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Justice John Marshall Harlan I

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I Introductory Remarks

Most of us remember Thurgood Marshall, the U.S. Supreme Court Justice whose hallmark was fairness for all people, regardless of their race, creed or social position. How many of us remember Supreme Court Justice John Marshall Harlan, who died just three years after Justice Marshall was born? Of those two, the most scholarly members of the Court, I have written about one. It is time that I deal with the other. T.S. Eliot once said “as we grow older the world becomes stranger, the pattern more complicated of dead and living.” Though it seems this world in which we live has more problems than ever before, it is wise to remember that the worlds in which those two great jurists lived had their problems. Having discussed the younger of those two Olympians it is with the thought that seeing how the other solved problems confronting his world that this article was written.

II The Minority Rights Cases

One of the earliest cases in which Justice Harlan wrote the Opinion of the Court was *Neal v. State of Delaware*. In that case a man of African decent complained to the U.S. Supreme Court that he was denied constitutional rights by the state court having denied his motion to remove his criminal case to federal court on the ground that the state constitution and statute, contained language providing that juries shall be complemented by members of the “white” race, discriminated against him because of his race. His second complaint was that he had been discriminated against by the fact that members of his race were being excluded from serving on juries. The Court, Justice Harlan writing its Opinion, overruled his objection as to removal, on the ground that the lower court clearly stated that the objectionable language, though not having been specifically removed from the state constitution and statute, by implication were considered to have been removed.

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1 In this paper he will be referred to as John Marshall Harlan, I, because his grandson, John Marshall Harlan, II, was also a great jurist, serving on the U.S. Supreme Court from March 28, 1955 until September 23, 1971, when he retired from the Court due to health reasons.


4 See supra note 2.

5 103 U.S. 370 (Oct. Term 1880).
be null and void. As to having been discriminated against by members of the African race not having served on juries, however, the Court reversed the state court. The wording of Justice Harlan’s Opinion left little doubt as to the holding of the Court:

The court will correct the wrong, will quash the indictment, or [sic] the panel; or, if not, the error will be corrected in a superior court, and ultimately in this court upon review. 6

And added

while a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color. So that we need only inquire whether, upon the showing made by the accused, the court erred in overruling the motions to quash the indictment and the panels of jurors. 7

And

The showing thus made, including, as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no “colored” citizen had ever been summoned as a juror in the courts of the State, —although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand, — presented a prima facie case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by

6 Id at 397.
7 Id.
want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State; and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States.\(^8\)

Three years after *Neal v. State of Delaware* the Court was called upon to determine *Bush v. Commonwealth of Kentucky*.\(^9\) There a citizen of Kentucky\(^10\) was indicted, tried and was sentenced to death for the alleged commitment of a crime. The prevailing statutes of Kentucky were virtually identical to those of Delaware.\(^11\) It was argued by the state that Kentucky’s highest court declared, as did the Delaware court, that since because of the Fourteenth Amendment, the reference to “white” persons was unconstitutional, it should be considered that the selection of the grand and petit juries served in compliance with the court’s ruling rather than with the Kentucky statute.\(^12\) Justice Harlan, writing the Opinion of the Court, found that there was nothing in the record which showed that the jurors were specifically instructed not to follow the statute.\(^13\) He therefore wrote that: “it should be assumed that the jury commissioners then appointed followed the statutes of Kentucky so far as they restricted the selections of grand jurors to citizens of the white race.”\(^14\)

In *Powell v. Com. of Pennsylvania*,\(^15\) Harlan quoted with approval from an earlier U.S. Supreme Court case\(^16\) in which the Opinion of the Court contained the following statement: “the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.”

The *Civil Rights Cases*\(^17\) concerned Congress’ attempt to enforce the Thirteenth and Fourteenth Amendments by enacting the Civil Rights Act of 1875. The Court, holding that the Fourteenth Amendment gave Congress the power to proscribe discriminatory action by the states, but it no application to the federal

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\(^8\) Id.

\(^9\) 107 U.S. 110, 122 (01/29/1883).

\(^10\) Justice Harlan’s native state.

\(^11\) See *supra*, the Neal case – text accompanying notes 5-8.

\(^12\) *Bush*, 107 at 121, 122.

\(^13\) Id. at 122.

\(^14\) Id.

\(^15\) 127 U.S. 678 (04/09/1888).

\(^16\) *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (05/10/1886).

\(^17\) 109 U.S. 3 (10/15/1883).
government, invalidated sections of that Act which made it a crime to deny equal access to “inns, public conveyances, theatres and other places of public amusement.” The Court ruled that the persons of African descent who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy such treatment. Justice Joseph P. Bradley, the author of the Opinion of the Court, wrote that:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.\textsuperscript{18}

Justice Harlan, in his lone dissent, chided Justice Bradley in saying that citizens of African descent were “special favorites of the laws,” by writing the following:

It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. What the nation, through congress, has sought to accomplish in reference to that race is, what had already been done in every state in 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 their legal right to take that rank, 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. At every step in this direction the nation has been confronted with class tyranny, [sic] which a contemporary English historian says is, of all tyrannies, the most intolerable, ‘for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot.’ To-day it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time it may be some other race that will fall under the ban. If the constitutional amendments be enforced, according to the intent

\textsuperscript{18} \textit{Id.} at 25.
with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude.\(^{19}\)

*Plessy v. Ferguson\(^{20}\)* involved a Louisiana statute, enacted on July 10, 1890, requiring railroads to provide equal, though separate, accommodations for “white and colored races.” On one occasion a man named Homer A. Plessy, a U.S. citizen and resident of Louisiana paid for, and occupied, accommodations provided for “white” persons on an intrastate journey within the boundaries of Louisiana, via the East La. Railway. He was 7/8 of Caucasian blood and 1/8 of African blood. Though his appearance was that of a Caucasian, a railroad conductor, apparently knowing that he was partially of African descent, required him to transfer his seat to the area of the train reserved for “colored” persons. Upon his refusal to change positions he was arrested and incarcerated. He was found guilty of a violation of the Louisiana statute by Judge John J. Ferguson of the Criminal District Court of the Parish of Orleans. The Louisiana Supreme Court affirmed the conviction.\(^{21}\) The U.S. Supreme Court was asked to reverse its decision. It did not; it affirmed the Louisiana Supreme Court.

Justice Henry B. Brown wrote the Opinion of the Court in which seven other Justices were in agreement. Justice Brown found that neither the Thirteenth nor the Fourteenth Amendments were violated. He referred to several cases, one of which\(^{22}\) held that a Louisiana state statute, such as the one under consideration, was unconstitutional because it interfered with interstate commerce. There the Court emphasized that its holding would not apply, if the statute concerned only intrastate commerce. In another case\(^{23}\) the Court held that a Mississippi statute which applied only to intrastate railroad journeys did not violate interstate commerce. Since the East La. Railroad operated solely within the Louisiana boundaries the statute was perfectly valid.

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\(^{19}\) *Id.* at 61, 62.

\(^{20}\) 163 U.S. 537 (5/18/1896).

\(^{21}\) *See Ex parte Plessy*, 11 So. 948 (La. 1892).

\(^{22}\) Hall v. De Cuit, 95 U.S. 485 (Oct. Term 1877).

\(^{23}\) *Louisville, N.O. Ry. Co. v. State of Mississippi*, 6 So. 203 (Miss. 06/10/1889), aff’d. 133 U.S. 587 (03/03/1890).
Justice Harlan, being the only dissenter, wrote a lengthy Opinion, in which he said:

in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. 24

He added that:

The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana. 25

And:

The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to

24 Id.at 559.
25 Id at 560.
render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.26

In Cumming v. Board of Ed. of Richmond County27 a group of taxpayers of African descent sued a school board that provided free high school education to students of Caucasian descent, but not to their children. They sought a closing of the subject school on the ground of “equal but separate,” then in vogue under Plessy v. Ferguson.28 The unanimous Court refused to grant the plaintiffs the relief they sought because, though it would hurt the Caucasian children, it would do nothing to help the plaintiffs’ children.29 Justice Harlan, writing the Opinion of the Court suggested that had the plaintiffs asked the board to build another school for their children, the outcome of the case might have been different.30 Before concluding the Opinion of the Court Justice Harlan wrote that:

while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.31

26 Id. at 560, 561.
27 175 U.S. 528 (12/18/1899).
28 See supra text accompanying notes 20-26.
29 Id. at 544.
30 Id. at 545.
31 Id.
Giles v. Harris\textsuperscript{32} affirmed a decree of the Circuit Court of the United States\textsuperscript{33} for the Middle District of Alabama which dismissed, for want of jurisdiction, a bill in equity to compel the board of registrars of Montgomery County to enroll people of African descent upon the voting lists. Justice Oliver Wendell Holmes wrote the Opinion of the divided Court. The Court considered the plaintiffs’ cause of action invalid for two reasons. The first was that “‘[i]f the sections of the Constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent.’”\textsuperscript{34} The second was that “[u]nless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form.”\textsuperscript{35}

In his dissent Justice Harlan parsed the majority Opinion by considering four statutes and sixteen cases. In summary he wrote that:

My views may be summed up as follows: 1. This case is embraced by that clause of the act of 1887-88 which provides that the circuit court shall have original cognizance ‘of all suits of a civil nature, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the Constitution or laws of the United States.’ 2. That the sum or value of the matter in dispute in such cases is jurisdictional under the statute. 3. That, as it did not appear from the record, in any way, that the matter in dispute exceeded in value the jurisdictional amount, the circuit court could not take cognizance of the case or dispose of it upon its merits. 4. That least of all does this court have jurisdiction to determine the merits of this case. 5. That when a case comes here upon a certificate as to the jurisdiction of a circuit court, this court may not forbear to decide that question, and determine the merits of the case upon a record which does not show jurisdiction in the circuit court.\textsuperscript{36}

As these are my views as to the jurisdiction of this court, upon this record, I will not formulate and discuss my views upon the merits

\textsuperscript{32} 189 U.S. 475 (04/27/1903).
\textsuperscript{33} At that time, Circuit Courts were the federal trial courts.
\textsuperscript{34} \textit{Id.} at 487.
\textsuperscript{35} \textit{Id.} 488.
\textsuperscript{36} \textit{Id.} at 503, 504.
of this case. But to avoid misapprehension, I may add that my conviction is that upon the facts alleged in the bill (if the record showed a sufficient value of the matter in dispute), the plaintiff is entitled to relief in respect of his right to be registered as a voter.\textsuperscript{37}

In \textit{Hodges v. United States}\textsuperscript{38} fourteen white men threatened and intimidated eight men of African descent to breach their contract with their employers and stop working for a lumber manufacturer even though they had entered into a contract with their employer to do so. The white men were indicted and convicted of violating a federal statute. On Writ of Error the convictions were overturned by the U.S. Supreme Court. The Court’s ruling was primarily based upon its conclusion that the Thirteenth Amendment in granting freedom to people of African descent denounced slavery and involuntary servitude, and the Fourteenth Amendment was adopted to implement it protected them against assault and battery and from trespass against their property or having it appropriated.\textsuperscript{39} It did not make them “wards of the nation.” Injuries sustained by such enforced breach of contract as appeared in this case must be addressed by state law, if any, as compensation. Justice Harlan, accompanied only by Justice William R. Day dissented with an Opinion of considerable length. He acknowledged that it was not the state of Arkansas that was accused of these wrongs, but individuals. The recent case of Clyatt v. United States\textsuperscript{40} clearly held that the prohibitions of the Thirteenth and Fourteenth Amendments are not limited to governments, but extend to individuals. He explained his reasons for that conclusion in the following words:

It would seem impossible, under former decisions, to sustain the view that a combination or conspiracy of individuals, albeit acting without the sanction of the state, may not be reached and punished by the United States, if the combination and conspiracy has for its object, by force, to prevent or burden the free exercise or enjoyment of a right or privilege created or secured by the Constitution or laws of the United States.\textsuperscript{41}

Of course the respondents were not being actually enslaved by their assailants, nor was their property trespassed upon. The wrongs having been committed by the petitioners was imposing upon the “black”

\textsuperscript{37} \textit{Id.} at 504.
\textsuperscript{38} 203 U.S. 1 (5/28/1906).
\textsuperscript{39} \textit{Id.} at 17.
\textsuperscript{40} 197 U.S. 207, 217 (03/13/1905).
\textsuperscript{41} Hodges, 203 U.S. at 34, 35.
men punishment, though not slavery, just as evil as slavery itself. This, Justice Harlan termed, the “badges or incidents of slavery,” a term which he used eleven times in his Dissenting Opinion. At one point he emphasized it in the following words:

this court has held that the 13th Amendment, by its own force, without the aid of legislation, not only conferred freedom upon every person (not legally held in custody for crime) within the jurisdiction of the United States, but the right and privilege of being free from the badges or incidents of slavery. And it has declared that one of the insuperable incidents of slavery, as it existed at the time of the adoption of the 13th Amendment, was the disability of those in slavery to make contracts. It has also adjudged - no member of this court holding to the contrary - that any attempt to subject citizens to the incidents or badges of slavery could be made an offense against the United States. If the 13th Amendment established freedom, and conferred, without the aid of legislation, the right to be free from the badges and incidents of slavery, and if the disability to make or enforce contracts for one's personal services was a badge of slavery, as it existed when the 13th Amendment was adopted, how is it possible to say that the combination or conspiracy charged in the present indictment, and conclusively established by the verdict and judgment, was not in hostility to rights secured by the Constitution?\footnote{43}{Id. at 35.}

The Court overruled the Hodges case in \textit{Jones v. Alfred H. Mayer Co.}\footnote{44}{392 U.S. 409, 443 n.78 (06/17/1968).}

\section{III. Who Was This Man Who So Upheld the Rights of Others?}

John Marshall Harlan was born on June 1, 1833 in Kentucky to James Harlan of a slave holding family dating back to 1779 and Elizabeth Harlan, nee Davenport Following in the footsteps of his father, a lawyer he attended Transylvania Law School. In 1851, having joined the Whig Party, he was elected Adjutant General of Kentucky. When the Whig Party dissolved in the early 1850’s he joined the “Know Nothing” Party, and soon resigned from it because of its members opposition to Catholicism, and joined the Democratic Party. At the beginning of the Civil War he organized a regiment of zouaves, and sought to

\footnote{42}{Id. at 27.}

\footnote{43}{Id. at 35.}
prevent Kentucky from seceding from the union. When his father died he took up residence in Frankfort. He won an election for the Attorney General position of the state. After losing reelection to that post in 1868 he joined the Republican Party, and moved to Louisville. During Rutherford B. Hayes’ campaign for the presidency of the United States in 1876 he was a staunch supporter. When Justice David Davis resigned from the Supreme Court Pres. Hayes nominated him to fill Davis’ place. Harlan was unanimously confirmed by the Senate on November 29, 1877, and took his Oath of Office on December 10th of that year. During his tenure on the Court he participated in 5,513 of the 5,565 cases considered by the Court, wrote 757 Opinions of the Court, specially concurred on 44 cases, and dissented in 382 cases, from which he acquired the pseudonym “the great dissenter.” During his tenure on the Court he served under Chief Justices Morrison R. Waite, Melville W. Fuller, and Edward D. White. Initially he was assigned to the 7th Circuit until 1896, and then until his demise he sat in the 6th Circuit. He heard 96 cases as a Circuit Court judge, and wrote the Opinion of the Court in 55 of them. Like Justice Joseph Story, Justice Harlan, while serving as a member of the U.S. Supreme Court taught law at Columbian Law School which later became known as the George Washington Law School in the District of Columbia. Each week he taught a Sunday School class at a Presbyterian church in the District. He died on December 14, 1911, having held the position of a Justice of the Court for 33 years, the third longest period up to that time. An honorable jurist he once admitted that one of his Opinions of the Court was erroneous, and dissented from a later decision in which the Court relied upon it.

45 At the time of Justice Harlan’s service the U.S. Supreme Court decided approximately 180 cases per year. This is slightly more than the present Court considers – approximately 120, on both oral argument and those solely on briefs.
46 His Opinions dealt heavily with judicial precedents, from the briefs and his own independent research. After discussing prior cases he would usually summarize how their holdings substantiated the decision of the Court in the case then being considered.
47 In one case, Cotting v. Godard, 183 U.S. 79, 115 (11/05/1901), he concurred in the judgment of the Court, but considered it unnecessary for the Court to discuss the due process issue. He was joined by six other Justices on that point.
48 In Marshall v. United States, 124 U.S. 391 (01/23/1888) he said that a retired U.S. army Colonel should receive 75% of the pay of a Colonel. In Marshall v. United States, 131 U.S. 391 (11/19/1888), he acknowledged that his prior ruling was a mistake and consequently dissented from that case in which the Court relied upon the prior case.
In another case he concurred with the Opinion of the Court, but made specific note of his disagreement with that Opinion’s reference to a specific case.

His son, John Maynard Harlan, a lawyer who argued frequently before the Court, sired a son, John Marshall Harlan II, who served as a member of the Court from March 17, 1955 to September 23, 1971, when he resigned due to ill health. Justice Harlan II, prior to his death gave all of his grandfather’s papers to Brandeis Law School of Louisville University.

IV. Some of Harlan’s Dissents later Vindicated

On 22 occasions Justice Harlan dissented from rulings of the Supreme Court, in cases not decided on racial grounds which later cases were abrogated in conformity with his thinking.

In *Hurtado v. California* The U.S. Supreme Court held that there is no constitutional requirement that a criminal prosecution be initiated by a grand jury. In that case the state brought a criminal charge through an Information filed by a Prosecutor; that procedure was approved by the Court. Justice Harlan wrote in a Dissenting Opinion:

> When the fourteenth amendment was adopted all the states of the Union -some in terms, all substantially - declared, in their constitution, that no person shall be deprived of life, liberty, or property otherwise than ‘by the judgment of his peers or the law of the land,’ or ‘without due process of law.’ When that amendment was adopted the constitution of each state, with few exceptions, contained, and still contains, a bill of rights, enumerating the rights of life, liberty, and property, which cannot be impaired or destroyed by the legislative department.

In *Allbright v. Oliver* Chief Justice William H. Rehnquist wrote that:

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49 He dissented in Antoni v. Greenhow, 107 U.S. 769 (03/05/1883), and in Moore v. Greenhow, 05/04/1885), he dissented, but observed that if the Antoni principles were to apply to Moore, with which he disagreed, the Moore majority was correct, even though he disagreed with it.

50 In Wolff v. City of New Orleans, 103 U.S. 358 (Oct. Term 1880) Harlan, while concurring with the majority’s Opinion, he disagreed with the majority’s handling of the holding of Meriwether v. Garrett, 102 U.S. 472 (Oct. Term 1880) because he did not want it understood that he agreed with what he considered an incorrect statement as to what was involved in that case.

51 110 U.S. 516 (03/03/1884).

52 *Id.* at 556, 557.

53 510 U.S. 266 (01/24/1994).
*Hurtado* held that the Due Process Clause did not make applicable to the States the Fifth Amendment's requirement that all prosecutions for an infamous crime be instituted by the indictment of a grand jury. In the more than 100 years which have elapsed since *Hurtado* was decided, the Court has concluded that a number of the procedural protections contained in the Bill of Rights were made applicable to the States by the Fourteenth Amendment.\(^{54}\)

In *Leisy v. Hardin*\(^ {55}\) the Court held that while the states were permitted to ban domestic liquor products they were not permitted to regulate imported liquor products in their original packages. Harlan dissented on the basis of prior decisions of the Court. Subsequent to the decision Congress enacted the Wilson Act\(^ {56}\) giving that states that specific power.

In *Buggs v. Spaulding*\(^ {57}\) the Court adopted a federal common law governance standard holding that the directors of a bank should not be responsible to stockholders of the bank for monies lost to the stockholders due to the directors’ dereliction of duty to exercise due care. Harlan dissented on the basis of those thoughts he expressed in his Dissenting Opinion:

> when the act of congress declared that the affairs of a national banking association shall be 'managed' by its directors, and that the directors should take an oath to 'diligently and honestly administer' them, it was not intended that they should abdicate their functions, and leave its management and the administration of its affairs entirely to executive officers. True, the bank may act by 'duly-authorized officers or agents' in respect to matters of current business and detail that may be properly intrusted to them by the directors. But certainly congress never contemplated that the duty of directors to manage and to administer the affairs of a national bank should be in abeyance altogether during any period that particular officers and agents of the association are authorized or permitted by the directors to have full control of its affairs. If the directors of a national bank chose to invest its officers or agents with such control, what the latter do may bind the bank as between it and those dealing with such officers and agents. But the duty

\(^{54}\) *Id* at 272.

\(^{55}\) 135 U.S. 100 (4/28/1890).


\(^{57}\) 141 U.S. 132 (5/25/91).
remains, as between the directors and those who are interested in
the bank, to exercise proper diligence and supervision in respect to
what may be done by its officers and agents.\footnote{Id. at 169.}

The ruling of the Court was abrogated by the holding of \textit{Erie R. Co. v. Tomkins}.\footnote{304 U.S. 64, 80 (04/25/1938) which held that Federal courts must be guided by the common
law, as well as the statutory law of the state in which they sit, rather than federal common law.}

In \textit{City of Brenham v. German American Bank}\footnote{144 U.S. 173 (3/28/1892).} the Court held that
negotiable securities may not be issued in execution of an express power to
borrow money. Harlan dissented, writing that:

It seems to us that the court, in the present case, announces for the
first time that an express power in a municipal corporation to
borrow money for corporate or general purposes does not, under
any circumstances, carry with it, by implication, authority to
execute a negotiable promissory note or bond for the money so
borrowed, and that any such note or bond is void in the hands of a
bona fide holder for value. There are, perhaps, few municipal
corporations anywhere that have not, under some circumstances,
and within prescribed limits as to amount, express authority to
borrow money for legitimate, corporate purposes. While this
authority may be abused, it is often vital to the public interests that
it be exercised [sic].\footnote{Id at 196.}

Just over a month later the Court, on Petition for Rehearing,
vacated its prior decision.\footnote{See City of Brenham v. German American Bank, 144 U.S. 549, 550 (5/2/1892).}

In \textit{United States v. E.C. Knight Co}.\footnote{156 U.S. 1 (01/02/1895).} the Court held that a Congressional
Act of July 2, 1890\footnote{26 Stat. 209. (07/01/1890).} attempting to protect trade and commerce from unlawful
restraints and monopolies was not offended by a sugar producing company which
had gained a monopoly from indiscriminately setting prices. Harlan dissented, and
wrote that:

by the opinion and judgment in this case, if I do not misapprehend
them, congress in without power to protect the commercial intercourse that such purchasing necessarily involves against the restraints and burdens arising from the existence of combinations that meet purchasers, from whatever state they come, with the threat - for it is nothing more nor less than a threat - that they shall not purchase what they desire to purchase, except at the prices fixed by such combinations. A citizen of Missouri has the right to go in person, or send orders, to Pennsylvania and New Jersey for the purpose of purchasing refined sugar. But of what value is that right if he is confronted in those states by a vast combination, which absolutely controls the price of that article by reason of its having acquired all the sugar refineries in the United States in order that they may fix prices in their own interest exclusively?65

The Knight case was abrogated by the Court in *NLRB v. Jones & Laughlin*66 which recognized the necessity of Congress regulating intrastate action where such action has a “close and substantial relation” to interstate commerce.

*Pollock v. Farmers’ Loan & Trust Co.*67 held that a state’s bond interest is immune from a non-discriminatory federal tax. Justice Harlan dissented on the basis that the decision violated prior decisions of the Court. Slightly more than a month later the Court vacated that prior decision.68 Feeling compelled to refute even the vacating decision Harlan wrote:

It is, I submit, greatly to be deplored that after more than 100 years of our national existence, after the government has withstood the strain of foreign wars and the dread ordeal of civil strife, and its people have become united and powerful, this court should consider itself compelled to go back to a long repudiated and rejected theory of the constitution, by which the government is deprived of an inherent attribute of its being, - a necessary power of taxation.69

65 City of Brenham, 156 U.S. at 36, 37.
66 301 U.S. 1, 100 (1937).
68 See Pollock v. Farmers’ Loan & Trust Co. 158 U.S. 601, 637 (05/20/1895).
69 *Id.* at 715.
United States v. Wong Kim Ark\textsuperscript{70} held that a person born in San Francisco, California, of Chinese parents, could not be excluded from the United States under the Chinese Exclusion Act\textsuperscript{71} after a temporary visit to China. The Supreme Court held that Section 1 of the Fourteenth Amendment confers citizenship “by birth within the territory.” Under the law of China the child’s parents, being citizens of China must remain such, to the exclusion of what United State law might be. The United States has recognized this Chinese law. Chief Justice Fuller dissented from the decision of the case on the basis that while the Fourteenth Amendment does not exclude from citizenship by birth children born in the United States of parents permanently located therein, and who might themselves become citizens; the Amendment, however, does not arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of the United States government are, and must remain, aliens. The person born in the United States, therefore, under the law of China, and the law of the United States, which acceded to China’s law, could not acquire U.S. citizenship. Justice Harlan, without writing an Opinion, agreed with the Chief Justice.

While the Wong Kim Ark case has not been specifically overruled, its subject matter is in a state of flux,\textsuperscript{72} effectively weakening its holding.

Maxwell v. Dow\textsuperscript{73} involved Charles L. Maxwell, who was found guilty of robbery by a jury of eight persons, pursuant to the Utah constitution which provided that in courts of general jurisdiction, except capital cases a jury shall consist of eight jurors. He was sentenced to eighteen years of imprisonment. In his complaint to the courts about being tried by fewer than twelve jurors, the Utah Supreme Court held that the state constitution

\textsuperscript{70} 169 U.S. 649 (03/28/1898).
\textsuperscript{71} The Chinese Exclusion Act (22 Stat. 58 Ch. 126 (1882)) was as the result of an extraordinary influx of relatively impoverished laborers immigrating to the United States after gold was discovered in California in January, 1848 and attracted thousands later that year. It suspended immigration of those persons for ten years. It was repealed by the Magnuson Act (57 Stat. 600, Ch. 344 (1943).
\textsuperscript{73} 176 U.S. 581 (02/26/1900).
did not violate the federal constitution, as neither the Sixth nor Seventh Amendments specifically required that juries must be composed of twelve members. The U.S. Supreme Court affirmed the Utah Supreme Court. Justice Harlan was the sole dissenter. He wrote:

No one, I think, can produce any authority to show that according to the ‘settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors,’ the trial of one accused of felony otherwise than by a jury of twelve, or wholly without a jury, was consistent with ‘due process of law.’ If the original Constitution had not contained a specific prohibition of trials for crime otherwise than by a jury, the requirement of due process of law in the Fifth Amendment would have stood in the way of any act of Congress authorizing criminal trials in the Federal courts in any mode except by a common-law jury. When, therefore, the Fourteenth Amendment forbade the deprivation by any state of life, liberty, or property without due process of law, the intention was to prevent any state from infringing the guaranties for the protection of life and liberty that had already been guarded against infringement by the national government.\(^74\)

And:

If it be said that there need be no apprehension that any state will strike down the guaranties of life and liberty which are found in the national Bill of Rights, the answer is that the plaintiff in error is now in the penitentiary of Utah as the result of a mode of trial that would not have been tolerated in England at the time American independence was achieved, nor even now, and would have caused the rejection of the Constitution by every one of the original states if it had been sanctioned by any provision in that instrument when it was laid before the people for acceptance or rejection. Liberty, it has been well said, depends, not so much upon the absence of actual oppression, as on the existence of constitutional checks upon the power to oppress. These checks should not be destroyed or impaired by judicial decisions.\(^75\)

\(^{74}\) Id. at 613, 614.

\(^{75}\) Id. at 617.
Seventy years later the U.S. Supreme Court followed Harlan’s thoughts by abrogating its *Maxwell* decision in *Williams v. Louisiana*.76

In *Taylor v. Beckham*77 The U.S. Supreme Court ruled that it had no jurisdiction to review a decision of a lower court in a *quo warranto* case concerning the complaint of a candidate for public office that he had been denied due process of the law by a recount of the election for that position. The Court having considered that the right to hold public office is not a property right as protected from denial of due process by the Fourteenth Amendment. Justice Harlan dissented, opining that:

> When the 14th Amendment forbade any state from depriving any person of life, liberty, or property without due process of law, I had supposed that the intention of the people of the United States was to prevent the deprivation of any legal right in violation of the fundamental guarantees inhering in due process of law. The prohibitions of that Amendment, as we have often said, apply to all the instrumentalities of the state, to its legislative, executive, and judicial authorities; and therefore it has become a settled doctrine in the constitutional jurisprudence of this country that ‘whoever by virtue of public position under a state government deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state’s power, his act is that of the state. This must be so, or [as we have often said] the constitutional prohibition has no meaning.’

And

> In my judgment the words ‘life, liberty, or property’ in the 14th Amendment should be interpreted as embracing every right that may be brought within judicial cognizance, and therefore no right of that kind can be taken in violation of ‘due process of law.’79

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76 399 U.S. 78, 92 (06/22/1970).
77 178 U.S. 548 (05/21/1900).
78 Id. at 599, 600.
79 Id. at 602, 603.
In *Board of Regents of State Colleges v. Roth*\(^{80}\) the U.S. Supreme Court, while not overruling *Taylor v. Beckham*, cast some doubt about its veracity. Justice Potter Steward considered some cases decided after *Taylor* and wrote:

Certain attributes of ‘property’ interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.\(^{81}\)

In *United States v. Lynah*\(^{82}\) the U.S. Supreme Court held that by improving navigation on the Savannah River the United States accidentally appropriated, by flooding, a rice plantation which bordered the river. The then Justice Edward D. White\(^{83}\) wrote a dissenting Opinion, which was joined in by Chief Justice Fuller and Justice Harlan. White pointed out, by dictum, that since the plantation lay partially beneath the high watermark of the river, the actions of the United States did not constitute appropriation, but at most damage to the property which could be rectified by a payment of money. The Court in *United States v. Chicago, M., St. P & P R. Co.*\(^{84}\) emasculated the *Lynah* decision.

In *Kidd v. State of Alabama*\(^{85}\) the U.S. Supreme Court approved a state taxing stock in some domestic corporations and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. With regard to corporations formed and having their property and business elsewhere, the Court held that the state, having the authority to tax stock in foreign corporations, must tax the stock held within the state if it is to tax anything. Justices Edward D. White and Harlan dissented.

\(^{80}\) 408 U.S. 564 (06/29/1972).
\(^{81}\) Id. at 577.
\(^{82}\) 188 U.S. 445 (02/23/1903).
\(^{83}\) Edward D. White subsequently (on 12/19/1910) became Chief Justice of the Court.
\(^{84}\) 312 U.S. 592, 598 (03/31/1941).
\(^{85}\) 188 U.S. 730 (02/23/1903).
without Opinion. The U.S. Supreme Court in *Fulton Corp. v. Faulkner*\(^8\) noted that the *Kidd* decision had been overruled by later commerce clause decisions.\(^7\)

In *West v. State of Louisiana*\(^8\) the U.S. Supreme Court held that the Sixth Amendment's right of confrontation with the witnesses against him does not apply to trials in state courts, on the ground that the entire Sixth Amendment does not so apply to such trials. Justice Harlan dissented without Opinion. The U.S. Supreme Court in *Pointer v. Texas*\(^9\) observed that ever since *Gideon v. Wainright*\(^9\) it can no longer be said that the Sixth Amendment does not apply to the states.

*In re Heff*\(^1\) held that a United States District Court lacked jurisdiction of a criminal trial of one accused of selling liquor to an Indian allottee because Congress had not authorized such jurisdiction. Justice Harlan dissented without Opinion. The following year Congress reversed the holding by the enactment of the Burke Act of 1906.\(^2\)

*Lochner v. New York*\(^3\) invalidated a New York law prescribing 60 hours per week work in bakeries. Justice Oliver Wendell Holmes wrote his now famous dissenting Opinion. Justice Harlan wrote a dissenting Opinion joined in by Justices Edward D. White and William R. Day, in which he said:

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not

\(^{86}\) 516 U.S. 325 (02/21/1996).
\(^{87}\) Id. at 326.
\(^{88}\) 194 U.S. 258 (05/02/1904).
\(^{89}\) 380 U.S. 400, 406 (04/05/1965).
\(^{90}\) 372 U.S. 335 (1963).
\(^{91}\) 197 U.S. 488 (04/10/1905).
\(^{92}\) 59th Cong. Ch. 2348, 34 Stat. 182. (05/08/1906).
\(^{93}\) 198 U.S. 45 (04/17/1905).
this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that, in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the state are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation. Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273. Nor can I say that the statute has no appropriate or direct connection with that protection to health which each state owes to her citizens (Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115); or that it is not promotive of the health of the employees in question (Holden v. Hardy, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Lawton v. Steele, 152 U. S. 133, 139, 38 L. ed. 385, 389, 14 Sup. Ct. Rep. 499); or that the regulation prescribed by the state is utterly unreasonable and extravagant or wholly arbitrary (Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633). Still less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law. Jacobson v. Massachusetts, 196 U. S. 11, ante, p. 358, 25 Sup. Ct. Rep. 358. Therefore I submit that this court will transcend its functions if it assumes to annul the statute of New York. It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors.\footnote{Id. at 69, 70.}

In 1952 the U.S. Supreme Court’ decision in \textit{Day-Brite Lighting Inc. v. State of Mo.}\footnote{342 U.S. 421, 423 (03/03/1952).} recognized the infirmities of the \textit{Lochner} decision by the following words of Justice William O. Douglas:

Our recent decisions make plain that we do not sit as a super-
legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits, as Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519, holds. But the state legislatures have [sic] constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.96

Haddock v. Haddock97 held that the mere domicile within the State of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all the other States by virtue of the full faith and credit clause of the Federal Constitution against a nonresident who did not appear and was only constructively served with notice of the pendency of the action. Three U.S. Supreme Court Justices dissented. Justice Henry R. Brown wrote an Opinion joined in by Justices David T. Brewer, Harlan and Oliver Wendell Holmes. Justice Holmes wrote an Opinion in which Justices Brown, Brewer and Harlan joined. The Haddock decision was specifically overruled by the Court in Williams v. North Carolina, I.98

Security Mut. Life Ins. Co. v. Prewitt99 ruled that states have the power to exclude foreign corporations from doing business with their boundaries.100 Justice Harlan joined the position taken by Justice William R. Day, who wrote a dissenting Opinion.101 In Terral v. Burke Const. Co.102 Chief Justice William Howard Taft opined that “Moyle v. Continental Insurance Co., 94 U. S. 535, 24 L. Ed. 148, and Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, must be considered as overruled and that the views of the minority judges in those cases have become the law of this court.”103

96 Id. at 423.
97 201 U.S. 562 (04/16/1906).
99 202 U.S. 246 (05/14/1906).
100 Id. at 257, 258.
101 Id. at 258.
102 257 U.S. 529 (02/17/1922).
103 Id. at 533.
In *Ex Parte Young*\(^{104}\) the Attorney General of a state was held in contempt for having brought a mandamus action in a state court to require the state to perform certain action. Upon a petition of aggrieved parties in federal court (in which the state was not named as a party), he was held in contempt of court. His defense was that such action was actually against the state, which was forbidden by the Eleventh Amendment to the U.S. Constitution. The U.S. Supreme Court disagreed with him, holding that the state court action was personal to him, and that the action was permitted to proceed. Justice Harlan dissented, in the following words:

no case heretofore determined by this court requires us to hold that the Federal circuit court had authority to forbid the attorney general of Minnesota from representing the state in the mandamus suit in the state court, or to adjudge that he was in contempt and liable to be fined and imprisoned simply because of his having, as attorney general, brought that suit for the state in one of its courts. On the contrary, my conviction is very strong that, if regard be had to former utterances of this court, the suit of Perkins and Shepard in the Federal court, in respect of the relief sought therein against Young, in his official capacity, as attorney general of Minnesota, is to be deemed—under the Ayers and Fitts Cases particularly—a suit against the state, of which the circuit court of the United States could not take cognizance without violating the 11th Amendment of the Constitution. Even if it were held that suits to restrain the instituting of actions directly to recover the prescribed penalties would not be suits against the state, it would not follow that we should go further and hold that a proceeding under which the state was, in effect, denied access, by its attorney general, to its own courts, would be consistent with the 11th Amendment. A different view means, as I think, that although the judicial power of the United States does not extend to any suit expressly brought against a state by a citizen of another state without its consent, or to any suit the legal effect of which is to tie the hands of the state, although not formally named as a party, yet a circuit court of the United States, in a suit brought against the attorney general of a state, may, by orders directed specifically against that officer, control, entirely control, by indirection, the action of the state itself in judicial proceedings in its own courts involving the constitutional validity of its statutes. This court has heretofore held

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\(^{104}\) 209 U.S. 123 (03/23/1908).
that that could not be done, and that such a result would, for most purposes, practically obliterate the 11th Amendment, and place the states, in vital particulars, as absolutely under the control of the subordinate Federal courts, as if they were capable of being directly sued. I put the matter in this way, because to forbid the attorney general of a state under the penalty of being punished as for contempt) from representing his state in suits of a particular kind, in its own courts, is to forbid the state itself from appearing and being heard in such suits. Neither the words nor the policy of the 11th Amendment will, under our former decisions, justify any order of a Federal court the necessary effect of which will be to exclude a state from its own courts. Such an order, attended by such results, cannot, I submit, be sustained consistently with the powers which the states, according to the uniform declarations of this court, possess under the Constitution. I am justified, by what this court has heretofore declared, in now saying that the men who framed the Constitution, and who caused the adoption of the 11th Amendment, would have been amazed by the suggestion that a state of the Union can be prevented, by an order of a subordinate Federal court, from being represented by its attorney general in a suit brought by it in one of its own courts; and that such an order would be inconsistent with the dignity of the states as involved in their constitutional immunity from the judicial process of the Federal courts (except in the limited cases in which they may constitutionally be made parties in this court), and would be attended by most pernicious results.  

In *International Soc. for Krishna Consciousness of Atlanta v. Eaves* 106 Judge Goldberg said that “[t]he Young rationale is, of course, now recognized as a fiction.” 107 On June 25, 1948 Congress enacted 28 U.S.C. § 1341 which provides that: “The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”

In *Twining v. State of N.J.* 108 the U.S. Supreme Court held that the exemption from one committing self incrimination in the courts of the states is not
secured by any part of the federal Constitution.\textsuperscript{109} Justice Harlan was the only member of the Court which disagreed with that proposition. In his dissenting Opinion he wrote that:

I am of opinion that, as immunity from self-incrimination was recognized in the 5th Amendment of the Constitution, and placed beyond violation by any Federal agency, it should be deemed one of the immunities of citizens of the United States which the 14th Amendment, in express terms, forbids any state from abridging, as much so, for instance, as the right of free speech (1st Amend.) or the exemption from cruel or unusual punishments (8th Amend.), or the exemption from being put twice in jeopardy of life or limb for the same offense (5th Amend.), or the exemption from unreasonable searches and seizures of one’s person, house, papers, or effects (4th Amend.). Even if I were anxious or willing to cripple the operation of the 14th Amendment by strained or narrow interpretations, I should feel obliged to hold that, when that Amendment was adopted, all these last-mentioned exemptions were among the immunities belonging to citizens of the United States, which, after the adoption of the 14th Amendment, no state could impair or destroy.\textsuperscript{110}

The Court overruled the Twining decision in Malloy v. Hogan\textsuperscript{111}

In Hendrix v. United States\textsuperscript{112} the defendant was being tried for violation of the prohibition laws of the U.S. His attempt to produce his wife as a witness was prohibited by the court for only laconic reasons. The U.S. Supreme Court affirmed, again without elucidation. The only dissent was from Justice Harlan who registered his position without Opinion. The case was overruled by Funk v. United States.\textsuperscript{113}

Standard Oil Co. v. United States\textsuperscript{114} was the seminal decision of the U.S. Supreme Court declaring that the Standard Oil Company of New Jersey and its subsidiaries had for the past forty years been engaging is a

\textsuperscript{109} Id. at 114.
\textsuperscript{110} Id. at 124, 125.
\textsuperscript{111} 378 U.S. 1, 6 (06/15/1964).
\textsuperscript{112} 219 U.S. 79 (01/03/1911).
\textsuperscript{113} 290 U.S. 371, 387 (12/11/1933).
\textsuperscript{114} 221 U.S. 1 (05/15/11).
violation of the Anti-Trust Act of July 2, 1890.\textsuperscript{115} Chief Justice Edward D. White\textsuperscript{116} wrote the Opinion of the divided Court in holding that the defendants violated the Congressional Act, but added that its finding was achieved only because the defendants were guilty of “undue” violation.\textsuperscript{117} This was the beginning of the “Rule of Reason” in anti-trust law.

Justice Harlan concurred with the Court’s finding that the defendants were guilty of a violation of the Act, but he dissented from the additional note to the effect that actionable violation should be found only if it were “undue.” Just one day short of five months from his death he wrote a masterpiece of scholarly prose, that should be required reading for everyone who aspires to be a lawyer in this country.

First he recites the conditions which prevailed in this country in 1890, when Congress enacted the legislation in question. In 1890 there was a “deep feeling of unrest” in the United States. We had barely rid ourselves of that scourge called slavery, and were now involved in another form of slavery, “that would result from aggravation of capital in the hands of a few individuals and corporations controlling for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life.”\textsuperscript{118} He noted that Congress may regulate interstate commerce, but not intrastate commerce because the States did not give up that right when the framers were at work drafting the Constitution. After quoting §§ 1 and 2 of the Act being reviewed he referred to \textit{U.S. v. Trans-Missouri Freight Ass’n}\textsuperscript{119} because it clearly rejected the defendants’ counsels’ attempt to urge the Court to adopt the same position espoused by the majority in this case. Counsel for the defendants in the Trans-Missouri case argued that Congress had intended to strike down only those contracts, combinations and monopolies as unreasonably restrained interstate commerce. The Court in answer to that argument proclaimed that this Court in that case “in words too clear to be misunderstood, said that to so hold was ‘to read into the act by way of judicial legislation, an exception not placed there by the lawmaking branch of the government.’ ‘This, the court said, as we have seen, ‘we cannot and ought not to do.’”\textsuperscript{120} The Court in the Trans-Missouri case refused to indulge in judicial legislation as this Court in this case ought to have done. Harlan

\footnote{26 Stat. at L. 209, Ch. 647, U.S. Comp Stat. 1901, p.3201.}
\footnote{Justice Edward D. White, the first Associate Justice having been elevated to the office of Chief Justice, assumed that position on December, 19, 1910.}
\footnote{In the Opinion of the Court (pages 20-81), Chief Justice White used the word “undue” ten times.}
\footnote{Id. at 83.}
\footnote{166 U.S. 290 (03/22/1897).}
\footnote{\textit{Standard Oil}, 221 U.S. at 90.}
then referred to seventeen other U.S. Supreme Court and one lower court decisions. Specifically Justice he wrote:

this court, many years ago, upon the fullest consideration, interpreted the antitrust act as prohibiting and making illegal not only every contract or combination, in whatever form, which was in restraint of interstate commerce, without regard to its reasonableness or unreasonableness, but all monopolies or attempt to monopolize ‘any part’ of such trade or commerce.  

And

my brethren, in their wisdom, have deemed it best to pursue a different course. They have now said to those who condemn our former decisions and who object to all legislative prohibitions of contracts, combinations, and trusts in restraint of interstate commerce, ‘You may now restrain such commerce, provided you are reasonable about it; only take care that the restraint is not undue.’ The disposition of the case under consideration, according to the views of the defendants, will, it is claimed, quiet and give rest to ‘the business of the country.’ On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely-extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited every contract, combination, or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry-difficult to solve by proof-whether the particular contract, combination, or trust involved in each case is or is not an ‘unreasonable’ or ‘undue’ restraint of trade.

As attorney Nima H. Mohebbi has written:

The initial positive reception to Standard Oil had slowly begun to wear off, however, near the end of the nineteenth century as the

121 Id. at 94.
122 Id. at 102, 103.
123 Law Clerk to U.S. District Judge Robert C. Chambers, S.D. West Virginia.
public developed an increasing fear of the company's sales practices. [FN87] Namely, Standard Oil practiced predatory price discrimination in order to maintain its hold on the oil markets in various regions of the country, and its tarnished executives frequently sought to evade the law when it seemed to help maximize profits. It was finally in 1907, after numerous state-initiated prosecutions of its subsidiaries, that Standard Oil was indicted and President Taft's Attorney General, George Wickersham, brought a suit seeking dissolution of the combination under the Sherman Act. At the time the action was brought, Standard Oil controlled roughly over half of the oil refining activities in the United States. 124

¶ V Harlan’s Opinions Concerning Various Subjects

A. Criminal Law

In United States v. Simmons 125 Justice Harlan wrote the following about purely statutory offenses:

Where the offence is purely statutory, having no relation to the common law, it is, ‘as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.’ 1 Bishop, Crim. Proc., sect. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence, [sic] and plead the judgment as a bar to any subsequent prosecution for the same offence. An indictment not so framed is defective, although it may follow the language of the statute. 126

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125 96 U.S. 360 (Oct. Term 1877).
126 Id. at 362.
B. Diversity of Citizenship Cases

In *Bors v. Preston*\(^{127}\) Justice Harlan wrote the following about the Court’s review of lower court decisions based on diversity of citizenship:

In cases of which the circuit courts may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, has, except under special circumstances declined to express any opinion upon the merits on appeal or writ of error where the record does not affirmatively show jurisdiction in the court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption[sic], in every stage of the cause, is that it is without their jurisdiction, unless the contrary appears from the record.\(^{128}\)

C. Equity Courts’ Functions

In *Snell v. Atlantic Fire & Marine Ins. Co. of Providence, Ill.*\(^{129}\) Justice Harlan opined on a function of courts of equity as follows:

It would be a serious defect in the jurisdiction of courts of equity if they were without the power to grant relief against fraud or mutual mistakes in the execution of written instruments. Of course parol proof, in all such cases, is to be received with great caution, and, where the mistake is denied, should never be made the foundation of a decree, variant from the written contract, except it be of the clearest and most satisfactory character. Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement after becoming aware of the mistake.\(^{130}\)

D. Federal Trial Courts’ Jurisdiction

In *Louisville Trust Co. v. Knott*\(^{131}\) Justice Harlan, speaking of the federal trial courts, then known as Circuit Courts, said the following:

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\(^{127}\) 111 U.S. 252 (_04/07/1884_).
\(^{128}\) *Id.* at 255.
\(^{129}\) 98 U.S. 85 (Oct. Term 1878).
\(^{130}\) *Id.* at 89, 90.
\(^{131}\) 191 U.S. 225 (11/30/1903).
The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the circuit court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other.\(^{132}\)

E. Federal Courts’ Determination of State Statutes

In *Oates v. First Nat. Bank of Montgomery*\(^{133}\) the Federal Court’s Review of State statutes was described in the following words:

We have already seen that the statutes of Alabama placed under the protection of the commercial law promissory notes, payable in money at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the Federal courts to determine upon their own judgment as to what these rules and doctrines are.\(^{134}\)

F. Foreign Judgments, Enforcement

In *Hilton v. Guyot*,\(^ {135}\) the Court held that in order for a court of this country to enforce a judgment of a foreign country, in addition to other factors, reciprocity must exist between the countries. In *Ritchie v. McMullen*,\(^ {136}\) decided the same day, the Court held that tribunals of this country must enforce a judgment rendered by a court of a foreign country which had basically the same requirements as referred to in *Hilton*. In *Ritchie* there was no mention of reciprocity specifically, but the Court referred, on two occasions,\(^ {137}\) to the fact that its decision was based on *Hilton*. Justice Harlan, along with Chief Justice Fuller and Justice David J. Brewer concurred in the judgment of the Court, but not for the reasons given. Their concurrence in the judgment was Chief Justice Fuller’s Dissenting Opinion in *Hilton*. In that dissent the requirement of reciprocity was rejected. Fuller wrote, in his Dissenting Opinion that:

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\(^{132}\) *Id.* at 233.

\(^{133}\) 100 U.S. 239 (Oct. Term 1879).

\(^{134}\) *Id.* at 246

\(^{135}\) 159 U.S. 113 (06/03/1895).

\(^{136}\) 159 U.S. 235 (06/03/1895).

\(^{137}\) See *Ritchie*, 159 U.S. at 240 and 243.
The fundamental principle concerning judgments is that disputes are finally determined by them, and I am unable to perceive why a judgment in personam, which is not open to question on the ground of want of jurisdiction, either intrinsically or over the parties, or of fraud, or on any other recognized ground of impeachment, should not be held, inter partes, though recovered abroad, conclusive on the merits.\textsuperscript{138}

G. Governmental Bonds

In \textit{Inhabitants of Montclair Tp. v. Ramsdel}\textsuperscript{139} Justice Harlan’s statement about governmental bonds included the following:

Legislative authority for an issue of bonds being established by reference to the statute, and the bonds reciting that they were issued in pursuance of the statute, the utmost which plaintiff was bound to show to entitle him, prima facie, to judgment, was the due appointment of the commissioners and the execution by them, in fact, of the bonds. It was not necessary that he should, in the first instance, prove either that he paid value, or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were, in fact, performed before the bonds were issued.\textsuperscript{140}

H. Hard Case Cannot be Permitted to Make Bad Law.

In \textit{Allen v. Morgan County}\textsuperscript{141} Justice Harlan said the following:

We did not, as counsel seem to suppose, overlook the argument based upon the subscription made by the city of Jacksonville. That subscription, as matter of law, was wholly disconnected from the subscription made by the county, and we could not regard the former as payment, in whole or in part, of the latter, without assuming to make for the parties a contract which they did not choose to make for themselves. If, as urged, that the result is unfortunate for the county, we can only say, what cannot be too

\textsuperscript{138} \textit{Id.} at 229.
\textsuperscript{139} 107 U.S. 147 (03/05/1883).
\textsuperscript{140} \textit{Id.} at 158.
\textsuperscript{141} 103 U.S. 515 (Oct. Term 1880).
often repeated, that hard cases cannot be permitted to make bad law.  

I. Interstate Commerce

In *Brimmer v. Rebman* Justice Harlan wrote that “a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute.” In *Champion v. Ames* he slightly expanded on his observations about interstate commerce as follows:

The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that under its power to regulate commerce among the several states Congress - subject to the limitations imposed by the Constitution upon the exercise of the powers granted - has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

J. Judicial Review of Lower Court Contempt Citations.

In *Ex parte Savin* Justice Harlan, in review of a contempt citation said the following:

Our conclusion is that the district court had jurisdiction of the subject-matter, and of the person, and that irregularities, if any, occurring in the mere conduct of the case, do not affect the validity

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142 *Id.* at 515.
143 138 U.S. 78 (01/19/1891).
144 *Id.* at 83.
145 188 U.S. 321 (02/23/1903).
146 *Id.* at 363, 364.
147 131 U.S. 267 (05/13/1889).
of its final order. Its judgment, so far as it involved mere errors, cannot be reviewed in this collateral proceeding, and must be affirmed.  

K. Native Americans

In United States v. Rickert, which concerned a state’s taxation of native Americans’ land, Justice Harlan wrote the following in the Opinion of the Court:

These Indians are yet wards of the nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race of which this court has said that ‘from their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.’

L. Nunc Pro Tunc Orders

In Hickman v. City of Ft. Scott, Justice Harlan discussed nunc pro tunc orders in the following manner:

The judgment was the one the court intended to enter, and the facts found were those only which the court intended to find. There is here no clerical mistake. Nothing was omitted from the record of the original action which the court intended to make a matter of

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148 Id. at 279, 280.
149 188 U.S. 432 (02/23/1903).
150 Id. 437, 438.
record. The case, therefore, does not come within the rule that a court, after the expiration of the term, may, by an order nunc pro tunc, amend the record by inserting what had been omitted by the act of the clerk or of the court.152

M. Patents

In Webber v. State of Virginia153 Justice Harlan wrote about patents in the following manner:

These considerations, gathered from the former decisions of this court, would seem to justify the conclusion that the right which the patentee or his assignee possesses in the property created by the application of a patented discovery, must be enjoyed subject to the complete and salutary power, with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few. The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plates by which copies of a map are multiplied is distinct from the copyright of the map itself.’ And again, the enjoyment of the right in the discovery ‘may be secured and protected by national authority against all interference; but the use of the tangible property which comes into existence by the application of the discovery is not beyond the control of State legislation simply because the patentee acquires a monopoly in his discovery.’154

N. Police Power

In Lake Shore & M. S. R. Co. v. State of Ohio155 Justice Harlan discussed police powers of the states in the following words:

what are called the police powers of the states were not surrendered to the general government when the constitution was ordained, but remained with the several states of the Union. And it

152 Id. at 418.
154 Id. 348, 349.
was asserted with much confidence that, while regulations adopted by competent local authority in order to protect or promote the public health, the public morals, or the public safety have been sustained where such regulations only incidentally affected commerce among the states, the principles announced in former adjudications condemn, as repugnant to the constitution of the United States, all local regulations that affect interstate commerce in any degree if established merely to subserve other public convenience.\textsuperscript{156}

O. Probate

In Ormsby \textit{v. Webb}\textsuperscript{157} Justice Harlan wrote the following concerning the probate of a Will:

a proceeding involving the original probate of a last will and testament is not strictly a proceeding in equity, although rights arising out of, or dependent upon, such probate have often been determined by suits in equity. In determining the question of the competency of the deceased to make a will, the parties have an absolute right to a trial by jury, and to bills of exceptions covering all the rulings of the court during the progress of such trial. These are not the ordinary features of a suit in equity. A proceeding in this district for the probate of a will, although of a peculiar character, is nevertheless a case in which there may be adversary parties, and in which there may be a final judgment affecting rights of property. It comes within the very terms of the act of congress defining the cases in the supreme court of this District, the final judgments in which may be re-examined here. If it be not a case in equity, it is to be brought to this court upon writ of error, although the proceeding may not be technically one at law, as distinguished from equity.\textsuperscript{158}

P. Supreme Court’s Power of Review of State Court’s Rulings

In \textit{Douglas v. Commonwealth of Kentucky}\textsuperscript{159} Justice Harlan opined that the U.S. Supreme Court possesses paramount authority, when

\begin{footnotesize}
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\textsuperscript{156} \textit{Id.} at 289.  \\
\textsuperscript{157} 134 U.S. 47 (03/03/1890).  \\
\textsuperscript{158} \textit{Id.} 64, 65.  \\
\textsuperscript{159} \textit{Id.} 68 U.S. 488 (11/29/1897).  \\
\end{footnotesize}
reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the Contract Clause of the Constitution, to determine for itself the existence or nonexistence of the contract’s set up, and whether its obligation has been impaired by the state enactment.\(^{160}\)

Q. Statutes of Limitations

In *Amy v. City of Dubuque*\(^ {161}\) Justice Harlan wrote that “It as is little to be questioned that the courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals.”\(^ {162}\) In *Town of Koshkonong v. Burton*\(^ {163}\) he wrote about state statutes of limitations that:

It was undoubtedly within the constitutional power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect.\(^ {164}\)

R. Taxation

In connection with taxation Justice Harlan espoused in *King v. Mullins*\(^ {165}\) as follows:

For the reasons stated, we hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the state by reason of the owner not having them placed, or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the

\(^{160}\) *Id.* at 502.

\(^{161}\) 98 U.S. 470 (Oct. Term 1878).

\(^{162}\) *Id.* at 471.

\(^{163}\) 104 U.S. 668 (Oct. Term 1881).

\(^{164}\) *Id.* at 675.

\(^{165}\) 171 U.S. 404 (05/31/1898).
representative of the state in the proper circuit court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition, and secure a redemption of his lands from the forfeiture declared, by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the constitution of the United States or the constitution of the state.\textsuperscript{166}

S. Treaties

\textit{Chew Heong v. United States}\textsuperscript{167} involved a Chinese laborer who temporarily left the United States, and when he attempted to return he was prevented by authorities on the ground that he did not have a certificate required by an Act of Congress, enacted approximately two years after a treaty with China, which did not require such certificate. The Court held that the treaty primed the statute. The laborer, having left the United States at a time when the treaty was in effect, and before the certificate was required, could not have obtained the certificate which was required at the time of his attempt to reenter the United States. Justice Harlan, in writing the Opinion of the Court, said that “he was clearly entitled, under the express words of the treaty, to go from and return to the United States of his own free will, - a privilege that would be destroyed if its enjoyment depended upon a condition impossible to be performed.”\textsuperscript{168} Approximately four years after this eminently sound decision was handed down Congress amended the statute\textsuperscript{169} to leave no doubt that Congress intended to abrogate the treaty, and consequently emasculate the decision.

T. Venue for Trial of Conversion Actions

In \textit{Stone v. United States}\textsuperscript{170} Justice Harlan discussed the intricacies of bring an action for conversion of secondary materials by the following wording:

In the present case the petition, it is true avers that the United States was the owner of the lands from which the trees were cut, but the gravamen of the action was the conversion of the lumber and the railroad ties manufactured out of such trees; and a

\begin{itemize}
\item [\textsuperscript{166}] \textit{Id.} at 436.
\item [\textsuperscript{167}] 112 U.S. 536 (12/08/1884).
\item [\textsuperscript{168}] \textit{Id.} at 560.
\item [\textsuperscript{169}] See 25 Stat. 504, Ch. 1064 (10/01/1888).
\item [\textsuperscript{170}] 167 U.S. 178 (05/10/1897).
\end{itemize}
judgment was asked, not for the trespass, but for the value of the personal property so converted by the defendant. The description in the petition of the lands and the averment of ownership in the United States were intended to show the right of the government to claim the value of the personal property manufactured from the trees illegally taken from its lands. Although the government's denial of the ownership of the land made it necessary for it to prove its ownership, the action, in its essential features, related to personal property, was of a transitory nature, and could be brought in any jurisdiction in which the defendant could be found and served with process. And a suit could have been brought to recover the property wherever it could be found.\textsuperscript{171}

§ VI. Harlan’s Opinions of the Court Which Have Been Questioned

Westlaw shows nine cases in which Justice Harlan wrote the Opinion of the Court as being overruled. An examination of those cases, however, reveals that either that they were technically not overruled or that Harlan was simply following the law then applicable, which was not overruled until by Courts in later years. While one case has not been overruled, a Congressional statute has made it, at best, obsolete.\textsuperscript{172}

In \textit{Martin v. Webb}\textsuperscript{173} a case which had been removed from a state court to a federal court, was affirmed by the Supreme Court, based upon federal law,\textsuperscript{174} as then required by \textit{Swift v. Tyson},\textsuperscript{175} and not modified by the Court until fifty-four years later in \textit{Erie R. Co. v. Thompson}.\textsuperscript{176}

In \textit{Hopt v. People}\textsuperscript{177} while a defendant was being tried for a capital offense with death as his punishment, jurors were selected outside the defendant’s presence. This procedure was objected to before the lower court, but the objection was denied by it primarily on the ground that the procedure was not objected to by defendant or his counsel. In reversing the lower court Justice Harlan wrote in the Opinion of the Court that

\begin{footnotesize}
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\item[\textsuperscript{171}] Id. at 182.
\item[\textsuperscript{172}] See infra text accompanying notes 204-207 concerning Adair v. United States, 208 U.S. 161 (01/27/1908).
\item[\textsuperscript{173}] 110 U.7. 7 (01/07/1884).
\item[\textsuperscript{174}] Requiring a bank to honor and approve actions of a bank official of lower status because he had been granted that power by the bank.
\item[\textsuperscript{175}] 41 U.S. 1, 22 (Jan. Term 1842).
\item[\textsuperscript{176}] 304 U.S. 64 (1938).
\item[\textsuperscript{177}] 110 U.S. 574 (03/03/1884).
\end{itemize}
\end{footnotesize}
it is said that the right of the accused to be present before the triers was waived by his failure to object to their retirement from the court-room, or to their trial of the several challenges in his absence. We are of opinion that it was not within the power of the accused or his counsel to dispense with statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, ‘cannot legally be disposed of or destroyed by an individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority.’ 1 Bl. Comm. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with, or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Comm. 11. Such being the relation with the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution. For these reasons we are of opinion that it was error, which vitiated the verdict and judgment, to permit the trial of the challenges to take place in the absence of the accused. 178

In Diaz v. United States 179 the Hopt case was cited as standing for the proposition that it forbid a trial on an assault and battery charge to proceed where a defendant had not been present for the entire proceeding.

178 Id. at 578. 579.
179 223 U.S. 442 (02/19/1912).
Justice Willis Van Dervanter explained the Court’s refusal to so extend the *Hopt* holding on the ground that it was rendered where the conviction was of a capital offense, and not in an assault and battery case, such as *Diaz*.\(^{180}\) Technically this was not an overruling, but the denial of an extension from an assault and battery case to a capital offense one.

In *Interstate Commerce Commission v. Brimson*\(^ {181}\) the Commission issued a subpoena to witnesses which were ignored. It sought the assistance of a court, to hold the witnesses in contempt without the assistance of a jury, as it was permitted to do by the Interstate Commerce Act. The Court held that the authorization was constitutional. Justice Harlan, writing the Opinion of the Court said: “[a]ny other course would, it might be apprehended, involve the exercise of original jurisdiction, and might possibly work injustice to one or the other of the parties.”\(^ {182}\) The Court in *Bloom v. State of Illinois*\(^ {183}\) without specifically overruling *Brimson* criticized its ruling. Justice Bryon White, in the Opinion of the Court wrote that:

> serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial.\(^ {184}\)

In *Davis v. United States*\(^ {185}\) a man was convicted of killing another man in an Indian Reservation. The Court, with Justice Harlan writing the Opinion of the Court, held that in such federal court actions it is the burden of the court to prove the defendant’s sanity. In 1984 Congress overruled that decision by enacting 18 U.S.C. §17(b), which provides that it is the defendant’s burden to prove insanity.\(^ {186}\)

In *Crain v. United States*\(^ {187}\) a man was convicted of a crime and imprisoned. In a split decision Justice Harlan, for the majority of the Court, on the basis of state court cases which had held that a certain form

\(^{180}\) *Id.* at 459.

\(^{181}\) 154 U.S. 447 (05/26/1894).

\(^{182}\) *Id.* at 490.

\(^{183}\) 391 U.S. 194 (05/20/1968).

\(^{184}\) *Id.* 198.

\(^{185}\) 160 U.S. 469 (12/16/1895).

\(^{186}\) See *State v. Holder*, 15 S.W. 3d 905, 911 (09/27/1999).

\(^{187}\) 162 U.S. 625 (04/20/1896)
of arraignment entered of record was essential to a legal trial; and holding that in a Federal court no valid trial could be had without the requisite arraignment and plea - that such must be shown by the record of conviction. If a legal trial cannot be had without a plea to the indictment, duly entered of record before trial, it would follow that such omission requires a reversal of the judgment of conviction, because the prisoner has been deprived of due process of law. The U.S. Supreme Court, in Garland v. State of Washington \(^{188}\) finding that subsequent cases had ruled to the contrary, felt compelled to overrule. \(^{189}\)

In Smyth v. Ames \(^{190}\) the U.S. Supreme Court held as improper, a Nebraska statute determining the method by which railroads should determine their rates for hauling freight. The unanimous Court. Justice Harlan writing the Opinion of the Court, set forth a complicated method, almost in eminent domain fashion, by which the carrier would first determine the value of its property that served the public and from that determination arrive at a fair return on the value of its property. \(^{191}\) The case has received judicial criticism, which has been summarized in the 1942 case of Federal Power Comm. v. Natural Gas Pipeline Co. \(^{192}\) without specifically mentioning the word “overruled.” \(^{193}\)

*Thompson v. Utah* \(^{194}\) involved an offense committed in Utah while it was a Territory, but the case was tried after Utah became a State. At the time of the offense, the defendant, under Utah Territory law, was entitled to a trial by a 12-person jury, but under the new State's law only 8 jurors were required. The U.S. Supreme Court in a split decision, held that this retrospective procedural change deprived the defendant of “a substantial right belonging to him when the offense was committed,” and therefore the Constitution’s Ex Post Facto Clause \(^{195}\) was violated. \(^{196}\) Justice Harlan, writing the Opinion of the Court wrote that:

> In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is ex post facto in its

\(^{188}\) 232 U.S. 642 (03/16/1914).
\(^{189}\) Id. at 645, 646.
\(^{190}\) 169 U.S. 466 (03/07/1898).
\(^{191}\) Id. at 550.
\(^{192}\) 315 U.S. 575 (03/16/1942).
\(^{193}\) Id. at 604.
\(^{194}\) 170 U.S. 343 (04/26/1898).
\(^{195}\) U.S. Const., Art. I, § 10, cl. 1.
\(^{196}\) *Thompson*, 170 U.S. at 355.
application to felonies committed before the territory became a state, because, in respect of such crimes, the constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury. ¹⁹⁷

In the 1990 decision of Collins v. Youngblood ¹⁹⁸ the Court reversed the Thompson case. Chief Justice William H. Rehnquist, the author of the Court’s Opinion, said:

The right to jury trial provided by the Sixth Amendment is obviously a “substantial” one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the Ex Post Facto Clause. To the extent that Thompson v. Utah rested on the Ex Post Facto Clause and not the Sixth Amendment, we overrule it. ²⁰⁰¹⁹⁹

In Connolly v. Union Sewer Pipe Co. ²⁰⁰ the Court was called upon to construe the constitutionality of an Illinois statute. ²⁰¹ Justice Harlan wrote in the Opinion of the Court that the portions of the statute which exempted agriculturists and live stock dealers from the statutory provisions were unconstitutional. Other provisions were found to be constitutional. The unconstitutional provisions were in contravention of the legislative intent. He concluded, therefore, that the entire Act, must be held invalid. In Tigner v. Texas ²⁰² the Court found that the Connolly ruling was correct at the time it had been made, but that the concept of what the law stood for had changed with time. Justice Felix Frankfurter wrote, in that Court’s Opinion:

we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of

¹⁹⁷ Id. at 355.
¹⁹⁹ Id. at 51, 52. The note 4 to which the Chief Justice referred provided that:

FN4. The Court’s holding in Thompson v. Utah, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898), that the Sixth Amendment requires a jury panel of 12 persons is also obsolete. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).

²⁰⁰ 184 U.S. 540 (03/10/1902).
²⁰² 310 U.S. 141 (05/06/1940).
the Texas legislature. Connolly's case has been worn away by the
erosion of time, and we are of opinion that it is no longer
controlling.\textsuperscript{203}

In \textit{Adair v. United States}\textsuperscript{204} the Court, with two Justices
dissenting\textsuperscript{205} held that a Congressional statute imposing punishment for
any employer who discharges an employee solely because of labor union
membership was unconstitutional. Justice Harlan wrote a lengthy Opinion
of the Court in which he opined that employers have the same due process
right to discharge their employees as the employees have to quit their
jobs.\textsuperscript{206} His almost concluding words were the following:

Looking alone at the words of the statute for the purpose of
ascertaining its scope and effect, and of determining its validity,
we hold that there is no such connection between interstate
commerce and membership in a labor organization as to authorize
Congress to make it a crime against the United States for an agent
of an interstate carrier to discharge an employee because of such
membership on his part. If such a power exists in Congress it is
difficult to perceive why it might not, by absolute regulation,
require interstate carriers, under penalties, to employ, in the
conduct of its interstate business, only members of labor
organizations, or only those who are not members of such
organizations, - a power which could not be recognized as existing
under the Constitution of the United States. No such rule of
criminal liability as that to which we have referred can be regarded
as, in any just sense, a regulation of interstate commerce. We need
scarcely repeat what this court has more than once said, that the
power to regulate interstate commerce, great and paramount as that
power is, cannot be exerted in violation of any fundamental right
secured by other provisions of the Constitution.\textsuperscript{207}

While the \textit{Adair} case has not been overruled, in \textit{Texas & N.O.R.
Co. v. Brotherhood of Railway & Steamship Clerks}\textsuperscript{208} Chief Justice
Charles Evans Hughes, writing the Opinion of the Court said that it was

\begin{itemize}
\item \textsuperscript{203} \textit{Id.} 147.
\item \textsuperscript{204} 208 U.S. 161 (01/27/1908).
\item \textsuperscript{205} Justice Joseph McKenna and Justice Oliver Wendell Holmes.
\item \textsuperscript{206} \textit{Adair}, 208 U.S. at 174, 175, 176.
\item \textsuperscript{207} \textit{Id.} at 179, 180.
\item \textsuperscript{208} 281 U.S. 548 (05/26/1930).
\end{itemize}
“inapplicable” to the case then under consideration because the Railway Act of 1926 did not interfere with “[t]he normal exercise of the right of the carrier to select its employees or discharge them.”

¶ VII The Insular Cases

A. Introductory Remarks

In *United States v. Verdugo-Urquidez* Chief Justice William Rehnquist said that the Insular Cases "held that not every constitutional provision applies to governmental activity even where the United States has sovereign power.” To understand the “Insular Cases,” it is best to know a bit about the Spanish colonization of the Americas, which began in 1492, with the discovery, by Columbus, of what was to become the North American Continent, but started to disintegrate in the late Nineteenth Century, by the peoples’ unrest with Spain, and the Spanish-American War. This requires some knowledge of Cuba, the Philippines, Puerto Rico, and Hawai’i, the four islands/archipelagos with which the United States had the most contact, and gave rise to the appellation “insular” cases.

B. Cuba

Spain’s disintegration of influence on the islands of Cuba, the Philippines, Guam, Samoa and others was precipitated by Cuba’s 1836 armed uprising for independence in Puerto Principe (Camaguey). In 1868 the people in Cuba became even more restless with Spanish domination, than they were in 1836, and The Ten Years War resulted in Spain’s granting more autonomy to the Cuban people in 1879. In 1892 an exiled Cuban revolutionary, Jose Marti, in New York City formed the Cuban Revolutionary Party. Though Marti is considered the founder of Cuban independence, his life was of short duration, being killed in a battle between revolutionary forces and Spanish troops on May 19, 1895. A completely unsettled condition existed in Cuba, with shortages of food and the Spaniard establishing concentration camps in which to imprison the dissidents. The development of a sugar industry on the island attracted U.S. settlers. Congress gave the American President power to assist the revolutionists in their efforts to oust Spanish control. In February, 1898

209 *Id.* at 570, 571.
211 *Id.* at 268.
the United States sent the second-class battleship “Maine” into the Havana harbor to protect the 8,000 Americans then living on the island. On the 15th of that month it exploded, from unknown causes; but Spain was popularly blamed. The Spanish-American War commenced with Madrid’s declaration of war on April 20, 1898, and Washington’s reply, with a like declaration, the following day. The war, however, was of short duration. Peace on the island did not actually come until December 10, 1898 with the signing of the Treaty of Paris. The war officially ended on April 11, 1899, when copies of the memorandum ratifying the Treaty were exchanged between the Spanish and American authorities. By the Treaty of Paris Spain recognized that its sovereignty over Cuba was at an end. Cuba, however, was not yet completely free of outside control. Both American and Spanish officials remained in governmental positions, despite their provocative presence. On April 12, 1900 Congress enacted an Organic Act establishing governance for the island. American troops remained in Cuba until March 2, 1901 when the U.S. Congress declared that U.S. troops leave the island. On December 31 of that year an election for first President of Cuba was conducted, and he took office on May 20, 1902; Cuba was declared an independent nation. The new Cuban Constitution gave the U.S. the privilege of intervening in Cuban affairs, and by a treaty certain land and water at Guantanamo Bay were perpetually leased to the United States, for “coaling (fueling) station” purposes. Several years later unsettled conditions erupted again on the island and in 1908 U.S. troops appeared, until self government was restored that year.

C. The Philippines

The situation in the Philippine Archipelago was, if different from that of Cuba, it was equally as complex. Dissatisfaction with being ruled by Spain first arose in August, 1896 with the establishment of the first Philippine Republic, which received supporting indication from the U.S.

212 30 Stat. 1754. This is not to be confused with The Treaty of Paris of Sept. 3, 1783, which ended the Revolutionary War between the British and the American revolutionists. Both treaties were constructed in Paris, France.
213 31 Stat. 77 Ch.191 (1900).
214 Executed by the Cuban President on Feb. 17, 1903, and by the U.S. President on Feb. 27, 1903.
prompting its people to declare their independence on June 12, 1898. The country, however was under U.S. control during the Spanish American War. On July 12, 1898 the President of the U.S., William McKinley, entered an Executive Order establishing tariffs on goods coming into the Philippine Islands while they were under the military control of the United States. Shortly after Spain indicated five days later - on July 17, 1898 - a desire for peace, the U.S. on August 14 of that year established a complete military government in the Philippines. President McKinley signed two Executive Orders creating a Philippine Commission for control of governance of the archipelago. The first was signed on January 20, 1899, and the second on March 18, 1900. They laid down considerable rules for the people to follow.\textsuperscript{215} By the Treaty of Paris,\textsuperscript{216} Spain, for the U.S. payment of $20 million, transferred control of the Philippine Islands\textsuperscript{217} to the U.S. The people, however, did not relish being transferred as subjects of one powerful nation to those of another powerful nation. It declared war on the U.S. on June 2, 1899. At first the native army conducted war against what it considered an invader, in a standard method of hostilities, but without much success. It soon transferred to guerilla tactics. What followed was an enormous loss of life on both sides, torture, cholera, malaria and acute shortages of food. On July 1, 1902 Congress enacted the Philippine Organic Act,\textsuperscript{218} granting to the people of the Philippines the U.S. Bill of Rights. Pres. Theodore Roosevelt, apparently tiring of the war, along with the majority of American citizens, on July 4, 1902 entered a full and complete pardon to all people of the Philippine archipelago who had participated in the conflict and declared the war to be at its end.

D. Puerto Rico

The situation in Puerto Rico, though less complicated than those of either Cuba or the Philippines, was vital to the fabric of the Insular Cases. Unrest in Puerto Rico with Spanish rule began in the Sixteenth Century. The harsh feeling developed in earnest with a popular revolt of the people on September 23, 1868. Twenty-seven years later, on December 8, 1895 The Puerto Rican Revolutionary Committee was founded in New York.

\textsuperscript{215} The Philippine Commission was replaced by an elective Senate by the Jones Act of 1916.
\textsuperscript{216} See supra text accompanying note 212.
\textsuperscript{217} Along with Guam and Samoa.
\textsuperscript{218} 32 Stat. 691, Ch. 1369 (1902),
City, that perhaps prompted another revolt two years later, which, in turn prompted Spain to grant the island an antonymous form of government beginning to function on July 17, 1898. The 1898 Treaty of Paris, in December of that year, by which Spain transferred its sovereignty to the United States saw the establishment of a U.S. military form of government on the island. On April 12, 1900 the U.S. Congress enacted the so-called “Organic Act of 1900.” Popularly known as the Foraker Act, it provided for a civilian form of government, the first of which was appointed by Pres McKinley on May 1, 1900. It consisted of an American Governor, five Puerto Rican and six American cabinet members. The first legislative assembly was elected on November 6, 1900, and it met on December 3d of that year. A second Organic Act for Puerto Rico was enacted by Congress on March, 2, 1917. In Balzac v. Porto Rico U.S. Supreme Court Justice William Howard Taft, commenting on that Act said “On the whole . . . we find no features in the Organic Act of Porto Rico of 1917 from which we can infer the purpose of Congress to incorporate Porto Rico into the United States . . . ” which appears to be the latest judicial pronouncement of the status of the island. On July 4, 1960 Pres. Harry S. Truman signed Public Act 600 permitting Puerto Ricans to draft their own constitution, establishing the country as a

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219 See supra text accompanying note 212.
221 Named for Senator Joseph B. Foraker, of Ohio, who introduced the Act.
222 Inter alia, it provided for a civil government for Porto Rico, with legislative, executive, and judicial departments; also, for the appointment by the President, by and with the advice and consent of the Senate of the United States, of a "governor, secretary, attorney general, treasurer, auditor, commissioner of the interior, and a commissioner of education. An executive council, the members of which should be appointed by the President, by and with the advice and consent of the Senate were provided for. The governor was required to report all transactions of the government in Puerto Rico to the President of the United States. Provision was made for the coins of the United States to take the place of Puerto Rican coins. All laws enacted by the Puerto Rican legislative assembly were required to be reported to the U.S. which reserved the power and authority to amend the same. The statutory laws of the United States, except as otherwise specifically provided and not locally inapplicable, and U.S. internal revenue laws are to have the same force and effect in Puerto Rico as in the United States. A judicial department was established with a judge to be appointed by the President, by and with the advice and consent of the Senate, to be known as the district court of the United States for Puerto Rico, from which writs of error and appeals were to be allowed to the U.S. Supreme Court. All judicial process was stated to "run in the name of the United States." 223 258 U.S. 298 (04/10/1922).
224 Id. at 313.
“Commonwealth.” The people have U.S. citizenship though their habitat is an unincorporated territory of the United States, though not a “part” of it.

E. Alaska

Spanish interest in Alaska can be traced to 1493 when a papal “bull” allocated to Spain the right to colonize the west coast of North America. During the last two decades of the Nineteenth Century Spain lost interest in Alaska, and concentrated on land further south. The last vestiges of Spanish presence are a few names, e.g. a town, a creek, a glacier, and a mountain peak named “Cordova”; a town, a port, the arm of a river, a bay, a camp, a creek and a glazier named “Valdez” are all that exist. Spain was followed by British colonists and later Russians. The United States purchased Alaska from Russia on August 1, 1867, pursuant to a March 30, 1867 treaty with Russia at a purchase price of $7 million, two hundred thousand. From 1867 to 1884 Alaska was a “Department” of the U.S., being administered by the U.S. Army, then by the Department of the Treasury, and lastly by the U.S. Navy. In 1884 the land became the “District” of Alaska; and in 1912 it became a “Territory,” until it acquired statehood on January 3, 1959. Population of the area increased with the discovery of gold in Canada (1896), and Alaska (1899). In 1902 a railroad, which still exists, connected the town of Seward, in the south with Fairbanks, in the north-central area.

F. Hawai‘i

The Hawaiian islands were settled by Polynesians before history was being recorded. It wasn’t until 1810 that the eight main islands were unified under King Kalāhua. When he died on a trip to San Francisco on January 20, 1891, his sister, Lili‘uokalani became queen. In January 1893 a group of European and American settlers of the islands formed a Committee of Safety which fostered an overthrow of Queen Lili‘uokalani and annexation to the U.S. On January 16, 1893 the Queen yielded to U.S. authority, enforced by its military might. Under the U.S. presidency of Grover Cleveland the Republic of Hawai‘i was declared. In March of 1897

226 A papal “bull” is a special edict issued by the pope of the Roman Catholic religion. The word “bull” is derived from the word “bulla,” the final authentication attached to the proclamation.
227 Dictionary of Alaska Place Names, 238.
228 Dictionary of Alaska Place Names 1016.
William McKinley, having succeeded Cleveland agreed to annexation, but due to popular rejection of the idea, it failed, which prompted the arrival of Japanese warships to bolster the objectors. McKinley, however, pursued annexation, and on July 7, 1898 he signed a resolution proclaiming the Territory of Hawai‘i to be part of the United States. On the 22d of March, 1900 Congress enacted the Hawaiian Organic Act, which officially established the Territory of Hawai‘i. The Territory’s legislature convened on February 20, 1901. On August 21, 1959 Hawai‘i became the fiftieth state of the union.

G. The Cases

When the United States began to acquire interests in foreign lands, mostly islands, the question arose as to the extent, if any, the Constitution and laws of the United States were to apply to those lands. The decisions of the U.S. Supreme Court cover a period of 56 years, from 1901 until 1957, with the number of cases being in conjecture. Quite a few of the cases, with were decided from 1901 until 1909, Justice Harlan was a member of the Court, and his presence must be noted.

229 Pres. Dwight Eisenhower signed the Hawaiian Admission Act on March 18, 1959; as 93% of the population voted for statehood, Hawai‘i became the fiftieth state of the union on August 21, 1959.

230 The first case, Neely v. Henkel, was decided on January 14, 1901. - see infra text accompanying notes 232-234. The last cases, Kinsella v. Krueger, 351 U.S. 470 and Reid v. Covert, 351 U.S. 487 were decided June 1, 1956 – near the end of the Term of the Court. In those cases wives of military personnel were tried and found guilty, by a military Court Martial, of the murder of their husbands in Japan and England, respectively. The Court approved the sentences on the ground that the Constitutional guarantee of trial by jury did not extend to persons related to military personnel, both of whom were living outside the United States at the time in question. In the following Term the court overruled those decisions, finding that they were based on the Insular Cases about which Justice Hugo L. Black said in a plurality Opinion that “it is our judgment that neither the cases nor their reasoning should be given any further expansion.” See Reid v. Covert 354 U.S. 1, 14 (06/10/1957). Justice John Marshall Harlan II, though voting with the majority in the prior two cases concurred in the third case on the narrow point that where the offence charged is a capital one, the accused is guaranteed a trial by jury. Specifically he said that: “no matter how practical and how reasonable this [court martial] jurisdiction might be, it still cannot be sustained if the Constitution guarantees to these army wives a trial in an Article III court, with indictment by grand jury and jury trial as provided by the Fifth and Sixth Amendments.” Id. at 74.
The first case, Neely v. Henkel concerned the period in this country’s history when Spain having withdrawn from Cuba, the Spanish-American War of 1898 having been concluded, the Cuban people became its ostensible sovereign. Though under control of the United States, primarily its military, Cuba was considered to be “foreign territory,” not a part of the United States of America. Neely, an American citizen and government official in Cuba, had been arrested for embezzlement during his tour of duty. Having sought a Writ of Habeas Corpus the U.S. Supreme Court ruled that he was to be governed not by U.S. laws, but by the internal criminal laws of Cuba. Justice Harlan, writing for the unanimous Court said that:

When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.

On May 27, 1901 the Court decided six cases concerned with the same question.

Di Lima v. Bidwell involved the right to recover duties paid under protest to the collector of the port of New York upon sugar brought into the United States from the island of Puerto Rico during the autumn of 1899, and subsequent to the cession of the island. It was decided that, as the effect of the ratification of the Treaty of Paris which took the island of Puerto Rico out of the category of foreign territory, within the meaning of that word as used in existing tariff laws of the United States Puerto Rico was henceforth domestic territory. No right remained to enforce, against goods coming from that “territory” into the United States, the previously enacted tariff of duties. Considering, however, the terms of the Treaty and the relation of the island to the United States.

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231 As a matter of fact two cases which preceded it could have been insular cases, Ex Parte Baez, 177 U.S. 378 (04/12/1900) and In re Vidal, 179 U.S. 126 (11/12/1900), but in the first the Court refrained from deciding it on the ground of mootness, and in the second that the Court found that it lacked jurisdiction.
232 180 U.S. 109 (01/14/1901).
233 Id. at 119.
234 Id. at 123.
235 182 U.S. 1 (05/27/1901).
236 Ratification of the Treaty of Paris was effected by the exchange of those documents on April 11, 1899.
237 The treaty was signed on Dec. 10, 1898. See supra text accompanying note 216.
States, Congress had power to impose a tariff on goods coming from that island into the United States. Justice Harlan joined the majority of the Court.

*Goetz v. United States*\(^{238}\) held that on the basis of the *Di Lima*\(^{239}\) case the islands of Porto Rico and the Hawaiian Islands were not “foreign countries.” Justice Harlan joined the majority of the Court.

*Dooley v. United States*\(^{241}\) involved the right to recover the amount of certain duties on goods carried into Puerto Rico from the United States between July 6, 1898, and May 1, 1900; the duties in question having been levied by authority of the general in command of the army of occupation or subsequently by order of the President as commander-in-chief. As a corollary of the doctrine announced in *De Lima v. Bidwell*,\(^{242}\) it was held that while the President of the United States had authority to impose tariff duties in Puerto Rico on goods coming into that country from the United States prior to the ratification of the Treaty of Paris,\(^{243}\) no such executive power existed after that ratification. It was consequently held that none of the duties paid prior to the ratification of the treaty could be recovered, while those paid subsequently could be.\(^{244}\) Justice Harlan joined the majority of the Court.

*Armstrong v. United States*\(^{245}\) followed the prior case (Dooley v. United States) in holding that so far as the duties were exacted upon goods imported into Puerto Rico prior to the April 11, 1899 ratification of the Treaty of Paris, they were properly exacted. So far as they were imposed upon importations after that date, plaintiff is entitled to recover them back.\(^{246}\) Justice Harlan joined the majority of the Court.

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\(^{238}\) 182 U.S. 221 (05/27/1901).

\(^{239}\) See supra text accompanying notes 235-237.

\(^{240}\) The island had been named “Puerto Rico” until the Treaty of Paris erroneously renamed it “Porto Rico.” The U.S. military on the island used the new spelling. Congress in the Foraker Act repeated the misspelling; see 31 Stat. 77, 56th Congress Ch.191. Even the judicial system of the U.S. followed suit. The name did not return to its original spelling until 1932 when Jose Lorenzo Pesquera, a non-partisan Resident Commissioner to the U.S. House of Representatives suggested that Congress should correct the error by returning “Porto Rico” to its original name, to wit: “Puerto Rico.” It did so on May 17, 1932. See 48 U.S.C.§ 731A.

\(^{241}\) 182 U.S. 222 (05/27/1901).

\(^{242}\) See supra text accompanying notes 235-237.

\(^{243}\) April 11, 1899. See supra text following note 212.

\(^{244}\) Dooley, 182 at 236.

\(^{245}\) 182 U.S. 243 (05/27/1901).

\(^{246}\) Id. at 244.
In *Downes v. Bidwell*\(^{247}\) the plaintiff sought to recover duties paid under protest on merchandise delivered at the port of New York from Puerto Rico. The tax was authorized by the Foraker Act.\(^ {248}\) The Court, in its majority Opinion, authored by Justice Henry B. Brown acknowledged that if Puerto Rico were a foreign country the Act would be constitutional, but if it were a part of the United States it would be unconstitutional, as in violation of Art. I, § 9 of the Constitution. The Court found that the Constitution does not apply to territories acquired by treaty until Congress has so declared, and that in the meantime, under its power to regulate the territories, it may deal with them regardless of the Constitution, except so far as concerns the natural rights of their inhabitants to life, liberty, and property.\(^ {249}\) Justice Brown concluded the Opinion of the Court with the following words:

We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.\(^ {250}\)

Chief Justice Fuller, dissented, believing that the provision of the Foraker Act permitting the collection of duties on products imported from Puerto Rico was unconstitutional. He wrote a lengthy Opinion which was joined in by Justice Harlan. In it the Chief Justice stressed that the majority thought the issue before the Court was: “[h]ad Puerto Rico, at the time of the passage of the Act in question, been incorporated into and become an integral part of the United States?” to which the majority thought it had not been so incorporated, hence the rule of uniformity was not applicable. Fuller thought such was not the issue before the Court. He thought that the question was as follow: accepting the fact that Congress had created a civil government for the island, constituted its inhabitants a body politic, given it a governor, other officers, a legislative assembly, and courts, with right of appeal to the U.S. Supreme Court. Under those circumstances may Congress in that same legislation, which was supposedly enacted by the authority given it by the Commerce Clause, impose certain duties on commerce between Puerto Rico and the states and other territories? The question is particularly pertinent if the duties are in contravention of the Constitution. The section of the Constitution that is being abused is Art. I, §8, cl.1, which requires

\(^{247}\) 182 U.S. 244 (05/27/1901).
\(^{248}\) See supra text accompanying note 220, 221..
\(^{249}\) 182 U.S. 244, 244 passim.
\(^{250}\) Downes, 182 U.S. at 287.
that all edicts of Congress in that connection “shall be uniform throughout the United States.” If this can be done, it is because the power of Congress over commerce between the states and any of the territories is not restricted by the Constitution, which everyone must answer that it is.251

Justice Harlan wrote a separate Dissenting Opinion in which he said that he could not agree with the majority of the Court that the Constitution’s prohibitions and limitations were addressed solely to the states;252 that the Constitution speaks not simply to the states in their organized capacities, but to all people whether of states or territories, who are subject to the authority of the United States;253 and that Congress is not authorized to adopt laws seen in “Monarchical and despotic” governments.254 Almost in conclusion, Harlan’s words were:

It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution.255

And:

Again, it is said that Congress has assumed, in its past history, that the Constitution goes into territories acquired by purchase or conquest only when and as it shall so direct, and we are informed of the liberality of Congress in legislating the Constitution into all our contiguous territories. This is a view of the Constitution that may well cause surprise, if not alarm. Congress, as I have observed, has no existence except by virtue of the Constitution. It is the creature of the Constitution. It has no powers which that instrument has not granted, expressly or by necessary implication. I confess that I cannot grasp the thought that Congress, which lives and moves and has its being in the Constitution, and is consequently the mere creature of that instrument, can, at its

251 Id. at 372.
252 Id. at 376, 378.
253 Id. at 378. This must have been intended to be a message to Congress that the Constitution also speaks to its members. Ed.
254 Id. at 380.
255 Id. at 382.
pleasure, legislate or exclude its creator from territories which were acquired only by authority of the Constitution.\textsuperscript{256}

\textit{Huus v. New York & Puerto Rico S.S. Co.}\textsuperscript{257} decided that ships plying between New York City and San Juan, Puerto Rico were engaging in simply “coasting trading.” Hence they were not subject to state pilotage laws as they were not engaged in foreign trade. Justice Harlan joined the majority of the Court.\textsuperscript{258}

\textit{Dooley v. United States}\textsuperscript{259} involved almost the same situation as existed in the prior case bearing the same name\textsuperscript{260} i.e. the validity of tariff duties levied in Puerto Rico on goods brought into that island from the United States. The duties in question were imposed after the ratification of the Treaty of Paris, and in and by virtue of the Foraker Act. Applying the principles announced in previous cases it was held that the duties were lawful because, although collected after the ratification, they were imposed not simply by virtue of the authority of the President, acting under the military power, but in conformity to a valid act of Congress, i.e. the Foraker Act. Justice Harlan concurred in the dissenting Opinion of Chief Justice Fuller who did not believe that Congress had the authority to authorize the imposition of such duties. The Chief Justice wrote that:

Congress may lay local taxes in the territories, affecting persons and property therein, or authorize territorial legislatures to do so, but it cannot lay tariff duties on articles exported from one state to another, or from any state to the territories, or from any state to foreign countries, or grant a power in that regard which it does not possess. But the decision now made recognizes such powers in Congress as will enable it, under the guise of taxation, to exclude the products of Porto Rico from the states as well as the products of the states from Porto Rico; and this, notwithstanding it was held in \textit{De Lima v. Bidwell}, 182 U. S. 1 . . . that Porto Rico after the ratification of the treaty with Spain ceased to be foreign and became domestic territory.\textsuperscript{261}

\begin{flushleft}
\textsuperscript{256} \textit{Id.} \\
\textsuperscript{257} 182 U.S. 392 (05/27/1901). \\
\textsuperscript{258} \textit{Id.} at 392 392 passim. \\
\textsuperscript{259} 183 U.S. 151 (12/02/1901). \\
\textsuperscript{260} \textit{See supra} text accompanying notes 241-244. \\
\textsuperscript{261} \textit{Dooley}, 183 U.S. at 175, 176.
\end{flushleft}
*Fourteen Diamond Rings v. United States* (The Diamond Rings),\(^{262}\) decided on the same day as the prior case,\(^{263}\) it involved the validity of tariff duties levied on diamond rings brought from the Philippine Islands into the United States. Adhering to the doctrines settled by the prior rulings, it was held that, as the Philippine Islands, by the ratification of the Treaty of Paris, had ceased to be “foreign” within the meaning of the tariff laws, the imposition of the duties complained of was unlawful. In the course of the opinion the effect of the Treaty as applied in the previous cases to Puerto Rico was pointed out, and the status of the Philippine Islands by virtue of the treaty was, in effect, held to be controlled by the former decisions.\(^{264}\) Justice Harlan joined the majority of the Court.

In *Territory of Hawai‘i v. Mankichi*\(^{265}\) Mr. Mankichi was tried for murder in Hawai‘i, when it was a territory, without being indicted by a grand jury, and was convicted by a jury of 12 persons, but only 9 of whom voted for conviction; the other 3 voting for acquittal. Due to these aberrations the District Court in Hawai‘i discharged him on habeas corpus. The U.S. Supreme Court, reversed the discharge. Justice Harlan dissented. In his Dissenting Opinion he said:

If the accused had committed the crime of murder in the territory of Arizona; if he had been convicted in any court in that territory, except under a presentment or indictment of a grand jury, and by the unanimous verdict of a petit jury; and if he had been then sentenced to be hanged, and was hanged, the judge of the court pronouncing the sentence would have been guilty of judicial murder.\(^{266}\)

And

In my opinion, the Constitution of the United States became the supreme law of Hawaii immediately upon the acquisition by the United States of complete sovereignty over the Hawaiian islands, and without any act of Congress formally extending the Constitution to those islands. It then, at least, became controlling, beyond the power of Congress to prevent. From the moment when the government of Hawaii accepted the joint resolution of 1898, by

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\(^{262}\) 183 U.S. 176 (12/02/1901).

\(^{263}\) Dooley v. United States. *See supra* text accompanying notes 241-244.

\(^{264}\) Fourteen Diamond Rings, 183 U.S. at 178.

\(^{265}\) 190 U.S. 197 (06/01/1903).

\(^{266}\) *Id.* at 236, 237.
a formal transfer of its sovereignty to the United States,—when the flag of Hawaii was taken down, by authority of Hawaii, and in its place was raised that of the United States,—every human being in Hawaii charged with the commission of crime there could have rightly insisted that neither his life nor his liberty could be taken, as punishment for crime, by any process, or as the result of any mode of procedure, that was inconsistent with the Constitution of the United States.\footnote{Id. at 238, 239.}

In \textit{Ribus y Hilo v. United States}\footnote{194 U.S. 315 (05/16/1904).} some citizens of Spain brought an action against the United State for the value of a ship ($10,000.00) sized in Ponce, Puerto Rico by U.S. military forces on July 28, 1898, while the Spanish-American War raged.\footnote{By way of elucidation, it was stated that since the Treaty of Paris did not specify when the war to be considered ended, as all treaties, it technically continued until ratified, on April 11, 1999.} The Court in a unanimous decision, Justice Harlan writing the Opinion of the Court, held that it did not have jurisdiction of this civil tort action because the seizure was an “act of war,”\footnote{Id. at 323.} though the legal action was not brought until after that war had ended. Harlan added by way of dictum that if there is conflict between a treaty and an Act of Congress, and there is no provision extant as to which one prevails, the Act of Congress prevails, since each is the “supreme law of the land.”\footnote{Id. at 324.}

\textit{Kepner v. United States}\footnote{195 U.S. 101 (05/31/1904).} involved an attorney, practicing law in Manila, who was accused by the U.S. government of embezzling his client. The trial court, without a jury, found him innocent of the charge. The United States appealed to the Philippine Supreme Court. The attorney defended on the ground that he had been denied his right against double jeopardy. The Philippine Supreme Court reversed the trial court, found him guilty, sent him to prison, suspended him from holding public office, and deprived him of his suffrage rights. The attorney sought a review by the U.S. Supreme Court on the same ground he had asserted before that Philippine Court. The U.S. Court reversed the Philippine Supreme Court, primarily on the ground that when Congress on July 1, 1902, enacted the Philippine Organic Act\footnote{See supra text accompanying note 218.} it applied the U.S. Constitution’s Bill of Rights (containing its Article V), to the Philippines. Justice Harlan joined the majority of the Court, though without writing a Concurring Opinion. He

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\footnote{Id. at 238, 239.}
\footnote{194 U.S. 315 (05/16/1904).}
\footnote{By way of elucidation, it was stated that since the Treaty of Paris did not specify when the war to be considered ended, as all treaties, it technically continued until ratified, on April 11, 1999.}
\footnote{Id. at 323.}
\footnote{Id. at 324.}
\footnote{195 U.S. 101 (05/31/1904).}
\footnote{See supra text accompanying note 218.}
mentioned in his *Trono*\textsuperscript{274} dissent that though he did not submit an Opinion in this case, he was in complete agreement with the decision.\textsuperscript{275}

*Dorr v. United States*,\textsuperscript{276} decided the same day as *Kepner*,\textsuperscript{277} considered the question of whether Congress must in establishing a system for trial of crimes and offenses committed in the Philippine Islands, carry to their people by proper affirmative legislation a system of trial by jury?\textsuperscript{278} The Court reviewed the history of the Philippines and noted several features of the Spanish legal system that governed those islands before they were ceded to the United States. The Court reasoned that, even though the Constitution contained no express provision as to the nature of the rights, if any, that Congress must extend to territories the United States seeks to govern under its treaty power. In the Opinion of the Court Justice William R. Day said that “there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.”\textsuperscript{279} Day, for the Court concluded that there were such rights, but the right to a jury trial was not among them. The reason he furnished were twofold. First trial by jury is not a fundamental right; otherwise that right would go wherever the jurisdiction of the United States extends. Secondly, Congress is not obliged to establish a legal systems for outlying territories belonging to the United States.\textsuperscript{280} To quote Justice Day’s he said that the Constitution “does not require [Congress] to enact for ceded territory ... a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation, and of its own force, carry such right to territory so situated.”\textsuperscript{281}

Justice Harlan dissented and in a separate Opinion he wrote:

I do not believe now any more than I did when Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, was decided, that the provisions of the Federal Constitution as to grand and petit juries relate to mere methods of procedure, and are not fundamental in their nature. 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,

\textsuperscript{274} See infra text accompanying notes 294-298.
\textsuperscript{275} See *Trono v. United States*, 199 U.S. 521, 535 (12/04/1905).
\textsuperscript{276} 195 U.S. 138 (05/31/1904).
\textsuperscript{277} See *supra* text accompanied by notes 272-275.
\textsuperscript{278} Id. at 143.
\textsuperscript{279} Id. at 147.
\textsuperscript{280} Id. at 148.
\textsuperscript{281} Id. at 149.
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. 282

And:

I cannot regard the judgment of the court otherwise than as an amendment of that instrument 283 by judicial construction, when a different mode of amendment is expressly provided for. Grand juries and petit juries may be, at times, somewhat inconvenient in the administration of criminal justice in the Philippines. But such inconveniences are of slight consequence compared with the dangers to our system of government arising from judicial amendments of the Constitution. The Constitution declares that it 'shall be the supreme law of the land.' But the court in effect adjudges that the Philippine Islands are not part of the 'land,' within the meaning of the Constitution, although they are governed by the sovereign authority of the United States, and although their inhabitants are subject in all respects to its jurisdiction, - as much so as are the people in the District of Columbia or in the several states of the Union. 284

Mendezona v. United States, 285 decided that same day as the Kepner case 286 case followed it without any quotable Opinion. Justice Harlan was a member of the majority.

In April, 1905, two cases, Lincoln v. United States and Warner, B. & Co. v. United States 287 were decided by the U.S. Supreme Court in the same decision. The cases came to the Supreme Court, one, on error to the district court of the United States for the southern district of New York, and the other by appeal from the Court of Claims. The one (Lincoln Case) was commenced on March 29, 1902; the other (Warner, B. & Co. Case) about two months before it - on January 17, 1902. In both cases recovery from the United States was sought in the amount of

282 Id. at 154.
283 He was referring to the U.S. Constitution.
284 Id. at 155.
285 195 U.S. 158 (05/31/1904).
286 See supra text accompanying notes 272-275.
287 197 U.S. 419 (04/03/1905). The decisions of both cases were described in the same Opinion of the Court, written by Justice Holmes.
duty paid by order of the President of the United States upon goods taken from
the United States into the Philippine Islands after the ratification of the Treaty of
Paris, and before the passage of any Act of Congress authorizing the President to
promulgate such collection orders. Justice Oliver Wendell Holmes wrote the
Opinion of the Court in which he said that the President's order plainly intended
to deal with imports from foreign countries only and Philippine ports not in the
actual military control of the United States. But even had it been intended to have
a wider scope, the Court did not perceive any ground on which it could have been
extended to imports from the United States to Manila, - a port which was
continuously in the possession as well as ownership of the United States from the
time of the treaty with Spain. The fact that there was an insurrection of natives,
not recognized as belligerents, in another part of the island than is Manila, or even
just outside its walls, did not give the President power to impose duties on imports
from a country no longer foreign.\footnote{288} Justice Harlan joined the majority of the
Court.

\textit{Rasmussen v. United States}\footnote{289} held that an Act passed by Congress
depriving persons accused of a misdemeanor in Alaska of a right to trial by a
common-law jury of twelve persons was repugnant to the Sixth Amendment of
the U.S. Constitution, and hence, void.\footnote{290} Justice Harlan concurred in the
decision, stating:

I entirely concur in the judgment holding the act of Congress in
question to be void. I do so, not upon the ground that Alaska had
been previously ‘incorporated’ into the United States by the
legislation of Congress, but upon the ground that the right of the
accused to a trial by the jury of the Constitution became complete
immediately upon the acquisition of Alaska by treaty, and before
any legislation upon the subject by Congress, -indeed, without any
power in Congress to add to or impair or destroy that right.\footnote{291}

The holding of that case was overruled by \textit{Williams v. Florida}\footnote{292} in which
Justice Byron White, in the Opinion of the Court, said that the 12-person jury
cannot be regarded as an indispensable component of the Sixth Amendment.\footnote{293}

\begin{footnotes}
\item[288] \textit{Id.} at 428, 429.
\item[289] 197 U.S. 516 (04/10/1905).
\item[290] \textit{Id.} at 518.
\item[291] \textit{Id.} at 530.
\item[292] 399 U.S. 79 (06/22/1970).
\item[293] \textit{Id.} at 99.
\end{footnotes}
In *Trono v. United States*\(^{294}\) three Philippine men was accused of murder in the first degree by assault on another individual. The trial judge found them innocent of the charge, but found them guilty of only an assault, rendering them relatively short prison terms and restitution. The three appealed to the Philippine Supreme Court. That court reversed the trial court. It found them guilty of murder in the second degree, sentencing them to much longer prison terms. The U. S. Supreme Court affirmed, primarily on the ground that once acquitted by the trial court they certainly may not be subjected to a trial again on the same ground, but when they appealed to the Philippine Supreme Court from the trial court they waived their rights to argue double jeopardy.\(^{295}\) Three Justices dissented including Justice Harlan. In his Dissenting Opinion he mentioned that he did not write a Concurring Opinion in the *Kepner* case,\(^{296}\) but that he was in complete agreement with it because from the moment of the complete acquisition of the Philippine Islands by the United States, and without any Act of Congress, or a proclamation of the President upon the subject, the people of the Philippines became entitled, of right, to the benefit of all the fundamental guaranties of life, liberty, and property to be found in the U.S. Constitution.\(^{297}\) Specifically he wrote that:

\[
\text{no person within the territory and subject to the sovereign jurisdiction of the United States can be legally deprived of his life or liberty for crime committed by him against the United States, except in the mode prescribed by the Constitution of the United States. I am unable to perceive how a principle declared by the supreme law of the land to be essential in all prosecutions for crime against the United States can be recognized as applicable to a part of the people subject to the sovereign jurisdiction of the United States, and yet be denied to another part of the people equally subject to the national authority. No tribunal or officer deriving its authority from the United States can disregard the mandatory injunctions of the Constitution by which the government of the United States is created, and under the sanction of which alone that government exists and performs its functions. It may be that the application of these principles to the Philippine Islands and to the people who inhabit them may, particularly in criminal prosecutions, prove sometimes to be inconvenient. But no authority exists anywhere to set aside plain provisions of the}
\]

\(^{294}\) 199 U.S. 521 (12/04/1905).
\(^{295}\) Id. at 533.
\(^{296}\) See supra text accompanying notes 272-275.
\(^{297}\) Id at 535.
The Court in *Lincoln v. United States and Warner B. & B. Co. v. United States* affirmed, on rehearing, the two prior cases of the same name. Chief Justice Fuller wrote the Opinion of the Court in which he stressed that when the Treaty of Paris was ratified the applicable laws of the United States became operative; but the President, nevertheless, continued in force the tariff created by the order of July 12, 1898, and, by an order of April 21, 1899, established a collection district with Manila as the chief port of entry, and under these orders collections of duties were made. This involves the question whether, after April 11, 1899, the President could have enforced any tariff other than such as existed under acts of Congress, or might be sanctioned by Congress. He said that that question had been “put at rest by this ratification.” Justice Harlan joined the majority of the Court.

In *Grafton v. United States* the defendant, was a private in the United States Army stationed in the Philippines. He was tried before a general Court-Martial for homicide, and acquitted. Subsequent to his acquittal, the United States filed a criminal complaint in a civil court based on the same acts. Seeking to discredit the view that the Double Jeopardy Clause would be violated by this subsequent prosecution, the Government asserted that “Grafton committed two distinct offenses—one against military law and discipline, the other against the civil law which may prescribe the punishment for crimes against organized society by whomsoever those crimes are committed.” He was found guilty by the civil trial court, which was affirmed by the Philippine Supreme Court. The U.S. Supreme Court reversed. Justice Harlan, writing the Opinion of the Court said that:

Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense.... If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is

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298 *Id.* at 536, 537.
299 202 U.S. 484 (05/28/1906).
300 *See supra* text accompanying notes 287, 288.
302 206 U.S. 333 (05/27/1907).
303 *Id.* at 351.
acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States.... [T]he same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government. Congress has chosen, in its discretion, to confer upon general courts-martial authority to try an officer or soldier for any crime, not capital, committed by him in the territory in which he is serving. When that was done the judgment of such military court was placed upon the same level as the judgments of other tribunals when the inquiry arises whether an accused was, in virtue of that judgment, put in jeopardy of life or limb.  

*United States v. Heinszen*, 305 was decided the same day as the prior case, *Grafton v. United States*. 306 It involved a tariff on goods coming into the Philippine Islands while they were under the military control of the United States, which duties were being imposed under a July 12, 1898 order of the United States President, as Commander-in-Chief of the military forces there. Those duties continued even after hostilities ceased due to the April 11, 1899 ratification of the Treaty of Paris and the April 1900 appointment by the President of a governing commission. On March 8, 1902, an Act of Congress continued the original tariff in force. Therefore the duties collected in 1898 up until April 11, 1899 when the Treaty was ratified, collection of the duties was proper; they were also properly collected after Congress acted on March, 8, 1902. During the period April 11, 1899 and March 8, 1902, however, there was no authorization for the collection. Congress responded to this problem in June 1906 by enacting a statute which specifically “legalized and ratified . . . the collection of all such duties” during that April 1899 – March 1902 gap period. The issue in this case was the constitutional validity of the June 1906 statute. The Court of Claims had refused to give effect to the Act of 1906, and the government appealed. The Supreme Court, in an Opinion by Mr. Justice Edward White on behalf of a six-judge majority, reversed, applying the principle that a legislative body may “‘cure irregularities, and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights.’ ” 307 With regard to the argument that the 1906 Act amounted

304 *Id.* at 352.
305 206 U.S. 370 (05/27/1907).
306 *See supra* text accompanying notes 302-304.
307 *Id.* at 384.
to a retroactive imposition of tariff duties, the majority opinion relied upon the “fact that when the goods were brought into the Philippine Islands there was a tariff in existence under which duties were exacted in the name of the United States.” The Court also held that it made no difference that the appellee taxpayers' action for a refund was pending when the “curative act” was enacted.

Justice Harlan agreed with Justice White, saying specifically:

Congress legalized, ratified, and confirmed, as fully, to all intents and purposes, as if the same had, by prior act, been specifically authorized and directed, the collection of all duties, both import and export, imposed by the authorities of the United States or of the provisional military government in the Philippine Islands, prior to March 8th, 1902, at all parts and places in said Islands, from the United States or from foreign countries. Interpreted in the light of previous and pending litigation, this act should be construed as denying the authority of any court to take cognizance of a suit brought against the United States to recover any claim arising out of such collections. The act should, therefore, be construed as withdrawing the consent of the United States to be sued on account of claims of that character. In this view, it was error to render judgment against the United States, whatever might be the liability of the collector, if his exaction of the duties in question was without authority of law. Upon this ground alone, and without considering any of the questions discussed in the opinion of the court, I concur in the judgment of reversal.

In *Kent v. Porto Rico* involved the authority of the Puerto Rican legislature to, in 1904, reduce the number of judges of each District Court from three to one, and change the territory included within each District. The U.S. Supreme Court held that under the Foraker Act the Legislature of Puerto Rico had broad and general powers to legislate concerning the courts within its jurisdiction, and that in the exercise of this power it was not limited to the courts then in existence and organized when the Foraker Act was enacted, specifically as to number of judges or the territory over which it might exercise jurisdiction. Justice Harlan was a member of the majority, without writing an Opinion.

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308 Id. at 385.
309 Id. at 387.
310 Id. at 391, 392.
311 207 U.S. 113 (11/18/1907).
312 See supra text accompanying notes 220 221.
In *People of the State of New York ex rel. Kopel v. Bingham* 313 the Supreme Court gave a lucid description of the Status of the island of Puerto Rico as of 1909. Chief Justice Fuller in the Opinion of the Court said that being a “Territory” it was “portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of Congress with a separate legislature, under a territorial governor and other officers appointed by the President and Senate of the United States.” 314 Justice Harlan was a member of the majority of the Court, without writing an Opinion.

*Jurugua Iroin Co. v. United States* 315 held that An American corporation doing business in Cuba was, during the war with Spain, an enemy to the United States with respect to its property found and then used in Cuba, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war. Justice Harlan mentioned the *Lynah* 316 and *Ribas* 317 cases the Opinions of the Court of which he authored. He also wrote the Opinion of the Court in this case, in which he stated:

under the recognized rules governing the conduct of a war between two nations, Cuba, being a part of Spain, was enemy's country, and all persons, whatever their nationality, who resided there, were, pending such war, to be deemed enemies of the United States and of all its people. The plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted; indeed, subject, under the laws of war, to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy. 318

And:

313 211 U.S. 468 (01/04/1909).
314 Id. at 475.
316 See supra text accompanying notes 82-84.
317 See supra text accompanying notes 268-271.
318 Id. at 305, 306.
the plaintiff corporation could not invoke the protection of the Constitution in respect of its property used in business in Cuba, during the war, any more than a Spaniard residing there could have done, under like circumstances, in reference to his property then in that island. If the property destroyed by order of General Miles had belonged at the time to a resident Cuban, the owner would not have been heard in any court, under the facts found, to claim, as upon implied contract, compensation from the United States on account of such destruction. How, then, under the facts found, could an obligation, based on implied contract, arise under the Constitution in favor of the plaintiff, an American corporation, which, at the time, and in reference to the property in question, had a commercial domicil [sic] in the enemy's country?\(^3\)

*Santiago v. Norqueral*\(^2\) held that the military power, which had been established in Cuba upon ratification of the Treaty of Paris had the authority to establish courts of justice, which are so essential a part of any government. With this thought in mind, the military power not only established the “provisional” court in Puerto Rico,\(^1\) but as well a system of courts which took the place of the courts under Spanish sovereignty, and were continued by the Organic Act of April 12, 1900.\(^2\) This establishment of authority was identical to that established in the Philippine Islands.\(^3\) Justice Harlan joined the majority of the Court.

In *Alvarez v. United States*\(^4\) a Puerto Rican resident and citizen was appointed the Procurador (solicitor) of the civil courts, on a lifetime basis, by the King of Spain. When the United States took control of Puerto Rico by the Treaty of Paris they removed that man from the position he held and dissolved it. He sued the United States for what he considered to be the value of the position to him. The Court held that no such cause of action existed. Justice Harlan, in writing the Opinion of the Court opined as follows:

Congress, by the Foraker act of 1900, provided that the laws and ordinances of Porto Rico, then in force, should continue in full

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\(^{319}\) *Id*. 308.

\(^{320}\) 214 U.S. 260 (05/24/1909).

\(^{321}\) That court was established by military authority, with the approval of the President, by general order No. 88, series of 1899.

\(^{322}\) See *supra* text accompanying note 220, 221.

\(^{323}\) *Id*. at 266.

\(^{324}\) 216 U.S. 167 (02/21/2010).
force and effect, except ‘as altered or modified by military orders in force’ when that act was passed. It is clear that claimant is not entitled to be compensated for his office by the United States because of its exercise of an authority unquestionably possessed by it as the lawful sovereign of the island and its inhabitants. The abolition of the office was not, we think, in violation of any provision of the Constitution, nor did it infringe any right of property which the claimant could assert as against the United States.

Dowdell v. United States\(^{326}\) involved criminal charges made against three defendants in the Philippines. To contest their conviction they argued that the use of certain certificates, sworn out by a clerk of court, a trial judge, and a court reporter, stating that defendants had been present at trial violated their Sixth Amendment rights to be confronted by their accusers. The U.S. Supreme Court, in affirming the Philippine Supreme Court, which rejected the defendants’ argument, found that those certificates, like a copyist's certificate, met every requirement of the Court's current definition of “testimonial.” The Court explained that the officials who executed the certificates “were not witnesses against the accused”\(^{327}\) because they “were not asked to testify to facts concerning [the defendants'] guilt or innocence.”\(^{328}\) Justice Harlan dissented without Opinion.

§ VIII Harlan’s Analysis of the Slaughter-House Cases

There were two “Slaughter-House” cases. The first, Slaughter-House Cases,\(^{329}\) one of this country’s most famous, decided before Harlan was appointed to the Court, concerned a statute enacted by Louisiana which called for the construction and operation of a place where animals might be slaughtered without close proximity to places where urban inhabitants might be offended by the fumes and odors emanating from such structures. A group of butchers who were excluded from being granted license to work in that facility sued, inter alia, the state because of

\(^{325}\) Id., at 176.

\(^{326}\) 221 U.S. 325 (05/15/2011).

\(^{327}\) Id., at 330.

\(^{328}\) Id.

\(^{329}\) 83 U.S. 36 (Dec. Term 1872). The reason for the appellation “cases,” rather than “case” is that The Butchers’ Benevolent Association of New Orleans sued the Crescent City Live-Stock Landing And Slaughter-House Company, some individuals, the State of Louisiana and The Crescent City Live-Stock Landing And Slaughter-House Company in separate actions.
being denied the privileges or immunities afforded them by the Fourteen Amendment. According to the state courts and the federal Supreme Court the butchers chose the wrong Constitutional provision upon which to base their case. Because the second section of the Fourth Article of the Constitution provided that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities in the several States” the butchers should have based their position on that provision rather than on the Fourteenth Amendment, which though otherwise similar to Article IV, referred to “citizens of the United States,” rather than “citizens of each State.” In addition to the Constitutional point the Court touched upon the statute being enacted within the state’s police power, which it considered permissible. The decision, though not having been overruled has been strongly criticized by the courts, and by legal scholars as being a “narrow” holding. In New Orleans Gas-light Co. v. Louisiana Light & Heat Producing & Manufacturing Co. the first case in which Justice Harlan referred to first Slaughter-House Case in his Opinions of the Court, he also criticized it, though not on the ground of narrowness, but that the state was not exercising its police power, which the Court in the Slaughter-House Cases touched upon briefly. Harlan was convinced that the Louisiana statute invaded the rights of the butchers who were denied affiliation with the state-endorsed slaughter-house, revealing his penchant for protecting those imposed upon. He said:

the matter determined in Slaughter-house Cases, was not, in any just or legal sense, an exercise of the police power for the preservation of the public health, but, under the pretense simply of exerting that power, was an in vasion [sic] of the right of citizens, other than those interested in that particular company, to engage in

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330 Emphasis supplied.
331 Emphasis supplied.
332 Id. at 62-64 and 87.
333 See Merrifield v. Lockyer, 547 F. 3d 9788, 983 (9th Cir. (Cal.) 10/22/2008); Nat. Rifle Ass’n, Inc., v. City of Chicago, 567 F. 3d 856, 857 (7th Cir. (Ill.) 06/02/2009); McDonald v. City of Chicago, 130 S. Ct. 3020, 3021 (06/28/2010).
335 115 U.S. 650 (12/07/1885).
an ordinary business, open to every one upon terms of perfect equality. . . .

In the second time he mentioned *Slaughter-House*, was in *Blake v. McClung* where he indirectly pointed out the narrowness of the holding by the following words:

the court . . . in reference to the scope and meaning of section 2 of article 4 of the constitution, said: ‘The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the several states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state government over the rights of its own citizens. Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.’

Justice Harlan was a member of the Court which decided the second *Slaughter-House* case, *Crescent City Live-Stock Co. v. Butchers’ Union Slaughter-House Co* but did not write a separate Opinion. In *Pittsburgh, C., C. & St. L.R. Co. v. Long Island Loan & Trust Co.* he discussed it. He said that the defendant in error in the second *Slaughter-House* argued that the effect to be given to a judgment or decree of the circuit court of the United States sitting in Louisiana by the courts of that state is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the state court is final. To which Harlan wrote:

But this is an error. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the constitution and laws of the United

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336 *Id.* at 669.
337 172 U.S. 239 (12/12/1898).
338 *Id.* at 252.
339 120 U.S. 141 (01/24/1887).
340 172 U.S. 304 (01/03/1899).
States, and comes within the jurisdiction of the federal courts by proper process . . . .

¶ IX. Eleven of Justice Harlan’s Final Opinions of the Court

A. Concerning Equal Protection of the Laws

In Western Turf Ass'n v. Greenberg a California statute gave operators of public attraction the right to eject patrons from their premises, even after they had paid the cost of admission. An ejected patron sued a race course contending that the statute violated the U.S. Constitution. The Court disagreed. Justice Harlan, writing the Opinion of the Court exclaimed that:

this court can only pass upon the validity of the statute with reference to the Constitution of the United States. We perceive no reason for holding it to be invalid under that instrument. The contention that it is unconstitutional as denying to the defendant the equal protection of the laws is without merit, for the statute is applicable alike to all persons, corporations, or associations conducting places of public amusement or entertainment.

B. Execution of Executive Powers

In Union Bridge Co. v. United States a bridge construction company was convicted for failing to make the alterations to a bridge over an interstate waterway which the Secretary of War required in order to secure navigation against an unreasonable obstruction. The company, in seeking a reversal of the conviction complained that by giving the Secretary of War the power he exercised, Congress unconstitutionally delegated executive and judicial powers to the chief of an executive department of the federal government. In rejecting the defendant’s position Justice Harlan wrote that:

If the principle for which the defendant contends received our approval the conclusion could not be avoided that executive officers, in all the departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have, from the

341 Id. at 510.
342 204 U.S. 359 (02/25/1907).
343 Id. at 362, 363.
344 204 U.S. 364. (02/25/1907).
foundation of the national government, exercised, and are now exercising, powers as to mere details, that are strictly legislative or judicial in their nature. This will be apparent upon an examination of the various statutes that confer authority [sic] upon executive departments in respect of the enforcement of the laws of the United States. Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be ‘to stop the wheels of government’ and bring about confusion, if not paralysis, in the conduct of the public business.\textsuperscript{345}

C. Desecrating the American Flag

In \textit{Halter v. State of Nebraska}\textsuperscript{346} the defendant was convicted of violating a state statute prohibiting the desecration of the U.S. flag by unlawfully exposing to public view, selling, exposing for sale, and having in its possession for sale, a bottle of beer upon which, for purposes of advertisement, was printed and painted a representation of the flag of the United States. The Court affirmed the conviction, Justice Harlan saying that:

\begin{quote}
It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order, and well-being of the people. Before this court can hold the statute void it must say that, and, in addition, adjudge that it violates rights secured by the Constitution of the United States. We cannot so say and cannot so adjudge.\textsuperscript{347}
\end{quote}

D. Denial of Due Process by Taxation

In \textit{Southwestern Oil Co. v. State of Texas}\textsuperscript{348} a taxpayer complained of being denied due process of law through a state’s taxation of it. Justice Harlan expressed the Court’s finding of a lack of a cause of action by his Opinion of the Court which contained the following language:

\begin{quote}
\end{quote}

\textsuperscript{345} \textit{Id.} at 386, 387.
\textsuperscript{346} 205 U.S. 34 (03/04/1907).
\textsuperscript{347} \textit{Id.} at 45.
\textsuperscript{348} 217 U.S. 114 (04/04/1910).
upon the adoption of the 14th Amendment, - whatever their own Constitutions may then, or have subsequently, declared, - the states became bound, as was the United States by the 5th Amendment, not to deprive any person of property without due process of law. Still it was never contemplated, when the Amendment was adopted, to restrain or cripple the taxing power of the states, whatever the methods they devised for the purposes of taxation, unless those methods, by their necessary operation, were inconsistent with the fundamental principles embraced by the requirements of due process of law and the equal protection of the laws in respect of rights of property.\textsuperscript{349}

E. Statutory Construction

In \textit{International Text-Book Co. v. Pigg}\textsuperscript{350} Justice Harlan uttered the following clear statement of statutory construction:

\begin{quote}
It is well settled that if a statute is in part unconstitutional, the whole statute must be deemed invalid, if the parts not held to be invalid are so connected with the general scope of the statute that they cannot be separately enforced, or, if so enforced, will not effectuate the manifest intent of the legislature.\textsuperscript{351}
\end{quote}

F. Claim Against the Federal Government

In \textit{Hooe v. United States}\textsuperscript{352} the Court would not allow recovery against the national government on a contract not authorized by Congress. Justice Harlan explained the reason:

\begin{quote}
The constitutional prohibition against taking private property for public use without just compensation is directed against the government, and not against individual or public \textsuperscript{sic} officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the government. So that whether we look at the jurisdiction of the
\end{quote}

\begin{footnotes}
\item[349] Id. at 119.
\item[350] 217 U.S. 91 (04/04/1910).
\item[351] Id. at 113.
\item[352] 218 U.S. 322 (11/28/1010).
\end{footnotes}
court below, in respect either of claims alleged to be founded upon the Constitution or to arise from contract, the plaintiffs cannot maintain this suit against the government; for they have received the entire sums which Congress appropriated to be paid out of the Treasury on account of rent of buildings or quarters for the Civil Service Commission.  

G. Police Power

In *Broadnax v. State of Missouri* the Court approved a state statute which provided provisions for the conduct of a private business, on the ground of police power, in an Opinion of the Court where Justice Harlan opined the following:

> While it is the duty of the Federal courts, if their jurisdiction be lawfully invoked, to see to it that the constitutional rights of the citizen are not infringed by the state, or by its authorized agents, they should not strike down an enactment or regulation adopted by the state under its police power, unless it be clear that the declaration of public policy contained in the statute is plainly in violation of the Federal Constitution. Much may be done by a state under its police power which many may regard as an unwise exertion of governmental authority. But the Federal courts have no power to overthrow such local legislation, simply because they do not approve it, or because they deem it unwise or inexpedient.

H. The Tenth Amendment

In *House v. Mayes* the Court approved the conviction of a man who allegedly violated a state statute attempting to prevent the commission of fraud, under the Opinion of the Court written by Justice Harlan stating:

> the government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; that a power may be implied when

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353 *Id.* at 335, 336.
355 *Id.* at 292, 293.
356 219 U.S. 270 (01/09/1911).
necessary to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States constitute the supreme law of the land, a state of the Union may exercise all such governmental authority as is consistent with its own Constitution, and not in conflict with the Federal Constitution; that such a power in the state, generally referred to as its police power, is not granted by or derived from the Federal Constitution, but exists independently of it, by reason of its never having been surrendered by the state to the general government.\textsuperscript{357}

I. Specific Performance

In \textit{Louisville \& N.R. Co. v. Mottley}\textsuperscript{358} Justice Harlan quoted with approval the following words of an English judge concerning specific performance: “no contract can properly be carried into effect, which was originally made contrary to the provisions of law, or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt.”\textsuperscript{359}

J. Original Jurisdiction of the Supreme Court

In \textit{Oklahoma v. Atchison, T. \& S. F. R. Co.}\textsuperscript{360} a state filed an original suit in equity in the U.S. Supreme Court to enjoin a railroad from charging rates on domestic shipments greater than those authorized by the state, to the detriment not of the state, but of its citizens. The Court found that it lacked jurisdiction due to the legal position expressed by Justice Harlan in the Opinion of the Court:

We are of opinion that the words in the Constitution conferring original jurisdiction on this court in a suit ‘in which a state shall be a party’ are not to be interpreted as conferring such jurisdiction in every cause in which the state elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its [sic] own laws or public policy against wrongdoers generally.\textsuperscript{361}

\textsuperscript{357} \textit{Id.} at 281, 282.
\textsuperscript{358} 219 U.S. 467 (02/20/1911).
\textsuperscript{359} \textit{Id.} at 485.
\textsuperscript{360} 220 U.S. 277 (04/03/1911).
\textsuperscript{361} \textit{Id.} at 289.
K. Jury Instructions

The last case in which Justice Harlan wrote the Opinion of the Court involved whether the trial judge had given a proper jury instruction in a personal injury case. He opined in *Delk v. St. Louis & S. F. R. Co.*[^362] that:

> when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.[^363]

¶ X. Concluding Remarks

When we depart this earth unfortunately too few of us leave tangible evidence that we have ever existed. Not so with John Marshall Harlan I. A member of the Supreme Court of the United States for 33 years he wrote 757 Opinions of the Court, only 9 of which have been departed from. Many of those decisions have made a valuable contribution to our knowledge of that noble profession – the pursuit of what is the law of this nation. He left a son, John Maynard Harlan, who maintained a successful practice of law in Chicago, Illinois, argued cases before the Court, and who sired a son, John Marshall Harlan II, an Associate Justice for 16 years on the same Court as was his grandfather, and who, as did that grandfather, left us memorable decisions we will not forget.

Yes John Marshall Harlan you left us much, with which we think of you with fond memories.

[^362]: 220 U.S. 580 (05/15/1911).
[^363]: *Id.* at 587.