

Of Color Lines and Race Lines: John Marshall Harlan, W.E.B. Du Bois, and the Persistence of Racial Inequality in a Colorblind Regime

Phillip Hutchison^{1*}

¹ California State University, Northridge, Northridge, California, USA

* Phillip Hutchison, E-mail: pah65047@csun.edu

Received: August 14, 2017 Accepted: September 4, 2017 Online Published: September 19, 2017

doi:10.22158/wjssr.v4n4p270

URL: <http://dx.doi.org/10.22158/wjssr.v4n4p270>

Abstract

The life of the first Justice Harlan has been the subject of myriad studies, largely inspired by his declaration “Our Constitution is color-blind,” which appeared in his storied dissent in Plessy v. Ferguson. This article interrogates unaddressed angles of his dissent that, when given proper attention, can deliver fruitful insights into his intentions behind the colorblind metaphor. The focus is primarily trained upon Harlan’s concept of the “race line,” which he referenced twice in his dissent. Placing this “race line” up against the colorblind Constitution will reveal that he purposed to keep whites educationally and financially dominant “for all time” by means of (colorblind) legal racial equality. The article delves further into the race line by juxtaposing it with W.E.B. Du Bois’s notion of the “color line,” which was voiced at the same moment of Plessy.

Keywords

John Marshall Harlan, W.E.B. Du Bois, Plessy v. Ferguson, Jim Crow, colorblindness

—The problem of the Twentieth Century is the problem of the color line.

W.E.B. Du Bois, *The Souls of Black Folk* (2015, p. 1)

—These notable additions to the fundamental law [the Thirteenth, Fourteenth, and Fifteenth Amendments] were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems.

John Marshall Harlan, dissent in *Plessy v. Ferguson* (163 U.S. 537, 555)

1. Introduction

Henry Billings Brown's majority opinion in the 1896 case *Plessy v. Ferguson* (163 U.S. 537) today ranks among the most ignominious rulings ever handed down by the United States Supreme Court. *Plessy's* accession to legal segregation unleashed Jim Crow into every crevice of Southern society, rapidly ballooning from "separate but equal" train cars to "separate but equal" everything. Brown's logic thus came to constitute judicial common sense among most whites through the first half of the Twentieth Century. Such common sense persisted until the advent of the civil rights movement, whose campaigns against legal racial subordination ultimately eviscerated the rationales Brown had deployed in his defense of Jim Crow. From that moment forward, Brown's opinion has been almost universally condemned as indefensible by any yardstick of racial justice. *Plessy* itself remains today as it has since the civil rights movement: the target of near-ubiquitous disdain, its anti-canoncity scarcely in dispute (Harris, 2004, p. 181; Amar, 2011, p. 75; Breyer, 2015, p. 31; Turner, 2015).

Such obloquy evaporates, however, when we turn to the sole dissent *Plessy* spawned. John Marshall Harlan—the son of a prominent Kentuckian politician and the Court's lone former slaveholder—composed a sulfurous invective that unambiguously denounced the majority's capitulation to Jim Crow and their hypocrisy in claiming that legalized segregation was something other than racially oppressive. Harlan's dissent thus represents for many the fundamental "antithesis" (Kull, 1992, p. 112) to the "bad logic, bad history, bad sociology, and bad constitutional law" (Harris, 1960, p. 101) seen to define Brown's majority opinion; in this regard, Harlan's enduring truism "Our Constitution is color-blind" places him squarely in the ranks of the heroic antiracist among both right-wing (Note 1) and left-wing (Note 2) commentators alike.

Others are less convinced. Such critics point out that directly before declaring the Constitution colorblind, Harlan asserted that whites were racially "dominant" and would remain so "for all time"—with the key ingredient locking in white domination being legal obeisance to the very colorblind Constitution for which Harlan is so honored today. These mutually exclusive positions—were Harlan's intentions in *Plessy* antiracist or racist?—form the core of the ongoing debate enveloping his dissent and its implications in our conjuncture of postraciality.

In this article, I attach my voice to this latter set of interlocutors. The indignation pouring from Harlan's pen in *Plessy*, I suggest, stemmed solely from his hostility to *legal* racial oppression. For Harlan, whites' overwhelming control of educational and financial resources and political power was, in full contrast, something to be celebrated. While previous work has explored this perspective in the context of the famous passage in which Harlan labeled the Constitution colorblind, we find that this thematic of disparaging legal racism whilst championing every material expression of racial inequality defines his entire dissent. Taking this thematic as my starting point, I explore and analyze another concept from Harlan's opinion—one that has not received the attention it deserves. Early therein, Harlan averred that the Thirteenth, Fourteenth, and Fifteenth Amendments had been "welcomed by the

friends of liberty throughout the world. *They removed the race line from our governmental systems*” (163 U.S. 537, 555). This in-depth study of Harlan’s “race line” will confirm that the only injustice Harlan inveighed against was legal injustice, rather than the political marginalization and economic destitution in which blacks continued to languish.

The argument unfolds over three sections. First, I make a brief foray into the famed paragraph in which “Our Constitution is color-blind” resides, training my focus on the relationship between that statement and Harlan’s hailing of white domination immediately preceding it. That discussion sets up my extensive analysis of the race line in the second section. This race line, I demonstrate, was fully a species of the legal realm. While the post-Civil War amendments had swept away black/white inequality “before the law,” their removal of the “race line” did not translate into the concomitant annihilation of inequality in any other domain of society; blacks had remained disproportionately poor and uneducated in the race line-free decades following the Civil War, Reconstruction’s interventions notwithstanding.

Only a few years after Harlan authored his *Plessy* dissent and spoke of a race line that served to legally inferiorize blacks, influential sociologist W.E.B. Du Bois published *The Souls of Black Folk*, coining therein the iconic axiom “The problem of the Twentieth Century is the problem of the color line” (2015, p. 1). Section three takes stock of the significance of this statement in the context of Harlan’s dissent. Comparing Harlan’s “race line” and Du Bois’s “color line” will not only expose their colossal differences, but will show how the former was restricted to its legal manifestations divorced from material racial inequalities in every other realm of society. Du Bois, in contrast, conceived the color line to incorporate the gamut of expressions of racial injustice: legal, economic, social, *ad infinitum*.

In concert, the three sections of this article aim to reveal the discursive cohesiveness informing John Marshall Harlan’s *Plessy* dissent, demonstrating that he had white political and economic domination in mind not only in his homage to the colorblind Constitution, but throughout his musings on the role of the Constitution in a post-slavery nation. I conclude this article with a brief discussion of the place of these arguments in the context of current studies of Harlan’s dissent and his complex life more generally.

2. Of Colorblindness and Racial Inequality

Before launching into my examination of John Marshall Harlan’s “race line”, I first provide contextualization via a study of the most quoted passage from his dissent in *Plessy v. Ferguson*, cited in its entirety:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of

citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race (163 U.S. 537, 559).

Were these words an expression of unparalleled antiracism from a late-Nineteenth Century Supreme Court justice? Or were they an evocation of (in the condemnatory phrase of Roy Brooks [2009, p. ix]) “out-and-out white supremacy”? My analysis of this paragraph and the race line concept decisively points to the latter (Note 3).

First, what main ideas might we draw from the *uber*-influential iterations inflecting this passage? We can begin by splitting its ten sentences into two parts. The first part, covering the opening three sentences, represents Harlan’s celebration of racial inequality in United States society of the late 1800s. I label these Harlan’s *white domination sentences*. Here, Harlan noted that whites considered themselves dominant (sentence one); agreed with them while furnishing empirical evidence of said dominance (sentence two); and confidently forecasted the reproduction of their domination “for all time” (sentence three.)

The second part, comprising the passage’s final seven sentences, strikes a crucially distinct chord. While Harlan began the paragraph lauding white domination in such arenas as education, wealth, and power, he marked a transition beginning in the fourth sentence: “*But* in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.” Harlan was thus transitioning from an exaltation of white domination in such spheres as education and wealth to a veneration of *legal racial equality*, underscoring in the second section of the passage (and elsewhere throughout the dissent) that blacks and whites were “equal before the law.” This commits us to the conclusion that all of Harlan’s statements succeeding his fourth-sentence conjunction “*But*” were in exclusive reference to the legal realm. Harlan’s dual use of the word “dominant” keys us into this difference. Whites may be dominant in prestige, achievements, education, wealth, and power, *but* in view of the Constitution, no dominant race exists in the eye of the colorblind law. When Harlan insisted “There is no caste here,” he had only the government-sponsored variety in mind—the kind encoded by *de jure* systems of racial oppression (to wit, slavery and Jim Crow.) Racial caste clearly existed in every other domain of society; Harlan had just listed off its various dimensions in his white domination sentences. To put this another way: While no racial caste existed “in view of the Constitution,” racial caste proved omnipresent “in view” of such material inequities as education, wealth, and power. This communicates that Harlan was solely seeking to end *legal* racial domination, rather than other manifestations of racial inequality (Hutchison, 2015).

Yet the implications extend beyond this. It is not enough to say, on the one hand, “Whites are dominant in prestige, achievements, education, wealth, and power,” and on the other hand, “all are equal before the law.” A fundamental *association* binds these two realities, and Harlan illumined that association at the end of the passage’s third sentence, when he surmised that the white race would retain its dominance “for all time, *if* it remains true to its great heritage and holds fast to the principles of constitutional liberty.” What exactly were those “principles of constitutional liberty” to which he was referring here? Harlan named them clearly enough in the second section of the above-quoted paragraph, from the idea that the colorblind Constitution affords all citizens equal access to the benefits of civil rights to the notion that all citizens are “peers” in the eye of the law no matter how “humble” or “powerful” they are elsewhere in society. The collective connotation of these assertions is evident—as recently articulated by Randall Kennedy (2013), these principles “posed no real threat to white supremacy” (p. 152). What Harlan was ultimately arguing was that whites were clearly dominant “in prestige, in achievements, in education, in wealth, and in power”—and that the best tactic to keep them that way was to declare whites and blacks equal before the colorblind Constitution (Carr, 1997, p. 116; Goldberg, 2002, p. 212). This formula of governmental colorblindness, numerous analysts have conclusively demonstrated, has proven beyond effective in reproducing the very racial inequalities Harlan enumerated in his famous passage (Alexander, 2010; Bonilla-Silva, 2013; Omi & Winant, 2013; Brown et. al., 2003). As Harlan communicated it, racial groups could be “equal before the law” (a point he repeatedly voiced throughout his opinion), but that did not mean they were equal in any other way. It is Harlan, in his *Plessy* dissent, who became the progenitor of the idea that legal equality would successfully preserve the countless extralegal inequities circulating within society, from education to power to wealth. A concise summation of this position appears in Moon-Kie Jung’s *Beneath the Surface of White Supremacy* (2015): “Harlan’s ‘antiracism’ was one within the boundaries of white supremacy, one for *legal* equality that he was certain would not upset but safeguard white dominance” (p. 77; see also Han, 2015, p. 38).

The above serves to suggest that, far from being the intrepid antiracist for which Harlan is given so much credit and deference, his fervent support of black civil rights was predicated on his conviction that the colorblind Constitution would reproduce white domination “for all time.” As he made clear in his white domination sentences, whites controlled vastly disproportionate political power and economic wealth—material inequalities that would carry over into a polity freed of Jim Crow’s legal shackles. “Introducing the notion of ‘colorblind’,” asserts David Theo Goldberg in *Are We All Postracial Yet?* (2015), “Harlan argued that whites had nothing to fear from opening up competition to all, as their existing skills, training, knowledge, and general superiority would guarantee their continued advancement” (p. 34). Harlan had crafted this precise point later in his dissent. “Sixty millions of whites are in no danger from the presence here of eight millions of blacks,” he insisted, revealing his understanding that integration would in no way dispel the enormous material advantages to which

whites had gained access thanks to centuries of slavery and related forms of anti-black suppression. His position ultimately becomes one of everlasting material racial hierarchy, to be reproduced “for all time” via submissiveness to the colorblind Constitution. Harlan thus demonstrated in his famous paragraph that nothing approaching equality in prestige, achievements, education, wealth, or power would emerge in a legally colorblind country, as he was manifestly confident that such equality would not follow from the rejection of de jure segregation. That confidence finds its most direct articulation in his white domination sentences; upon cataloguing the ways whites sat atop the socioeconomic hierarchy, he declared, “So, *I doubt not*, [whites] will continue to be [dominant] for all time....” These are not the protestations of a justice beseeching his colleagues to create a society characterized by thoroughgoing racial equality. In fact, such statements directly conflict with the argument advanced by many legal scholars: that Harlan would today be an indefatigable advocate of race-conscious policy designed to eliminate racial inequality in all its pernicious expressions.

In confirming this position, we need not solely dwell on “Our Constitution is color-blind” and its immediate discursive vicinity. Harlan thought through his *Plessy* opinion, and his conviction that legal racial equality and material racial inequality could easily cohabit informs the entirety of his dissent. To demonstrate this, the following section turns to Harlan’s concept of the “race line,” further affirming that the blistering opprobrium he aimed at Jim Crow represented an assault on legal caste and legal hierarchies, rather than upon whites’ massive educational and financial advantages.

3. Of Race Lines and Legal Racial Hierarchy

The 1960s civil rights movement is rightly hailed as a watershed moment in the crusade for racial justice in the United States; it successfully vanquished de jure racial oppression via such cases as *Brown v. Board of Education* and the various civil rights laws. As a result, all citizens experience the “equality before the law” for which Justice John Marshall Harlan had advocated over half a century earlier. While the purging of legal racial subordination surely proved an unprecedented victory, other forms of racial caste continue to plague people of color, poisoning their live(lihood)s and truncating their dreams. All racial groups may today possess civil rights and be equals “in the eye of the law,” but this has failed to translate into any other form of equality (powell, 1995, p. 894); people of color remain disproportionately poor and enter educational environments of lesser quality—all the while facing an altogether new form of racial caste in the guise of the nation’s prison system, the population of which began skyrocketing in the immediate post-civil rights era (Alexander, 2010; Murakawa, 2014). All this occurs within the colorblind Constitution’s guarantee of legal racial equality, just as Harlan predicted in his dissent in *Plessy v. Ferguson*.

Harlan could base his confidence on this result because legal racial equality had previously taken hold in the United States upon the conclusion of the Civil War and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. Below, I closely analyze his contention that these amendments had

“removed the race line from [the nation’s] governmental systems” and illuminate why this race line was solely a legal construction disconnected from persisting racial inequalities in wealth, education, and the like. My arguments here will further demonstrate that the only equality that interested Harlan was of the legal variety; offering up legal racial equality via the colorblind Constitution would in no way infiltrate any other facet of society, protecting white domination “for all time.”

3.1 *The Dimensions of the Race Line*

Harlan made two references to the race line, the first of which occurred several paragraphs before his reflections on white domination and the colorblind Constitution. Prior to his initial comment about the race line, Harlan briefly discoursed upon the post-Civil War amendments, stressing that their overriding purpose was to “protect all the civil rights that pertain to freedom and citizenship.” He then wrote: “These notable additions to the fundamental law...removed the race line from our governmental systems” (163 U.S. 537, 555). Harlan’s fear, then, was that Jim Crow would re-implant the race line, thrusting (as he later lamented) “the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law” (163 U.S. 537, 562).

Harlan also brought forth the race line concept towards the end of his opinion, as he dismissed the majority’s invocation of such segregation-affirming precedents as *Roberts v. City of Boston*, since they had been decided prior to the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments:

Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments, National and State, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law (163 U.S. 537, 563).

Harlan employed the race line in identical fashion in this passage, positing its removal (or “obliteration,” here) upon the ascendance of the Reconstruction amendments. His follow-up remark recalls one of the dissent’s predominant themes: that the ratification of those amendments established “the equality of all men before the law.”

How was this race line a purely legal construct? While Reconstruction had made minor strides in realizing substantive equality among blacks and whites, mammoth disparities remained—the very disparities Harlan proudly proclaimed as he declared “Our Constitution is color-blind.” The post-Civil War amendments had “removed” and “obliterated” the race line, but they had not removed or obliterated racial inequalities “in prestige, in achievements, in education, in wealth, and in power” (Note 4). Harlan was not concerned that Jim Crow would plunge blacks back into the bowels of poverty—they had languished in the clutches of penury during both slavery and the decades immediately following emancipation. Developments between the Civil War and *Plessy* guaranteed this result (despite the absence of any race line), a catastrophe Frederick Douglass detailed in an 1875 address:

We were slaves—and you have made us free—and given us the ballot. But the world has never seen any people turned loose to such destitution as were the four million slaves of the South. The old roof was pulled down over their heads before they could make for themselves a shelter. They were free! free to hunger; free to the winds and rains of heaven; free to the pitiless wrath of enraged masters, who, since they could no longer control them, were willing to see them starve (quoted in Turner, 2012, p. 56).

It was in these immediate post-Civil War years that Douglass came to acknowledge (in the words of Jack Turner) (2012) “that one could be legally free, politically enfranchised, and economically helpless in America” (p. 61). I submit that in his own way, Harlan arrived at the same realization. Blacks had experienced (in W.E.B. Du Bois’s famous dictum) “a brief moment in the sun” (1935, p. 30), as honest attempts had indeed been made during Reconstruction to include blacks in the prosperity of the nation (Note 5). But none of those efforts established anything distantly resembling parity “in prestige, in achievements, in education, in wealth [or] in power,” as Harlan had correctly highlighted, neutralized as they were by a tsunami of Black Codes, Ku Klux Klan intimidation, and countless other displays of white intransigence.

While Harlan never directly referenced the race line anywhere else in his dissent, his concluding comments parallel the point he was fashioning with the concept:

Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens now constituting a part of the political community called the People of the United States, for whom, and by whom through representatives, our government is administered (163 U.S. 537, 563-564).

While slavery and Jim Crow surely differed in the details, to Harlan they amounted to the same thing. The race line of slavery (“an institution tolerated *by law*”) had been removed, but the (legal) incubus of Jim Crow was now poised to take root in society. What the Constitution’s accession to Jim Crow had accomplished, Harlan protested, was to place blacks “in a condition of *legal* inferiority.” This was the sole manifestation of inferiority that concerned Harlan; in this vein, he could have tweaked his white domination sentences to read, “The black race is the subordinate race in prestige, in achievements, in education, in wealth, and in power” (Note 6). Such indicia of inferiority lay beyond the purview of the colorblind Constitution; the possession of civil rights would not upend white dominance or symbiotic black inferiority in these extralegal domains of society. The opportunity to exercise civil rights, Harlan averred, does not presuppose such equality—or lack thereof. They are two separate domains.

The race line concept, then, was indisputably legal. And it was horizontal as well; the legal distinctions it wrought placed blacks in a lower legal echelon, outside the penumbra of civil rights protections whites possessed as a matter of course. This race line had existed during slavery and was “removed”

and “obliterated” thanks to the post-Civil War amendments—only to be reintroduced via the utter fiction of “separate but equal.” These observations make the inherent horizontality of the race line clear: positioning whites on the top and blacks on the bottom in an environment of legally encoded unequal power relations.

3.2 Further Insights

What additional insights might we glean from Harlan’s usage of the race line? Unlike Harlan’s notion of colorblindness, which appeared nowhere else in his thirty-four year Supreme Court tenure, the race line concept first surfaced in his *Civil Rights Cases* dissent in 1883, where he likewise classified it as fully legal in nature. Speaking of the Thirteenth Amendment’s boundaries and intention, he asserted that that amendment “alone obliterated the race line so far as all rights fundamental in a state of freedom are concerned” (109 U.S. 3, 40). The lone disruption to the parallelism here was Harlan’s suggestion that the Thirteenth Amendment was solely responsible for the destruction of the race line, while in *Plessy* he included the other Reconstruction amendments as likewise fulfilling that role. Given Harlan’s staunch conviction on the legal evil of slavery (Przybyszewski, 1999, p. 39; Hutchison, 2015, p. 439), his special emphasis on what the Thirteenth Amendment specifically accomplished should not evoke much surprise. As aforementioned, however, that amendment may have disappeared the race line preventing slaves from exercising any “rights which the white man was bound to respect” (as Chief Justice Roger Taney infamously phrased it in *Dred Scott v. Sandford* [60 U.S. 393, 407]), but it did not a priori grant former slaves equality in such realms as wealth and education.

Combining all three references, we encounter another commonality—in each instance, Harlan employed the past tense: “removed” and “obliterated.” In this context, we can compare it to his present-tense assertion “There is no caste here” (Note 7). Indeed, the two are discursively synchronous; the race line’s removal had fomented the concomitant termination of racial caste. On this score, Harlan could have just as easily composed such statements as “There is no race line here” and “The post-Civil War amendments obliterated racial caste from our governmental systems” (Note 8) And all the while, whites remained dominant in every extralegal domain of society: race lines in prestige, achievements, education, wealth, and power abounded in society, and (recalling Douglass’s lamentations) emancipation had done little to vitiate them. Like Douglass, Harlan understood that white domination would persist in a slavery- and Jim Crow-free nation: the three decades without these race lines gave him all the evidence and confidence he needed.

We can apply the relationship between the race line and racial caste to many of the other statements in Harlan’s famous passage, for it was the race line’s absence that proved the all-necessary precondition for his assertions therein. In a society with a race line, for example, the law decidedly does *not* “regard man as man”; this was incontestably the case during slavery, and that reality would return come Jim Crow. In this situation, “The humblest” is *not* “the peer of the most powerful,” either socially (by definition) or legally (as was the race line’s function.) Through all this, Harlan was arguing, in effect,

that thanks to the race line, there were two Constitutions: one for whites (who would see their legal rights continuously protected), and one for blacks (who, being of a lower legal caste, would face the gamut of circumscriptions upon their civil rights.) As he strenuously attempted to make clear, there was only one Constitution: and it was colorblind.

Yet this race line-free Constitution would not dispel the extralegal material inequalities dividing whites and blacks. Placed in its proper context, the race line furnishes further evidence that Harlan was scarcely seeking the removal of any form of racial inequality beyond the legal. This observation will become clearer as we consider the race line along another “line”—one that has occasioned decidedly more analysis in its century-plus career.

4. Of Color Lines and Racial Oppression

Rivaling the popularity of Harlan’s dissent and his assertion “Our Constitution is color-blind” is the great historian and sociologist W.E.B. Du Bois’s proclamation that “the problem of the Twentieth Century is the problem of the color line.” Innumerable academic and lay treatises on race and racism open their arguments with this quotation; it remains the entrypoint for a wide spectrum of discussions on the obdurate staying power of racial injustice in the United States (Lewis, 1994; Bush, 2009; Porter, 2010).

In light of the commensurate attention fastened upon both Harlan’s dissent and Du Bois’s concept of the color line, it stands to ask what differences Harlan’s race line and Du Bois’s color line might possess. One need not look far: while Harlan was focused solely on the United States context, Du Bois cast the color line globally, framing it as “the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea” (2015, p. 10). Harlan’s race line was narrowly pitched, as fully a function of legal systems of white supremacy in the United States; for all Harlan’s barbs against legal racial oppression, at no point was he interested in dissolving the material racial inequalities such white supremacist systems had forged in their wake. The race line had been obliterated, and all that was needed now was Constitutional colorblindness to maintain those inequalities.

By contrast, Du Bois not only conceived of the color line globally, he viewed it as encompassing the totality of white supremacist oppression, from the economic disparities governing the relations between the world’s “darker” and “lighter” nations to his likewise influential concepts of double consciousness and the veil. From the economic to the social to the legal to the corporeal, Du Bois wielded the color line as a means to problematize the worldwide reach of racial oppression into every pocket of the globe, with all its social, economic, interpersonal, and legal consequences.

The inherent inclusivity of the color line is further evidenced by the in-depth treatment it has received over the century-plus since its first voicing. Scholars across the disciplines employ the color line to illuminate and protest the oppression and inequalities that inundate American society and beyond,

critically interrogating a world in which poverty continues to closely correlate with dark skin (Winant, 2002, p. 305). And its lasting popularity today further communicates that Du Bois's color line is scarcely tethered to solely the legal realm, as countless texts spanning the interdisciplinary gamut have drawn upon it in the decades following the demise of government-mandated racial oppression following the civil rights movement. Color lines continue to represent among the deepest fault lines in the United States today; the material inequities Harlan itemized provide merely an inkling of the disparities governing every measurement of life chances in this country. Harlan had himself boasted of whites' dominance in education and wealth, gaps that endure today (Oliver & Shapiro, 2006). To Harlan's list we could add a near-never ending inventory of indicators of insidious inequality, including infant mortality, neighborhood quality, life expectancy, job attainment, and the aforementioned hyperincarceration of poor black and Latino males (Wacquant, 2009; Alexander, 2010). These "Twenty-First Century color lines"—to invoke the title of a recent anthology (Grant-Thomas & Orfield, 2009)—prove ubiquitous, despite the elimination of Harlan's race line half a century earlier. Just as post-Civil War legislation had failed to eradicate racial differences in prestige, achievements, education, wealth, and power, so has the 1960s re-abolition of the race line failed to witness the termination of these same imbalances (Massey, 2007, p. 112).

None of the above would trigger the opprobrium of the colorblind Constitution, as the only racial injustice it can tackle is that of solely a *legal* nature. So long as the imbalances enumerated above contain no present-day legal underpinnings, the colorblind Constitution has no responsibility to rectify these and other egregious inequalities (O'Brien, 1998, p. 766). While Du Bois's color line speaks to and intervenes in the myriad villainous manifestations of racism, Harlan's race line possesses a most limited use in today's environment of formal legal equality.

The problem of the Twenty-First Century continues to be the problem of the color line (Prashad, 2002, p. 38). In this regard, Du Bois's maxim retains its vitality. David Wilkins, in a 1996 text, echoed the throngs of scholars who have commended his enduring statement, asserting that "the accuracy of Du Bois's prophecy is beyond dispute." Its sole shortcoming, continued Wilkins, "is the implication that this most American of problems might be solved in this century" (1996, p. 3). The indices supplied above only partially explain the color line's obstinate intractability; material racial inequalities combine with police brutality, white nationalism, and countless other expressions of racial oppression to produce a color line all but destined to distinguish U.S. society (and beyond) for many years to come. And indeed, these color lines are only hardening in the context of a Donald Trump presidency, enabling the emboldening of the white nationalism of the "alt-right" and their continued (and escalating) campaigns against Muslims, undocumented immigrants, and other groups.

But what of "the problem of the [race] line"? Here again, the contrast between Du Bois and Harlan stands in sharp relief. While Du Bois's color line has been a defining element throughout the world for centuries, in the U.S., the race line problem was solved—twice. Harlan applauded its initial resolution

in *Plessy* and the *Civil Rights Cases*, crediting the Reconstruction amendments with its removal. Harlan's lament, as we have seen, was the race line's reappearance in the guise of Jim Crow; "the problem of the [race] line" thus characterized American society through the first half of the Twentieth Century. That problem would be solved again in the civil rights era, swept away by the legislation of the 1960s and the installation of legal racial equality.

Left in the race line's wake, however, was the problem Harlan did *not* intend to solve: Du Bois's color line, signified by the very racial imbalances in prestige, achievements, education, wealth, and power that Harlan had hailed in 1896. More than this: as I have detailed in the above paragraphs, Harlan could confidently dissent precisely because he understood that not only would solving the problem of the race line *not* solve the problem of the color line—it would help fortify the color line in ways scholars have only started to outline.

5. Conclusion

Harlan studies are hardly at an impasse. Interventions on the "Great Dissenter" and his legendarily complex jurisprudence continue to appear, as do new documentations providing fresh perspectives on his life. Epitomizing the latter are the transcriptions of Harlan's lectures while teaching at Columbian (now George Washington) University, which such scholars as Josh Blackman and Davison M. Douglas have gone far to publicize, drawing attention to their importance as a means to comprehend the gargantuan complexities characterizing this towering "judicial enigma" (Blackman, Frye, & McCloskey, 2013; Douglas, 2013; Przybyszewski, 1999; Yarbrough, 1995).

Asphyxiating the potential richness of these new angles on Harlan's life is the notably profound disagreement over his legacy and the import of his insights upon our society today. Nowhere does this disagreement appear more sharply than in the most scrutinized of his over one thousand opinions—his dissent in *Plessy v. Ferguson*. Harlan's colorblind Constitution remains at the nexus of the debate over the proper place of race within public policy, with legal scholars and justices across the political spectrum indefatigably calling upon his words in *Plessy* to support vastly different (and incommensurate) racial agendas. Goodwin Liu best captured this curious dilemma in speaking of two Supreme Court justices who have fervently drawn upon Harlan's opinion: "How could Justice Harlan be a hero to both Justice [Thurgood] Marshall and Justice [Clarence] Thomas on matters of race?" (2008, p. 1384) (Note 9). Precisely this quandary led Gabriel Chin, in an oft-cited law review article, to suggest that in the politically polarizing atmosphere of the post-civil rights era, "all sides covet the endorsement of Harlan's dissent" (1996, p. 154).

The preceding arguments show Chin to be only partially correct in this assessment. This article has joined a burgeoning chorus of commentators who—far from "coveting" Harlan's famed discourse—insist that his commitments to white domination paralleled that of Henry Billings Brown and his besmirched majority opinion. As George Lipsitz has recently noted, "The disagreement

between Harlan and the majority was not over whether the law should support white supremacy, but rather about the best and most effective ways of supporting it” (2015, p. 128). Here, I have contended that Harlan’s concept of the “race line” strengthens the claim that Harlan’s interests lay in perpetuating white domination in prestige, achievements, education, wealth, and power “for all time”; I have illuminated how this race line proves fully compatible with the averments located in his most quoted passage. A polity without a race line, Harlan attempted to convey, was a polity without legal racial caste: and in both instances, material racial inequality would reign. Such inequality represented but a piece of the “color line” W.E.B. Du Bois spoke of at the same historical moment of *Plessy*. As Du Bois and Harlan both well understood (separated by their mutually exclusive racial goals), the law only represented part of the network and framework of racial oppression in the U.S. and the world beyond. Equipped with this understanding, and using his influential perch on the bench of the Supreme Court, Harlan positioned himself at the vanguard of illustrating “that legal declarations of ‘equality’ are often tools for maintaining stratifying social and economic arrangements” (Spade, 2015, p. 14).

Colorblindness, as a result, has today functioned precisely as Harlan envisioned it would: as a legal device for preserving racial inequality in such areas as education, prison rates, wealth, and neighborhood quality. This colorblindness is arguably even more racially insidious than in Harlan’s conception, as it likewise explains away these enduring racial differences as a function of the incapacity of people of color to take advantage of the equal opportunities the civil rights movement put in place half a century ago (Massey, 2007, p. 112; Bonilla-Silva, 2013, p. 87). In this regard, the 1960s civil rights acts had the same effect as the 1860s post-Civil War amendments—each “removed” and “obliterated” the race line, but accomplished neither for the persistence of racial inequality in a colorblind regime.

References

- Aleinikoff, A. (1992). Re-reading Justice Harlan’s dissent in *Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*. *University of Illinois Law Review*, 4, 961-977.
- Alexander, M. (2010). *The new Jim Crow: Mass incarceration in the age of colorblindness*. New York: The NewPress.
- Amar, A. (2011). *Plessy v. Ferguson* and the anti-canon. *Pepperdine Law Review*, 39, 75-89. Retrieved from https://digitalcommons.law.yale.edu/fss_papers/3706
- Blackman, J., Frye, B., & McCloskey, M. (2013). John Marshall Harlan: Professor of law. *George Washington Law Review*, 81, 1063-1134.
- Bonilla-Silva, E. (2013). *Racism without racists: Color-blind racism and the persistence of racial inequality in America* (4th ed.). Lanham: Rowman and Littlefield.
- Breyer, S. (2015). *The Court and the world: American law and the new global realities*. New York: Knopf.

- Brooks, R. (2009). *Racial justice in the age of Obama*. Princeton: Princeton University Press.
<https://doi.org/10.1515/9781400831043>
- Brown, M., Carnoy, M., Currie, E., Duster, T., Oppenheimer, D., Shultz, M., & Wellman, D. (2003). *Whitewashing race: The myth of a color-blind society*. Berkeley: University of California Press.
- Bush, R. (2009). *The end of white world supremacy: Black internationalism and the problem of the color line*. Philadelphia: Temple University Press.
- Carr, L. (1997). *"Color-blind" racism*. Thousand Oaks, CA: Sage.
- Fair, B. K. (1997). *Notes of a racial caste baby: Color blindness and the end of affirmative action*. New York: New York University Press.
- Goldberg, D. T. (2002). *The racial state*. Malden, MA: Blackwell.
- Goldberg, D. T. (2015). *Are we all postracial yet?* Malden, MA: Polity Press.
- Grant-Thomas, A., & Orfield, G. (Eds.). (2009). *Twenty-first century color lines*. Philadelphia: Temple University Press.
- Grinsell, S. (2010). "The prejudice of caste": The misreading of Justice Harlan and the ascendancy of anticlassification. *Michigan Journal of Race and Law*, 15, 317-367.
- Han, S. (2015). *Letters of the law: Race and the fantasy of colorblindness in American law*. Stanford: Stanford Law Books. <https://doi.org/10.11126/stanford/9780804789110.001.0001>
- Harris, C. (2004). The story of *Plessy v. Ferguson*: The death and resurrection of racial formalism. In M. C. Dorf (Ed.), *Constitutional law stories* (pp. 181-222). New York: Foundation Press.
- Harris, R. (1960). *The quest for equality: The Constitution, Congress, and the Supreme Court*. Baton Rouge: Louisiana State University Press.
- Hutchison, P. (2015). The Harlan renaissance: Colorblindness and white domination in Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*. *Journal of African American Studies*, 19(4), 426-447. <https://doi.org/10.1007/s12111-015-9316-y>
- Jones, N. (1996). The Harlan dissent: The road not taken—An American tragedy. *Georgia State Law Review*, 12, 951-972.
- Jung, M. (2015). *Beneath the surface of white supremacy: Denaturalizing U.S. racism's past and present*. Stanford: Stanford University Press.
- Kennedy, R. (2013). *For discrimination: Race, affirmative action, and the law*. New York: Vintage.
- Kull, A. (1994). *The color-blind Constitution*. Cambridge: Harvard University Press.
- Lewis, D. L. (1994). *W.E.B. Du Bois, 1868-1919: Biography of a race*. New York: Holt Paperbacks.
- Lipsitz, G. (2015). From *Plessy* to *Ferguson*. *Cultural Critique*, 90, 119-139.
<https://doi.org/10.5749/culturalcritique.90.2015.0119>
- Liu, G. (2008). The first Justice Harlan. *California Law Review*, 96, 1383-1393.
- Massey, D. (2007). *Categorical inequality: The American stratification system*. New York: Russell Sage Foundation.

- Murakawa, N. (2014). *The first civil right: How liberals built prison America*. Oxford: Oxford University Press.
- O'Brien, M. T. (1998). Justice John Marshall Harlan as prophet: The *Plessy* dissenter's color-blind constitution. *William and Mary Bill of Rights Journal*, 6, 753-775.
- Oliver, M., & Shapiro, T. M. (2006). *Black wealth/white wealth: A new perspective on racial inequality* (2nd ed.). New York: Routledge.
- Omi, M., & Winant, H. (2015). *Racial formation in the United States* (3rd ed.). New York: Routledge.
- Porter, E. (2010). *The problem of the future world: W.E.B. Du Bois and the race concept at midcentury*. Durham: Duke University Press. <https://doi.org/10.1215/9780822393191>
- Powell, C. M. (2008). Rhetorical neutrality: Colorblindness, Frederick Douglass, and inverted critical race theory. *Cleveland State Law Review*, 56, 823-894.
- Powell, J. A. (1995). An agenda for the post-civil rights era. *University of San Francisco Law Review*, 29, 889-910.
- Prashad, V. (2002). *Everybody was Kung Fu fighting: Afro-Asian connections and the myth of cultural purity*. Boston: Beacon Press.
- Przybyszewski, L. (1999). *The republic according to John Marshall Harlan*. Chapel Hill: University of North Carolina Press.
- Spade, D. (2015). *Normal life: Administrative violence, critical trans politics, and the limits of law*. Durham: Duke University Press. <https://doi.org/10.1215/9780822374794>
- Turner, J. (2012). *Awakening to race: Individualism and social consciousness in America*. Chicago: Chicago University Press. <https://doi.org/10.7208/chicago/9780226817149.001.0001>
- Turner, R. (2015). The way to stop discrimination on the basis of race... *Stanford Journal of Civil Rights and Civil Liberties*, 11, 45-88.
- Wacquant, L. (2009). *Punishing the poor: The neoliberal government of social insecurity*. Durham: Duke University Press. <https://doi.org/10.1215/9780822392255>
- Weiner, H. (2009). The subordinated meaning of "color-blind": How John Marshall Harlan's words have been erroneously commandeered. *Journal of Social Change*, 11, 45-109.
- Wilkins, D. (1996). Introduction: The context of race. In K. A. Appiah, & A. Gutmann (Eds.), *Color conscious: The political morality of race* (pp. 3-29). Princeton: Princeton University Press. <https://doi.org/10.3171/foc.1996.1.2.3>
- Williams, L. F. (2003). *The constraint of race: Legacies of white skin privilege in America*. University Park, PA: Pennsylvania State University Press.
- Winant, H. (2002). *The world is a ghetto: Race and democracy since World War II*. New York: Basic Books.
- Wu, F. (2002). *Yellow: Race in America beyond black and white*. New York: Basic Books.
- Yarbrough, T. (1995). *Judicial enigma: The first Justice Harlan*. Oxford: Oxford University Press.

Notes

Note 1. For conservatives, Harlan's clarion call for colorblindness meant exactly that: full colorblindness in the legal realm, which provides a crucial piece of the judicial ammunition and vitriol they aim at such race-conscious policies as affirmative action. As Justice Clarence Thomas declared in the 2007 case *Parents Involved in Community Schools v. Seattle School District No. 1*, "My view of the Constitution is Justice Harlan's view in *Plessy*" (551 U.S. 701, 772). In *The Color-Blind Constitution*, Andrew Kull (1992, p. 1) writes that Harlan's "comfortable metaphor [the color-blind Constitution] stands for an austere proposition: that American government is, or ought to be, denied the power to distinguish between citizens on the basis of race."

Note 2. Many oppose the conservative views highlighted in Note 1, insisting that Harlan's antagonism to Jim Crow suggests that he would fiercely support the very color-conscious programs conservatives assert he would abhor. Alexander Aleinikoff epitomizes this stance, arguing for the need to "reclaim Harlan's opinion [from conservatives] in a march towards a new birth of freedom" (1992, p. 977). For other examples, see Weiner 2009; Fair 1997; Grinsell 2010; and Jones 1996.

Note 3. Much of this section draws upon my earlier piece "The Harlan Renaissance" (Hutchison, 2015).

Note 4. As the authors of *Whitewashing Race* assert, the Reconstruction era was marked by a "combination of legal equality with social and economic racial inequality....At the time [of Reconstruction], it was commonly understood that the Fourteenth Amendment guaranteed equality before the law....But few believed that the Thirteenth, Fourteenth, or Fifteenth Amendments required social or economic equality between blacks and whites" (Brown et. al., 2003, p. 31).

Note 5. The best-known governmental attempt was the short-lived Freedmen's Bureau. Linda Faye Williams (2003, p. 47) assessed the Bureau's successes and failures in creating economic equality for blacks, writing: "In the end, the Bureau did not represent a significant or sustained challenge to whiteness as a real or imagined property value. Freed people were denied means of economic independence even as they remained uncompensated for more than 250 years of unpaid labor....Perhaps, however, the most important conclusion to draw is that whatever the Bureau's shortcomings, it surely accomplished more for the freed people than they would have gotten if there had been no Bureau. If the result fell far short of success, the alternative might well have been total failure."

Note 6. Frank Wu (2002, p. 146) notes, "Harlan believed only that African Americans were equal in a formal and technical sense—as laypeople sometimes contemptuously regard the law; as only a game of semantics. Harlan did not flinch from declaring that African Americans are inferior in every other respect."

Note 7. The same could be said of the rest of Harlan’s key arguments: “Our Constitution *is* color-blind”; “In respect of civil rights, all citizens *are* equal before the law”; and so forth. And: the post-Civil War amendments eliminated (past tense) the race line, but the white race is (still) dominant.

Note 8. As Cedric Merlin Powell (2008, p. 831, n. 31) asserted, the Reconstruction Amendments “were debated, drafted, and ratified in the context of race—the newly emancipated slaves had to be brought into the American polity as full fledged citizens. To do so, the racial caste system had to be dismantled, and these constitutional amendments did just that.”

Note 9. Liu also noted in this vein that in a single case, *Parents Involved in Community Schools v. Seattle School District No. 1* (551 U.S. 701), “citations to Harlan’s dissent in *Plessy v. Ferguson* appeared seven times across four separate opinions” (2008, p. 1384).