement in its denunciation. In *Adair* v. *United States,*[7] which was an interpretation of a Federal statute making it a crime for an interstate railroad or its agent to discharge an employee for belonging to a labor organization, he said:

"In our opinion that section, in the particular mentioned, is "an invasion of the personal liberty, as well as of the right of "property, guaranteed by that Amendment. Such liberty and "right embraces the right to make contracts for the purchase "of the labor of others and equally the right to make contracts "for the sale of one's own labor; each right however, being sub-"ject to the fundamental condition that no contract, whatever "its subject matter, can be sustained which the law, upon reason-"able grounds, forbids as inconsistent with the public interests "or as hurtful for the public order or as detrimental to the common "good."

Often he stood alone against the court in this view. Thus in *Schick* v. *United States,*[8] he insisted that it was in derogation of the constitutional right of trial by jury to permit an accused to waive such a trial, and in *Twining* v. *New Jersey,*[9] he said:

"I cannot support any judgment declaring that immunity "from self-incrimination is not one of the privileges or immunities "of National citizenship, nor a part of the liberty guaranteed by "the Fourteenth amendment against hostile state action. The "declaration of the court, in the opinion just delivered, that im-"munity from self-incrimination is of great value, a protection "to the innocent and a safeguard against unfounded and tyranni-"cal prosecutions, meets my cordial approval. And the court "having heretofore, upon the fullest consideration, declared that "the compelling of a citizen of the United States, charged with "crime, to be a witness against himself, was a rule abhorrent to "the instincts of Americans, was in violation of universal Ameri-"can law, was contrary to the principles of free government and "a weapon of despotic power which could not abide the pure "atmosphere of political liberty and personal freedom, I cannot "agree that a State may make that rule a part of its law and "binding on citizens, despite the Constitution of the United "States. No former decision of this court requires that we should "now so interpret the Constitution."

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[7] 208 U. S. 161, 171 (1907).
[8] 195 U. S. 65 (1904).
[9] 211 U. S. 78, 126 (1905).

A sane jurist, a firm believer in popular judgment, he was nevertheless thoroughly imbued with the sanctity of the Constitution and with the necessity of upholding its mandates. He would undoubtedly have gone to great lengths, sacrificed expediency, and even, perhaps, inflicted hardship in a given case if he thought that only thus could one of the great safeguards of constitutional liberty be protected. Yet he was in no sense a harsh judge, and whenever possible, consistently with his idea of fundamental rights, he attempted to give force to salutary legislation, and to the demands of modern civilization.

Equally typical of his views of the rights of American citizens under the Constitution are his opinions in the *Insular Cases*. The circumstances of these cases gave rise to the question of the application of the Constitution in all its parts, to the newly-acquired territories outside our shores. Justice Harlan maintained that wherever the Constitution was in force at all, it was in force as to all its provisions, and insisted that the rights of a citizen of Hawaii or the Philippines subsequent to their annexation were as high, so far as all the Constitutional guaranties and privileges were concerned, as those of a native of New York or Pennsylvania. Hence we find him concurring in the opinion of the Court in *De Lima* v. *Bidwell*,[10] the case which held that, in the absence of legislation, duties could not be collected on goods shipped from Porto Rico into the United States after the annexation; and, on the other hand vigorously dissenting in the next case of *Downes* v. *Bidwell*,[11] in which the court upheld a provision of the Foraker Act providing for an import duty on goods imported from Porto Rico. He took the position that the moment Porto Rico came under our sovereignty it became a part of the United States, and that such a tax was therefore in violation of the clause of the Constitution requiring that imposts and duties imposed by Congress shall be uniform throughout the United States. He says:[12]

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[10] 182 U. S. 1 (1900).
[11] 182 U. S. 244 (1901).
[12] Page 380.

"It is one thing to give such a latitudinarian construction to "the Constitution as will bring the exercise of power by Congress, "upon a particular occasion or upon a particular subject, within "its provisions. It is quite a different thing to say that Congress "may, if it so elects, proceed outside of the Constitution. The "glory of our American system of government is that it was "created by a written constitution which protects the people "against the exercise of arbitrary, unlimited power, and the "limits of which instrument may not be passed by the govern- "ment it created, or by any branch of it, or even by the people "who ordained it, except by amendment or change of its pro- "visions."

We find him dissenting again in *Hawaii* v. *Mankichi*,[13] on the ground that, once Hawaii was annexed it became an integral part of the United States, and subject to all the Constitutional guaranties of liberty, one of the most fundamental of which is trial in criminal cases by, and the right to a unanimous verdict of, twelve jurors. Hence he maintained that a conviction, under the law of Hawaii, by a majority of a jury of twelve, is in violation of the Constitutional right. His thought in all these cases may perhaps be summed up in these words:[14]

"Can it be that the Constitution is the supreme law in the "States of the Union, in the organized Territories of the United "States, between the Atlantic and Pacific Oceans, and in the "District of Columbia, and yet was not, prior to the act of 1900, "the supreme law in territories and among peoples situated as "were the territory and people of Hawaii, and over which the "United States had acquired all rights of sovereignty of what- "soever kind? A negative answer to this question, and a recogni- "tion of the principle that such an answer involves, would place "Congress above the Constitution. It would mean that the "benefit of the constitutional provisions designed for the protec- "tion of life and liberty may be claimed by some of the people "subject to the authority and jurisdiction of the United States, "but cannot be claimed by others equally subject to its au- "thority and jurisdiction. It would mean that the will of "Congress, not the Constitution, is the supreme law of the land "only for certain peoples and territories under our jurisdiction. "It would mean that the United States may acquire territory by "cession, conquest or treaty, and that Congress may exercise "sovereign dominion over it, outside of and in violation of the

[13] 190 U. S. 197 (1902).
[14] See page 239.

"Constitution, and under regulations that could not be applied "to the organized Territories of the United States and their "inhabitants. It would mean that, under the influence and guid- "ance of commercialism and the supposed necessities of trade, "this country has left the old ways of the fathers, as defined "by a written Constitution, and entered upon a new way, in "following which the American people will lose sight of or be- "come indifferent to principles which had been supposed to "be essential to real liberty. It would mean that, if the principles "now announced should become firmly established, the time may "not be far distant when, under the exactions of trade and com- "merce, and to gratify an ambition to become the dominant "political power in all the earth, the United States will acquire "territories in every direction, which are inhabited by human "beings, over which territories, to be called 'dependencies' or "'outlying possessions,' we will exercise absolute dominion, "and whose inhabitants will be regarded as 'subjects' or 'depen- "dent peoples', to be controlled as Congress may see fit, not as "the Constitution requires, nor as the people governed may "wish. Thus will be engrafted upon our republican institutions, "controlled by the supreme law of a written constitution, a "*colonial* system entirely foreign to the genius of our government "and abhorrent to the principles that underlie and pervade the "Constitution."

And in *Dorr* v. *United States,*[15] he again dissented on the same ground.

His attitude in these cases was not new. He had long insisted upon the universality, under the Constitution, of the right of trial by a jury of twelve,[16] and in the cases above cited he therefore merely applied the Constitution to the islands. The chief point on which he broke with the majority of the court was that of the Constitution "following the flag." Justice Harlan asserted that as soon as a territory was incorporated into the United States, and came under the sovereignty of the Federal Government, the Constitution became applicable to it, not in part, but as a whole, and that the rights of the citizens of that territory to all the Constitutional privileges and guaranties were absolute. To hold otherwise, to hold that Congress had yet

[15] 195 U. S. 138 (1904).

[16] See Justice Harlan's opinions in Hurtado v. California, 110 U. S. 516 (1883); Thompson v. Utah, 170 U S. 343 (1897); Maxwell v. Dow, 176 U. S. 581 (1899).

to enact legislation in order to perfect these rights was, he insisted, to place Congress above the Constitution.

In *Gonzalez* v. *Williams,*[17] he concurred in the unanimous opinion of the court, to the effect that, after the annexation of Porto Rico, citizens of that island coming into the United States, were not to be treated as "alien immigrants."

As is to be expected, the same cardinal principles which guided Justice Harlan in the decisions above cited are found to shape his opinions in the cases that he had to decide under the Commerce Clause. Adherence first of all to the supremacy of the Constitution, and hence to the paramount authority of Congress in all cases involving the question of interstate commerce pure and simple, was tempered by a readiness to concede to the states a full measure of "police power," wherever the same was exercised to safeguard the welfare of the community. An excellent illustration of this is to be found in his opinions in the cases of *Plumley* v. *Massachusetts,*[18] and *Geer* v. *Connecticut.*[19] In the former, delivering the opinion of the court, he upheld a statute of Massachusetts which made it a misdemeanor to sell oleomargerine colored to resemble butter, maintaining that this was legislation entirely within the rights of a state government, and not in conflict with the control of Congress over interstate commerce, even though the oleomargerine attempted to be sold was brought across the state line. In *Geer* v. *Connecticut,* on the other hand, he dissented from the opinion of the court, and insisted that a statute of a state was unconstitutional which made it a misdemeanor to kill game with the intent of taking it out of the state. In his opinion in the former case we find this language:[20]

"If there be any subject over which it would seem the States "ought to have plenary control, and the power to legislate in "respect to which it ought not to be supposed was intended to "be surrendered to the general government, it is the protection "of the people against fraud and deception in the sale of food

[17] 192 U. S. 1 (1903).
[18] 155 U. S. 461 (1894).
[19] 161 U. S. 519 (1895).
[20] Page 472.

"products. Such legislation may, indeed, indirectly or inci-
"dentally affect trade in such products transported from one
"State to another State. But that circumstance does not show
"that laws of the character alluded to are inconsistent with the
"power of Congress to regulate commerce among the States."

His attitude in the latter decision may, perhaps, best be seen in this paragraph: [21]

"* * * To hold that the person receiving personal property
"from the owner may not receive it with the intent to send it
"out of the State is to recognize an arbitrary power in the govern-
"ment which is inconsistent with the liberty belonging to every
"man, as well as with the rights which inhere in the ownership
"of property. Such a holding would also be inconsistent with
"the freedom of interstate commerce which has been established
"by the Constitution of the United States."

A more striking example of his attitude of mind toward such a class of problems could scarcely be found. Insisting at all times on the supremacy of Congress with respect to interstate commerce, he was nevertheless ready to admit an exception, or rather, to take a case outside the operation of the rule, when the public necessity would seem to demand it.[22]

In the *Lottery Case,*[23] Justice Harlan delivered the opinion of the court, holding that lottery tickets are articles of commerce, and hence within the control of Congress, and a more recent opinion illustrating his adherence to the doctrine of the supremacy of Congress is *Western Union Telegraph Co.* v. *Kansas.*[24] In this case he delivered the opinion of the court, to the effect that a state may not impose a tax on a corporation doing interstate business, when the tax is based upon the entire capital stock of the corporation, much of which is invested outside the state. He says: [25]

"It is of the last importance that the freedom of interstate
"commerce shall not be trammelled or burdened by local regu-

[21] Page 543.
[22] See also Crutcher v. Kentucky, 141 U. S. 47 (1890).
[23] 188 U. S. 321 (1902).
[24] 216 U. S. 1 (1909)
[25] Page 37.

"lations which, under the guise of regulating local affairs, really "burden rights secured by the Constitution and laws of the "United States. While the general right of the States to regu- "late their strictly domestic affairs is fundamental in our con- "stitutional system and vital to the integrity and permanence of "that system, that right must always be exerted in subordina- "tion to the granted or enumerated powers of the General "Government, and not in hostility to rights secured by the "Supreme Law of the Land."

He dissented in the *Employers Liability Cases*,[26] maintaining that the fact that an act *might* be interpreted to include intrastate commerce does not render it unconstitutional, provided it can be given force and effect, without giving it such interpretation, as proper legislation within the power of Congress in its control over interstate commerce.

Perhaps the most interesting of Justice Harlan's opinions, and certainly those for which he was most widely known at the time of his death, are to be found in the cases arising under the Sherman Anti-Trust Act. In the first case that came before the Supreme Court under that enactment—*United States* v. *E. C. Knight Co.*,[27]—he took a position, in which he at that time stood alone, and from which he never receded. It will be remembered that that was the case in which the court said that a combination, even though amounting to a practical monopoly, which had for its object the control of the *manufacture* of refined sugar, was not within the purview of the Act, manufacturing not being considered a carrying on of interstate commerce. Justice Harlan, in a powerful dissent, pointed out that such an interpretation of the law was nothing more than an evasion of its mandates, and in the course of his opinion delivered this significant, almost prophetic utterance:[28]

"We have before us the case of a combination which abso- "lutely controls, or may, at its discretion, control the price of all "refined sugar in this country. Suppose another combination, "organized for private gain and to control prices, should obtain

[26] 207 U S. 463 (1907).
[27] 156 U. S. 1 (1894).
[28] Page 44.

"possession of all the large flour mills in the United States; "another, of all the grain elevators; another, of all the oil terri- "tory; another, of all the salt-producing regions; another, of all "the cotton mills; and another, of all the great establishments "for slaughtering animals, and the preparation of meats. What "power is competent to protect the people of the United States "against such dangers except a national power—one that is "capable of exerting its sovereign authority throughout every "part of the territory and over all the people of the nation?"

In this case, then, he took the stand that the prohibition of the statute was absolute and unqualified, and from this attitude he never swerved up to, and including, his opinions in the *Standard Oil* and *Tobacco Cases,* decided a few months before his death. Hence we find him concurring in the *Trans-Missouri Freight Cases,*[29] the *Joint-Traffic Cases,*[30] the *Addyston Pipe Case,*[31] *Bement* v. *National Harrow Co.,*[32] *Montague* v. *Lowry,*[33] the *Northern Securities Case,*[34] *Loewe* v. *Lawton,*[35] and *Shawnee* v. *Anderson,*[36] in all of which the court held illegal the combination attacked. In perhaps the most important of these, the *Northern Securities Case,* he delivered the opinion of the court, and a glance at his language will show how little his attitude had changed in the ten years since the Knight case was decided.

"But even if the court shared the gloomy forebodings in "which the defendants indulge, it could not refuse to respect the "action of the legislative branch of the Government if what it "has done is within the limits of its constitutional power. The "suggestions of disaster to business have, we apprehend, their "origin in the zeal of parties who are opposed to the policy "underlying the Act of Congress or are interested in the result "of this particular case; at any rate, the suggestions imply that "the court may and ought to refuse the enforcement of the pro- "visions of the act, if, in its judgment, Congress was not wise "in prescribing as a rule by which the conduct of interstate and

[29] 166 U. S. 290 (1896).
[30] 171 U. S. 505 (1898).
[31] 175 U. S. 211 (1899).
[32] 186 U. S. 70 (1901).
[33] 193 U. S. 38 (1903).
[34] 193 U. S. 197 (1903).
[35] 208 U. S. 274 (1907).
[36] 209 U. S. 423 (1907).

"international commerce is to be governed, that every combina-
"tion, whatever its form, in restraint of such commerce and the
"monopolizing or attempting to monopolize such commerce shall
"be illegal. These, plainly, are questions as to the policy of
"legislation which belong to another department, and this court
"has no function to supervise such legislation from the stand-
"point of wisdom or policy."[37]

Finally, there are his now famous opinions in the *Standard Oil* and *Tobacco Cases,*[38] in which he concurred in the judgments but dissented from the opinions of the other eight justices. His position there taken, that the Sherman Act is unqualified in its terms and capable of only one interpretation, is in exact conformity with his opinions in the *E. C. Knight* and the *Northern Securities Cases,* and with that of the majority of the court in the *Trans-Missouri Freight Case* and the *Joint Traffic Cases.* It is a position which may or may not result in a wise interpretation of the Act, but its logic would seem to be unanswerable. It is the expression of a mind, fearless in its convictions, free from the least suspicion of casuistry, and bent on upholding the spirit as well as the letter of a Congressional enactment.

Indeed these are the notable characteristics of Justice Harlan's opinions. His mind was essentially simple in its workings, free from delight in subtle distinctions, resorting rather to direct and vigorous logic. He was prone to follow authority, and was never so well satisfied as when he could succeed in bringing a given set of facts under the operation of some recognized adjudication. In practically every opinion which he delivered bearing upon a question of interstate commerce he cited Marshall's now classic language in *Gibbons* v. *Ogden,*[39] and all through his work runs a current of reliance upon the established judgments of the court. So, too, he adhered closely to the precepts of the Constitution, combating at every turn attempts to strain its interpretation in order to solve particular exigencies. In the construction of a statute he endeavored to ascertain the intent of the legislative body which was responsible for its

[37] Page 351.
[38] 221 U. S. 1 and 106 (1901).
[39] 9 Wheaton, 1 (1824).

enactment, and in the absence of any guide to such intent, it was his custom to accept the words of the act as they are used in the ordinary affairs of life. A sincere patriot, he was proud and jealous of the integrity of our time-honored institutions and resented all attempts to alter them by "judicial legislation." If there is a criticism of his work it lies in his readiness to carry his convictions to their logical result, regardless of particular hardships, or even of social and political upheaval. Yet he was a sane and wise statesman, ever willing and anxious to uphold salutary legislation.

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

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