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JUSTICE JOHN MARSHALL HARLAN AS PROPHET: THE *PLESSY* DISSENTER'S COLOR-BLIND CONSTITUTION

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The concept of color-blindness has long elicited much debate over its precise meaning and the role it should play in jurisprudence. Such debate was catalyzed by Justice John Marshall Harlan's well-known Plessy *dissent. In the wake of the efforts of both civil rights activists and conservatives to use color-blindness to further their respective goals, Professor O'Brien seeks to clarify Harlan's vision of color-blind jurisprudence and examines the ways in which recent Supreme Court decisions echo Harlan's concepts regarding a color-blind constitution.*

Professor O'Brien first provides a brief introduction to the concept of color-blindness. O'Brien then examines Harlan's experiences in politics and war to explain the bases of Harlan's beliefs, which O'Brien argues were steeped in white paternalism and Republican federalism. By analyzing Harlan's decisions in several key cases, O'Brien pinpoints two consistencies in Harlan's race jurisprudence: his commitment to federalism and his belief that for a court to find that a plaintiff has been racially discriminated against, the discrimination must have been explicit and purposeful. Finally, O'Brien adresses the limitations of constitutional color-blindness and the ways in which current members of the Supreme Court continue to echo Harlan's opinions regarding the interaction between federalism and color-blind racial justice.

Professor O'Brien concludes that although John Marshall Harlan was prophetic in his prediction that legally sanctioned segregation would place minorities in a position of legal inferiority, Harlan's world-view caused him to fail to address pervasive prejudice against African-Americans by elevating formal equality and federalism concerns above social realities and remedial needs. Additionally, O'Brien concludes that, like Harlan, the current Supreme Court unnecessarily has limited its remedial power with regard to racial justice.

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In his well-known dissent in *Plessy v. Ferguson*[1], Justice John Marshall Harlan spoke with the voice of a prophet. He accurately predicted that the effect of legally sanctioned segregation would be to "place in a condition of legal inferiority a large body of American citizens."[2] Harlan could not have foreseen, however, the continuing debate over his proclamation that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."[3] More than one hundred years after *Plessy*, Harlan's language "has become an important cultural text,"[4] whose meaning and merit increasingly are disputed.[5]

For years, legal color-blindness was a central goal of civil rights activists.[6] To scholars like Andrew Kull, author of *The Color-Blind Constitution*, color-blindness continues to hold promise as a tool to be used in achieving racial equality.[7] Recently, however, the color-blind principle has been used as a rallying cry for conservatives who have sought to dismantle affirmative action and other race-conscious programs. Color-blindness is presently viewed by many scholars as a weapon in a battle against minority efforts to improve equality.[8] Neil Gotanda, for example, has argued that color-blind

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[1] 163 U.S. 537 (1896).

[2] *Id.* at 563 (Harlan, J., dissenting). For an excellent history of mandatory segregation laws, see C. Vann Woodward, The Strange Career of Jim Crow (3d rev. ed. 1974).

[3] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

[4] T. Alexander Aleinikoff, *Re-reading Justice Harlan's Dissent in* Plessy v. Ferguson: *Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961, 961.

[5] The current Supreme Court is deeply divided on the issue of color-blindness. Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas have "committed themselves to the principle that government can almost never classify citizens on the basis of race." Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 791, 791 (1996); *see also* Cedric Merlin Powell, *Blinded By Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 205 nn.65-68 (1997) (describing the various current Justices' positions on color-blindness); Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy To Prove the Colorblind Thesis*, 2 MICH. J. RACE & L. 101, 109 n.44 (1996) (citing arguments by Supreme Court Justices for and against constitutional color-blindness).

[6] *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 22-39, 138-63 (1992) (describing color-blindness as a goal of nineteenth-century abolitionists and later civil rights activists, including the NAACP).

[7] Professor Kull wrote: "A scrupulous nondiscrimination may yet prove, because of the limitations of human justice, to be the most effective contribution that *law* (as distinct from political action) can make to the achievement of racial equality in this country." *Id.* at 222. Among the other contemporary scholars who have endorsed color-blind decision making as a means to achieve greater racial equality are Stephen Carter and Randall Kennedy. *See generally* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991); Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

[8] *See* Aleinikoff, *supra* note 4, at 961; Frank R. Parker, *The Damaging Conse-*

constitutionalism is "a collection of legal themes functioning as racial ideology [and] foster[ing] white racial domination."[9]

Harlan, himself, did not explain the meaning nor foresee the effect of color-blind adjudication.[10] Nevertheless, in *Cumming v. Richmond County Board of Education*,[11] Harlan, writing for a unanimous majority, presented a view of the remedial limitations of constitutional or jurisprudential color-blindness. *Cumming*, in which the Court let stand a decision by a white school board to close the county's only black high school,[12] is frequently viewed as a surprising philosophical turnaround for Justice Harlan,[13] who dissented eloquently in *Plessy*. The *Cumming* decision, however, is not a philosophical turnaround. Instead, it is consistent not only with the judicial philosophy of Justice Harlan, but also with the concept of constitutional color-blindness. A survey of the life and decisions of Justice John Marshall Harlan demonstrates that Harlan's color-blind jurisprudence was steeped in white paternalism and Republican federalism. Harlan's world-view led him to develop race jurisprudence in which constitutionally cognizable discrimination could be found only in the language of state law or in intentionally harmful racist acts, which could be individually identified and punished.[14]

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quences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice, 45 AM. U. L. REV. 763, 773 (1996).

[9] Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2 (1991).

[10] *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.").

[11] 175 U.S. 528 (1899).

[12] *See id.* at 545.

[13] Harlan's decision in *Cumming* has been described as an "enduring puzzle" and has given rise to divergent descriptions of his civil rights record. LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 235 (1992); *See also* C. Vann Woodward, *The Case of the Louisiana Traveler, in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 171 (John Garraty ed., rev. ed. 1987) (describing Harlan as "a Southern gentleman and a slaveholder, and at heart a conservative"). Other scholars, particularly Alan Westin, Harlan's official biographer, have depicted Harlan as a transformed Southerner, a champion of civil rights and civil liberties, who as a Justice developed a "liberal pattern" that ultimately led to his fame as "The Great Dissenter." Alan F. Westin, *Mr. Justice Harlan, in* MR. JUSTICE 122 (Allison Dunham & Philip B. Kurland eds., rev. ed. 1964); *see also* BETH, *supra*, at 226 (concurring that Harlan "made his enduring reputation" in liberal dissent, but cautioning not to overlook his paternalistic attitudes toward blacks, and thus not to think of him as a twentieth-century liberal); Florian Bartosic, *The Constitution, Civil Liberties and John Marshall Harlan*, 46 KY. L.J. 407 (1958); Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637 (1957) [hereinafter Westin, *Transformation*]. J. Morgan Kousser, in reviewing the *Cumming* case, seriously questions Justice Harlan's "devotion to civil rights." J. Morgan Kousser, *Separate But Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J. S. HIST. 17, 18 (1980).

[14] Professor Alan Freeman has described this concept of racial discrimination as the

In *Cumming*, and in his other decisions involving race issues, Harlan failed to address the pervasive and continuing subordination of African-Americans; his decisions elevated formal equality and federalism concerns above social realities and remedial needs.

The *Cumming* case is, indeed, a prophetic example of modern "color-blind" jurisprudence, which implicitly incorporates the world-view of white paternalism and Republican federalism. In his *Cumming* decision, Justice Harlan looked in vain for any evidence that the white school board acted out of an intent to harm black children. Finding none, Harlan made a "color-blind" decision that dealt a serious blow to black efforts to require white school boards to provide equal educational facilities for black children.[15] Almost one hundred years later, a Supreme Court that has begun to harken back to Harlan's idea of constitutional color-blindness[16] has reversed a district court's order that was designed to remedy the effects of discrimination in education,[17] invalidated a congressionally mandated affirmative action program,[18] and voided newly created majority-minority voting districts.[19] From *Cumming* to the present, color-blind jurisprudence has sought to root out color-conscious legal standards and identifiable acts of intentional discrimination, but has ignored the pervasively discriminatory reality faced by black plaintiffs and has failed to provide a remedy for racial injustice.

"perpetrator perspective," from which one views discrimination "not as conditions but as actions, or series of actions, inflicted on the victim by the perpetrator." Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* CRITICAL RACE THEORY 29 (Kimberle Crenshaw et al. eds., 1995).

[15] *See infra* notes 72-106 and accompanying text.

[16] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction.") (Scalia, J., concurring in part and concurring in the judgment); *id.* at 2119 ("[U]nder our Constitution, the government may not make distinctions on the basis of race.") (Thomas, J., concurring in part and concurring in the judgment); Shaw v. Reno, 509 U.S. 630, 657 (1993) ("Racial classifications of any sort pose the risk of lasting harm to our society."); *see also* references cited *supra* note 5.

[17] *See* Missouri v. Jenkins, 515 U.S. 70, 89-100 (1995) (holding that the district court remedy exceeded the scope of the defendant's discriminatory conduct).

[18] *See Adarand*, 515 U.S. at 212-27.

[19] *See* Miller v. Johnson, 515 U.S. 900, 920-21 (1995) (applying strict scrutiny to a redistricting plan that considered race in formulating district lines); *Shaw*, 509 U.S. at 642-48 (holding that districts that were highly irregular in shape reflected impermissible use of racial considerations in determining voting districts).

I. A BRIEF INTRODUCTION TO THE COLOR-BLIND CONCEPT

If "color-blindness" had a single essential meaning, or an "absolute value," it would be the absence of race, or an antirace principle. In terms of pure logic, color-blindness might be understood as the antithesis of color-consciousness. Having said this, however, does not imbue the term with any particular meaning as a tool for legal decision making. Instead, it lends to the term all of the complexity, ambiguity, and inconsistency that are inherent in "race."[20] Color-blindness, like race itself, is an "unstable and 'decentered' complex of social meanings constantly being transformed by political struggle."[21] Like race, color-blindness may have potent effects on the construction of other social and power relations and may serve either to oppress or to liberate.[22] Like race, color-blindness can be neither value free nor content neutral.[23] As a jurisprudential term, the meaning of color-blindness is shaped by the judges and justices who expound it as a constitutional principle, and who are, in turn, shaped by their own life experiences, values, and perceptions. Each judge who construes and applies color-blindness attempts to apply an antirace principle in a society where "racial demarcation is endemic to [the] sociocultural fabric and heritage—to [the] laws and economy, to [the] institutionalized structures and discourses, and to [the] epistemologies and everyday customs."[24] Each explication of constitutional color-blindness bears the mark of cultural inertia, the burden of precedent, and the full weight of the social meaning of "race."

One thus would not expect to find the jurisprudence of John Marshall

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[20] The literature of race and race theory is rich and far too vast to catalogue here. A recent article by Professor Christine Hickman traces the history of American use of racial categories and cites much of the best literature on race. *See generally* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997) (examining the history of race classification and recommending the use of a separate multiracial category in the U.S. Census); *see also* Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography 1993, A Year of Transition*, 66 U. COLO. L. REV. 159 (1995).

[21] MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1980S, at 68 (1st ed. 1986).

[22] *See* Evelyn Brooks Higginbotham, *African-American Women's History and the Metalanguage of Race*, 17 SIGNS: J. WOMEN CULTURE & SOC'Y 251, 252 (1992) (defining race and discussing the challenge of bringing race more prominently into feminist analyses of power); *see also* Kimberle Williams Crenshaw, *Race Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, *in* CRITICAL RACE THEORY, *supra* note 14, at 103, 116-19 (describing the way the hegemonic rhetoric of race may be enlisted to aid blacks).

[23] *See generally* Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135 (1996).

[24] Higginbotham, *supra* note 22, at 254.

Harlan (or any other Justice) to be color-blind in any absolute sense.[25] Instead, the color-blind jurisprudence of Justice Harlan reflects his contextual perception of the scope, nature, and importance of racial injustice, and his attempt to craft a decisional rule with which to address that problem. A survey of the life of Justice Harlan is therefore in order to begin to understand what Harlan perceived color-blind constitutionalism to entail.

II. THE MAKING OF A NATIONALIST

John Marshall Harlan was born in Kentucky in 1833, the son of a slaveholding Whig congressman.[26] He grew up in a household in which the treatment of slaves, judged against the standard of the times, was relatively humane.[27] Harlan's father is said to have had "ambivalent, but generally negative, feelings about slavery."[28] One of the household slaves, Robert Harlan, may have been Harlan's half-brother; and at least one scholar has suggested that John Marshall Harlan's relationship with his half-brother gave him some degree of insight about race, or at least an inability "to deny . . . the humanity of blacks."[29]

Harlan attended Center College and Transylvania University Law School, graduating in 1852 to begin a career in law and politics. Harlan, a "strapping six-foot, two-inch redhead" was an impressive stump-speaker and energetic campaigner.[30] Early in his political life, Harlan adopted the Whig belief in a strong national government and developed an antipathy toward the Democrats who favored states' rights.[31] During the 1850s, however, the

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[25] Not surprisingly, one scholar recently described Justice Harlan's jurisprudence as "only partially color-blind." Earl M. Maltz, *Only Partially Color-Blind: John Marshall Harlan's View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973, 1015 (1996).

[26] Harlan's father, James Harlan, was a great admirer of the "national philosophy of Chief Justice John Marshall" and decided to name his son for him. Louis Filler, *John M. Harlan, in* 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 628 (Leon Friedman & Fred L. Israel eds., rev. ed. 1997). Chief Justice John Marshall was the fourth Supreme Court Chief Justice. His decisions established the Supreme Court as the final arbiter of the Constitution and the Constitution as the supreme law of the land. He generally is credited with transforming the judiciary into a powerful branch of government.

[27] *See* James W. Gordon, *Did the First Justice Harlan Have a Black Brother?, in* CRITICAL RACE THEORY, THE CUTTING EDGE 122 (Richard Delgado ed., 1995).

[28] *Id.* at 123.

[29] *Id.* Although John Marshall Harlan's father never formally acknowledged paternity, he emancipated Robert Harlan in 1848. Because of physical similarities among the Harlans, and because of the apparent special treatment that Robert Harlan received at several different times in his life, several scholars have speculated that Robert Harlan was John Marshall Harlan's half brother. *See id.* at 122-39.

[30] Westin, *Transformation*, *supra* note 13, at 641.

[31] *See* G. Edward White, *John Marshall Harlan I: The Precursor, in* THE AMERICAN

Whig Party was deeply divided by the conflict over slavery and secession. Harlan, like many Kentucky Whigs, was both pro-Union and pro-slavery. When the Whig Party ultimately dissolved, Harlan sought a political party that would accommodate both his pro-slavery stance and his unionist position. He was active in the American Party, or "Know-Nothing Party," the "Opposition Party," and, subsequently, in the Conservative Union Party. He ran unsuccessfully for Congress in 1859, losing to a Democrat by only fifty votes in a suspected case of ballot box stuffing by the Democrats.[32]

Between 1859 and 1861, Harlan worked to avoid war and secession. When war broke out, he joined the Union forces as Colonel of the Tenth Kentucky Infantry. Harlan served actively in numerous battles and was nominated for the post of brigadier general. His fighting experiences alongside the sturdy Kentucky mountaineers are credited as the source of his egalitarian ethic. Later Harlan wrote, "When war menaced the country . . . it was the poor and sons of the poor who sprang to its defense . . . ."[33]

In 1863, Harlan's father died, and Harlan resigned from the military to support his family. Harlan became a leader in the Conservative Union Party, which sought to steer a middle course between states'-rights Democrats and the Republicans.[34] Harlan campaigned against ratification of the Thirteenth Amendment and lost an election bid for U.S. Senator on the Conservative Union ticket in 1867. Harlan ultimately became convinced that the Democrats and Republicans were the only two viable political parties in Kentucky and made a decision to break with the pro-slavery forces and to join the Republican Party. Harlan would later recall, "'I was an intense Nationalist,' and the 'great majority of the Democrats in Kentucky believed that their first allegiance was to the State . . . .'"[35]

Harlan's distrust of the Democrats and states'-rights advocates was visceral and passionate. Harlan had experienced, first-hand, the violent upheaval of civil war. Debates over the power of the federal government were not, for him, antiseptic intellectual exercises, but instead were a blood-stained saga from which the country had barely escaped. His experiences in war left him certain of both the dangers of loyalty to individual states and of the paramount importance of a strong federal government. Harlan's decision to become a Republican thus was informed by his conclusion that "'the general tendencies and purposes of the Democratic Party were mischievous, while those of the Republicans were better calculated to preserve the results of the War . . . .'"[36]

JUDICIAL TRADITION 131, 133 (1988).

[32] *See* Westin, *Transformation*, *supra* note 13, at 644.

[33] *Id.* at 647.

[34] *See id.* at 652-53.

[35] *Id.* at 656 (quoting Harlan papers in Westin's possession).

[36] *Id.* at (quoting Harlan papers in Westin's possession).

In 1871, Harlan ran for governor as a Republican, speaking out in favor of the Reconstruction Amendments and the Civil Rights Act of 1866, and arguing that the only way to secure peace was to "accept the results of the War, recognize the legal rights of the new freedmen, and end the reign of violence . . . ."[37] Harlan is reported to have been deeply disturbed by the campaign of anti-Negro terrorism carried out in anonymity by the Regulators, the White Man's League, and the Ku Klux Klan. He viewed terrorism as a threat, not only to blacks, but also to law and order. He advocated federal intervention, if necessary, to restore the rule of law, saying, "[I]f our courts are to be intimidated, and the laws trampled under foot by a band of cut-throats and murderers, I trust that some power will prove itself sufficiently strong to grapple with such monsters."[38] Harlan also campaigned in favor of strong antimonopoly legislation and a general property tax to fund public schools. A plank in his common schools platform called for the leveling of school taxes. When deciding who should pay, Harlan maintained that "the rich owed it to the poor to contribute to the education of the latter."[39] Harlan sought the black vote, but made clear that he was not an advocate of "social equality" for blacks.

> What do they mean by this cry of Negro equality? Do you suppose that any law of the State can regulate social intercourse of the citizen? . . . We do not declare as the Democratic orators well know, in favor of social equality. No law ever can or will regulate such relations. Social equality can never exist between the two races in Kentucky.[40]

Harlan was defeated in 1871, and again in 1875 in his second gubernatorial campaign. Harlan supported Rutherford B. Hayes in 1876 and was influential in Hayes's successful presidential bid. In 1877, Harlan was nominated to the Supreme Court and underwent a difficult confirmation battle in the Senate, in which it was alleged that he was not a "real Republican" and in which his devotion to the Reconstruction Amendments was questioned. Finally, Harlan was confirmed and sworn in as Associate Justice to the Supreme Court in December 1877. Although he considered retiring from the Court to devote himself to the cause of the Presbyterian Church, Harlan served on the Court for thirty-four years until his death in 1911.[41]

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[37] *Id.* at 659.

[38] *Id.* at 662.

[39] White, *supra* note 31, at 132.

[40] Westin, *Transformation*, *supra* note 13, at 662-63 (quoting *Louisville Daily Commercial*, July 29, 1871).

[41] *See* Filler, *supra* note 26, at 640.

Harlan was, by all accounts, an aristocrat and a fervent believer in law and order. These traits were augmented by his orthodox Presbyterianism and his belief in the dignity of man. Harlan also was devoted to the Federal Constitution. His experiences as a politician in Kentucky and as a veteran of the Civil War left him convinced of the need for a strong federal government and suspicious of anyone who advocated increased state rights or state power. For him, racially discriminatory laws presented a direct threat to the integrity of the Union that he had fought to preserve. White violence against blacks undermined the peace and tranquility of a civilized society and defiled the dignity of the white man, as well as that of the black victims. For Harlan, however, social and economic inequality was simply part of the natural order of things, a result of the superiority of white civilization.[42] Harlan thus understood race discrimination in terms of the problems it presented for refined white society—a society to which Harlan belonged, a society he perceived to be part of the solution to race discrimination, rather than part of the problem.

III. JOHN MARSHALL HARLAN'S COLOR-BLINDNESS

Before exploring the meaning of constitutional color-blindness as it is reflected in the jurisprudence of John Marshall Harlan, one should note that although Justice Harlan argued emotionally for a color-blind constitution in his dissent in *Plessy*, it could be argued that his jurisprudence simply may be inconsistent on this issue.[43] Or, perhaps, Justice Harlan might have reasoned differently in *Plessy* if he had been writing for a majority of the Court.[44] Alternatively, later political or practical considerations could have altered his concept of color-blindness during his years on the Court. While each of these arguments may have merit, Justice Harlan's decisions on issues involving race nevertheless reveal sufficient consistency to support a theory that they reveal his version of color-blind constitutional adjudication.

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[42] In his famous *Plessy* dissent, Harlan made clear that he believed in white racial superiority and that he did not advocate social equality for blacks. *See* Plessy v. Ferguson, 163 U.S. 537, 554, 559, 561 (1896) (Harlan, J., dissenting).

[43] Some scholars have argued that Harlan's record on race issues simply is inconsistent. *See* BETH, *supra* note 13, at 225 n.6. The inconsistency argument also might include the possibility that Harlan's jurisprudence was consistently color-blind with respect to certain rights but not to others. *See, e.g.*, EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 99 (1990) (explaining that the drafters of the Fourteenth Amendment drew a distinction between civil and political rights).

[44] Justices may feel more free to take what they consider to be an extreme position in dissent, knowing that their argument will not have precedential value—will not be law. When writing for the majority, Justices may take more care to present rules of adjudication that they believe can and should be followed in future cases.

Two prominent themes connect Justice Harlan's constitutional color-blindness: (1) the elevation of issues of federalism above other policy considerations and (2) the construction of race discrimination as identifiable acts of government "conceived in hostility to, and enacted for the purpose of humiliating citizens of the United States of a particular race."[45] These concerns are not necessarily unique to Justice Harlan nor to "color-blind" jurisprudence. Rather, these are among the unstated assumptions that are central to Harlan's constitutional color-blindness. In other words, these themes *color* Harlan's color-blindness.

A. *Harlan's Nationalist Jurisprudence*

Harlan's judicial opinions generally reflect a "judicial conservatism," or a reluctance to revise acts of the legislature by judicial construction.[46] Harlan was a staunch defender of criminal procedural rights and of the rights of the people to be free from government intrusion. He also was a proponent of extending the rights contained in the Bill of Rights to the states and the territories.[47] Harlan, however, was first and foremost a nationalist. Harlan, in the model of his namesake, Chief Justice John Marshall, supported a broad view of Congress's power under the Interstate Commerce Clause of the Constitution, giving plenary authority to Congress to control commerce in the interest of economic expansion.[48] In case after case, Harlan demonstrated his passion for the Union and his belief in a strong central government. An excellent example of the strength of Harlan's nationalism is found in his dissent in *Pollock v. Farmers' Loan & Trust Co.*,[49] in which the majority struck down a federal income tax measure as unconstitutional. Harlan reportedly delivered his dissent with such vigor that he pounded the desk in front of him and shook his finger under the noses of the other Justices,[50] saying that the majority opinion "strikes at the very foundations of national authority, in that it denies to the general government a power which is, or may become, vital to the very existence and preservation of the Union . . . ."[51]

Not surprisingly, Harlan's opinions in race cases reflect his concern that the federal legislature secure the results of the Civil War. In the *Civil Rights*

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[45] *Plessy*, 163 U.S. at 563 (Harlan, J., dissenting).

[46] *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 105 (1911) (Harlan, J., concurring in part and dissenting in part).

[47] *See* Filler, *supra* note 26, at 639; Westin, *Transformation*, *supra* note 13, at 695-97.

[48] *See* White, *supra* note 31, at 135.

[49] 158 U.S. 601 (1895).

[50] *See* Filler, *supra* note 26, at 634.

[51] *Pollock*, 158 U.S. at 671 (Harlan, J., dissenting).

Cases,[52] Harlan cast the lone dissenting vote in an opinion that declared the Civil Rights Act of 1875 unconstitutional.[53] Harlan proclaimed in dissent that the national legislature must have the power, under the Interstate Commerce Clause, to enact appropriate legislation to protect the new right of federal citizenship.

> With all respect for the opinion of others, I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves.[54]

In his well-known *Plessy* dissent, Harlan again articulated his view of the import of the War Amendments and the evil of state efforts to undermine them.

> State enactments, regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat the 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.[55]

For Harlan, the purpose of the War Amendments was clear: "to secure 'to a race recently emancipated, a race that through many generations have [sic] been held in slavery, all the civil rights that the superior race enjoy[s].'"[56] For Harlan, who assumed white racial superiority, the denial of equal civil rights[57] to freed blacks in the South presented an affront to the

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[52] 109 U.S. 3 (1883).

[53] *See* 18 Stat., pt.3 335 (1875). The Civil Rights Act of 1875 was an act of Congress forbidding discrimination against Negroes in railway trains, theaters, and hotels. *See id.*

[54] The Civil Rights Cases, 109 U.S. at 53 (Harlan, J., dissenting).

[55] Plessy v. Ferguson, 163 U.S. 537, 560-61 (1896) (Harlan, J., dissenting).

[56] *Id.* at 555-56 (Harlan, J., dissenting) (interior quotations omitted).

[57] For nineteenth-century jurists, the term "civil rights" held a different meaning from the current, commonly understood definition of "civil rights." Although there is extensive debate over the parameters of Reconstruction Era "civil rights," there is general agreement that such rights included the right to contract, the right to own property, and the right to sue and be sued. *See* John Harrison, *If the Eye Offend Thee, Turn the Color Off*, 91 MICH. L. REV. 1213, 1228-34 (1993) (describing Reconstruction Era

federal power embodied in the War Amendments and a threat to the stability of the federal government. Federalism, rather than race discrimination itself, was Harlan's central concern.

This point is dramatically illustrated in Harlan's decisions that dealt with Chinese immigration. In 1889, Harlan joined a unanimous Court in a case that affirmed the sweeping power of the federal government over immigration, declaring that Congress may constitutionally exclude "foreigners of a different race."[58] In spite of the obviously race-based decision making required by the statute, Harlan endorsed the congressional authority to pass and enforce such a law.[59] Similarly, in a case in which Wong Kim Ark, who was born in the United States to Chinese parents, claimed U.S. citizenship and challenged the authority of a statute that excluded him from the Unites States after his trip abroad, Harlan joined a dissent that supported congressional authority to make color-based distinctions in citizenship determinations.[60] One might argue that these decisions reveal only that Harlan had less sympathy for Chinese people than he did for the freed slaves.[61] However, when the issue presented to the Court involved state, rather than federal, power to engage in race-based discrimination against Chinese people, Harlan joined the majority decision, which invalidated a discriminatory city ordinance.[62] Thus, some of what appears at first glance to be an unexplainable variance in Justice Harlan's record on race discrimination may be attributable to his perception that the core problem underlying race-based state governmental decision making was its implicit challenge to federal power.

B. *Harlan's Perception of the Evil to Be Avoided*

A second theme that ties together Harlan's race jurisprudence is his identification of intentional, explicitly race-based state governmental decision making, grounded in race hostility, as the harm to be avoided. Harlan's views in this regard first became evident in a series of decisions addressing

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understanding of the meaning of "equality" and "rights").

[58] The Chinese Exclusion Case, 130 U.S. 581, 606 (1889).

[59] *See id.* at 606.

[60] *See* United States v. Wong Kim Ark, 169 U.S. 649, 705-32 (1897) (Fuller, C.J., dissenting, with whom Harlan, J., joined). For a detailed examination of Justice Harlan's record in ruling on the rights of the Chinese, see Maltz, *supra* note 25, at 999-1015.

[61] This argument is strengthened by a passage in Justice Harlan's famous *Plessy* dissent, in which he describes the Chinese people as "a race so different from our own that we do not permit those belonging to it to become citizens of the United States." Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

[62] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

jury qualifications. In *Strauder v. West Virginia*, a black man who was accused of killing his wife sought to remove his case from state to federal court because state law permitted only white men to serve on grand and petit juries.[63] Harlan joined in the majority opinion, written by Justice Strong, which held that removal to federal court was appropriate because the state statute singled out and "expressly denied" blacks the right to participate in the jury system.[64] In *Virginia v. Rives*,[65] however, a black defendant sought removal alleging that a state judge limited jury service to whites, even though the state jury statute extended the duty of jury service to "all male citizens,"[66] and Harlan voted to disallow removal. Harlan joined Justice Strong's decision, which reasoned that prior to trial the defendant "has only an apprehension that [his civil] rights will be withheld from him"[67] and that the federal court should presume that the defendant would be able to vindicate his rights in the state court or state appellate court.[68]

In other cases in which race discrimination was not apparent on the face of state jury selection statutes, Harlan upheld convictions in which the trial courts had determined that the proof offered did not establish discrimination,[69] had held that discrimination in state jury selection could not be raised by a federal writ of habeas corpus,[70] and had required proof of actual discrimination when the state statutes had required that potential jurors be able to read and write.[71] In these cases, Harlan joined with the Court in assuming the good faith of white officials, and in placing a high burden of proof and procedural difficulty on black defendants who sought to enforce the right to a jury selection process that did not exclude citizens based on race.

In *Plessy v. Ferguson*, in which the plain language of a Louisiana statute required separate train accommodations for white and colored passengers, Harlan had little difficulty identifying the intent of the state law. "The arbi-

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[63] *See* 100 U.S. 303, 304 (1879).

[64] *See id.* at 308.

[65] 100 U.S. 313 (1879).

[66] *Id.* at 315.

[67] *Id.* at 320.

[68] *See id.* at 318-22. Another factor that accounts for the difference in reasoning between *Strauder* and *Rives* is the recodification of the Civil Rights Acts of 1866 and 1870. In the recodification process, procedural elements of the statutes were separated from the substantive portions and recodified as separate sections. Although the recodification was administrative and should not have had substantive impact, the revised statutes provided only for post-judgment removal, rather than pre-judgment and post-judgment removal. *See* THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION 1-12, 490-93 (3rd ed. 1991).

[69] *See* Thomas v. Texas, 212 U.S. 278 (1909).

[70] *See* Andrews v. Swartz, 156 U.S. 272 (1895).

[71] *See* Williams v. Mississippi, 170 U.S. 213, 225 (1898).

trary separation of citizens, on the basis of race," he wrote, "is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."[72] He perceived such state legislation to be "conceived in hostility to, and enacted for the purpose of humiliating citizens of the United States of a particular race."[73] Similarly, in *Berea College v. Kentucky*, Harlan dissented from a decision that upheld a state law that criminalized racially integrated education.[74] Harlan's decisions in race discrimination cases amounted to a per se rule that state statutes that make an explicit race distinction are invalid. Unlike the majority in *Plessy*,[75] Harlan acknowledged that the race-based state statutes at issue in *Plessy* and *Berea College* were intended to discriminate against the newly freed slaves. This is the sense in which Harlan is most strongly identified as color-blind: He insisted that the race line be removed from the language of state law.[76] In the absence of such explicit statutory language, however, Harlan required black plaintiffs to meet a high evidentiary burden to show discriminatory intent.[77]

Harlan's vision of constitutional color-blindness thus requires only formal, legal equality; his vision of equal protection of the law does not, in any sense, encompass the social or economic equality of African-Americans. Harlan made this point clear in *Plessy*.

> 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.[78]

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[72] *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

[73] *Id.* at 563.

[74] 211 U.S. 45, 65-69 (1908) (Harlan, J., dissenting).

[75] The *Plessy* majority asserted that if laws requiring the separation of races stamp the colored race with a badge of inferiority, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Plessy*, 163 U.S. at 551.

[76] *See, e.g., id.* at 563-64 (Harlan, J., dissenting).

[77] *See, e.g.*, Thomas v. Texas, 212 U.S. 278 (1909); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899); Williams v. Mississippi, 170 U.S. 213 (1898); *cf.* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (holding that an ordinance that did not discriminate against Chinese people on its face violated constitutional equal protection requirements because it gave unfettered discretion to authorities who administered the law "with an evil eye and an unequal hand").

[78] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

Although Harlan was, time and again, the only member of the Court who argued in favor of striking down facially discriminatory state statutes, his "color-blindness" was founded on a cornerstone of nationalism and was shielded from the pervasive reality of racial subordination. Harlan's color-blindness required the language of state statutes to be race-neutral, not because of a generalized belief in racial equality, but because of his high regard for federal power and his fear of the social dangers of race-hate.

IV. THE LIMITATIONS OF COLOR-BLINDNESS

The remedial limitations of Harlan's color-blind jurisprudence were revealed in a unanimous decision of the Court, authored by Harlan only three years after his eloquent *Plessy* dissent. The opinion in *Cumming v. Richmond County Board of Education*[79] was delivered by Justice John Marshall Harlan in October of 1899. The ruling let stand the decision of the all-white county school board to close the only publicly supported high school for blacks in the county.[80] Nevertheless, the threads of Harlan's version of constitutional color-blindness are present in the decision.

The story of the *Cumming* case begins on July 10, 1897, when the all-white Richmond County Board of Education announced its decision to close Ware High School, a public high school that enrolled seventy blacks.[81] Ware High had been in operation for seventeen years. Without any previous public discussion, the Board announced that it would close the black high school and use the money saved ($852.50) to hire elementary school teachers.[82] Joseph W. Cumming, James S. Harper, John C. Ladeveze, and William J. White, all upstanding blacks from the city of Augusta, filed a petition with the Board in protest, citing the fact that the Board was continuing to support Tubman High School, a public high school for white girls, and Hephzibah High School, a Baptist high school for white boys and girls.[83] The petition, which had been signed by 155 black Augustans, pointed out that recently increased state appropriations would provide sufficient funds for both the elementary and high schools and that the public school law required separate but equal school facilities.[84] After considering the petition and hearing oral arguments from Ladeveze and White, the twenty-eight-member Board voted overwhelmingly to reject the petition.[85]

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[79] 175 U.S. 528 (1899).

[80] *See id.* at 544-45.

[81] *See* Kousser, *supra* note 13, at 25.

[82] *See id.* at 27.

[83] *See Cumming*, 175 U.S. at 532.

[84] *See* Kousser, *supra* note 13, at 27; *see also* Board of Educ. v. Cumming, 29 S.E. 488 (1898).

[85] *See* Kousser, *supra* note 13, at 27-28.

The plaintiffs did not credit the Board's assurance that it would reopen Ware when economic conditions improved.[86] They knew that the closure of Ware High School was not a simple result of lack of funds. If there was any shortfall in funding for the education of colored children in Richmond County, it was caused by the Board's appropriation to the white school population a large portion of the money that should have been allocated to the colored schools.[87] The plaintiffs understood that Richmond County spent three to four times as much money on each white student as it did on each black student.[88] The plaintiffs knew that Ware was the only publicly supported high school in the state and that it offered them a uniquely important "avenue of mobility" in the late-nineteenth-century South.[89] They resolved to pursue the matter and hired three white lawyers who, in turn, brought two suits in Superior Court.[90] One suit sought to enjoin the collection of taxes and to enjoin the Board from spending money on the white high schools.[91] The suit claimed that the tax was illegal and void. The plaintiffs argued that, to the extent that it included amounts for high schools that were spent on high schools for the white school population only, the tax violated the Equal Protection Clause of the Fourteenth Amendment.[92] The second suit asked for a writ of mandamus directing the Board to reinstate Ware High School.[93] Upon hearing both cases,[94] Superior Court Judge Enoch H. Calloway refused to enjoin the collection of taxes, but did enjoin the Board from using funds for the white high schools until it established a black high school in the county.[95] Finally, the judge declined to issue a mandamus requiring the establishment of a black high school.[96]

In March of 1898, Georgia's high court overruled the lower court, dissolving the injunction and dismissing the mandamus.[97] Writing the unanimous opinion, Justice Thomas Jefferson Simmons concluded that the Board

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[86] *See Cumming*, 175 U.S. at 533 (quoting the defendant's answer).

[87] *See id.* at 529 (quoting the plaintiffs' amended petition).

[88] *See* Kousser, *supra* note 13, at 24-25.

[89] *Id.* at 22-23.

[90] *See id.* at 28-29.

[91] *See id.* at 29.

[92] *See id.* The suit did not challenge the tax so far as it was levied for the support of primary, intermediate, and grammar schools.

[93] *See id.*

[94] In its defense, the Board filed an answer arguing that it had not established any system of high schools in the county. It pointed out that state law did not require such a system, and that if the Board chose to establish high schools, it could do so "at such points in the county as the interests of the people might require." Board of Educ. v. Cumming, 29 S.E. 488 (1898).

[95] *See* Kousser, *supra* note 13, at 31.

[96] *See Cumming*, 29 S.E. at 489; Kousser, *supra* note 13, at 31.

[97] *See Cumming*, 29 S.E. at 490.

had wide discretion when it came to establishing, maintaining, or providing support for high schools.[98] The Board "could establish a white high school, and provide none for blacks, or vice versa,—if the 'interest and convenience of the people' required that they should do so."[99]

The plaintiffs intensified their fund-raising efforts, retaining George Franklin Edmunds, a lawyer and highly respected United States senator from Vermont.[100] On behalf of his clients, Edmunds made an appeal to the United States Supreme Court.[101] Edmunds, in what may have been a strategic error, appealed only one of the two cases.[102] He did not ask for a mandamus to compel re-establishment of a black high school.[103] Appeal was taken to the United States Supreme Court "to review a decision refusing an injunction against a board of education to prevent maintenance of a high school for white children without also maintaining one for colored children."[104]

In his opinion for the Court, Harlan first made clear that the plaintiffs did not challenge the constitutionality of the Georgia law that required separate school facilities for the races.[105] This is important because in the absence of a challenge to the power of the state to mandate racial discrimination, the nationalist focus of Harlan's color-blind mission was missing. Instead, *Cumming* presented federalism issues that best could be described as the inverse of *Plessy*. In *Plessy*, Harlan's passion was invoked by his nationalist fervor and his antipathy for any state legislative action designed to undermine the War Amendments. By contrast, in *Cumming*, the plaintiffs presented only a challenge to the exercise of official discretion in a traditional area of state authority. Harlan concluded that

> the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.[106]

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[98] *See id.* at 489.

[99] *Id.*

[100] *See* Kousser, *supra* note 13, at 32-33.

[101] *See id.*

[102] *See id.* at 34.

[103] *See id.*

[104] Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 528 (1899).

[105] *See id.* at 543-44. If the plaintiffs were to have made such a challenge, they undoubtedly would have lost their case, but then Justice Harlan may have appeared as a dissenting Justice rather than as the author of the Court's unanimous opinion.

[106] *Id.* at 545. It should be noted that during his campaigns for political office in Kentucky, Harlan had spoken out in favor of segregated education. In a speech in which

The *Cumming* appeal did not challenge the power of the state to mandate racially segregated schools and thus failed to invoke Harlan's nationalist ardor.

The second thread of Justice Harlan's color-blind analysis is found in Harlan's fruitless search of the record for proof that the Board had acted with intent to discriminate on the basis of race. Harlan wrote, "[I]f it appeared that the board's refusal to maintain such a school was in fact an abuse of its discretion and in hostility to the colored population because of their race, different questions might have arisen in the state court."[107]

Consistent with his other race-discrimination decisions in which there was no challenge to an explicitly race-based state law, Harlan was unwilling to assume discriminatory intent in *Cumming* and instead required evidence of race hostility.[108] Harlan found no grounds to reverse the ruling of the Georgia Supreme Court, reasoning that the injunction sought would not provide for a black high school, but would only deprive white students of a school without giving the black students any educational benefit.[109] As Harlan viewed the record, the decision of the Board was not an intentional act of racial discrimination, but rather an attempt to provide the greatest good for the greatest number of black children. He wrote, "We are not permitted by the evidence in the record to regard that decision as having been made with any desire or purpose on the part of the board to discriminate against any of the colored school children of the county on account of their race."[110]

It appeared to Harlan that the decision of the Board "was in the interest of the greater number of colored children"[111] and that the case did not present a clear and unmistakable, nor intentional, violation of the recent amendments. The absence of an intentional violation of the Constitution meant that the plaintiffs would receive no remedy. Augusta's only black public high school would remain closed.[112] A four-year public high school like Ware was not again available until 1945.[113]

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he proclaimed himself to be in favor of full legal equality of negroes with whites, Harlan went on to say that "in the public schools, it was obviously 'right and proper' to keep 'whites and blacks separate.'" Westin, *Transformation, supra* note 13, at 663 (quoting *Louisville Daily Commercial*, July 29, 1871).

[107] *Cumming*, 175 U.S. at 545.

[108] *Cf., e.g.*, Neal v. Delaware, 103 U.S. 370 (1881) (requiring evidence of actual discrimination in the administration of the jury selection process).

[109] *See Cumming*, 175 U.S. at 544.

[110] *Id.*

[111] *Id.*

[112] *See* Kousser, *supra* note 13, at 43.

[113] *See id.* at 43 n.61.

The timing of the *Cumming* decision could not have been worse, as the expansion of universal schooling reached the high school level at century's end.[114] At the very time progressive reformers were reconceptualizing the role of schooling in America and urging high schools to prepare white children for citizenship, work, and community life,[115] southern blacks were told by the highest court in the land that the states had the discretion to segregate blacks[116] and to spend tax money in ways that primarily benefitted whites.[117] Southern blacks were forced to use their own ingenuity to set up their own public schools, with a fraction of the funding enjoyed by white schools.[118] In the meantime, the public school crusade that moved through the South "made spectacular improvements in white educational facilities through higher taxes and the fiscal savings of racial discrimination."[119] In black education, however, the main development during this period was "the gradual fiscal strangulation of the separate black public schools."[120] As public education expanded, whites could depend on the force of law to condemn blacks as "social outsiders."[121] The Court "gave

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[114] *See* ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES, A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY 501-08 (1934) (noting public interest in public education dramatically increased as a result of industrial development, national prosperity, and immigration); EDWARD A. KRUG, THE SHAPING OF THE AMERICAN HIGH SCHOOL 187-89 (1964) (describing the first major expansion of the public high school between 1890 and 1905); DAVID B. TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION 182-86 (1974) (describing the expansion of public schooling after 1890).

[115] *See* HERBERT M. KLIEBARD, THE STRUGGLE FOR THE AMERICAN CURRICULUM 1893-1958, at 1-29 (1986) (describing the social and intellectual movements that transformed American schooling at the end of the nineteenth century); TYACK, *supra* note 114, at 110-25, 217-55 (noting that white school reformers worked fervently to create an American community through education and to "Americanize" immigrant children, but did not include black children in their design); *see also* Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 370-74 (1997) (noting that Progressive Era activists succeeded in establishing the ideal of "education for citizenship" in the pantheon of American public education, while industrialization and urbanization simultaneously spurred the development of public schooling for individual advantage).

[116] *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding segregation of train compartments constitutional).

[117] *See* Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

[118] *See generally* JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935 (1988); HORACE MANN BOND, NEGRO EDUCATION IN ALABAMA: A STUDY IN COTTON AND STEEL (1939); MEYER WEINBERG, A CHANCE TO LEARN: THE HISTORY OF RACE AND EDUCATION IN THE UNITED STATES (1977) (examining the history of education of many races in America).

[119] DONALD L. GRANT, THE WAY IT WAS IN THE SOUTH 233 (1993); *see also* LOUIS HARLAN, SEPARATE AND UNEQUAL xvi (1968).

[120] Wayne J. Urban, *Introduction* to BOND, *supra* note 118, at xx.

[121] PAULA S. FASS, OUTSIDE IN, MINORITIES AND THE TRANSFORMATION OF AMERI-

southern and other states a green light to heighten discrimination in publicly funded activities and discouraged black litigants from seeking redress in the federal courts."[122] Between *Cumming* and *Brown v. Board of Education*[123] in 1954, the Supreme Court heard only six cases that involved separation of the races in education.[124] In all six cases, the high Court deferred to the legal precedents set at the end of the nineteenth century.

V. HARLAN AS PROPHET

In significant ways, Justice Harlan's race jurisprudence presages current Supreme Court race discrimination analysis. One scholar recently suggested that "[t]he ideal of a color-blind Constitution is close to securing five votes on the Supreme Court for the first time since it was considered and rejected during Reconstruction."[125] A majority of the Court has never formally endorsed a per se rule against race-based governmental decision making, and has continued to allow limited use of race-based classifications for the remediation of proven civil rights violations;[126] however, Justices Clarence Thomas, Antonin Scalia, and Anthony Kennedy, and Chief Justice Rehnquist all have endorsed the principle that government almost never can classify citizens on the basis of race.[127] Furthermore, one hundred years after *Plessy*, Justice Harlan's central concerns have re-emerged as themes in the opinions of several Supreme Court Justices who endorse constitutional color-blindness.

An interesting example is found in the concurring opinions of Justices Thomas and O'Connor in *Missouri v. Jenkins*.[128] The case involved a challenge to the validity of a district court's remedial order in an eighteen-year-

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CAN EDUCATION 115 (1989).

[122] Kousser, *supra* note 13, at 42-43.

[123] 347 U.S. 483 (1954).

[124] *See* McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Oklahoma State Bd. of Regents, 332 U.S. 631 (1948); Missouri *ex. rel.* Gaines v. Canada, 305 U.S. 337 (1938); Gong Lum v. Rice, 275 U.S. 78 (1927); Berea College v. Kentucky, 211 U.S. 45 (1908).

[125] Rosen, *supra* note 5, at 791.

[126] *See* Swann v. Charlotte-Mecklenberg, 402 U.S. 1 (1971) (holding district court's use of racial quota as a starting point for school desegration valid).

[127] *See, e.g.,* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236-55 (1995); Shaw v. Reno, 509 U.S. 630, 642-49
(1993).

[128] 115 S. Ct. 2038 (1995). The intent here is not to address all of the many issues that the Court's complex decision raises. Instead, it is hoped only that this Essay points out a few of the themes of Harlan's version of constitutional color-blindness that are woven into the text of Justice Thomas's and Justice O'Connor's concurring opinions.

old desegregation case.[129] The district court had found that the state of Missouri and the Kansas City School District had operated a segregated school system.[130] In thirty years following the Supreme Court's decision in *Brown v. Board of Education*,[131] the school district had failed to disassemble its segregative system. In 1985, twenty-five schools in the district had enrollments of ninety percent or more black students.[132] The predominantly black schools had lower-paid faculties and staffs than the surrounding predominantly white schools, a lower per-pupil expenditure, and facilities that were "literally rotted."[133] Students at the district schools had achievement test scores that were lower than the national averages.[134] The district court entered its first remedial order in 1985, and continued oversight of the school district during the time preceding the Supreme Court's review.[135] At stake in the 1995 Supreme Court decision was the validity of the district court's remedial order that required salary increases and remedial "quality education" programs.[136]

The loudest echo of Justice Harlan is near the beginning of Justice Thomas's concurrence, when Thomas described the order of the district court as an exercise of authority that "trampled upon principles of federalism."[137] Although Justices Thomas, O'Connor, and Harlan certainly would not agree on the many issues relating to the proper balance of power in a federal system, in these two cases involving racial justice in public education, all three Justices chose to emphasize the historic autonomy of the states in education and to describe the federal court's power in education as "limited."[138] All three Justices treated the institutional concerns of the federal system as paramount and sifted the issues of racial justice through a screen designed to protect the integrity of the federal system.

A second similarity between *Cumming* and *Jenkins* is seen in the perception of the evil to be avoided. It has been illustrated above that Justice Harlan discerned racial injustice primarily in explicit statutory language requiring the separation of the races. Like Justice Harlan, Justice Thomas views the legal harm of race discrimination as emanating from de jure, not de facto, race classifications.[139] In the absence of a specific de jure race-based classification, both Justice Harlan and Justice Thomas have analyzed

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[129] *See id.* at 2042.
[130] *See id.*
[131] 347 U.S. 483 (1954).
[132] *See Jenkins*, 115 S. Ct. at 2042.
[133] *Id.* at 2060 (O'Connor, J., concurring) (citation omitted).
[134] *See id.* at 2055.
[135] *See id.* at 2042.
[136] *Id.* at 2045.
[137] *Id.* at 2062 (Thomas, J., concurring).
[138] *See id.* at 2061 (O'Connor, J., concurring).
[139] *See id.* at 2065 (Thomas, J., concurring).

whether the governmental actor intentionally violated the Constitution.[140] Interestingly, Justice Thomas searched the *Jenkins* record in vain for a basis for a "real finding" of intentionally discriminatory government action.[141] He admonished the district courts not to "confuse the consequences of de jure segregation with the results of larger social forces or of private decisions."[142] Likewise, Justice O'Connor described the "white exodus" from the city that resulted in the perpetuation of a substantially segregated school district as "natural, if unfortunate, demographic forces."[143] She wrote, "The unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation."[144]

Thus, in their concurring opinions, Justices Thomas and O'Connor preserved Justice Harlan's determination (voiced in his *Plessy* dissent) that social inequality and private acts of prejudice are not germane to constitutional adjudication. Furthermore, as in *Cumming*, in spite of the pervasively discriminatory reality faced by the plaintiffs, and the plaintiffs' tangible difficulties in securing a quality education, the Court still searched for identifiable acts of intentional discrimination. The result is what Alan Freeman has described as a "jurisprudence of violations."[145] Focusing on the language of race-based classifications and searching for discriminatory intent, the Court unnecessarily has limited its remedial power and failed to reach for racial justice. "In short, color-blind constitutionalists live in an ideological world where racial subordination is ubiquitous yet disregarded—unless it takes the form of individual, intended, and irrational prejudice."[146]

VI. CONCLUSION

In his dissent to *Plessy*, Justice John Marshall Harlan correctly prophesied the pernicious effects of judicial approval of mandatory segregation laws and proclaimed the Constitution to be color-blind. Although he did not

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[140] *See id.* at 2062 (Thomas, J., concurring); *cf.* Keyes v. School Dist. No. 1, Denver, 413 U.S. 189, 205-06 (1973) (using a de jure race classification similar to that used in *Jenkins*). *Compare* Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 544 (1899).

[141] *Jenkins*, 115 S. Ct. at 2064 (Thomas, J., concurring). The district court had inferred an intentional violation from the prior de jure segregation, the continuing de facto segregation, and the failure of the school system to take steps to eliminate the vestiges of the dual system. *See id.* at 2062 (Thomas, J., concurring).

[142] *Id.* at 2063 (Thomas, J., concurring).

[143] *Id.* at 2060 (O'Connor, J., concurring).

[144] *Id.* at 2061 (O'Connor, J., concurring).

[145] Freeman, *supra* note 14, at 41.

[146] Gotanda, *supra* note 9, at 46.

foresee all the possible future effects of a color-blind constitution, his other decisions give us a view of the remedial limitations of constitutional or jurisprudential color-blindness.

It should be remembered that John Marshall Harlan did not set out to be a champion of civil rights for blacks. Instead, he was converted by his experiences in war and in politics to a fervent belief in the necessity of a strong federal government, the importance of supporting federal legislation, and the evil of state laws that were openly hostile to the rights secured by the War Amendments. Although Harlan was alone on the bench in his sympathy for blacks during the nadir of race relations, he nevertheless believed in white superiority. His apparent inconsistencies on race issues and civil rights are wholly compatible with firebrand federalism and white paternalism. Harlan's jurisprudence does not, after all, see all the colors of racism.