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JUSTICE JOHN M. HARLAN

DREW S. DAYS, III*

This article focuses on the specific contributions of John Marshall Harlan to the law of equal protection. Preparation of this discussion was facilitated by Justice Harlan's production of a remarkable volume of judicial writings from which I could seek to extract his philosophical attitudes toward the equal protection clause. From his appointment to the Court in March 1955, through June 1968, the Justice wrote 484 opinions.¹ For a ten-year period beginning in 1958, he had a higher number of opinions per Term than any other member of the Court.² His pace hardly slackened between 1968 and his retirement in September 1971, although he was almost totally blind during the last seven years of his tenure on the Court.³

Justice Harlan was a "whole" jurist. There was no need for me to pore through Harlan's opinions with a "fine-toothed comb" in order to discern his point of view. His opinions constitute a jurisprudential corpus that reflects a coherent judicial and doctrinal focus while remaining responsive to the facts of each case. As Professor Paul Freund observed about the Justice's writings:

[O]ne reads his opinions with the secure feeling that they will convey an understanding of the exact controversy to be resolved and will disclose the philosophical wellsprings of the Justice's position. One or the other effect alone is not difficult for a judge to achieve; together, if they do not quite warrant a combination patent for their designer, they are at least rare enough to be remarkable.⁴

Nathan Lewin correctly observed this quality in Justice Harlan's style: "His style was lucid and always understandable to lawyers. He was never given to question begging or evasion of 'gut issues'. . . ."⁵

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1. *Biographical Note*, in *THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN* xxv (D. Shapiro ed. 1969) (hereinafter cited as *SELECTED OPINIONS*).

2. *Id.*

3. C. BARNES, *MEN OF THE SUPREME COURT: PROFILES OF THE JUSTICES* 97 (1978).

4. Freund, *Foreward to SELECTED OPINIONS*, *supra* note 1, at xiii.

5. Lewin, *Justice Harlan: "The Full Measure of the Man."* 58 A.B.A.J. 579, 583 (1972).

A wonderful anecdote about one of Justice Harlan's clerks emphasizes this point:

The clerk reports that a draft opinion worked over by the Justice in a significant case closed one section of its discussion with the conclusion that rejection of the petitioner's position "was clear." The law clerk protested, insisting, for reasons he elaborated at length, that it was not clear at all. Maybe so, said the Justice, nodding sagely. Down went his pencil to the paper, slashing in the word "manifestly" to modify "clear."⁶

Substantively, Justice Harlan believed deeply in concepts of federalism. In a 1963 speech, he stated:

Our federal system, though born of the necessity of achieving union, has proved to be a bulwark of freedom as well. We are accustomed to speak of the Bill of Rights and the Fourteenth Amendment as the guarantees of personal liberty. Yet it would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have. Indeed, it was upon the structure of government that the Founders primarily focused in writing the Constitution.⁷

Justice Harlan saw the genius of our system in the diffusion of power at the federal level and between the federal and state governments. For him, the political process, not the judicial process, was the more effective means in the long run for resolving complex societal problems: "[S]ome well-meaning people apparently believe that the judicial rather than the political process is more likely to breed better solutions of pressing or thorny problems. This is a compliment to the judiciary but untrue to the democratic principle."⁸

Because these themes run throughout all of Justice Harlan's writings, it is difficult to limit treatment of Justice Harlan's views on equal protection to a discussion of only those cases invoking the equal protection clause. Further, Justice Harlan's equal protection doctrines were expounded more often in dissent than in majority opinions or separate concurrences.

One can readily agree with Professor Freund's observation about the appeal Justice Harlan's opinions have for students: "[T]he very students who more often than not regret the Justice's position freely acknowledge that when he has written a concurring or dissenting opinion they turn to it first, for a full and candid exposition of the case and an intellectually rewarding analysis of the issues."⁹

Nevertheless, a dissent is a dissent is a dissent. Justice Harlan went

6. *Id.*

7. U.S. NEWS & WORLD REPORT, *Can Courts Cure Everything*, Aug. 26, 1963, at 49 (excerpts from an address of Justice Harlan at the dedication of the American Bar Center in Chicago on August 13, 1963).

8. *Id.*

9. Freund, *Foreward* to SELECTED OPINIONS, *supra* note 1, at xiv.

from twenty-three dissenting votes and eight dissenting opinions during his first full Term to ninety-seven dissenting votes and twenty-four dissenting opinions in the 1963 Term.¹⁰ Between 1963 and 1967, Justice Harlan voted in dissent an average of 62.6 times per Term, almost twice the number of Justice Stewart, who averaged 38.6.¹¹

Pointing to contributions to equal protection by "The Great Dissenter" on the Warren Court is no mean feat, however. Fortunately, Justice Harlan's writings in equal protection cases provide appropriately representative categories within which each of these larger themes of federalism is fully developed. In that regard, I address three areas: (1) racial discrimination; (2) apportionment and voting; and (3) wealth classification and economic and social legislation.

RACIAL DISCRIMINATION

With few exceptions, Justice Harlan's positions were in harmony with the Warren Court's attempts to advance the cause of racial justice. Justice Harlan held that the view that state classifications generally should be upheld in the face of an equal protection challenge where they were "reasonable"—that is, not arbitrary or capricious.¹² In contrast to his general view, however, classifications based upon race could stand only if the state's interest was "of the most weighty and substantial kind."¹³ One of the first cases in which he voted was the 1955 decision of *Brown v. Board of Education*¹⁴ in which the Supreme Court articulated remedial guidelines for implementing its historic 1954 school desegregation decision of the same name.¹⁵ Then, and thereafter, Justice Harlan joined with the Warren Court in all major school desegregation decisions as well as decisions striking down segregative laws and official practices during the 1960's.¹⁶ In these cases, however, the state-imposed racially discriminatory acts were open and notorious.

Where the presence of state action was less obvious, the Justice was troubled by the thought that the equal protection clause was being in-

10. *Biographical Note*, in *SELECTED OPINIONS*, *supra* note 1, at xxvi.

11. *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 312 (1968); *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 182 (1964). See also *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 101 (1956).

12. See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 34-36 (1956) (Harlan, J., dissenting).

13. *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring).

14. 349 U.S. 294 (1955).

15. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

16. E.g., Schools: *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969). Public Accommodations: *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Jails: *Lee v. Washington*, 390 U.S. 333 (1968). Miscegenation: *McLaughlin v. Florida*, 379 U.S. 184 (1964).

voked to reach what he regarded as purely private action.¹⁷ The early intimations of this philosophical problem for Justice Harlan appeared in *Burton v. Wilmington Parking Authority*,¹⁸ a 1961 case holding that racial segregation practiced by proprietors of a restaurant operated in a state-owned parking facility constituted state action that violated the equal protection clause. There Justice Harlan wrote in dissent: "The Court's opinion, by a process of first indiscriminately throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of 'state action.'" ¹⁹

Five years later, in *Evans v. Newton*,²⁰ the Court held that Macon, Georgia did not sufficiently rid a park for whites only of its "public character" by merely returning it to private trustees. Hence, the requisite state action was found and equal protection principles were applied.²¹ Justice Harlan, dissenting on both procedural and substantive grounds, argued against the "pervasive potentialities" of the Court's expansion of the "public function" theory of state action.²²

It substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and amorphous as it is far-reaching. It dispenses with the sound and careful principles of past decisions in this realm. And it carries the seeds of transferring to federal authority vast areas of concern whose regulation has wisely been left by the Constitution to the States.²³

Even where he agreed that state action was present in the political sphere, Justice Harlan was not always ready to find an equal protection violation. In *Reitman v. Mulkey*,²⁴ at issue was California's Proposition Fourteen, which amended the California Constitution to repeal a variety of open housing statutes. The Court found that sufficient state ac-

17. U.S. Const. amend. XIV prohibits a state from discriminating on the basis of race. An individual who discriminates is subject to judicial scrutiny under this "state action" requirement only if the individual is a state official acting under "color of law" or acting in concert with state officials. See B. SCHWARTZ, CONSTITUTIONAL LAW 408-14 (1979). See also *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

18. 365 U.S. 715 (1961).

19. *Id.* at 728.

20. 382 U.S. 296 (1966).

21. *Id.* at 301-02.

22. The "public function" doctrine was first expounded in the "company town" case of *Marsh v. Alabama*, 326 U.S. 501 (1946). A private individual is restricted under the fourteenth amendment if he is involved in what is traditionally a government function, such as operation of election systems, and governance of cities and towns or public facilities such as parks. In *Marsh* the Court said that to determine whether a "public function" was present, it would "balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, . . . mindful of the fact that the latter occupy a preferred position." *Id.* at 509.

23. 382 U.S. at 322 (Harlan, J., dissenting).

24. 387 U.S. 369 (1967).

tion existed to warrant application of the equal protection clause and declared the amendment unconstitutional.²⁵ Justice Harlan contended that because the fourteenth amendment neither requires nor forbids states to pass laws preventing private discrimination, California's repeal was of no constitutional significance. The state had merely decided to remain neutral on such issues.²⁶

In *Hunter v. Erickson*,²⁷ a city ordinance of Akron, Ohio, passed by referendum, required that any subsequent ordinances relating to non-discrimination in housing be passed by a majority of the voters.²⁸ With Justice Harlan concurring this time, the Court struck down the ordinance as violative of the equal protection clause.²⁹ Justice Harlan described with the greatest clarity his philosophy concerning the constitutionality of state statutes which structure the internal government process and which are challenged under the equal protection clause. According to Justice Harlan, there are two classes of such statutes. The first type has "the clear purpose of making it more difficult for racial and religious minorities to further their political aims."³⁰ Such a statute can stand only if "supported by state interests of the most weighty and substantial kind."³¹ Most statutes, however, fall within the second category and are designed to provide "a just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with political opponents."³² These statutes do not violate the equal protection clause.³³ Justice Harlan found that the Akron statute fell into the former category,³⁴ the constitutional amendment in *Reitman*, however, was clearly in the latter.³⁵

REAPPORTIONMENT AND VOTING

Justice Harlan's classification of statutes designed to "structure the internal government process" provides a helpful bridge into his rationales in reapportionment decisions. Justice Harlan believed that various reapportionment schemes fell within the second category and that the statutes were "a just framework within which the diverse polit-

25. *Id.* at 373.

26. *Id.* at 388-89 (Harlan, J., dissenting).

27. 393 U.S. 385 (1969).

28. *Id.* at 386.

29. *Id.* at 393.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 394-95.

34. *Id.* at 394.

35. *Id.* at 395. See *Reitman v. Mulkey*, 387 U.S. 369, 389 (Harlan, J., dissenting).

ical groups in our society may fairly compete.”³⁶ Therefore, such schemes were not violative of the equal protection clause.

In no other equal protection area was Justice Harlan to demonstrate a more unyielding and consistent position than in his opposition to the Warren Court’s “one person, one vote” decisions on legislative reapportionment.³⁷ Like Justice Frankfurter, from whom he drew much intellectual strength while they served on the Court together,³⁸ Justice Harlan expressed the thought that federal courts should not enter this political thicket.³⁹ In *Baker v. Carr*,⁴⁰ in which the Court held questions of reapportionment justiciable, Justice Harlan stated that he found “nothing in the Equal Protection Clause or elsewhere in the Federal Constitution which expressly or impliedly supports the view that state legislatures must be so structured as to reflect with approximate equality the voice of every voter.”⁴¹

The reapportionment cases provided Justice Harlan with an opportunity not only to express his views on representative democracy, but also to elaborate fully on his concept of the federal judicial role in our system of government. In *Baker*, Justice Harlan wrote:

Those observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source, will no doubt applaud this decision and its break with the past. Those who consider that continuing national respect for the Court’s authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern.⁴²

In *Reynolds v. Sims*,⁴³ a case in which the Court held several state reapportionment schemes unconstitutional under the equal protection clause, Justice Harlan argued:

[T]hese decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional “principle,” and that this Court should “take the lead” in promoting reform when other branches of government fail to

36. *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring).

37. *See, e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (Harlan, J., separate opinion); *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970) (Harlan, J., dissenting); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Avery v. Midland County*, 390 U.S. 474 (1968) (Harlan, J., dissenting); *Reynolds v. Sims*, 377 U.S. 533 (1964) (Harlan, J., dissenting). *See also* Dorsen, *John Marshall Harlan*, in *IV THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, at 2810 (L. Friedman & F. Israel eds. 1969).

38. *Compare Baker v. Carr*, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting) *with id.* at 330 (Harlan, J., dissenting).

39. 369 U.S. at 330 (Harlan, J., dissenting).

40. 369 U.S. 186 (1962).

41. *Id.* at 332 (Harlan, J., dissenting).

42. *Id.* at 339-40.

43. 377 U.S. 533 (1964).

act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.⁴⁴

Justice Harlan was never persuaded of the wisdom or the constitutionality of this reapportionment decision. Only a few months before he left the Court, the Justice observed, once more in a separate opinion, that the majority opinion in *Reynolds v. Sims* represented “the morass into which the Court has gotten itself by departing from sound constitutional principle in the electoral field.”⁴⁵

WEALTH CLASSIFICATIONS: ECONOMIC AND SOCIAL LEGISLATION

Justice Harlan’s conviction that “[t]he Constitution [was] not a panacea for every blot upon the public welfare,” and that the Court should not be “a general haven for reform movements”⁴⁶ found no fuller expression than in cases where wealth classifications or economic and social legislation were challenged under the equal protection clause. His approach to these cases can be understood only against a backdrop of his views on both the equal protection clause and the due process clause.

Justice Harlan believed that, as a general rule, the equal protection test applicable to state legislation was as follows: a state enactment or practice may be struck down only if it cannot be justified as “founded on some rational and otherwise constitutionally permissible state policy.”⁴⁷ To the suggestion that a stricter equal protection standard applied in cases where so-called fundamental liberties and rights are threatened,⁴⁸ Justice Harlan responded that such an approach was inconsistent with the purposes of the equal protection clause⁴⁹ and with well-established principles of federalism which underlie the equal protection clause.⁵⁰ However, Justice Harlan did recognize the need for a

44. *Reynolds v. Sims*, 377 U.S. 533, 624-25 (1964) (Harlan, J., dissenting).

45. *Whitcomb v. Chavis*, 403 U.S. 124, 170 (1971) (Harlan, J., separate opinion).

46. 377 U.S. at 624-25 (1964) (Harlan, J., dissenting).

47. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 681 (1966) (Harlan, J., dissenting).

48. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

49. *Id.* at 659 (Harlan, J., dissenting).

50. *Id.* at 677.

level of scrutiny stricter than mere rationality in the racial discrimination area, basing his belief on the view that "the historical origins of the Civil War Amendments might attribute to racial equality this special status."⁵¹

In any event, Justice Harlan remained firm in his opinion that the equal protection clause does not impose on the states "an affirmative duty to lift the handicaps flowing from differences in economic circumstances."⁵² He feared that an equal protection test for "fundamental interests" would increase the likelihood that the federal judiciary might judge state policies "in terms of the individual notions and predilections of its own members"⁵³ or allow the importation of leveling principles foreign to constitutional adjudication. As Justice Harlan noted:

The second branch of the "compelling interest" principle is even more troublesome. For it has been held that a statutory classification is subject to the "compelling interest" test if the result of the classification may be to affect a "fundamental right," regardless of the basis of the classification. . . .

. . . Virtually every state statute affects important rights. . . . [T]o extend the "compelling interest" rule to all cases in which such rights are affected would go far toward making this Court a "super-legislature."⁵⁴

He did not believe that wealth classification cases raised "the typical equal protection question of the reasonableness of a 'classification' on the basis of which the State has imposed legal disabilities, but rather the reasonableness of the State's failure to remove natural disabilities."⁵⁵

In contrast, under Justice Harlan's due process clause analysis, the initial search is to determine whether governmental action affects a right assured by the Constitution. Rights protected according to this approach are not merely those that can be located explicitly or implicitly in the first eight amendments, but include "those concepts which are considered to embrace those rights 'which are. . . *fundamental*; [and] which belong. . . to the citizens of all free governments.'"⁵⁶ Due process is a "discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions [of the first eight amendments]."⁵⁷ If no right is found, governmental action can be struck down only if it is "so arbi-

51. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 682 n.3 (1966) (Harlan, J., dissenting). See *Shapiro v. Thompson*, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting).

52. *Griffin v. Illinois*, 351 U.S. 12, 34 (1956) (Harlan, J., dissenting).

53. 383 U.S. at 681-82 (1966) (Harlan, J., dissenting).

54. *Shapiro v. Thompson*, 394 U.S. 618, 660-61 (1969) (Harlan, J., dissenting).

55. 351 U.S. at 36 (1956) (Harlan, J., dissenting).

56. *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting).

57. *Id.* at 542.

trary and unreasonable” as to render it utterly lacking in rational justification.⁵⁸ Where a protected right is affected, the analysis ultimately proceeds to a determination of whether the governmental interests at stake outweigh any burden that may be imposed upon exercise of the protected right.⁵⁹

Justice Harlan was convinced that the due process approach, and not the equal protection analysis, provided the only principled method for analyzing disabilities caused by governmental classifications that fall outside the areas of racial discrimination or purely commercial regulations. So armed, he dissented from some of the Warren Court’s most notable rulings, including those in which the Court struck down the poll tax,⁶⁰ prohibited lengthy residency requirements for welfare applicants,⁶¹ granted free transcripts⁶² and appointment of counsel to indigent criminal defendants on appeal,⁶³ and authorized recovery by illegitimate children and their mothers under state wrongful death statutes.⁶⁴

CONCLUSION

I yield to no one in my respect for the achievements of the Warren Court in equal protection. It acted when other institutions of government seemed paralyzed and unable to address inequality in race relations and in the political process. We are all better off, in my estimation, because the Court confronted these complex issues and did the best that it could do. Nevertheless, certain decisions of the Warren Court bring to mind a description of the first Justice Harlan’s performance on the bench: “His logic was not always constitutionally impeccable. But his heart led him to sound conclusions even when his logic and legal knowledge failed him.”⁶⁵

The greatness of Chief Justice Warren emanated from his ability to form coalitions through compromise and moral suasion that would serve to advance the cause of “equal justice under law.”⁶⁶ But as a result of that process, Warren Court opinions often failed to demonstrate “logic” and “legal knowledge.”⁶⁷

It is in that context that Justice Harlan’s contributions to the Warren

58. *Id.* at 539-40.

59. *Id.* at 553-55.

60. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

61. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

62. *Griffin v. Illinois*, 351 U.S. 12 (1956).

63. *Douglas v. California*, 372 U.S. 353 (1963).

64. *Levy v. Louisiana*, 391 U.S. 68 (1968).

65. Filler, *John M. Harlan*, in II *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, at 1294 (L. Friedman & F. Israel eds. 1969) (quoting Professor Beth).

66. *See, e.g.*, R. KLUGER, *SIMPLE JUSTICE* 694-99 (1976).

67. *Id.* at 693.

Court become apparent. Freed of the need to form coalitions, he was able to articulate his own position lucidly, forcefully, and consistently. He could explain, often better than the majority itself, the nature and implications of its rulings. Oddly enough, in many instances his dissents elucidated the precedential value of the majority opinion and gave substance to the significant principles it established. As Professor Freund observed, many students of the Warren Court, while agreeing with the majority opinion, look to Justice Harlan's dissents for an intellectually rewarding analysis of the issues.⁶⁸ I believe that Justice Harlan's dissents help us to better understand and appreciate the achievements of the Warren Court. I hope that we build upon the lessons given by that Court and strive toward even greater equality in America. As Justice Harlan pointed out: "Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principle, not on *ad hoc* notions of what is right or wrong in a particular case."⁶⁹

68. See text accompanying note 9 *supra*.

69. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A.J. 943, 944 (1963).