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ARTICLES

The Harlan Renaissance: Colorblindness and White Domination in Justice John Marshall Harlan's Dissent in *Plessy v. Ferguson*

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Abstract Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* remains a contested flashpoint in the conversation over black equality over a century after the Supreme Court's ignominious decision installed legal racial inequality as the law of the land. While myriad commentators extol Harlan as an inspirational beacon of racial justice for his eloquent and solitary stand against Jim Crow, this article questions such praises and argues that, in the context of white material supremacy and black material deprivation, Harlan was every bit as "racist" as the justices comprising *Plessy*'s majority. This article centrally contends that Harlan unsuccessfully attempted to inform his Supreme Court colleagues that legalized segregation was unnecessary in keeping whites the master race of the social realm; as Harlan conceived it, the "color-blind Constitution" would function equally well in trapping blacks in the maelstrom of political powerlessness and economic destitution.

Keywords Colorblindness · Racial inequality · *Plessy v. Ferguson* · John Marshall Harlan · Jim Crow

Introduction

Considering the thoroughgoing influence of Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* (163 U.S. 537), it can be easy to forget that for the first half-century following the decision, Harlan's words exerted essentially zero influence on racial thought or policy. Exiled by the surging ubiquity of the Jim Crow racial order, Harlan's dissent would remain banished to the footnotes of Constitutional casebooks

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for most of the early twentieth century. Not until such civil rights groups as the NAACP made *Plessy* their target in the years leading to *Brown v. Board of Education* (345 U.S. 483) did his dissent become a site of profound legal interest. Then, as the civil rights movement pressed forward in response to *Brown* and related (inter)national developments, a politically diverse cast of characters likewise began to seize on Harlan's now-canonic phrase "Our Constitution is color-blind," propelling his dissent from near-complete obscurity to one of the most oft-quoted pieces of judicial writing in Supreme Court history. Variously celebrated as "prophetic" (Weiner 2008, p. 176; Thomas 1997, p. 36; Irons 2004, p. 28), "empathic" (Groves 1951, p. 67), and "righteous" (Aleinikoff 1992, p. 961), Harlan's dissent (and the ideas he expressed there) feature prominently in every Supreme Court case focusing on race in the post-civil rights era.

Being that colorblindness endures as the nation's dominant racial ideology in the twenty-first century, the contemporary popularity of Harlan's opinion comes as little surprise. What Harlan exactly *meant* by "Our Constitution is color-blind," however, remains a matter of bitter contestation; indeed, much of the controversy surrounding his dissent sources from the many different (and incompatible) interpretations of those fateful words. While conservatives read Harlan's phrase as an all-encompassing ban on institutional race-consciousness (Glazer 1987; Thomas 1987; Kull 1992; D'Souza 1995; Thernstrom and Thernstrom 1997; Lundin 1997), many left-leaning writers assert that Harlan's heroic stand against Jim Crow would have committed him to uprooting all expressions of racial inequity (Aleinikoff 1992; Fair 1997; Holt 2011; Weiner 2009). Others, less enamored of Harlan's famed axiom, stress that he wielded the metaphor of colorblindness as a means to keep whites the master race; such commentators point out that immediately preceding his invocation of colorblindness, Harlan asserted that the white race was the "dominant race" and would remain so "for all time" if it held faithful to the colorblind Constitution (Gotanda 1991; Carr 1997; Goldberg 2002; Olson 2004; Brooks 2009; Lipsitz 2015).

In what follows, I demonstrate why this latter interpretation is the correct reading of Harlan's dissent. Such scholars have ably highlighted Harlan's racism and foregrounded the role of colorblindness in locking in white domination and black deprivation. Their views, however, remain marginalized in the larger conversation over *Plessy v. Ferguson*, muted by the myriads who insist that Harlan—by dint of being the lone Justice to oppose Jim Crow—*had* to be antiracist a priori. This article proceeds from the conviction that voluminous evidence from Harlan's opinion remains to be excavated, evidence that will confirm that, in the context of material racial inequality, there was little antiracism to be had on the part of *Plessy*'s sole dissenter.

My aims in this article are two: first, to establish Harlan's white supremacist intentions by examining underexplored avenues within his opinion (section one), and second, to investigate the various bases for Harlan's decision to stand apart from his colleagues and declare Jim Crow segregation unconstitutional (section two.) I enter this debate by training my attention upon the distinction between the *social realm* and the *legal realm*—a distinction that is central to Harlan's approach, as his main point was that establishing colorblind equality in the legal realm would in no way imperil racial inequality in the social realm. As we shall see, every ounce of hostility Harlan directed at Jim Crow sourced from its role in engendering a system of "legal inferiority" (as he worded it in his concluding remarks); indeed, he continually underscored his conviction that Jim Crow unashamedly trampled upon the civil rights of blacks, whom Harlan

called "our equals before the law." His clarion calls for the equality of blacks and whites before the law stands in palpable contradistinction to his discourse on equality in the social realm; while he considered legal racial subordination anathema, the *social* inferiority of blacks registered nary a protest from him.

The two sections of this article provide in-depth textual confirmations for this position, demonstrating that Harlan was wrapped up in condemning legal racial oppression rather than social racial inequality. The first section focuses on the key passage in which "Our Constitution is color-blind" appears, as it is there that Harlan drew in sharpest relief the distinction between the social and legal realms, making a crucial discursive transition from the former to the latter midway through the passage. In the opening three sentences, Harlan declared the white race "dominant" and proceeded to list off the indices of that domination "in prestige, in achievements, in education, in wealth, and in power" while asserting that such dominance would persist "for all time." Harlan then marked the transition beginning in the fourth sentence: "*But* in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens." The remainder of the paragraph is shot through with repeated insistences that all citizens are "equal before the law" (163 U.S. 537, 559). This approach enables us to ask new questions about Harlan's other statements in the passage, which commentators commonly quote but then pass over, evidently interpreting them as lofty rhetorical flourishes that simply speak for themselves. What exactly did Harlan have in mind, for example, when he opined that "The humblest is the peer of the most powerful" or that "The law regards man as man"? This section will scrutinize such assertions anew, communicating that Harlan's most-analyzed paragraph is one that begins with a celebration of white domination in the social realm and ends with an indictment of racial domination in the legal realm. Acknowledging the centrality of Harlan's mid-passage transition will expose Harlan's opening three sentences for what they were: an unabashed exaltation of racial inequality and whites' position atop the socioeconomic ladder.

Harlan's position begs a heretofore unasked question: if his dissent was thus written in the name of white domination, why did he not simply affix his name to Henry Billings Brown's majority opinion? Section two responds in kind: as Harlan took pains to explicate, Jim Crow would induce one political headache after another, fueling interracial tensions domestically and tarnishing the country's reputation abroad. Collectively, these consequences would render *Plessy* a decision the nation would come to regret, rivaling the infamy of *Dred Scott v. Sandford* (60 U.S. 393). In such a context, Harlan's vociferous preference for the colorblind Constitution becomes comprehensible, as does his unmistakable devotion to the Reconstruction amendments. That devotion, section two will also inform, sprang from his experiences as a former slave owner and as a committed Presbyterian. By analyzing these and related aspects of his biography, we can peer more closely into Harlan's thought process and make better sense of the usually unique positions he took on racial issues.

Collectively, the forthcoming arguments will reveal that—far from championing thoroughgoing racial equality—John Marshall Harlan was insisting that racial justice in the legal realm could perpetuate racial injustice in the social realm "for all time." By labeling the Constitution colorblind, Harlan hoped to convey an essential fact about the relationship between the law and the larger society in which it operated, with all its flaws and contradictions: that social inequities do not require the imprimatur of the law

to sustain themselves (Mills 2003, p. 36). "Equality before the law"—as much a mantra for Harlan as "Our Constitution is color-blind"—could consummate the reproduction of racial inequality as effectively as any state-sponsored system of laws.

The Transition and the Implications

As the following iterations from Justice John Marshall Harlan remain among the most quoted in the annals of the Supreme Court, they logically form the centerpiece of the ensuing analysis:

> 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. But 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 (163 U.S. 537, 559).

In this section, I interrogate the relationship between white domination and colorblindness, bound by the conviction that properly highlighting that relationship requires accentuating the distinction between the social and legal realms while acknowledging the transition Harlan made there from the former to the latter.

The Transition

In the opening of this passage, Harlan assertively illumined the racial reality of late-1800s America: whites considered themselves dominant, an opinion with which Harlan wholeheartedly agreed. He then inventorized the specific dimensions of that dominance: "in prestige, in achievements, in education, in wealth, and in power." Harlan's avowal of white domination was not merely a "belief," as some writers have posited (Thomas 1997, p. 36; Grinsell 2010, p. 356; Golub 2005, p. 593); it was based on objective data that conclusively confirmed the facts of that domination. By any empirical measurement—by any yardstick—the white race *was* the dominant race, possessing disproportionate prestige, achievements, education, wealth, and power. In all walks of American life, whites held the reigns of influence, a state of affairs that was not lost on Albion Tourgee, who penned the following in his *Plessy* brief:

> Six-sevenths of the population are white. Nineteen-twentieths of the property of the country is owned by white people. Ninety-nine hundredths of the business

> opportunities are in the control of white people.… Under these conditions, is it possible to conclude that the reputation of being white is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity? (as cited in Elliott 2001, p. 287)

Harlan took these observations and ran a different direction with them; while Tourgee was committed to the dissolution of these racial inequalities (via his maxim "color-blind justice," likely the inspiration for Harlan's reference to the colorblind Constitution) (Elliott 2006), Harlan not only hailed such inequality but declared it would persist "for all time."

Then came the crucial and central transition. Once Harlan had laid out the facts of white domination, he arrived at the heart of the matter: why he considered Jim Crow a violation of the 14th Amendment's equal protection of the laws. To frame that argument, he moved from the social realm to the legal realm. Whites may have been incontestably dominant in the social realm, "*But* in view of the Constitution, in the eye of the law….There is no caste here." The all-important conjunction "But" signaled Harlan's shift in vision from the social to the legal; while white domination manifested in myriad forms, Harlan insisted that such domination could not characterize the legal realm due to the strictures of the colorblind Constitution.

The Implications

Highlighting Harlan's transition points up a spectrum of implications necessary for correctly grasping his purpose in *Plessy*. Harlan's discourse in the opening three sentences of the paragraph were focused *only* on the social realm—a brief yet crucial commentary on the social dominance of whites in every significant dimension of society. The follow-up transition then commits us to the conclusion that all of Harlan's statements succeeding his fourth-sentence conjunction "But" *solely* referenced the legal realm. This first becomes clear when we take note that Harlan used the word "dominant" twice in the passage, once before and once after the transition. The first usage I illuminated above: a *social* dominance expressed in whites' comparatively higher levels of education, wealth, and the like. Harlan fully embraced this expression of white domination ("So, *I doubt not*, [the white race] will continue to be [dominant] for all time….") Such manifestations of white domination as education and wealth, Harlan was suggesting, landed outside the reach of the Constitution, and he located such indices in a completely distinct domain from the specifically legal domination implied by Jim Crow.

Harlan's second reference to domination, appearing directly after his transition, further clarifies this separation of white domination in the social and legal realms: "But in view of the Constitution…there is in this country no superior, *dominant*, ruling class of citizens." This is, in full contrast, a *legal* dominance produced by such governmental systems as slavery and Jim Crow. Harlan was insisting here that the white race could remain dominant socially without having that dominance inscribed into the law. His disparate uses of the word "dominant" here thus communicate that it is entirely possible to applaud whites' dominance in prestige, achievements, education, wealth, and power while simultaneously advancing the idea that no dominant race

exists "in the eye of the law." This distinction is central to Harlan's discourse, one that is—again—signified by his mid-passage conjunction "But."

Let us now appraise the remainder of Harlan's post-transition sentences in light of these assertions. Aside from "Our Constitution is color-blind," the arguably most oft-examined statement within the famous passage is "There is no caste here," and it is frequently invoked to emphasize Harlan's antiracism (Fair 1997; Powell 2008; Grinsell 2010; Sunstein 1994). A different reading emerges, however, when we place this comment in the context of Harlan's transition from the social to the legal realm. Situated after the transition, Harlan was thus referencing caste in the legal sense—a "legal racial caste" that de jure systems of white supremacy (such as Jim Crow) implanted and legitimated in society. In placing "There is no caste here" in the present tense, Harlan was speaking the truth: upon the ratification of the post-Civil War amendments, legal racial caste did not exist, as those amendments had made all citizens "equal before the law." "There is no caste here" embodied Harlan's protest over the reintroduction of a legal caste system via Jim Crow. In this regard, he could not have been referring to caste in the social sense; to claim "There is no social caste here" would have been a nonsensical assertion, being that he had just taken pains to establish that social caste *was* present in such arenas as education and wealth. In view of society, racial caste was omnipresent; only "in view of the Constitution, in the eye of the law" did racial caste cease to exist. Many look to this brief statement as verification of Harlan's antiracism (Cass Sunstein called it "one of the greatest sentences in American law") (1994, p. 2435), but an approach that underscores the division between the social and legal realms reveals that Harlan had utterly no interest in dissolving social racial caste—all his wrath was directed at the legal caste systems of slavery and Jim Crow.

Whether or not Harlan himself recognized or intended this, the following sentence has become the crux and ineluctable center node of his dissent—and the heart of its stormy legacy: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Contextualization is critical: Harlan was offsetting the colorblindness of the Constitution with the unapologetic color-consciousness of Jim Crow. Yet this Constitution is not simply colorblind—it "neither knows nor tolerates classes among citizens." This is precisely what Jim Crow would (and did) unleash: the imposition of a legal hierarchy where whites could infringe upon blacks' civil rights at their whim and will. When such public establishments as railroad companies made Jim Crow-esque distinctions, they served to "tolerate" the very classes to which the Constitution must remain blind. *Social* classes permeated United States society—the gap between the nation's rich and poor in the *Plessy* era (which was, after all, the early *Lochner* era) was both expanding and increasingly contentious. Again, Harlan was only targeting *legal* classes, opposing the unconstitutional legal hierarchies and legal caste systems that flowed from them.

Likewise worth exploring is Harlan's comment that the colorblind Constitution does not "know" such "classes among citizens." Harlan was likely reiterating an earlier point he had made: "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights" (163 U. S. 537, 554). Harlan's approach broadcasts the appropriateness and accuracy of the colorblind metaphor: in the exercising of civil rights, the Constitution must—quite literally—be (color)blind to whomever is enjoying those rights. As Harlan had previously made clear

in his dissent in the *Civil Rights Cases* of 1883 (109 U.S. 3), such freedoms as attending a theater or frequenting a hotel fell under the umbrella of civil rights. If the Constitution thus could not "know" the racial identities of those partaking in these civil rights, it would also be blind to the fact that whites would be enjoying such rights to a greater degree than blacks—what with their dominance in education, power, and (especially) wealth, which would grant them wider access to the privileges of theaters, hotels, and the like. So long as such racial inequalities in the enjoyment of civil rights were not *legally* generated, they would not offend the colorblind Constitution.

This theme of civil rights continues in what Harlan wrote directly after declaring the Constitution colorblind: "In respect of civil rights, all citizens are equal before the law." This thematic of "equality before the law" threads through the entire dissent. Whenever Harlan approvingly spoke of equality, it was always in its legal manifestations: "equality before the law," blacks as "our equals before the law," and so forth. Collectively, it is clear from all these references that, for Harlan, the legal equality of which he spoke operated *in isolation*, as in the opening sentences of the passage, he made the social *in*equality between blacks and whites unambiguous. To put this another way, blacks and whites could be "equals before the law," but that did not mean they were equals in any other respect—in the social realm, racial inequality would rule "for all time" if the nation remained blind to race "in view of the Constitution." Here, it is also important to stress Harlan's conclusion that Jim Crow segregation encroached upon the civil rights of blacks, a point he made repeatedly throughout his opinion (Obasogie 2014, pp. 118–120; Mangis 2005, p. 28). Such civil rights included, as we have previously seen, the right to sit on juries, frequent hotels, and travel in railroad coaches without regard to race. For Harlan, the post-Civil War amendments had settled these matters, but as he elsewhere lamented, "it seems that we have yet, in some of the States, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, on the basis of race" (163 U.S. 537, 560). As before, this "dominant race"—this "superior class of citizens"—was a legal incarnation that had no place in a constitutionally colorblind nation. Whites may have wielded greater wealth and power, but this gave them no license to trespass upon the legal, civil rights of blacks, making them unequal before the law. For Harlan, this "dominant" class of citizens was fully the sinister outgrowth of the rupturing of the post-Civil War amendments.

The next statement in Harlan's passage further substantiates these themes—one that scholars frequently cite, but infrequently analyze: "The humblest is the peer of the most powerful." This post-transition averment dictates that the colorblind Constitution cannot distinguish between the humble and the powerful "in the eye of the law" (certainly they are not peers outside the law's ambit.) That law, however, is under no obligation to inquire why some are humble and others powerful—or how they got that way. Harlan, of course, had earlier conveyed which racial group was the most powerful in his exaltation of white domination in the social realm. Whites' disproportionate possession of social power, however, could not carry over into the legal realm, where citizens of all racial groups (should) have the equal right to commingle with other races on a train car. Only "in the eye of the law" would blacks and whites remain peers.

The penultimate sentence of Harlan's admired paragraph contains a wealth of insights that further confirm that his attacks were solely trained on legal racial inequality: "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's points are two: first comes the notion that "The law regards man as man." What does this mean? It clearly evoked Harlan's oft-echoed principle that all citizens are "equal before the law." The same implication applies: just as people could be "equal before the law" while stunningly unequal in every other respect, the law could still "regard man as man" whether that man resided in a mansion or a cardboard box. (We could extend this exponentially: as regards the law, a man is still a man whether he is a billionaire or bankrupt, has a doctorate or less than a grade school education, *ad infinitum*.) This idea heralds reminders of Anatole France's celebrated saying that "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread" (as cited in Carr 1997, p. 130). It was the majestic equality of the law to "regard man as man," viewing them as equals despite the rampant inequalities defining every other aspect of their lives.

This bleeds directly into Harlan's second point: that same law "takes no account of his surroundings" in the context of civil rights. Such "surroundings," as indicated above, surely included one's domicile—a comfortable cottage or a rain-drenched underpass, a large plantation home or its unsanitary worker's quarters. "Surroundings," of course, transcended place of residence to encompass every detail of a citizen's life, and it needs to be acknowledged that at the moment of *Plessy*—1890s America—"surroundings" for blacks meant relatively substandard housing, debt peonage, and convict leasing. Harlan insisted that the Constitution was obliged to turn a blind eye to such inequalities in "surroundings" and could not take account of their comparatively deleterious effects on blacks. All that was needed was for the Constitution to "regard man as man" in the context of such civil rights as voting and sojourning on railroads. So long as no civil rights violations were involved, whatever conditions obtained between blacks and whites lay outside the orbit of the colorblind Constitution and thus mandated no rectification.

All told, properly grasping Harlan's intentions in *Plessy* necessitates underlining the crucial discursive shift he made midway through his renowned paragraph: starting with a celebration of white social dominance in prestige, achievements, education, wealth, and power and ending with a series of eloquent admonitions that the Constitution must wax blind to the social realm's innumerable racial inequalities. And Harlan most directly relayed that association with his third-sentence insistence "So, I doubt not, [the white race] will continue to be [dominant] for all time, *if* it remains true to its great heritage and holds fast to the principles of constitutional liberty." The remainder of the passage illuminated precisely what those "principles of constitutional liberty" were: rejecting legal racial caste, refusing to tolerate classes among citizens, regarding man as man, protecting blacks' civil rights and keeping them "equal before the law" while taking no account of blacks' relative material deprivation. As recently voiced by Randall Kennedy, these principles "posed no real threat to white supremacy" (2013, p. 152). Following the colorblind Constitution, Harlan concluded, would prove the most effective way to maintain whites' dominant social standing. The *Plessy* majority's refusal to appreciate those connections doubtlessly sparked Harlan's parting salvo: "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." Regulating blacks' civil rights—or simply refusing to interfere with them—would both effectively

reproduce white domination in the social realm "for all time," as the law was not needed to keep racial inequality in place.

Further Implications

This distinction between social and legal equality permeated Harlan's other musings in *Plessy*. While he only made one direct reference to the matter of social equality therein, it conclusively illuminated his outright dismissiveness about social equality and the idea that "equality before the law" would somehow bring it about (indeed, he castigated that argument as "scarcely worthy of consideration") (163 U.S. 537, 561). This is because Harlan conceived of social equality as inhering in the equal possession of such commodities as wealth and education, of which blacks indisputably had less. The idea that the integration of railway coaches would not usher in a milieu of social equality logically follows. The relevant passage communicating this point appears roughly midway through his opinion:

> [S]ocial 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 street 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 (163 U.S. 537, 561).

As Jack Balkin notes, Harlan's central argument here is that "it doesn't matter how much you integrate the institutions of American political and civil society. Blacks and whites are not social equals and they are not going to be" (2005, p. 112). And they are not going to be *precisely because* the integration of railway cars in no way imperils the dominance of whites in the context of material racial inequality. As Harlan understood, rubbing shoulders while traveling from New Orleans to Covington (as Homer Plessy attempted) would not induce some magical shuffling of resources between the white and black passengers; whites would still possess comparatively greater wealth than blacks at the conclusion of their sojourn on the railroad. Harlan's frustration with the majority was surely a function of their inability to grasp this simple insight. "Sixty millions of whites are in no danger from the presence here of eight millions of blacks," insisted Harlan (163 U.S. 537, 560), and the racial disparities governing the social realm doubtlessly formed the heart of his confidence in such assertions. The vastly greater resources whites controlled were in no danger in a society of integrated train cars.

This same approach, I submit, informed Harlan's other decisions involving the race issue, evincing a consistency that renders his views in these cases more intelligible. Scholars have been perpetually flummoxed, for instance, by Harlan's majority opinion in the 1899 public school segregation case *Cumming v. Richmond County Board of Education* (175 U.S. 528), labeling his transparently anti-black ruling "an enduring puzzle" (Beth 1992, p. 235) and "a curious position" (Hoffer 2012, p. 120) and condemning it as a violation and contradiction of his erstwhile defense of black civil rights in *Plessy* three years prior (Kousser 1999, p. 325). (Indeed, it is the first piece of

evidence Harlan biographer Tinsley Yarbrough supplies for his decision to describe Harlan as a "judicial enigma") (1995, p. xiii). What might appear to represent a glaring contradiction in Harlan's thought process becomes fully consonant with his *Plessy* dissent once we centralize his conviction that racial inequalities in educational opportunity fell outside the legal realm protections afforded by the colorblind Constitution. As noted above, Harlan was solely interested in shielding blacks' *legal* equality, an equality functioning separately from educational access (or lack thereof.) At bottom, Harlan's ruling in *Cumming* remains "enigmatic" only if he is considered the late-19th Century Supreme Court defender of black equality *par excellence*, rather than a justice who advocated for the preservation of blacks' civil rights as a means to perpetuate white domination "in prestige, in achievements, *in education*, in wealth, and in power…for all time." (Here as elsewhere, Harlan proved prescient, as a much later Supreme Court would hold, in the 1973 case *San Antonio v. Rodriguez* [411 U.S. 1], that equity in education and wealth are not constitutionally protected and that the Constitution is under no obligation to rectify inequalities attached to them) (Kozol 1991; Chemerinsky 2010).

More "enigmatic" on this score is Harlan's dissent in the 1908 private school decision *Berea College v. Kentucky* (211 U.S. 45). There, he insisted as unconstitutional the Day Law, which mandated segregation in all Kentucky educational institutions. Fully aware that the law's progenitors had aimed it directly at Berea College, Harlan argued that, as a private institution, Berea College provided services that were to be "rendered for compensation" (211 U.S. 45, 67) and that the government could not infringe upon prospective students' liberty to receive an education there, whatever their race. This position presents a perplexing question, as the logic he applied in both *Cumming* and *Plessy* did not seem to follow into the private college domain. After all, while both segregation in public secondary schools and integration on train cars would leave material racial inequality untouched, private college integration might chip away at white domination in education. While the potential exists that *Berea College* signaled a sea-change in Harlan's thinking vis-à-vis race, two points cast some doubt on that possibility. First, thanks to the racial inequality-perpetuating precedents of *Plessy* and *Cumming*, Harlan must have known that few blacks would be attending college at all. (Indeed, fewer than 3% of Americans between the ages of 18 and 24 were enrolled in higher educational institutions at the time of *Berea College*.) Furthermore, with their low levels of wealth, blacks would have less access to private schools, period. And, second, the relatively negligible impact of integrated private school education on national racial inequality dovetails with Harlan's avid belief in providing opportunities for individual blacks to rise and excel (Przybyszewski 1999, p. 69). Such convictions mirror today's colorblind regime, one that welcomes the likes of Barack Obama and Condoleeza Rice into the halls of power while condemning wide swaths of the black community to near-exitless poverty in impoverished ghettos—to say nothing of the endemic police repression and hyperincarceration afflicting these same neighborhoods (Alexander 2010; Murakawa 2014; Coates 2015; Ioanide 2015; Wacquant 2009).

Whatever the possibilities of a late-life shift in racial perspective, Harlan never altered his ardent defense of the activities he placed in the legal domain—especially those attached to the Thirteenth, Fourteenth, and Fifteenth Amendments. His second best-known dissent from the racial arena—the *Civil Rights Cases*—fully anticipated his later *Plessy* opinion (Maltz 1995, p. 988). As discussed earlier, classifying such endeavors as frequenting a theater or staying in a hotel as civil rights, Harlan opposed

the majority's reasoning that discrimination within private businesses did not offend the Thirteenth or Fourteenth Amendments. Harlan dissented again in the lesser-publicized 1903 decision *Giles v. Harris* (189 U.S. 475), which involved the constitutionality of the mechanisms whites had concocted to circumvent the Fifteenth Amendment's guarantee of voting rights for all males, regardless of race. Here, Harlan was following the framework he had formulated in *Plessy*; as he had insisted in 1896, the ability "to exercise the high privilege of voting" was a clear constitutional protection afforded by the Reconstruction amendments. Such a privilege, of course, did not imply racial parity in the areas Harlan perceived as outside the corona of the colorblind Constitution. In his estimation, neither a white man nor a black man should experience any blockades in their attempt to approach the ballot box; but if the former was educated and living in opulence while the latter was comparatively destitute, it was of no Constitutional concern.

Jim Crow as (Inter)National Liability

The previous section outlined Harlan's unambiguous condemnation of legal racial oppression in *Plessy v. Ferguson*, a thematic upon which he waxed rhapsodic from start to finish. Harlan's discursive skewering of Jim Crow represents for his coterie of followers their *raison d'etre* in pledging their faith in his words for the cause of contemporary racial justice. As we have seen, however, Harlan had every intention of keeping whites in the center seat of political and economic power, positing that the colorblind Constitution would engineer the reproduction of that power "for all time." Jim Crow, to be sure, facilitated the maintenance of unequal racial power relations plenty effectively, a point certainly not lost on Harlan. Since the racial climate was inexorably lurching towards "separate but equal," why not simply support Jim Crow as the majority did instead of crafting an entire dissent vying for a colorblind Constitution? Addressing this inquiry requires that we go beyond the standard replies given by Harlan's contemporary devotees (that he dissented because he was an antiracist advocate of black equality.) As such, we need to dig into other parts of his dissent to unearth our answer.

In so doing, we come to recognize another leitmotif guiding Harlan's thinking, as evidenced by the sheer amount of space he devotes to it: the idea, put simply, that Jim Crow was a prodigiously bad political practice that the United States was better off discarding. Harlan insisted on the colorblind Constitution as a means to preserve socioeconomic racial inequality while jettisoning the baggage that legal racial oppression necessarily carried with it, recognizing (unlike his colleagues, apparently) that the latter was not a necessary precondition of the former.

Harlan formulated two lines of attack. On the one hand, he fretted over the disastrous consequences Jim Crow would wreak upon the domestic scene. As with slavery and its Civil War endpoint, Harlan was convinced that Jim Crow would be the soil upon which the "seeds of race hate" would germinate, as both were systems, "planted under the sanction of law," that brazenly trampled upon the rights of blacks, the result of which would doubtlessly "do harm to all concerned." Secondly, Harlan also warned of the international implications of Jim Crow segregation, convinced that the practice was bound to desecrate the United States' image on the world stage by fatally compromising the "boasts" the country made as a supposed exemplar of freedom and democracy.

Together, these issues inform why Harlan considered Jim Crow a deadweight and a liability that the nation would later come to regret; in this context, Harlan brought forth the colorblind Constitution as an alternative that would not only keep whites dominant, but do so without sullying the nation's reputation abroad or fomenting interracial enmity.

Harlan's emphasis on the adverse ramifications of Jim Crow permits us a crucial window into his thought processes, helping to make sense why this particular justice—the one former slaveholder, it should be remembered—became the exception to a Supreme Court riding the winds of transparent legal racial injustice. First, I will be suggesting that Harlan's certitude that Jim Crow would plant "the seeds of race hate" stemmed from his experience as a member of a slave owning family, one in which paternalism trumped violence and repression as the proper relationship between white master and black slave. Additionally, as Harlan's biographers have pointed out, his horror at the naked antiblack violence following emancipation—which represented a significant driver in the passage of the post-Civil War amendments—led him to steadfastly champion the legal equality those amendments represented. Later, I argue that Harlan's Christian worldview deeply informed his conviction that the legal subordination of blacks would burnish the U.S.'s reputation among the world's nations.

Yet, as we shall see at the close of this section, Harlan's impatience with the majority did not solely reflect his certainty in the ideologically malodorous stain Jim Crow would blanket upon both the Constitution and society itself. The source of Harlan's vexation was not simply because majority opinion author Henry Billings Brown granted Jim Crow free reign, but that he also made Herculean efforts to whitewash the practice and make it appear somehow unoppressive because Louisiana's Separate Car Act "equally" applied to whites and blacks, who would both incur equal penalties for violating the statute. And Brown proceeded furthermore to rebuke blacks for having the audacity to argue otherwise—in Brown's view, blacks' perspective on Jim Crow as a tool of racial subjugation was one that they had made up in their heads. Such efforts, Harlan insisted, would all be for naught, as nobody would be deceived by the Court's attempt to render Jim Crow an equitable practice; its purpose in degrading blacks and ma(r)king them legally inferior was as transparent as the Court's unabashed avowal of the "subordinate" status of the black race in *Dred Scott*. The "injustice" demarcating Jim Crow was readily "apparent" to all—both inside and outside the country—and Brown's puerile attempt to pretend that it was otherwise was nothing more than a "thin disguise."

The Seeds of Race Hate

Harlan discoursed upon Jim Crow's noxious impacts upon black/white relations in a series of passages that appeared shortly after his famous paragraph on the colorblind Constitution. The first reads thus:

> 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… (163 U.S. 537, 560).

These words directly followed his comments on the legal fiasco of slavery and the premier Supreme Court decision, *Dred Scott*, which had given it legal backing. For Harlan, the post-Civil War amendments had seemingly spirited these sorry episodes safely away into the nation's past. Such optimism, however, was summarily dashed by "state enactments" which presented the possibility and reality that the "beneficent purposes" behind those amendments could easily be deluged by a wave of anti-black malice in the form of legalized segregation. As his dissent overall makes clear, Harlan's protests over Jim Crow revolved around his conviction that the "legal inferiority" thrust upon blacks via state-mandated segregation was simply a return to a slave-like environment in which legal equality would once again be denied to blacks—the post-Civil War amendments notwithstanding. One could imagine Harlan the Presbyterian quoting the old proverb "As a dog returns to its vomit, so fools repeat their folly." The nation had expended so much blood and tears extinguishing slavery, and now Jim Crow was poised to turn back the clock and render meaningless those sacrifices. This was a situation to which Harlan could not give his blessing.

The return of Supreme Court-approved legal racial inequality would result in dastardly consequences for the relationships between whites and 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 (163 U.S. 537, 560).

Harlan demonstrated with marked clarity that Jim Crow was more than simply a reflection of white antipathy towards blacks—it was an onerous practice because it would serve to *create* and *perpetuate* such antipathies. As Rebecca Scott recently remarked in this vein: "Segregation was not merely an end in itself; it was a means to an end, that of denying social recognition to people of color" (2008, p. 803). Harlan picked up on what Scott labels the "intentional humiliation" (2008, p. 803) at the heart of Louisiana's Separate Car Act. Indeed, it was the belief in natural and ineradicable black inferiority which had given Jim Crow a heartbeat in the first place (Pole 1978, p. 199). And the Court's accession to segregation itself would inflame anew feelings of racial distrust and hatred due to blacks' understanding of that fact. For Harlan, the true crime was that such "intentional humiliation" was now, due to the ruling in *Plessy*, "to be planted under the sanction of law."

The end result of such law-sponsored humiliations immediately followed.

> 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 pretence of recognizing equality of rights, can have no other result than to render permanent

> peace impossible and to keep alive a conflict of races the continuance of which must do harm to all concerned (163 U.S. 537, 560–1).

The legal degradation of blacks would lead to its logical conclusion. As Harlan viewed it, "permanent peace" would prove an impossibility in the context of such degradations, given the imprimatur of the Constitution. And Harlan hinted at the possibility that Jim Crow could recreate the circumstances that led to the Civil War (since now the "legitimate results of the war" had been effaced by "the pretence of recognizing equality of rights.") At bottom, Jim Crow was a fully disgraceful practice that—while it may have stoked whites' racial egos—would culminate in a variety of dastardly consequences on par with the bloodbath of the Civil War.

A brief foray into Harlan's pre-justice life will help to make sense of this opposition, as his experiences anticipated the obloquy he would later level at legal racial oppression in *Plessy*. For instance, Harlan observers frequently recount the approach his slave-owning father, James Harlan, took towards "slave drivers" who publicly beat their slaves, an outlook that doubtlessly molded his son's views vis-à-vis the appropriate relationship between white master and black slave: one that prioritized paternalism over naked violence (Yarbrough 1995, p. 9). Such perspectives surely influenced Harlan as made his much-scrutinized switch to the Republican Party in 1868. While certainly his future political ambitions weighed on that decision, his defection was likely primarily motivated by "his revulsion to the racial violence orchestrated by the Democrats" (Przybyszewski 1999, p. 39). As Linda Przybyszewski (1999, p. 39) notes, in Kentucky such anti-black pogroms were markedly virulent. As she inquires, "Could the boy who remembered his father's disgust at the brutality of a white slave driver become a man willing to embrace the political company of men who murdered blacks in the dead of night?" This crystallized for Harlan the overarching importance of amendments designed to protect the legal rights of blacks from these ubiquitous encroachments. This history allows one to draw a fairly straight line from his father's example to his defection to the Republican Party to his clamorous denunciation of the racial oppression *Plessy* would codify.

International Implications

Harlan also looked beyond the borders of the United States in cataloguing the countless repercussions Jim Crow would produce in the country. He proved himself keenly aware of the fact that other nations were eyeballing the United States and closely tracking their domestic decisions, racial and otherwise. Harlan wished to maintain good standing among such nations and excoriated the *Plessy* majority for refusing to acknowledge the ways Jim Crow could potentially tarnish that standing.

Harlan made two direct references to the international arena. The first such mention occurred when he commented that the post-Civil War amendments "were welcomed by the friends of liberty throughout the world" (163 U.S. 537, 555). Harlan worried that the re-introduction of a racially oppressive system would stain the country's image abroad—especially if it were given a judicial stamp of approval by the highest court in the land. These "friends of liberty," Harlan cautioned, were certain to judge Jim Crow segregation with disdain; for all the effort invested in the abolition of slavery (to wit, the Civil War), other nations were unlikely to "welcome" the racial backsliding inherent in

what amounted to another system of legal racial domination. Jim Crow, Harlan declared, would place blacks again in a milieu of "legal inferiority," doubtlessly inducing the disapprobation of the "friends of liberty throughout the world" that had celebrated the demise of slavery three decades earlier.

Harlan's second reference to the injurious international implications of Jim Crow arrived towards the conclusion of his opinion:

> If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law (163 U.S. 537, 562).

Here, Harlan demonstrated that he was under no illusions as regards the negative sentiments whites and blacks harbored towards each other. But for him, such troubles couldn't hold a candle to the international relations disaster awaiting on the other side of Jim Crow racism. In granting legalized segregation unbridled reign while simultaneously advertising the "freedom enjoyed" by its citizens, the United States was opening itself up to accusations of hypocrisy by other countries.

That Harlan would privilege the matter of the U.S.'s reputation points up the influence of his fervid Christian commitments. Harlan tightly tethered the law and Christianity in his worldview, a linkage that emerged in an oft-quoted barb aimed at him by fellow Justice David Brewer at the gala honoring the former's twenty-five years on the Supreme Court. Harlan, jabbed Brewer, "goes to bed every night with one hand on the Constitution and the other on the Bible, and so sleeps the sweet sleep of justice and righteousness" (as cited in Przybyszewski 1999, p. 54). Whatever the context or intention behind this quip, Harlan's life bore it out: a steadfast Presbyterian, he taught Sunday school for decades and was a well-respected lay leader in the Church.

In *The Republic According to John Marshall Harlan*, Linda Przybyszewski explores in detail the relationship between the Bible and the Constitution that Brewer humorously expressed. Referencing Harlan's lectures while teaching law at Columbian University in Washington, D.C., she notes that he believed "that God had established a moral foundation for law…" (1999, p. 49). This foundation, Harlan stridently professed, had encountered its greatest articulation in the Constitution over all of the world's legal treatises. That the Constitution was the U.S.'s central legal document gave the country, in Harlan's eyes, the responsibility to live up to its vaunted ideals. Przybyszewski details this matter in a passage worth quoting at length:

> In his lectures, Harlan used typology, the religious theory that events in the Old Testament foreshadow events in the New Testament, in order to explain American history. Many Americans, both black and white, used the Bible this way, as "the story above all other stories." In Harlan's hands, the Revolutionary War became a type for the Civil War. With the help of God, Americans had first overthrown the hierarchy of monarchy and nobility, then they overthrew the

> hierarchy of race. *In this, they were divinely destined to serve as an example to the world* (1999, p. 47, my emphasis).

From these lines, the fatal flaw Harlan found in Jim Crow becomes evident. Thus Harlan's prediction that the U.S. would come to regret their ruling in *Plessy* as they had *Dred Scott*: while he saw the Reconstruction amendments as eradicating the (legal) "hierarchy of race," the return to a (legal) caste system a la enforced segregation was the sign of a country brazenly reneging on its "divine destiny" to "serve as an example to the world." Harlan's repeated overtures on the adverse reaction of other nations to *Plessy* doubtlessly emerged from this belief system—one, as Przybyszewski and others suggest, changed little during his tenure on the Court. This would be a reaction, as we shall see here, that Harlan was convinced that *all* nations would share.

Harlan and the "Thin Disguise"

It was in the context of Jim Crow's egregious (inter)national effects that Harlan took direct aim at the logic animating Justice Henry Billings Brown's majority opinion. In Harlan's view, Brown's cardinal sin was not solely his constitutionalization of Jim Crow with all its toxic consequences: it was also in the way he squared de jure segregation with the "equality before the law" laid out in the post-Civil War amendments. Brown accomplished this by insisting that because Jim Crow was separate *but equal*, it did not violate the Fourteenth Amendment's "equal protection of the laws," since whites and blacks were equally excluded from each other's train cars. For Brown, everything was the same: whites and blacks each got a passenger coach to sit in, they were each barred from the other group's cars, and both would suffer the same penalty for violation of Louisiana's Separate Car Act. Brown's stressing of that Act's facial racial equality proved central to his ability to place Jim Crow securely within the Fourteenth Amendment's confines.

Doing so, of course required Brown to camouflage the inferiorizing intentions of compulsory segregation, for he had to respond to the briefs submitted on Homer Plessy's behalf. Albion Tourgee's brief verbosely assailed Jim Crow's true purpose: "to perpetuate the caste distinctions on which slavery rested" (as cited in Olson 1967, p. 103). A similar refrain appeared in Samuel Phillips and F. D. McKenny's brief, wherein they argued that Jim Crow amounted to a "taunt by law" of blacks' previous slave condition (as cited in Olson 1967, p. 104, emphasis removed). Such condemnations of legal segregation, to be sure, extended beyond these briefs to encompass the whole of the black community and their white allies. Brown still had to contend with these claims—and as we will see here, he did so in a way that marginalized black voices with even more pernicious finality.

Once Brown had created the illusion of fair play within the Jim Crow regime, he then consigned the argument that it was inferiorizing as fully a function of black paranoia. In other words, he not only rejected the racially oppressive nature of Jim Crow, but accused blacks of having "chosen" to invest the practice with malevolent intentions. As Brown asserted in what many consider the opinion's most damning passage,

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. 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 (163 U.S. 537, 551).

Mark Golub concisely captures the insidious implications of this reasoning; as he describes it, the passage "works as a kind of double injury: it constitutionalizes the physical segregation of racial minorities while simultaneously disqualifying minority interpretations of their own lived experience" (2005, p. 582). (Read: We, the *Plessy* majority, could care less what blacks and their white allies think about legally mandated segregation.)

Harlan, for his part, would have none of such half-baked pretexts; throughout his dissent, he made unambiguously clear that the Separate Car Act had nothing to do with prohibiting whites from entering black train cars and everything to do with barring blacks from white cars. "The thing to accomplish," asserted Harlan, "was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches" (163 U.S. 537, 557). He blisteringly berated Brown's belief that "separate but equal" was "reasonable" legislation because it reflected the equal desires of blacks and whites. Brown had argued that segregation had passed the reasonableness test, as it sufficiently comported with "the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort…" (163 U.S. 537, 550). Harlan's searing comeback exposed the utter falsity of such a claim: Jim Crow solely involved the "established usages, customs, and traditions" of *white* people; it was designed to promote *white* people's "comfort."

Harlan took great pains to upbraid Brown's attempt to purify Jim Crow of any complicity in the oppression of blacks. Yet one of his primary reasons in doing so was to remind the *Plessy* majority that the entire world shared the very interpretation Brown had exerted such massive efforts to deny:

> It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. *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 (163 U.S. 537, 556–7, my emphasis).

The whole point of Jim Crow was to mark blacks with a "brand of servitude" akin to slavery, drowning them in an acid bath of "intentional humiliation." "*No one*," Harlan insisted, "would be so wanting in candor as to assert the contrary" (163 U.S. 537, 557, my emphasis).

In these locations and elsewhere, Harlan illuminated in no uncertain terms that nobody was going to be fooled by the majority's attempt to pass de jure segregation off as a neutral and constitutionally clean system. And he vented his exasperation at the tortured rhetorical gymnastics in which Brown engaged in his long-winded, pithy defense of Louisiana's Separate Car Act. In eloquent

rebuttal, Harlan repeatedly inveighed that Brown's sanitized rendition of Jim Crow "will not mislead anyone"—a group that doubtlessly included the same "friends of liberty throughout the world" that had celebrated the annihilation of slavery several decades earlier. In other words, *because* "every one knows" that Jim Crow's purpose was to affix a state-sponsored "badge of servitude" upon blacks (Brown's paeans to the contrary), "all will admit" that Jim Crow's very design re-inferiorized blacks and made them second-class citizens as they were during slavery (163 U.S. 537, 560). The American polity and the international community alike would see right through the "thin disguise" that was Brown's milquetoast rationale for Jim Crow (163 U.S. 537, 562).

It was on these bases that Harlan announced his full opposition to the legal caste system that lay at the core of de jure segregation. Brown's sophomoric effort to market that system as fair and equitable was no more than a "thin disguise" whose malicious purposes would not deceive anyone, and he further rubbed salt in the wound by scornfully dismissing blacks' attempt to highlight that malice. All this ultimately produced Harlan's prescient reprimand that the judgment in *Plessy* "will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case" (163 U.S. 537, 559). As Harlan correctly predicted, the United States would come to rue the day that segregation became legalized (Dudziak 2011; Cheng 2013; Bell 1980; Klinkner and Smith 1999).

And his palpable frustration was, at bottom, a function of his conviction *that absolutely none of the above was even necessary*, as whites would remain socially dominant in a nation beholden to a colorblind Constitution. As I have discussed throughout this article, Harlan was convinced that Jim Crow was a counterproductive atavism unnecessary in keeping whites the dominant race in prestige, achievements, education, wealth, and power. The colorblind Constitution, Harlan asserted, would cleanly circumvent the (inter)national headaches that would inevitably accompany the nation's capitulation to Jim Crow segregation. To Harlan's lights, Jim Crow was an unnecessary factor in the calculus of white racial power; as Harlan professed it, while colorblindness would indeed condemn Jim Crow and its legally oppressive brethren, it would likewise keep whites materially dominant in perpetuity.

Conclusion

John Marshall Harlan's dissent in *Plessy v. Ferguson* was many things: an insistence on legal equality, a celebration of white domination, and much more. It was also, as this article has catalogued, a series of predictions, the center piece of which hinged on his certainty that *Plessy* would ultimately go the way of *Dred Scott* into the ignominious dustbin of the anti-canonical. And it would do so for the two reasons Harlan stressed in his dissent: it would plant "the seeds of race hate" within the nation and it would wreak damage upon the U.S.'s international reputation.

Harlan's foresight into the dastardly repercussions of Jim Crow represents one of the primary reasons his *Plessy* dissent is admired to such a great extent. As Akhil Amar recently remarked, through his dissent, Harlan said "to the rest of [the justices], in effect, 'You are all wrong, and I'm right, I'm as right as right can be. History will prove that'" (2011, p. 82). And history indeed did exactly that—though not for several

decades after his death, after he "had largely faded from the nation's memory" (Yarbrough 1995, p. 226).

Much of the appreciation surrounding Harlan's dissent involves his oft-quoted reproach to the majority's constitutionalization of enforced segregation; as he argued, they had thinly disguised Jim Crow's malevolent intentions by suggesting that while the railroad cars at the heart of the case were separate, they were equal (thus safely landing in the range of the Fourteenth Amendment's "equal protection of the laws.") This maneuver allowed Brown to accuse blacks of racial oversensitivity, dismissing their allegations of Jim Crow's devious purposes as so much black paranoia. Harlan's trenchant rebuttal—that nobody inside or outside the country's borders was going to be fooled by such logic—represents one of the reasons so many in the legal community have labeled him the "Great Dissenter."

In the glow of Harlan's intrepidity—and audacity, in Amar's formulation (2011, p. 82)—to stare down his colleagues in their capitulation to a racial status quo that had decidedly turned against Reconstruction's ideals, the true point becomes easily submerged. As I discussed in the first section of this essay, while the post-Civil War amendments had ushered in legal equality (while sidelining racial caste en route), they had failed to construct equality of any other variety. Harlan explicitly highlighted that fact: with or without legal equality, whites remained atop society's pyramid in prestige, achievements, education, wealth, and power. The unconstitutional imposition of another caste system—racial hatred codified "under sanction of law"—was an unnecessary ingredient in the perpetuation of white domination. The colorblind Constitution was set to safeguard whites' material privileges "for all time," thus rendering Jim Crow nothing more than an (inter)national liability staining America's image. On that account—rather than any desire for true equality between blacks and whites—Harlan dissented.

This article has endeavored to prioritize these less savory features of Harlan's dissent. The alternative reading advanced here remains crucial in a conjuncture where "Our Constitution is color-blind" persists as a near-default assertion serving to constitutionally legitimize crusades for the abolishment of anything distantly smacking of institutional race-consciousness. In this regard, the need to highlight Harlan's insistence that legal colorblindness would reproduce white domination "for all time" becomes imperative. Armed with Harlan's dissent, the post-civil rights conservative strategy has proven doubly advantageous for them: not only has Harlan's colorblind rhetoric kept whites dominant, it has done so wrapped in the gossamer threads of antiracism.

Recent works, such as Randall Kennedy's *For Discrimination* (2013) and Osagie Obasogie's *Blinded by Sight* (2014), which contain brief critiques of Harlan's opinion that parallel the argument I have offered here, point to a more hopeful—and nuanced—perspective of Harlan's unique insights that comports with the distinction between the legal and social realms that formed the basis of Harlan's confident opposition to Jim Crow. Such examinations consider the *whole* of Harlan's argument, rather than quoting out of context such ostensibly inspirational and antiracist declarations as "Our Constitution is color-blind" and "There is no caste here." Odes to Harlanian colorblindness shorn of its association with white domination persist in the literature, however (for a recent example, see Langford 2014), and such analyses fail to capture Harlan's illumination of the capacity of colorblindness to sustain black/white inequality. Harlan had realized, several generations before the 1960s civil rights movement did, that giving blacks civil rights and "equality before the law" would not grant them

equality in any other domain of society. If anything, Harlan's dissent should function as a blueprint for the difficulties in attaining thoroughgoing racial equality in United States society; rather than "reclaim[ing] Harlan's opinion in a march towards a new birth of freedom" (as Alexander Aleinikoff fashions it) (1992, p. 977), his dissent should be exhibited as the textbook example of why legal colorblindness should be avoided at all costs in an environment where racial inequalities "in prestige, in achievements, in education, in wealth, and in power" reign.

The conflicted career of Harlan's dissent communicates the confusions and contradictions that so often accompany the (racial) facts of life in the United States. In his decision to dissent in *Plessy v. Ferguson*, John Marshall Harlan introduced a new way of conceiving the relationship between the law and material racial inequality. There, he acknowledged his understanding, in the words of J.R. Pole, that "equality before the law could stand alone as an isolated but indestructible principle, unblemished by gross inequalities in every other walk of life" (1978, p. 199). Harlan, however, went even further than this. Not only could the law remain "unblemished" in the presence of such egregious inequities: that same unblemished law could lock in those very inequities more effectively than the pernicious interventions of legal racism ever could. Within this framework, every racial group may be "equal before the law," but their incongruent positioning in the socioeconomic hierarchy promises that they will not be equal in any other way. The "humblest" may be the "peer of the most powerful" in the presence of the Constitution, but such peer relationships halt at the doorstep of the social realm. Thus could Harlan confidently beseech the Supreme Court to strip the law clean of its transparent complicity in racial oppression. It would take the roughly seventy years between *Plessy* and the civil rights laws to finally do so. As the lone justice to oppose Jim Crow, the adoration heaped upon him is understandable. Future studies of Harlan's dissent must hack through the thicket of such adoration to the grim core—that his opposition to legal racism was merely his method of introducing to the nation the idea that whites' material advantages could be effectively insulated in a milieu of legal racial equality.

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