Patrician view of the Second Reconstruction

by Sanford Roberts

John Marshall Harlan: the Great Dissenter of the Warren Court
by Tinsley Yarborough
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As the Supreme Court of William Rehnquist prepares for another term of tightening the noose around the necks of American citizens as well as the necks of any foreign citizens who can be dragooned into an American court, it is useful to remember we did not arrive at the present state by overnight express. The willingness of today's Supreme Court to permit improper, oppressive, and even barbaric exercises of governmental power owes much to the dissenters of a bygone era. Prof. Tinsley Yarborough's book tells the tale of one dissenter who happened to be Chief Justice Rehnquist's closest predecessor. Even though Justice Marshall Harlan may seem to represent a "kinder, gentler" jurisprudence, he and the present Chief Justice are soulmates on most questions of constitutional law.

John Marshall Harlan sat on the U.S. Supreme Court from 1955 to 1971, a period when the Warren Court revitalized the legacy of the Reconstruction-era Congress, especially the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution. This biography of Justice Harlan plods its way through the details of this monumental era in American constitutional history. Listless as it is, the book obliquely demonstrates the significance of this Second Reconstruction in shaping the jurisprudence of the protagonist. Lawyers for the civil rights movement periodically prevailed upon Justice Harlan to vote with them in pivotal cases, even though his constitutional principles and social inclinations seemed to put him on the other side.

Professor Yarborough, unfortunately, fails to portray the dynamic interplay between the Supreme Court and the turbulent political world outside the courtroom. His Supreme Court inhabits a one-dimensional world limned in hues of gray legalisms. Although Yarborough performed a yeoman's service of researching the conference notes and draft opinions of Supreme Court justices, he remains trapped within the cloistered confines of the conference room and the four corners of legal documents. His book organizes the discussion of prominent Supreme Court cases into topical modules as if this were *American Jurisprudence* rather than someone's life story.

Two John Marshall Harlans

John Marshall Harlan was actually the second individual so named to sit on the U.S. Supreme Court. His great-grandfather, James Maynard Harlan, a Henry Clay Whig from Kentucky, named his first son after Chief Justice John Marshall. This John Marshall Harlan lived up to his christening by securing an appointment to the U.S. Supreme Court in 1877 where he served for 34 years with great distinction. One of his sons, John Maynard Harlan, developed a lucrative law practice in Chicago where his only son, John Marshall Harlan II, was born in 1899.

As detailed in his first two chapters, the younger Harlan spent his formative years in circumstances far removed from the backwoods of Kentucky where his grandfather grew up. His father's wealth and social contacts allowed him to follow the well-worn career path of patricianism from prep school to Ivy League university to Oxford's Balliol College on a Rhodes scholarship to a prestigious Wall Street law firm where he settled in as a corporate litigator. A former clerk interviewed by the author depicted him as the quintessential establishmentarian: "Harlan was part of the establishment, as close to an upper-class justice we've had since [Charles Evans] Hughes. . . . His main concern, his lodestar, was to keep things on an 'even keel.' He used that phrase many times to me in conversation." The book's epilogue emphasizes that the younger Harlan became a committed Anglophile at Oxford and admired all things British, including Britain's legal system, throughout his adult life. He even adopted British spellings in his court opinions.

The two John Marshall Harlans were polar opposites in outlook, experience, and temperament, but Professor Yarborough only blinks at this contrast. We are informed the grandson wore his grandfather's gold vest pocket watch and claimed the first John Marshall Harlan was prone to "overstatement," but this book is mute about his memories or thoughts concerning his grandfather.

The senior Harlan championed the nationalization of constitutional rights, provided for in the Reconstruction Amendments at a time when the high court was retreating from the issue. This John Marshall Harlan was not just a great dissenter, but very often, a prophetic minority of one. In 1896, when his brethren condoned segregation, Justice Harlan registered the solitary dissent which contained the immortal words: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Fifty-eight

years later, the Warren Court vindicated him in *Brown v. Board of Education,* the famous 1954 decision outlawing segregation in the public schools.

The jurisprudence of Harlan II owed little, if anything, to his grandfather. In his early years on the court, the second Harlan's mentor was Justice Felix Frankfurter, a tie which earned him the sobriquet "Frankfurter without mustard." The Frankfurter-Harlan duo constituted an oppositionist bloc to the reasoning, but not necessarily the results of Warren Court decisions. After Frankfurter retired in 1962, Harlan took up the mantle, but at no time, with or without Frankfurter, did he become the great dissenter imagined by the author.

Whether it was his patrician's sense of *noblesse oblige* or a desire to keep things on an "even keel" in turbulent times, Justice Harlan periodically concurred in and even wrote the majority opinion in cases extending protection to the civil rights movement. For example, he authored the landmark opinion, *NAACP v. Alabama,* which imposed a First Amendment right of association against demands by the State of Alabama for the membership lists of the NAACP. He voted with the majority in *New York Times v. Sullivan* to subject state libel laws to a strict First Amendment standard, a decision which overturned a half-million-dollar defamation judgment aimed at crippling the civil rights movement. He also subscribed to opinions upholding the Civil Rights Act of 1964 and the Voting Rights Act of 1965 as valid exercises of congressional power.

The issue of 'incorporationism'

This does not suggest that Justice Harlan was the warm friend of civil rights which his grandfather was. "Poor Grandpa Harlan," sighed one lawyer after Harlan II opposed the civil rights position in one case, "how he must suffer for such" a decision. Yarborough synopsizes the grandson's judicial philosophy as including the belief "that the political processes, federalism, and separation of powers were ultimately more valuable safeguards than specific guarantees to individual liberty, as well as the view that judicial constructions of such liberties should be conditioned by due regard for those important features of the American political and legal system." Still, Harlan was not willing to make individual rights completely dependent upon the beneficence of state governments. In his view, the Fourteenth Amendment's Due Process Clause prohibited all arbitrary action by state authorities as well as guaranteeing "fundamental fairness" in legal proceedings.

Yarborough accentuates the difference between Justice Harlan and the majority of the Warren Court in his discussion of "incorporationism," a subject which pervades this book and receives comprehensive treatment in its penultimate chapter. "Incorporationism" may sound like a mundane reference to business law; it is actually a constitutional doctrine of considerable importance. This doctrine professes that the first section of the Fourteenth Amendment, which prohibits the states from abridging the privileges and immunities of U.S. citizens or depriving any person of life, liberty, or property, without due process of law, "incorporates" the Bill of Rights, applying its contents as restrictions upon the powers of the states. Absent the Fourteenth Amendment "incorporation" thesis, state governments remained at liberty to restrict and even abolish the most basic rights of their citizens. The constitutional rights, which were secured against invasion by the federal government, could be annulled by any and all states choosing to do so.

The elder Harlan had expounded this view in several dissenting opinions, but no majority of the Supreme Court ever accepted the idea that the Bill of Rights, *in toto,* operates as an injunction against the states. However, in the 1930s, the Supreme Court began to do in a piecemeal fashion what it refused to accomplish in one fell "incorporationist" swoop. In a series of cases, the court extended the Fourteenth Amendment's Due Process Clause to those portions of the Bill of Rights deemed essential to "the concept of ordered liberty." By the time of Earl Warren's ascendancy, court precedents incorporated the entire First Amendment into the Fourteenth, but very little of the Fourth, Fifth, Sixth, and Eighth Amendments had been similarly included. Since these latter amendments apply to the criminal justice system, the refusal to incorporate them within the Fourteenth Amendment allowed state police and prosecutors to act beyond the pale of constitutional limitation.

During the 1960s, Warren Court majorities selectively incorporated the most crucial provisions of the Fourth, Fifth, Sixth, and Eighth Amendments into the Fourteenth Amendment. John Marshall Harlan became the principal critic of this policy inside the Warren Court. Yet, despite his opposition to "the onward march of" the incorporation doctrine, Justice Harlan frequently concurred in the "incorporationist" majority decisions on the grounds of due process.

The Due Process Clause, wrote Harlan, "has not been reduced to any formula; its content cannot be determined by reference to any code . . . it has represented the balance which our nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." Adhering to an elastic notion of due process, Harlan distinguished himself from his epigone William Rehnquist.

This book is not Professor Yarborough's first chronicle of a Supreme Court justice nor does it appear to be his last. According to the book jacket, his next opus will be a biography of the first Justice Harlan. More than 50 years ago, Edward Corwin observed that the dissents of the elder Harlan "deserve more fame than they have been accorded for keeping the spark of life going in the *corpus juris* of our constitutional law during a very damp season." My reading of this dreary biography causes me to anticipate that the professor's portrait of Grandpa Harlan will be warped by seasonal dampness.