



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
Joel W. Solomon United States Courthouse
900 Georgia Avenue
Chattanooga, Tennessee 37402

ASSOCIATE JUSTICE JOHN MARSHALL HARLAN,
THE GREAT DISSENTER

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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.

These noble words of course are from Associate Supreme Court Justice John Marshall Harlan in his powerful, brave dissent in the infamous case of *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896). Justice Harlan stood alone in his dissent, arguing that “separate but equal” accommodations on train cars were unconstitutional. All the other members of the Supreme Court rejected Justice Harlan’s arguments, and many members of the population may have as well. The verdict of history has sided with Justice Harlan and proven his wisdom. In part because of Justice Harlan’s powerful dissent in *Plessy*, he was labeled the Great Dissenter.

June is the anniversary of Justice Harlan’s birth (June 1, 1833), so it is altogether fitting that we celebrate the unparalleled contributions to our legal heritage of this most distinguished Justice and American.

Our Constitution Is Color-Blind.

Harlan’s words that the Constitution is color blind would become widely acclaimed and accepted in later years. *Plessy* was decided in the Jim Crow era, when laws in the south were designed to segregate, discriminate against, and intimidate Black Americans. Justice Harlan’s words were radical for the time and not widely accepted either in the south or in much of the rest of the nation. Thurgood Marshall, who argued and won the equally historic case of *Brown v. Board of Education* many years later, held Harlan’s inspiring words as a guiding light in his own pursuit of equal justice before the law. According to Peter Canellos in his biography of Harlan, *The Great Dissenter*, Marshall pursued his fight against segregation in the south “armed only with Harlan’s

dissenting opinion in *Plessy v. Ferguson* – Marshall’s bible....” Of course, *Brown* ultimately overturned *Plessy* in 1954, when the Supreme Court decided that “separate but equal” schools are inherently unequal.

Congress Has Authority to Outlaw Discrimination Based on Race.

Harlan’s willingness to go against the majority of his colleagues on the Supreme Court was not limited to *Plessy*. It was evident much earlier in his tenure on the Court. In 1883, the Supreme Court was called upon to decide whether the Civil Rights Act of 1875 was constitutional. Among other things, this law forbade racial discrimination in public accommodations such as transportation, hotels, and railroads. The Supreme Court held that the Act was unconstitutional because it exceeded Congress’s authority under the Fourteenth Amendment.

Justice Harlan dissented from his colleagues. In Harlan’s view both the Thirteenth and Fourteenth Amendments gave Congress the authority to pass the Civil Rights Act. He argued that Congress could do what was “necessary or proper to eradicate all forms and incidents of slavery,” and to protect people from state laws that infringed on civil rights. Harlan wrote, “[t]he supreme law of the land has decreed that no authority shall be exercised in the country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude.”

In a magnificent symbolic act, Justice Harlan used the same inkstand in writing his dissent that Chief Justice Taney had used in 1856 to write in *Dred Scott v. Sandford* that no Black person whose ancestors had been brought into the country as slaves could be a United States citizen. Justice Harlan thus demonstrated that the law must move beyond old notions of inequality, division, and discrimination.

Other Dissents.

In major case after major case, Justice Harlan dissented from his colleagues. And for many of those cases, his dissenting opinions have since become prevailing law.

In 1895, the question of whether the federal government had the authority to levy a federal income tax was before the Court. Justice Harlan and three other Justices dissented, arguing that the federal government indeed had that power.

Also in 1895, Justice Harlan was the sole dissenter to the Court’s decision severely limiting the power of the federal government to pursue antitrust actions. The federal government had begun to attack monopolies and used the Sherman Antitrust Act to go after conglomerations of economic power. The majority denied the federal government had this power. Justice Harlan dissented.

In 1903, Justice Harlan dissented in *Giles v. Harris* (1903) when the majority ignored a significant jurisdictional obstacle to hold that the Court could not enforce political rights. This case involved a challenge to an Alabama law that enhanced the requirements to register to vote after a certain deadline, allowing white men to stay on the rolls indefinitely but effectively restricting most Black men from registering to vote. This was a widely used tactic in some southern states.

In the landmark, but now widely discredited, case of *Lochner v. New York* (1905), Justice Harlan dissented. The case dealt with a New York law limiting the hours bakers were allowed to work in a day and a week. The majority found the law interfered with the freedom to contract and was therefore invalid. Justice Harlan dissented, arguing the liberty to contract is subject to reasonable state regulations “for the common good and the well-being of society.”

In 1906, Justice Harlan and one other Justice dissented in *Hodges v. United States*. Three white men had been convicted of conspiring to “injure, oppress, threaten, and intimidate” several Black men to prevent them from working their jobs. The majority held that the Thirteenth Amendment applied only to the states and state actors. Because the defendants in the case were individuals, the federal convictions were overturned. Justice Harlan dissented, restating his argument that the Thirteenth Amendment was sufficient authority for Congress to protect African Americans from discrimination and violence, even in the absence of state action.

Protections of the Bill of Rights Are Applicable to States.

In *Hurtado v. California* (1884), Justice Harlan was the first justice to offer the view that the Fourteenth Amendment made the provisions of the Bill of Rights applicable to the states, specifically discussing the due process right to a grand jury. In his later dissent in *Patterson v. Colorado* (1907), he said: “I go further and hold that the privileges of free speech and a free press, belonging to every citizen of the United States, constitute essential parts of every man’s liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a state to deprive any person of his liberty without due process of law.” This idea of the incorporation of the Bill of Rights by the Fourteenth Amendment was later adopted by the Supreme Court and is now the prevailing view of the law.

Conclusion.

John Marshall Harlan was an outstanding Supreme Court Justice. Our nation has much to be thankful for in his service and his ideas. In boldly stating that the Constitution is color-blind, Justice Harlan, the Great Dissenter, shared a new vision for our nation. His vision led to stronger laws and a more equitable nation for us all. Let us celebrate his birth month.

Curtis L. Collier
United States District Judge
Chair, Eastern District of Tennessee Civics and Outreach Committee

Carrie Brown Stefaniak
Law Clerk to the Honorable Curtis L. Collier
Past President, Chattanooga Chapter of the Federal Bar Association

Erienne Reniajal Lewis
Law Clerk to the Honorable Curtis L. Collier

Rachel Elaine Noveroske
Law Clerk to the Honorable Curtis L. Collier