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Book Review: John Marshall Harlan: Great
Dissenter of the Warren Court. by Tinsley E.
Yarbrough.

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rights programs, including preferences, that enabled him to reach or stay in the middle-class. Thus, affirmative action may in one sense be self-limiting. Its very success may be partially responsible for calls from within some quarters of the black community to limit it.

This is not, however, a simple case either of majoritarian cooption or of some victims pulling up the ladder before others have a chance to escape. It instead reflects the importance of economic status to self-definition in our culture. As Carter says: "The day is gone when large numbers of black students see themselves as the vanguard of a revolution; what students want now, and with reason, is a piece of the action. So do I." Perhaps one effect of the civil rights movement's success is the development of such class fissures within the African-American community. Carter's reflections, then, are ultimately not about affirmative action, but about what it means to be both black and traditionally successful in a world that still limits many blacks' chances of success. The book's importance, in other words, lies not in its arguments, but in its ambivalences.

JOHN MARSHALL HARLAN: GREAT DISSENER OF THE WARREN COURT. By Tinsley E. Yarbrough.¹ New York: Oxford University Press. 1992. Pp. xvi, 395. Cloth, \$29.95.

*Michael E. Parrish*²

As Earl Warren and his Court moved aggressively in the late 1950s and early 1960s to eradicate racial segregation and to extend the Bill of Rights to the states, the first Justice John Marshall Harlan became a patron saint to Hugo Black, William O. Douglas and other of its more liberal, activist members. The former slave owner from Kentucky, mocked by Justice Holmes as "my lion-hearted friend," had dissented in *The Civil Rights Cases*,³ *Plessy v. Ferguson*,⁴ *Hurtado v. California*,⁵ and *Twining v. New Jersey*,⁶ all of which established his claim to being the jurisprudential progenitor of those who battled to expunge racism from the Constitution and to incorporate the Bill of Rights into the guarantees of the Fourteenth Amendment.

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1. Professor of Political Science, East Carolina University.
 2. Professor of History, University of California, San Diego.
 3. 109 U.S. 3 (1883).
 4. 163 U.S. 537 (1896).
 5. 110 U.S. 516 (1884).
 6. 211 U.S. 78 (1908).

The first Harlan's burgeoning reputation for liberalism did not go unchallenged, however. Holmes' own progeny, Felix Frankfurter, often on the defensive during the early Warren years, reminded the second Justice John Marshall Harlan that his grandfather had written for a unanimous Court in 1899 when the Justices refused to block a Georgia school board from closing an all-black high school while continuing to operate similar institutions for white students.⁷ Whether to test his own doubts about the *Brown* decision or simply to needle his junior colleague, Frankfurter pursued the issue relentlessly for several weeks. "I submit that any judge who thought that the Constitution, as a legal proposition, is color blind, would at least have been able to reach the lawyer-like result . . . in not leaving colored high school children out in the cold," he concluded. With good reason, Harlan II remained unpersuaded by Frankfurter's analysis of *Cumming* and convinced that his grandfather would have ruled against racially segregated public schools had a later case presented that issue.⁸

For their part, those who placed Harlan I on a liberal pedestal in the 1960s seldom recalled that he wrote for the majority in *Adair v. United States*,⁹ where the Justices struck down on "freedom of contract" grounds an act of Congress that had attempted to end the union-busting practice of yellow-dog contracts on the nation's railroads. How the jurist who dissented in *Lochner* and wrote a sweeping opinion that affirmed a broad commerce power for Congress¹⁰ could have also penned *Adair* has baffled legal scholars for a long time. Harlan I, it seems, was a man of contradictions.

So, too, was his namesake and grandson, a Rhodes Scholar and a high-priced Wall Street lawyer, who was named to the high court by Eisenhower in 1955 and served until 1971. Often bracketed with Frankfurter and Potter Stewart as one of the Warren Court's frequent nay-sayers, Harlan II is most frequently remembered for resisting the application of the Bill of Rights to the states, rejecting court-ordered reapportionment, opposing the *Miranda* warnings,¹¹ and backing the Nixon administration in the Pentagon Papers

7. *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899).

8. Frankfurter conveniently ignored Harlan I's passionate dissent in *Berea College v. Commonwealth of Kentucky*, 211 U.S. 45, 67 (1908) where the majority, including Holmes, sustained a state law prohibiting racial integration in private schools. "I am of opinion," Harlan wrote, "that in its essential parts the statute is an arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile state action and is, therefore, void."

9. 208 U.S. 161 (1908).

10. *Champion v. Ames*, 188 U.S. 321 (1903).

11. *Miranda v. Arizona*, 384 U.S. 436 (1966).

case.¹²

But Harlan II has enjoyed a major renaissance of late that should receive yet another boost with the publication of Tinsley Yarbrough's fine biography. This past June, when the Supreme Court largely reaffirmed the right to abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹³ the five-Justice majority rested its constitutional arguments squarely upon Harlan II's broad conception of the Fourteenth Amendment's Due Process Clause which he set forth first in dissent in *Poe v. Ullman*¹⁴ and later restated when concurring in *Griswold v. Connecticut*.¹⁵ How Harlan II would have voted in *Roe v. Wade*¹⁶ or *Casey* must remain as shrouded in mystery as his grandfather's views on segregated public schools, but it can be argued persuasively that by utilizing his approach to the liberty protected by the Fourteenth Amendment in *Casey*, the majority placed abortion rights on a firmer constitutional foundation than ever before.¹⁷

Yarbrough, whose previous books examined the judicial careers of J. Waties Waring, Hugo Black and Frank Johnson, has written a sympathetic yet critical interpretation of the Justice most often associated with the conservative wing of the Warren Court, a spokesman for judicial restraint in an age of activism, a Frankfurter, some wag observed, without the mustard. Such a characterization is probably unfair to Harlan, who certainly lacked the latter's combative personality and acerbic wit, but whose judicial impact may prove to be more durable for those very same reasons.

Utilizing all the extant judicial papers from the period and drawing upon extensive interviews with Harlan's former clerks and associates, Yarbrough's study ranks among the best biographical works covering the Warren years. Avoiding tedious chronology, his wise selection of particular cases highlight Harlan's central values without drowning the reader in a swamp of detail. The Harlan who emerges was a very intelligent, kindly, well-intentioned man, but one who exhibited all the cultural and political limitations of his social class. When he was good, as in *Poe v. Ullman* or *Griswold*, he could be very, very good. But when he was bad, as in *Flemming*,¹⁸

12. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

13. 112 S. Ct. 2791, 2804-08 (1992).

14. 367 U.S. 497 (1961).

15. 381 U.S. 479 (1965).

16. 410 U.S. 113 (1973).

17. See Ronald Dworkin, "The Center Holds," *The New York Review of Books*, August 13, 1992, 29-33.

18. 363 U.S. 603, 617, 638 (1960). Harlan provided the fifth vote and wrote for the majority in upholding the termination of social security benefits to an alien who had been deported from the United States for membership in the Communist Party during the 1930s.

he could be horrid.

Frankfurter, the immigrant lad who made good, often gave offense to allies and adversaries alike. Harlan II seldom did. He was the very model of the American patrician—raised in genteel comfort, educated at prep schools, Princeton and Oxford, polite, well mannered, well tailored, in short, a gentleman who appears to have been taught from the cradle that people of his background were destined to rule the nation's politics and legal system.

In this respect Harlan II came from a long line of patrician judicial forbearers—Joseph Story, who agonized over the evils of slavery, but sustained the Fugitive Slave Act; Oliver Wendell Holmes, who relished the clash of ideas, but helped put Debs in prison; Charles Evans Hughes, who deplored debt peonage, but fought the economic reforms of the New Deal. The most recent incarnation of this social type appears to have been Lewis Franklin Powell, Jr., the courtly Virginian, who fought segregation and cast crucial votes on abortion and affirmative action, but placed consensual homosexual relations beyond the pale of constitutionally protected liberty and dismissed statistical arguments showing gross racial disparities in the imposition of capital punishment.¹⁹

The patrician as jurist deplores anti-radical witch-hunts led by the hoi polloi that threaten to undermine the efficacy of more genteel forms of repression. He defends privacy, especially when linked to the conventional, heterosexual pleasures of his social class. He seldom votes to disturb the existing distribution of property and political relations. That, in a nutshell, was Harlan II, the Justice who helped inter the Smith Act in *Yates v. United States*,²⁰ but sent Junius Scales to jail a few years later under the same statute.²¹

In addition to *Poe v. Ullman* and *Griswold*, Harlan II raised

Justice Brennan's dissent branded the law and the termination a bill of attainder through which Congress sought to punish "aliens deported for conduct displeasing to the lawmakers." Harlan argued that judicial inquiries into legislative motives were "at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed."

19. On Powell see especially his votes in *Keyes v. Denver School Dist. No. 1*, 413 U.S. 189 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *University of California Regents v. Bakke*, 438 U.S. 265 (1978); *Bowers v. Hardwick*, 478 U.S. 186 (1986); and *McCleskey v. Kemp*, 481 U.S. 279 (1987).

20. 354 U.S. 298 (1957).

21. *Scales v. United States*, 367 U.S. 203 (1961). Harlan voted to restrict the scope of congressional anticommunist inquiries in *Watkins v. United States*, 354 U.S. 178 (1957), but two years later eviscerated that ruling in *Barenblatt v. United States*, 360 U.S. 109 (1959). He wrote for the 5-4 majority that sustained the registration provisions of the McCarran Act and in favor of New York's broad anticommunist loyalty oath requirement for public school teachers. See *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

high the banner of privacy in *Roth*,²² a major obscenity decision of the Warren years, and *Chimel v. California*,²³ which narrowed the limits of warrantless searches incident to an arrest. But he resolutely opposed the reapportionment revolution and was the lone dissenter in *Flast v. Cohen*,²⁴ where the Justices modified standing requirements and broadened the opportunities for taxpayers to contest government programs. He seldom appears to have met a monopolistic business corporation he didn't like.²⁵

A lawyer's lawyer, it was appropriate that Harlan filled the seat occupied by Robert Jackson, another first-class advocate, litigator, and process-oriented jurist, whose occasional eloquence on behalf of freedom of speech and liberty was exceeded only by his belief in conspiracies and his passion for order.²⁶ But from the perspective of 1992 and the present Supreme Court, now packed with political lackeys and intellectual harlots, even Jackson and Harlan have taken on the stature of devoted civil libertarians. One can only hope and pray that the *Casey* five continue to read the Harlan of *Griswold* and not the Harlan of *Flemming*.

THE CONSTITUTION IN CONFLICT. By Robert A. Burt.¹ Cambridge, Mass.: Harvard University Press. 1992. Pp. 454. \$29.95.

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The Constitution in Conflict is a disappointingly weak book about a powerful and important idea in constitutional law. The

22. *Roth v. United States*, 354 U.S. 476 (1957).

23. 395 U.S. 752 (1969).

24. 392 U.S. 83 (1968).

25. Harlan's principal clients at Root, Clark, Buckner & Howland prior to his judicial appointments had included American Telephone and Telegraph, Western Electric, International Telephone and Telegraph, the Gillette Safety Razor Company, American Optical and DuPont. He represented the latter in their unsuccessful effort to maintain a dominant financial interest in General Motors, and when the Supreme Court finally sustained the government's Clayton Act complaint, he recused himself, but later denounced Justice Brennan's opinion for its "superficial understanding of a really impressive record." The record, of course, had been one he helped to prepare at Root, Clark.

26. Compare Jackson in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), with Jackson in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), or *Kunz v. New York*, 340 U.S. 290 (1951).

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