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The First Justice Harlan

Goodwin Liu†

As a scholar of constitutional law and educational policy, I have been busy trying to sort out a recent Supreme Court decision that lies at the nexus of these areas. I am referring to the Seattle and Louisville voluntary school desegregation cases decided in Parents Involved in Community Schools v. Seattle School District No. 1.1 There is a lot to say about the 185 pages of opinions comprising the decision, and you are very brave to let me appear before you with no red or yellow lights on the podium.

Actually, my purpose is not to discuss Parents Involved in any detail (I have analyzed it elsewhere2), but rather to focus on a Supreme Court Justice who had a quite palpable presence in the decision. The person I have in mind is not Chief Justice Roberts, whose plurality opinion all but rewrote the history of Brown v. Board of Education;3 not Justice Breyer, whose eloquent dissent sought to keep alive Brown's promise of "one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live";4 and not Justice Kennedy, whose swing opinion rejected colorblindness in student assignment but limited the options available to school officials to achieve integration.5

3. Brown v. Bd. of Educ., 347 U.S. 483 (1954); see Parents Involved, 127 S. Ct. at 2767 (plurality opinion) (describing the violation in Brown as "'differential treatment . . . on the basis of race' that harmed black and white children equally). But see Parents Involved, 127 S. Ct. at 2798 (Stevens, J., dissenting) ("The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.").
4. Parents Involved, 127 S. Ct. at 2836 (Breyer, J., dissenting).
5. See id. at 2788-97 (Kennedy, J., concurring in part and concurring in the judgment).
In fact, my subject is not any of the sitting Justices. It is the first Justice Harlan. In reading the Parents Involved decision, I found it striking that citations to Harlan’s dissent in Plessy v. Ferguson appeared seven times across four separate opinions.

Even more striking is the fact that Harlan’s legacy has been claimed by two Justices with virtually opposite views on race: Thurgood Marshall and Clarence Thomas. Justice Thomas centered his concurring opinion in Parents Involved on Harlan’s famous words: “Our constitution is color-blind.” And Justice Thomas quoted the late Constance Baker Motley as saying that “[Thurgood] Marshall had a ‘Bible’ to which he turned during his most depressed moments. The ‘Bible’ would be known in the legal community as the first Mr. Justice Harlan’s dissent in Plessy v. Ferguson . . . [No] opinion . . . buoyed Marshall more in his pre-Brown days.”

How could Justice Harlan be a hero to both Justice Marshall and Justice Thomas on matters of race? How could his record be so celebrated yet so indefinite that it is invoked to support radically different legal views? What was his vision for the nation’s future on race relations and civil rights? These questions drew me into an exploration of Justice Harlan’s life on and off the bench, through which I have found more intrigue than answers. The contest between Justice Thomas and Justice Marshall over Harlan’s legacy is a small reflection of the many contradictions in his nineteenth-century experiences with race. As I explain here, Harlan’s perspectives are more complex than any one sentence of his writings can capture.

At one level, it is no mystery why Justice Harlan so often ends up on the short list of great Supreme Court Justices. In addition to his lone dissent in Plessy, Harlan dissented alone in the Civil Rights Cases in favor of upholding a federal ban on racial discrimination in public accommodations. He dissented in Berea College v. Kentucky in favor of invalidating a state ban on operating a racially integrated private college. He dissented in Lochner in favor of

7. See Parents Involved, 127 S. Ct. at 2758 n.14 (plurality opinion); id. at 2782, 2783, 2787, 2788 (Thomas, J., concurring); id. at 2791-92 (Kennedy, J., concurring in part and concurring in the judgment); id. at 2799 n.6 (Stevens, J., dissenting).
11. 211 U.S. 45, 58 (1908) (Harlan, J., dissenting).
judicial deference to state health and safety regulations. He dissented in *Pollock v. Farmers' Loan & Trust Co.* in favor of the constitutionality of the federal income tax. He dissented alone in *United States v. E.C. Knight*, rejecting the Court's narrow construction of the Commerce Clause. He dissented in the *Insular Cases* in favor of extending constitutional rights to non-citizens in newly conquered U.S. territories. And he dissented alone in *Hurtado v. California*, one of several opinions in which he argued that the Fourteenth Amendment made the Bill of Rights applicable to the states—a position opposed by his grandson, the second Justice Harlan, decades later.

Of course, Harlan's views in these and other areas have been largely vindicated. He is famous, to quote one historian, "for his preternatural ability to articulate the ideals inherent in the Constitution before the nation fully recognized them." Although Holmes and Brandeis also had their moments, Harlan, it may be said, inaugurated the tradition of the Great Dissent.

But the portrayal of Harlan as a legal prophet does not fully wash. The same Justice who dissented in *Plessy* also authored the Court's opinion three years later in *Cumming v. Richmond County Board of Education*, upholding a Georgia school district's refusal to provide a high school for black children even as it provided one for white children. Harlan also joined *Pace v. Alabama*, upholding a statute punishing interracial adultery more severely than intraracial adultery. Moreover, Harlan famously besmirched his *Plessy* dissent by underscoring the injustice of segregation to blacks with the comment that even "a Chinaman can ride in the same passenger coach with white citizens." Harlan also voted to uphold the race-based immigration policies in the notorious *Chinese Exclusion Cases* and in *Fong Yue Ting v. United States*,

14. 156 U.S. 1, 18 (1895) (Harlan, J., dissenting).
16. 110 U.S. 516, 538 (1884) (Harlan, J., dissenting).
20. 175 U.S. 528 (1899).
21. 106 U.S. 583, 585 (1883) (finding no discrimination because the punishment for interracial adultery applies equally "to both offenders, the white and the black").
24. 149 U.S. 698 (1893).
and he voted against the Court’s decision in *United States v. Wong Kim Ark* upholding birthright citizenship for a Chinese man born to non-citizen parents in the United States.\(^{25}\)

In order to understand Harlan, we have to see him not as a mythic figure, but as a man who lived and struggled with the assumptions and contradictions of his times. In doing so, we need not lessen our regard for Harlan. To the contrary, we might gain a fuller appreciation of why he deserves admiration.

II

John Marshall Harlan was born to James Marshall and Eliza Davenport Marshall in Kentucky in 1833.\(^{26}\) His father James named him after the great Chief Justice, not because he foresaw John’s appointment to the Supreme Court, but because the family was deeply devoted to the tradition of Whig nationalism. Indeed, John had a brother named Henry Clay, after the renowned Whig leader who was a friend and contemporary of their father. His father James was a prominent lawyer and politician who held several elected positions in Kentucky.\(^{27}\)

The Harlans were not planters, but they owned about a dozen slaves. By all accounts, the slaves in the Harlan household were treated well, even beyond their laboring years. John’s wife, Malvina, who moved into the Harlan family home from Indiana, observed in her memoirs that the eldest slaves, a husband and wife in their nineties, “were cared for like two babies.”\(^{28}\) The Harlans conducted and thought of themselves as benevolent slave masters.

The dissonance in that phrase mirrors other contradictions. James Harlan made it possible for several of his slaves to purchase their freedom, even as he bought and sold slaves in complicity with the slave trade.\(^{29}\) One slave who purchased his freedom was Robert Harlan, a light-skinned black who most historians agree was James Harlan’s son and John Harlan’s half-brother.\(^{30}\) John Harlan never acknowledged Robert as a blood relation, but it is well-documented that John and Robert remained friends and often collaborated in

\(^{25}\) 169 U.S. 649, 705 (1898) (Fuller, C.J., dissenting, joined by Harlan, J.).


\(^{27}\) See Beth, supra note 26, at 1, 12-13 (discussing the political career of James Harlan and the Harlan family’s commitment to Whig nationalism); Yarbrough, supra note 26, at 3-10 (same).

\(^{28}\) Przybyszewski, supra note 26, at 23 (quoting diary of John Harlan’s wife, Malvina). On slaveholding in the Harlan family, see id. at 20-27.

\(^{29}\) See id. at 26.

\(^{30}\) For biographical information on Robert Harlan and his relationship to John Harlan, see Beth, supra note 26, at 12-13, and Yarbrough, supra note 26, at 10-20.
Republican politics throughout their lives. Robert became wealthy in the California Gold Rush and had a successful business career in Cincinnati, thereby demonstrating that freed slaves could become productive citizens even without formal schooling. Moreover, Robert's very existence suggests that John Harlan was describing his contemporary reality rather than predicting the future when he said in *Plessy* that "[t]he destinies of the two races, in this country, are indissolubly linked together." That Harlan would author the *Plessy* dissent was hardly preordained by his early professional life. Harlan went to Transylvania Law School in Lexington, where he became immersed in the nationalist ideology of Washington, Hamilton, Story, and his namesake John Marshall. Upon graduating in 1853, he became a lawyer and an active participant in Whig politics. At the time, the national Whig party faced increasing conflict over slavery, dividing into Northern and Southern camps. In Kentucky, the local party tried to appeal to both pro- and anti-slavery factions with the uniting theme of American nativism. Harlan joined the so-called Know-Nothing movement, and during several political campaigns in the 1850s he spoke prominently in defense of anti-foreign, anti-Catholic values.

Harlan proved to be an extremely able orator, and, at age 25, he won election to a county judgeship. The next year, 1859, he ran for Congress as a Whig candidate. The main issue in the contest between him and his Democratic opponent was slavery, and Harlan positioned himself as "the more devoted defender of property rights in slaves." Harlan was staunchly opposed to abolition and believed the national government was obligated to respect the property rights of slaveholders in the new territories. Although he lost that election, Harlan established himself as a key player in Kentucky politics.

On the eve of civil war, with the erosion of any political middle ground, Harlan squarely opposed secession and backed the Union cause. He joined the Union army in 1861, and as a colonel, he led important missions in Kentucky, Mississippi, and Tennessee. By all accounts, Harlan was deeply affected by the war. In particular, the loyal service of Catholics and German immigrants in his regiment tempered his nativism, and his faith in the Union grew stronger.

Harlan left the army in 1863 and returned to Kentucky, where he was drafted by the Unionist Party to run for state attorney general. During his successful campaign, Harlan attacked President Lincoln's Emancipation Proclamation, making clear his belief that the cause of preserving the Union

31. *See id.*
34. *See YARBROUGH, supra* note 26, at 29-31; Westin, *supra* note 26, at 640-41.
was distinct from the cause of ending slavery. Lincoln had "perverted the character of the war," Harlan said, for the purpose of the war was "to maintain the Union, and the Constitution which was the only bond of that Union. It was for the high and noble purpose of asserting the binding authority of our laws over every part of this land. It was not for the purpose of giving freedom to the negro." Harlan went on to argue several cases as attorney general defending the rights of Kentucky slaveholders against federal interference.

In the aftermath of the war, Harlan tried to carve a middle road between the Radical Republicans and the Confederate Democrats, attacking both abolition and secession. He opposed the Thirteenth Amendment on the ground that the prohibition of slavery violated the property rights of slaveholders in states, such as Kentucky, that remained loyal to the Union; and he opposed the Fourteenth Amendment as the product of Northern fanaticism that would dilute the white vote while enfranchising blacks. But with the passage of those amendments, the Democratic backlash revived talk of secession and rebellion, and also took the form of extreme violence directed at pro-Union whites and blacks. When these tactics delivered electoral victories to the Democrats, Harlan saw that there was no constituency for a moderate third party in Kentucky, and he cast his lot with the Republicans.

As one biographer notes, "the lynchings, floggings, robberies and terrorizing which swept through Kentucky between 1868 and 1871 and the failure of the Democratic Administration to control this . . . convinced [Harlan] that the only way to bring peace was to accept the results of the War, recognize the legal rights of the new freedmen, and end the reign of violence, even if it took federal intervention to do the job." As the Republican candidate for governor in 1871, Harlan gave a campaign speech declaring a change of heart on black civil rights. "It is true," he said, "that almost the entire people of Kentucky, at one period in their history, were opposed to freedom, citizenship and suffrage of the Colored race. It is true that I was at one time in my life opposed to conferring these privileges upon them." But, he said, "[i]t seemed wise to the majority of the people of this nation, not only to secure them their freedom in this way, but also to secure them the rights of citizenship, and the rights of suffrage; and I am now thoroughly persuaded that the only mode by which the nation could liberate itself from the conflicts and passions

38. Westin, supra note 26, at 651 (quoting a speech delivered by Harlan at New Albany, Indiana, on October 4, 1864).
39. See YARBROUGH, supra note 26, at 60-61.
40. See Westin, supra note 26, at 652-53.
41. See id. at 653-54.
43. On Harlan's conversion to Republicanism, see BETH, supra note 26, at 81-97, and YARBROUGH, supra note 26, at 65-85.
44. Westin, supra note 26, at 659.
engendered by the war . . . was to pass these Constitutional Amendments . . . . They are irrevocable results of the War.” He added: “Let it be said that I am right rather than consistent.”

Although there were fewer political consultants back then, Harlan’s Democratic opponents spared no pains in attacking his flip-flop on civil rights. They called him a “political weathercock” and quoted his earlier statements opposing the Thirteenth and Fourteenth Amendments. (Just imagine the television ad if he were running today: “John Harlan says he supports civil rights, but in 1864 he opposed the Emancipation Proclamation . . . .” ) Harlan lost the race for governor in 1871 and again in 1875. But by then, he had become a major national figure in the Republican Party. With the election of Rutherford Hayes as president in 1876, Harlan, who had campaigned vigorously for Hayes in Kentucky and other border states, was well-positioned for an important appointment. He got the call on October 16, 1877, when Hayes sent his name to the Senate for confirmation as an Associate Justice of the Supreme Court.

III

During his confirmation hearing, Harlan was opposed by skeptics of his recent conversion to the Republican Party and his belated allegiance to the Civil War Amendments. Beyond his campaign speeches, Harlan did not have a long résumé on civil rights. But whatever doubts his critics might have had, Justice Harlan was quick to dispel them upon joining the bench.

Harlan’s dissent in Plessy is his most celebrated opinion. But the opinion in which Harlan apparently took greatest pride was his lone dissent in the Civil Rights Cases of 1883. The question was whether Congress had power to enact the Civil Rights Act of 1875, which prohibited racial discrimination in public accommodations such as inns, theaters, and railcars. The Court held that “[i]t would be running the slavery argument into the ground” to call such discrimination a badge or incident of slavery under the Thirteenth Amendment. It further held that, because the Fourteenth Amendment’s prohibitions apply only to state action, discriminatory conduct by private entities was beyond the reach of Congress’s enforcement power under Section 5 of the Fourteenth Amendment.

Harlan’s dissent is remarkable for its expansive constitutional vision. To

45. Id. at 659-60 (quoting a speech delivered by Harlan at Livermore, Kentucky, on July 26, 1871).
46. Id. at 662 (internal quotation marks omitted).
47. On Harlan’s nomination and confirmation to the Supreme Court, see BETH, supra note 26, at 119-29, and YARBROUGH, supra note 26, at 102-14.
48. See BETH, supra note 26, at 121; YARBROUGH, supra note 26, at 109-10.
50. See id. at 10-19.
effectuate the Thirteenth Amendment prohibition on slavery, he argued, Congress’s express power to enforce the new guarantee of freedom must be commensurate with its earlier, implied power to enforce the condition of bondage. Before the war, the Court had upheld Congress’s power under the Fugitive Slave Clause to protect the rights of slave-owners against contrary state laws, even though the clause assigned no enforcement authority to Congress.\(^1\) National authority to protect constitutional rights, Harlan said, "ought not now to be abandoned, when the inquiry is not as to an implied power to protect the master’s rights, but what may Congress, under powers expressly granted, do for the protection of freedom, and the rights necessarily inhering in a state of freedom."\(^2\)

As to the Fourteenth Amendment, Harlan rejected the assumption that the amendment "consists wholly of prohibitions upon state laws and state proceedings."\(^3\) "The first clause of the first section—‘all persons born or naturalized in the United States . . . are citizens of the United States, and of the state wherein they reside,’” he observed, "is of a distinctly affirmative character."\(^4\) For Harlan, the Citizenship Clause was not a mere guarantee of legal status, as it might be understood in a dispute over naturalization. Instead, he said, the citizenship guarantee denotes membership in a "political community known as the ‘People of the United States.”\(^5\) In other words, the Citizenship Clause of the Constitution literally constitutes the nation. Together, the Thirteenth and Fourteenth Amendments promised freedom, but not a condition of stateless liberty. They promised membership in the national community.

Moreover, the Constitution says that citizenship carries certain privileges and immunities.\(^6\) The text does not say what they are, but Harlan argued that "[t]here is one, if there be no others—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same state.”\(^7\) The idea that citizenship implies civil equality regardless of race underpins Harlan’s contention that the Civil Rights Act of 1875 was a valid enactment to enforce the Fourteenth Amendment citizenship guarantee. For Harlan, citizenship was central to understanding the meaning of constitutional equality.

Interestingly, although citizenship expanded Harlan’s vision of racial equality, it also had implications for the interpretation of the Constitution. For Harlan, the Citizenship Clause was central to understanding the meaning of constitutional equality.

\(^1\) See id. at 28-30 (Harlan, J., dissenting) (discussing Prigg v. Pennsylvania, 41 U.S. 539 (1842) (upholding Fugitive Slave Act of 1793), and Ableman v. Booth, 62 U.S. 506 (1858) (upholding Fugitive Slave Act of 1850)).
\(^2\) Id. at 34.
\(^3\) Id. at 46.
\(^4\) Id. (quoting U.S. CONST. amend. XIV, § 1).
\(^5\) Id.
\(^6\) See U.S. CONST. amend. XIV, § 1 (referring to the “privileges or immunities of citizens of the United States”).
\(^7\) Civil Rights Cases, 109 U.S. at 48 (Harlan, J., dissenting).
equality, it also limited his vision in other respects. His strong nationalism provides a window for understanding why he did not have much sympathy for the plaintiffs in the *Chinese Exclusion Cases*. For people who were legally incorporated into the national community, Harlan vigorously opposed the racial caste system, or what we might call second-class citizenship. But, for people outside of the national community, Harlan saw no reason why Congress should not have plenary power to set criteria for membership, even criteria based on race. This nationalist view made it possible for Harlan to indulge the prevailing view that the Chinese were "of a distinct race and religion . . . tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people."58

Yet within his nationalist commitment to racial equality, what do we make of *Pace v. Alabama*, where Harlan voted to uphold harsher penalties for interracial adultery, and the *Cumming* case, where he wrote a unanimous opinion upholding separate and unequal educational opportunities for black children? These results are puzzling, for the challenged policies were part of the racial caste system every bit as much as the segregated railcars in *Plessy* and the discriminatory inns and theaters in the *Civil Rights Cases*.

Historians have struggled to explain Harlan’s position in *Pace* and *Cumming*. One recent biographer has intriguingly suggested that Harlan, though committed to racial equality, was also deeply committed to racial *identity*.59 In *Plessy*, Harlan famously said that "[e]very true man has pride of race,"60 and he began the paragraph that contains "[o]ur constitution is color-blind" by saying, "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty."61 Harlan also hinted at racial identity when he said, "Sixty millions of whites are in no danger from the presence here of eight millions of blacks."62

From this perspective, we see why Harlan might have refused to challenge the popular taboos against interracial sex and interracial schools. While Harlan rejected the idea of *de jure* racial hierarchy, he nevertheless believed in the concepts of race and racial identity. Social contact between the races threatened to erode these concepts and, with them, the cultural categories and traditions that Harlan knew well from his Kentucky upbringing. Even at the time of *Brown v. Board of Education*, schooling and marriage were closely associated

59. See Przybyszewski, supra note 26, at 81-117.
61. *Id.* at 559.
62. *Id.* at 560.
as the ultimate zones in which many Americans would claim that racial separation, and not necessarily supremacy, was simply a way of life.

But we know that racial separation and supremacy are deeply intertwined, and in all likelihood, Harlan knew this too. Although Harlan spoke of racial identity in black and white terms in Plessy, he was intimately familiar with a more complex reality in the person of his half-brother Robert. And although his opinion in the Cumming case does not acknowledge segregated schools to be a symbol of racial caste, Harlan was not unaware. At the end of his career, he listed several cases to be published in a “book containing my opinions & dissenting opinions.” The list includes his dissents in the Civil Rights Cases, Plessy, and other cases concerning black civil rights. It does not include his opinion in Cumming.63

IV

Justice Harlan served on the Supreme Court for thirty-four years, the sixth-longest tenure of all time. He began with colleagues who witnessed the Civil War, and he ended with colleagues who would witness the New Deal. Along the way, he authored 772 opinions for or with the Court, and 137 dissents.64 In the final analysis, how do we measure his accomplishments? How do we take stock of this complex man?

Harlan was right about many things before the Court got it right, and it is tempting to describe Harlan as a legal prophet. But the label has two problems. First, it suggests that Harlan approached the issues of his time with a kind of mystic intuition or sixth sense, when in fact he applied lawyerly forms of textual and historical reasoning that were equally available to his colleagues on the bench. Second, to be labeled a prophet is to be held to an impossible standard. In many ways, Harlan’s views fell short of our current notions of racial equality. But Harlan was not a philosopher; he was a judge. His job was not to divine eternal truths, but to make socially situated legal judgments. It is correct to say that Harlan’s views on race were as problematic in some ways as they were progressive in others. But in reaching that conclusion, we benefit from a century’s worth of hindsight and experience that Harlan did not have.

A better measure is to compare Harlan’s record with the norms of his era. On some issues, notably Chinese immigration, Harlan fared no better than his colleagues. But on civil rights, Harlan’s vision of racial equality was exceptional on the Court. True, his views generally reflected those of the Radical Republican Congress. But unlike Charles Sumner, John Bingham, and Thaddeus Stevens, Harlan did not enjoy the support of his institutional colleagues. His dissents must have required courage, for he had no basis to foresee his vindication. Indeed, after Plessy, the nation lost interest in black

63. See Przybyszewski, supra note 26, at 117.
64. See Westin, supra note 26, at 699.
civil rights for the next sixty years. A 1953 edition of the Encyclopedia of American History included an entry on Harlan but did not mention his civil rights dissents. Only after Brown v. Board of Education was Harlan generally regarded as a "great" Justice because of those dissents.

An even more poignant measure is to compare Harlan’s record with the norms of his own life experience. How was it possible to grow up in a slaveholding family and become the Supreme Court’s foremost champion of black freedom? How did Harlan reconcile his earlier opposition to the Civil War Amendments with the expansive interpretations of the amendments he rendered as a judge? And how did Harlan rationalize the mores and traditions of his upbringing with the compelling logic of his commitment to racial equality? The answers to these questions are, like Harlan’s record on civil rights, not always satisfying and complete. But one might say that Harlan traveled as far as could be expected of anyone over the span of a single human life.

The complexities and contradictions of Harlan’s journey should counsel a measure of caution when invoking his legacy to support one side or the other in current legal controversies. How would Harlan have ruled on the constitutionality of voluntary race-conscious school desegregation? The question is not analytically vexing as much as it is simply peculiar. Although Harlan presaged the modern debate between antisubordination and anticlassification theories of the Fourteenth Amendment, he never reached the conclusion under either theory that segregated schooling was unconstitutional.

Yet even if it is wrong to treat Harlan as an oracle on civil rights, his successes and shortcomings importantly teach us how far it is possible to transcend the social understandings of one’s own cultural context and upbringing. Perhaps more than any single opinion or any specific utterance, it is the total arc of Harlan’s life that is his foremost legacy. So understood, it is a legacy that inspires faith that our nation and its laws can always become more enduring and just.

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65. See Przybyszewski, supra note 26, at 8.