American Colossus

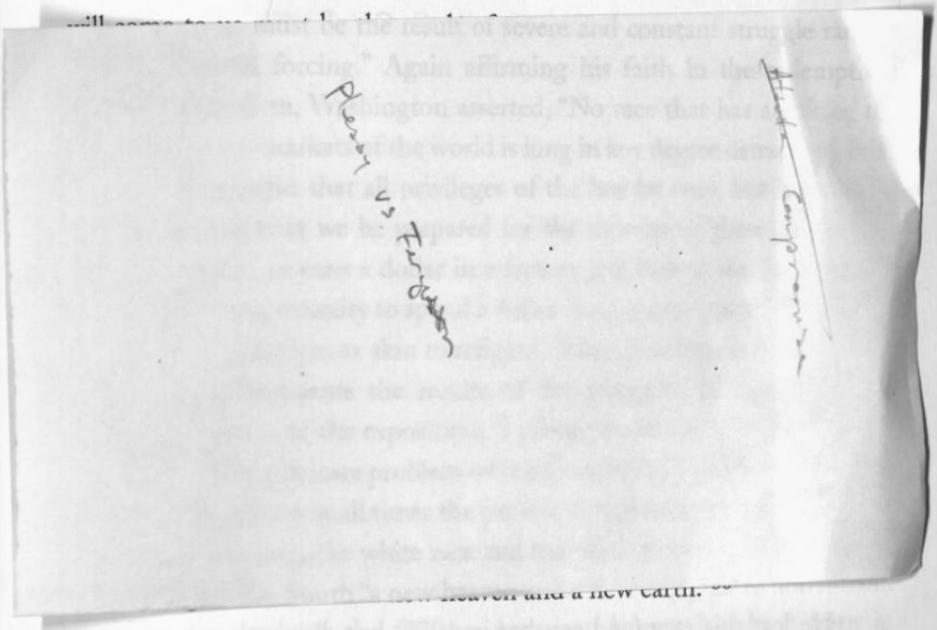
THE TRIUMPH OF CAPITALISM

1865–1900

H. W. Brands

Doubleday

New York London Toronto Sydney Auckland



JOHN MARSHALL HARLAN had his own views about race and capitalism, and they were rather surprising for one of his background. Harlan's father had named him John Marshall for the great chief justice, whose Southern origins and nationalist sentiments the elder Harlan shared. Harlan senior was a Kentucky contemporary and close friend of Henry Clay, with whom he served in Congress; like Clay he owned slaves but never became an apologist for the peculiar institution (at a time when John Calhoun and others were extolling slavery as a boon to both the white and the black races). The younger Harlan owned slaves briefly but was even less enamored than his father of the institution. After studying law at Transylvania College in Lexington, John Marshall Harlan joined his father's law practice and might have followed him into the Whig party, but the Whigs fell apart amid the sectional troubles of the early 1850s, prompting Harlan (and his father) to seek refuge in the American, or Know-Nothing, party. Harlan won his first elective office, a county judgeship, as a Know-Nothing. Yet that party, too, dissolved, and Harlan migrated to the Constitutional Unionists and eventually the Republicans. During the Civil War he served as an officer in the Union army and became a friend of fellow Kentuckian Benjamin Bristow, Grant's treasury secretary. Harlan was a delegate to the 1876 Republican national convention, at which his well-

timed shift to Rutherford Hayes helped the Ohioan win the nomination. Hayes returned the favor by appointing Harlan to the Supreme Court seat vacated in the postelection maneuvering. As a Southerner, Harlan suited Hayes's policy of reconciliation, but as a Republican he didn't alienate the rest of the GOP.

Harlan's thinking on race shifted with the changing times. During the war's early going he argued that Kentucky should secede if Lincoln imposed emancipation on the state. He called the Emancipation Proclamation unconstitutional and initially condemned the Reconstruction amendments as "a complete revolution in our republican government." Blacks, he said, were inferior to whites and should be kept in a subordinate position. But by the time he ran for Kentucky governor in 1871 on the Republican ticket he was disavowing his previous positions. "There is no man on this continent . . . ," he said, "who rejoices more than I do at the extinction of slavery."[31]

He lost this race (and another in 1875) but didn't abandon his new convictions, and after he joined the Supreme Court he gained a reputation as the regular odd man out—to the point that his fellow justices teased him for his chronic "dissent-ery." He stood alone against the other eight in the *Civil Rights Cases* of 1883, which struck down the Civil Rights Act of 1875. The majority held that Congress had overstepped by barring private discrimination (albeit in public conveyances and accommodations); the Fourteenth Amendment, the majority said, forbade only state discrimination. "It does not authorize Congress to create a code of municipal law for the regulation of private rights," Associate Justice Joseph Bradley wrote. Harlan dismissed this reasoning as sophistry. The point of Reconstruction, he said, and in particular of the Thirteenth Amendment, had been not simply to end slavery but to remove the "burdens and disabilities which constitute badges of slavery and servitude." The drafters of the Thirteenth Amendment had recognized that African Americans, given their history as slaves, might require special protection. "Congress, therefore, under its express power to enforce that amendment by appropriate legislation, may enact laws to protect that people against the deprivation, on account of their race, of any civil rights enjoyed by other freemen. . . . Such legislation may be of a direct and primary character."[32]

The 1883 decision encouraged Southern states to experiment with new forms of discrimination—to write, among other laws and regulations,

the municipal codes Justice Bradley denied to Congress. Much of daily intercourse between the races was governed by custom and followed patterns decades in place. Whites generally associated with whites and blacks with blacks. In those areas where interaction was unavoidable—in commerce, for example—contact was often brief and clearly a matter of business. Black customers might patronize white department stores, and white customers black barbers, and no one feel threatened or unusually demeaned. In certain public places and events, the races could associate quite freely. Charles Dudley Warner, Mark Twain's friend and collaborator, traveled to New Orleans for a business exposition in 1885 and remarked the easy interaction between the races. "On 'Louisiana Day' in the Exposition, the colored citizens took their full share of the parade and the honors," Warner wrote. "Their societies marched with the others, and the races mingled on the grounds in unconscious equality of privileges." Even observers attuned to discrimination could be hard pressed to find it. T. McCants Stewart, the African American lawyer, had been born in South Carolina but was living in Boston when he decided, in 1885, to return to his native state as part of a larger tour of the South. "On leaving Washington, D.C., I put a chip on my shoulder and inwardly dared any man to knock it off," he wrote. His railcar filled up; passengers had to sit on their luggage. "I fairly foamed at the mouth, imagining that the conductor would order me into a seat occupied by a colored lady so as to make room for a white passenger." But the conductor said nothing, and the black and white passengers crowded elbow to knee. Stewart continued to Columbia, South Carolina, where the tolerant atmosphere astonished him. "I feel about as safe here as in Providence, R.I.," he wrote. "I can ride in first class cars on the railroads and in the streets. I can go into saloons and get refreshments even as in New York. I can stop in and drink a glass of soda and be more politely waited upon than in some parts of New England." In other Southern cities the situation was much the same. No one harassed him; whites struck up conversations with him apparently oblivious to his color. "I think the whites of the South," he concluded, "are really less afraid to have contact with colored people than the whites of the North."[33]

Yet the situation changed, for several reasons. The political campaign to disfranchise black voters fostered, indeed almost required, an increasingly rigid ideology of white superiority. The Fourteenth and Fifteenth amendments might be nullified in Southern practice, but not without

emotional effort. Meanwhile the emergence of Southern industry, at a time of labor strife nationally, disposed white employers toward any measures that would weaken the bargaining power of their black workers. Marginalizing the black race as a whole served the capitalists' purpose well. Similarly, the development of an agrarian protest movement gave opponents of the protesters an incentive to try to split the movement along racial lines, as some attempted with the Lodge elections bill. Finally, at the level of mere logistics, the spread of railroads across the South put blacks and whites in closer contact for longer periods of time than most had ever experienced.

As it happened, the railroads were where much of the new discrimination—the Jim Crow system, named for a black caricature—was first formalized. In 1890 Louisiana adopted a law "to promote the comfort of passengers on railway trains"; the crucial clause mandated "equal but separate accommodations for the white and colored races." Like nearly all such legislation, this measure was race-neutral on its face; whites could no more sit in black cars than blacks could sit in white cars. And there were exceptions: black nurses attending white children might ride in the white cars (and, theoretically, vice versa). But the intent of the law was as plain as that of the other laws curtailing African American rights. And it was emphasized by the cinders and ash that blew into the black cars, which were placed in the least desirable spot in the trains, just behind the locomotives.[34]

Louisiana wasn't the first state to pass a segregationist railroad law. Florida had done so in 1887, Mississippi in 1888, and Texas in 1889. Other states were poised to follow. But Louisiana's circumstances were unusual. As Charles Warner had noted just five years earlier, the races in Louisiana mingled more freely than in many other Southern states (and, indeed, than in several Northern states). The descendants of the *gens de couleur libres*—the free blacks of French heritage and culture—were accorded respect denied to most African Americans elsewhere. If legally enforced segregation took root in Louisiana, it could spring up anywhere.[35]

For this reason advocates of racial equality determined to challenge the Louisiana law. "We'll make a case, a test case, and bring it before the federal courts," wrote Louis Martinet, the editor of the leading black paper in Louisiana, the *New Orleans Crusader*. A committee of prominent Louisiana African Americans was formed, and funds were solicited. Northern civil rights advocates offered to help. Albion Tourgée, a New

York lawyer who had carpetbagged in North Carolina during Reconstruction, winning a seat on the state's superior court, wrote Martinet volunteering his services. Tourgée suggested having a woman, nearly white in appearance but black by Louisiana law, sit in a white coach. She would make a sympathetic defendant, he reasoned.[36]

Martinet replied that things were more complicated in Louisiana than Tourgée realized. "It would be quite difficult to have a lady *too* nearly white refused admission to a 'white' car," Martinet said. "There are the strangest white people you ever saw here. Walking up and down our principal thoroughfare—Canal Street—you would be surprised to have persons pointed out to you, some as white and others as colored, and if you were not informed you would be sure to pick out the white for colored and the colored for white. Besides, people of tolerably fair complexion, even if unmistakably colored, enjoy here a large degree of immunity from the accursed prejudice." If Martinet and the committee were to have their test case, they might have to announce the presence of the intruder in the white car and insist on his or her black identity.[37]

Things came to that, but not at once. Even while debating the skin tone of their test subject, Martinet and the committee had trouble finding a railroad that enforced the separate-car law. The railroad corporations were agnostic on the morality of segregation but didn't like its impact on their bottom lines. The separate cars were expensive to operate, and the law alienated black passengers, some of whom threatened a boycott. In time the committee found a company willing to enforce the law, in the hope—of the company no less than the committee—of having the law overturned. Daniel Desdunes, the son of a member of the committee, boarded a train at New Orleans bound for Mobile. He sat in the white car, was told to relocate, refused, and was arrested. Tourgée came from New York to direct the case, which ascended through the lower Louisiana courts to the state supreme court, where it intersected another case, brought by the Pullman Palace Car Company and alleging that the Louisiana law infringed the commerce clause of the Constitution. The Louisiana high court agreed, voiding the law as it applied to interstate travel. Because Desdunes was bound for Alabama, the charge against him was dismissed.[38]

On their next try the New Orleans committee made sure the test passenger bought an intrastate ticket. Homer Plessy later described himself as seven-eighths Caucasian and one-eighth African; he commonly passed for

white in New Orleans. In June 1892 he purchased a ticket from New Orleans to Covington, Louisiana, on the East Louisiana Railroad. Either at the time of purchase or when he sat down in the white car, Plessy identified himself as a black man. By agreement, the conductor asked him to move; he refused and was arrested.

The case came before Judge John H. Ferguson of the state district criminal court. Ferguson found for the prosecution, causing Tourgée, on Plessy's behalf, to appeal to the Louisiana supreme court. As most observers expected, the Louisiana high court upheld the decision, although the court's reasoning occasioned some surprise. "The sole question involved in this case . . . ," Associate Justice Charles Fenner asserted for the court, "is whether a statute requiring railroads to furnish separate, but equal, accommodations for the two races . . . violates the Fourteenth Amendment." In ruling that it did not, Fenner cited precedents not from Southern or federal courts but from state courts of the North, in particular from two states historically identified with abolitionism. The supreme court of Massachusetts had ruled as early as 1849 that segregated schools were constitutional. That court, answering the claim that segregation perpetuated race prejudice, had declared, "This prejudice, if it exists, is not created by law and cannot be changed by law." The supreme court of Pennsylvania, in a case quite similar to the present one, involving a law mandating separate railcars for the two races, had decreed, "To assert separateness is not to declare inferiority. . . . It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix." Fenner, speaking in the voice of the Louisiana court, said that the law in question applied to the races with "perfect fairness and equality" and noted "if the fact charged be proved, the penalty would be the same whether the accused were white or colored." Fenner expressed a certain puzzlement as to why the case had come up at all. "Even were it true that the statute is prompted by a prejudice on the part of one race to be thrown in such contact with the other, one would suppose that to be a sufficient reason why the pride and self-respect of the other race should equally prompt it to avoid such contact, if it could be done without the sacrifice of equal accommodations." Plessy's appeal was denied.[39]

That left the United States Supreme Court as the sole hope for overturning the Louisiana law. Martinet and the Louisianans wished to press forward at once. Tourgée and some other civil rights advocates from out-

side the state hesitated. If the national court reversed the Louisiana decision, well and good. But if the high court affirmed the Louisiana decision, it would legitimize segregation not simply in Louisiana but in every state. The result could be devastating to the cause of racial equality.

Tourgée had a second reason for proceeding slowly. Of the justices currently on the Supreme Court, only John Marshall Harlan could be counted on to oppose the Louisiana law. The other justices engendered no such confidence. "One is inclined to be with us legally, but his political bias is the other way," Tourgée told Martinet. "There are two who may be brought over by the argument. There are five who are against us. Of these one may be reached, I think, if he 'hears from the country' soon enough. The others will probably stay where they are until Gabriel blows his horn." Tourgée hoped time would change either the makeup of the court or the minds of some of the justices.[40]

Tourgée put off the appeal as long as he could, but eventually he had to bring it forward or accept defeat by default. The Supreme Court heard the case of *Plessy* v. *Ferguson* in the autumn of 1895. Tourgée attacked the Louisiana law at several points. He adopted Justice Harlan's phrase and logic in saying it branded blacks with a "badge of servitude" and thereby defied the spirit of the Thirteenth Amendment. The law also denied blacks the equal protection promised them by the Fourteenth Amendment, Tourgée said. It failed to define race, leaving this determination to railroad company officials and thereby depriving blacks of due process. It willfully ignored that separate accommodations for blacks would not remain equal accommodations for long in Louisiana (or anywhere in America, for that matter). "When the law distinguishes between the civil rights or privileges of two classes, it always is and always must be to the detriment of the weaker class or race." The provision allowing black nurses to ride in white cars demonstrated the true purpose of the law, for only so long as blacks were in positions subservient to whites could their presence be endured; otherwise it was insufferable. Governments were established to promote the *general* welfare and happiness; the Louisiana act, by design, did no such thing. It was "plainly and evidently intended to promote the happiness of one class by asserting its supremacy and the inferiority of another class." In a sentence that summarized his case and the entire argument against the Jim Crow law, Tourgée declared: "Justice is pictured blind, and her daughter, the Law, ought at least to be color-blind."[41]

THE SUPREME COURT rendered its decision in May 1896. By a vote of 7 to 1, the court upheld the Louisiana law. Associate Justice Henry Billings Brown, writing for the majority, dismissed the contention that the law in any way violated the Thirteenth Amendment. Quoting the majority opinion in the *Civil Rights Cases*, Brown declared, "It would be running the slavery question into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business." As to the Fourteenth Amendment, it was indeed written to enforce political equality between the races. "But, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." Brown cited the Boston case upholding segregated schools as an example. But the essential weakness—"the underlying fallacy"—of the plaintiff's argument lay in the contention that enforced separation of the races implied the inferiority of blacks. "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Brown asserted that during Reconstruction blacks had held the dominant position in the Louisiana legislature without causing whites to acknowledge their own inferiority. He added, "The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals." To think otherwise was to ignore history and human nature. "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political

rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[42]

John Marshall Harlan's years of isolation on the court had only deepened his conviction that American jurisprudence was failing American democracy. Harlan was no social leveler. "The white race deems itself to be the dominant race in this country," he wrote in his solitary dissent. "And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty." But part of that heritage and the essence of those principles was equality before the law. "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."

Harlan returned to his argument from the *Civil Rights Cases*, referenced by the counsel for Plessy, that the Thirteenth Amendment barred the imposition of any "badge of servitude," and he judged that the Louisiana law imposed just such a badge on blacks. But he now placed greater weight on the equal protection and due process clauses of the Fourteenth Amendment. For the state of Louisiana to assert, and the majority of the Supreme Court to accept, that the segregation law was race-neutral was fatuous or deceitful. "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . No one would be so wanting in candor as to assert the contrary." Moreover, the Louisiana law deprived members of both races of individual freedom. "If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each."

Should the principle of racial discrimination once be accepted, there might be no end to its applications.

> If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court room, and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day?

The present decision recalled one of the worst moments in the history of the court. "The judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."

Harlan intended the analogy very seriously. The Dred Scott case had closed the door of democracy to blacks as a people and unleashed the demons of divisiveness in the nation as a whole; the current judgment could have consequences no less dire.

> The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution. . . . Sixty millions of whites are in no danger from the presence here of eight millions of blacks. 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.

Harlan couldn't know how truly he spoke. The resounding decision of the court in the *Plessy* case drove the final nail in the coffin of racial egalitarianism. The executive branch of the federal government had abandoned blacks in the Compromise of 1877; the legislature deserted them definitively when the Senate rejected the Lodge elections bill in 1891. Now the judiciary turned its back on African Americans who simply wished to exercise rights they had won at such great cost thirty years before. During the Civil War it was possible—for Northerners, at any rate—to conceive of freedom and democracy as marching together toward victory; Lincoln's Emancipation Proclamation had been followed just months later by his Gettysburg Address, with its stunningly eloquent definition of democracy as government "of the people, by the people, for the people." But at war's end the alliance between freedom and democracy began to splinter, as wartime alliances often do. Freedom for blacks—including the freedom to participate in politics and public life—required curtailing democracy for whites; the Fourteenth and Fifteenth amendments were essentially restraints on white majorities disposed to deny political rights to blacks.

The problem of minority rights within majority rule wasn't unique to Gilded Age America; it is inherent in democracy. But it became acute and undeniable in the United States during the decades after the Civil War, for although the constitutional restraints on the white legislative and practical majorities held for a while, they couldn't withstand the relentless pressure of personal prejudice and political partisanship. In other respects, Gilded Age democracy was under siege from capitalism; in the matter of race relations, democracy besieged itself.

John Marshall Harlan understood this, and he articulated his frustration in the bitter coda to his *Plessy* dissent. "We boast of the freedom enjoyed by our people above all other peoples," he declared. "But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done."[43]