RUNNING HEAD: John Marshall Harlan I

Exploring the Judicial Philosophy and Intellectual Independence of John Marshall Harlan I: A Temporal Examination across Three Chief Justices

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Introduction

Justice John Marshall Harlan I was appointed to the United States Supreme Court by President Rutherford Birchard Hayes on October 29, 1877.[ii] At the time of his appointment, Morrison Remick Waite was Chief Justice of the Court. Justice Harlan served under Chief Justice Waite until 1888. After the death of Chief Justice Waite, Justice Harlan served under two other Chief Justices: Melville Weston Fuller between 1888 and 1910 and Edward Douglass White, Jr., in 1910 and 1911.[iii] Justice Harlan is one of twenty-two associate justices to have served with at least three different Chief Justices.[iv]

The Chief Justice of the United States Supreme Court has three primary responsibilities: managerial leadership, intellectual leadership, and social leadership,[v] all of which require sustained interaction with the associate justices serving during their tenure. Given the influence that necessarily accompanies the position of Chief Justice, and Justice Harlan's position of having served with three different Chief Justices, the current essay explores the intellectual relationship between Justice Harlan and the three Chief Justices with whom he served. Specifically, an empirical exploration attempts to determine whether Justice Harlan's judicial philosophy and decisionmaking were influenced by the three Chief Justices with whom he served or whether he remained intellectually independent throughout his thirty-four year career on the Court.

Part I of this essay provides a detailed description of Justice Harlan: his upbringing; educational background; political and religious affiliations and experiences; and judicial, social, and political philosophies.

Part II, first, discusses the extent to which Chief Justice Waite fulfilled the responsibilities of managerial, intellectual, and social leadership during his tenure as Chief Justice; second, provides the results from a quantitative analysis of all Supreme Court decisions during the Waite era; third, presents a qualitative analysis of those cases in which Justice Harlan and Chief Justice Waite recorded divergent opinions; and fourth, reviews Justice Harlan's contributions to *Strauder v. West Virginia*[vi] and the *Civil Rights Cases*.[vii]

Part III, first, discusses the extent to which Chief Justice Fuller fulfilled the responsibilities of managerial, intellectual, and social leadership during his tenure as Chief Justice; second, provides the results from a quantitative analysis of all Supreme Court decisions during the Fuller era; third, presents a qualitative analysis of those cases in which Justice Harlan and Chief Justice Fuller recorded divergent opinions; and fourth, reviews Justice Harlan's contributions to *Fong Yue Ting v. United States*[viii] and *Plessy v. Ferguson*.[ix]

Part IV, first, discusses the extent to which Chief Justice White fulfilled the responsibilities of managerial, intellectual, and social leadership during his career as Chief Justice; second, provides the results from a quantitative analysis of all Supreme Court decisions during the White era; third, presents a qualitative analysis of those cases in which Justice Harlan and Chief Justice White recorded divergent opinions; and fourth, reviews Justice Harlan's contribution to *Standard Oil Company v. United States*.[x]

Part V concludes that Justice Harlan's judicial philosophy remained independent throughout his term on the Court and that the Chief Justices with whom he served likely had little influence on his decisionmaking.

I. Background of John Marshall Harlan I

John Marshall Harlan I was born on a farm in Boyle County, Kentucky, on June 1, 1833, the son of James Harlan, an influential lawyer and politician who served as a United States Attorney and in the United States House of Representatives.[xi] The family moved to Harrodsburg, Kentucky, in 1835, and to Frankfort, the capital of Kentucky, in 1840.[xii] A descendant of Quaker immigrants and a stern Presbyterian,[xiii] Justice Harlan was raised in comfortable circumstances in a slaveholding family.[xiv]

Justice Harlan received his A.B. degree from Centre College in 1850 at the age of seventeen and subsequently studied law at Transylvania University for two years.[xv] In 1853, he was admitted to the bar and began to practice law. In 1854, Harlan was elected city attorney, and, in 1856, was reelected for a second two-year term.[xvi] In that same year, he married Malvina Shanklin of Evansville, Indiana, whose memoirs detailing her relationship with her husband and their lives in Kentucky were recently published.[xvii] The Harlans had six children.[xviii] A grandson – John Marshall Harlan II – served on the Supreme Court between 1955 and 1971.[xix]

In 1858, Justice Harlan, at the age of twenty-five, served for one year as Franklin County Judge, winning election on the Know Nothing ticket.[xx] The Know Nothings, a nativist (anti-immigrant) party, enjoyed brief popularity between the collapse of the Whig party and the rise of the Republican party.[xxi] The nativist movement, championing the so-called rights of Protestant, American-born male voters, grew out of fear over new waves of immigration.

Between 1820 and 1845, a modest influx of immigrants arrived in the United States. Immigration surged between 1845 and 1854, however, with three million aliens

pouring into seaboard cities like Boston and New York. With this influx of immigrants, membership in the Know Nothing party soared.[xxii] By 1854, the Know-Nothings had formed the American Party and won elections nationwide. Once they began to try to enact legislation, however, the Know-Nothings became mired in political reality.[xxiii] Although they had transcended their own xenophobic expressions and tried to achieve desirable reform, their accomplishments were transitory.

Justice Harlan ran for the United States House of Representatives in 1859, but was narrowly defeated.[xxiv] In 1861, he moved to Louisville to practice law. He believed that a civil war was likely and that, if war came, the border states would leave the Union.[xxv] On April 12, 1861, the Civil War began when the Confederate army attacked Fort Sumter.[xxvi] During the Civil War, Justice Harlan joined the Union Army and served as a Colonel. He resigned his commission in 1863 to help his family at home, narrowly missing promotion to Brigadier General, which was before the United States Senate at the time of his resignation.[xxvii]

After his return home, Justice Harlan was elected Attorney General of Kentucky and served as a member of the Constitutional Union Party between 1863 and 1867.[xxviii] In the Presidential election of 1864, he bitterly criticized Abraham Lincoln and voiced his displeasure with the Thirteenth Amendment. He firmly believed that the abolition of slavery by the Federal government was "a flagrant invasion of the right of self-government."[xxix] Indeed, Justice Harlan himself owned slaves until he was forced to free them by the passage of the Thirteenth Amendment.

In the Presidential campaign of 1868, Justice Harlan switched camps, embracing the Republican Party and Ulysses S. Grant for President. He now defended

the Civil War Amendments because he believed they were necessary for the reconstruction of the Union.[xxx] Justice Harlan ran for Governor of Kentucky in 1875 on the Republican ticket, but lost to J.B. McCreary.[xxxi] Following President Rutherford B. Hayes' presidential victory, a campaign on which he assisted, the President considered Justice Harlan for Attorney General, but was advised against it for political reasons.[xxxii] Justice Harlan subsequently refused a diplomatic post and ultimately accepted an appointment to the Louisiana Commission.[xxxiii]

A muscular, athletic,[xxxiv] and imposing figure at 6' 2" and 240 pounds with a deep and powerful voice,[xxxv] Justice Harlan was nominated to the Supreme Court by President Hayes on October 17, 1877, to fill the vacancy caused by the resignation of Justice David Davis, who left the Court to run for the United States Senate.[xxxvi] The Senate confirmed Justice Harlan's appointment on November 29, 1877,[xxxvii] and he began his service, at forty-four years old, on December 10, 1877.[xxxviii]

Justice Harlan had a reputation on the bench for individualism, frankness, honesty and integrity.[xxxix] His deep religious convictions shaped, in great part, his understanding of the Supreme Court and the role of judicial decisionmaking.[xl] He viewed the Court as guardian of the Constitution, but fervently eschewed Justice Stephen Field's "natural rights" philosophy.[xli] Justice Harlan was "a stern defender of the Bill of Rights and the due process clause, and despite his border state origin became a vigorous and eloquent advocate of a nationalistic interpretation of the Thirteenth, Fourteenth, and Fifteenth Amendments."[xlii] A fervent federalist, a strict national constitutionalist,[xliii] and the author of more than 1,100 opinions (approximately 700 majority, 100 concurring, and 300 dissenting),[xliv] Justice Harlan, known as "The Great Dissenter," died on October 14,

1911, at the age of seventy-eight. He served on the Supreme Court for thirty-four years, a tenure exceeded by only four other Justices.[xlv]

II. Justice Harlan and the Waite Court

a. Background

Chief Justice Waite was nominated to the Supreme Court on January 19, 1874, and confirmed on January 21, 1874.[xlvi] The process by which Chief Justice Waite was nominated – as the relatively obscure, seventh choice of President Ulysses S. Grant[xlvii] – is viewed by some as a harbinger to the mediocrity that characterized his era.[xlviii] Moreover, he was nominated to a position that several sitting associates justices, including John F. Swayne, William Strong, and Samuel F. Miller, had coveted, which further hindered his appeal.[xlix] These stumbling blocks aside, Chief Justice Waite is now viewed as an exceptional social and managerial leader and an adequate intellectual one.[l] While he was able to "fashion camaraderie necessary for the Court to function effectively"[li] and "maintain Court unity,[lii] he "relinquished much of the intellectual leadership of the Court to his colleagues.[liii] The subsections that follow, first, provide a quantitative analysis of those cases in which both Chief Justice Waite and Justice Harlan participated; second, provide a qualitative analysis of those cases in which Chief Justice Waite and Justice Harlan recorded divergent opinions; and third, provide an in-depth examination of *Strauder*[liv] and the *Civil Rights Cases*.[lv]

b. Quantitative Analysis

The quantitative analysis of Supreme Court decisions during the Waite, Fuller, and White Courts involved several steps. First, the analysis was restricted to only those decisions in which Justice Harlan and the aforementioned Chief Justices participated contemporaneously. All decisions in which either Justice Harlan or the Chief Justice failed to participate were excluded. Second, for each decision rendered, the following information from the United States Reports was extracted: the year the case was decided, whether the case was decided unanimously, whether the Chief Justice voted in the majority, whether the Chief Justice authored the majority opinion, whether the Chief Justice submitted a concurring or dissenting opinion, whether Justice Harlan voted in the majority, whether Justice Harlan authored the majority opinion, and whether Justice Harlan submitted a concurring or dissenting opinion. With the exception of the year the case was decided, all of the variables were coded dichotomously (No/Yes) and entered into an SPSS (Statistical Package for the Social Sciences) database. Third, univariate and bivariate analyses were conducted with all of the available data.

A total of 2,672 Supreme Court cases were decided during the time that Chief Justice Waite and Justice Harlan served simultaneously. Of these decisions, 2,449 (92 percent) were decided unanimously. This consistent agreement, which spanned more than a decade, suggests that Chief Justice Waite probably wielded very little intellectual influence over the associate justices. Rather, the high majority of unanimous decisions suggests either that the cases coming before the Court were straightforward or that all of the Justices enjoyed comparable intellectual acumen.

Of these 2,672 cases, Justice Harlan voted with the majority 97 percent of the time (*n*=2,598), while Chief Justice Waite sided with the majority 98 percent of the time (*n*=2,624). Justice Harlan authored the majority opinion eight percent of the time (*n*=222), while Chief Justice Waite wrote the majority opinion in 713 cases (27 percent). During this time frame, Justice Harlan authored six concurring (less than one percent) and 74 (three percent) dissenting opinions, while Chief Justice Waite wrote two (less than one percent) concurring and 48 (two percent) dissenting opinions.

Justice Harlan and Chief Justice Waite cast similar votes in 2,570 cases (96 percent), opposing each other in 102 cases (four percent). When Chief Justice Waite sided with the majority, Justice Harlan authored a dissenting opinion in 64 cases. When Justice Harlan sided with the majority, Chief Justice Waite authored 38 dissenting opinions. A qualitative exploration of these 102 cases follows below.

c. Qualitative Analysis

The qualitative analysis of the 102 cases in which Justice Harlan and Chief Justice Waite voiced divergent opinions yielded no evidence in support of the hypothesis that the Chief Justice influenced Justice Harlan's decisionmaking, for four reasons. First, many dissenting opinions were recognized with no explanation for *why* they were submitted. That is, at the end of the majority opinion, only the phrase "Justice Harlan dissents" was presented with no additional textual explanation.

Second, those dissenting opinions that were accompanied by textual support were sometimes authored by a different justice. It is impossible to know, therefore, the extent to which either Chief Justice Waite or Justice Harlan contributed to that opinion.

Third, those dissenting opinions that were authored by Chief Justice Waite or Justice Harlan were sometimes co-authored, again making it impossible to distinguish between intellectual contributions.

Finally, there were no overt or subtle textual references, by either Chief Justice Waite or Justice Harlan, which suggested an influence by the former over the latter. In short, if Chief Justice Waite did influence Justice Harlan's judicial decisionmaking, there was no evidence of it in the qualitative analysis.

Despite the lack of direct qualitative evidence, however, there was evidence to suggest that Justice Harlan remained consistent in his judicial thought throughout his tenure on the Waite Court. This temporal intellectual consistency suggests that, rather than being influenced by Chief Justice Waite, Justice Harlan remained true to his own ideals and consistently voted his own conscience.

d. Case Studies

i. *Strauder v. West Virginia*

In *Strauder*, a black man was convicted of murder in a West Virginia state court by a jury on which blacks had been excluded by statute.[lvi] The Supreme Court of West Virginia affirmed the conviction. The United States Supreme Court, in a 7-2 vote decision in which both Justices Harlan and Waite voted with the majority (Justices Stephen J. Field and Nathan Clifford dissented), reversed the conviction, holding that the Fourteenth Amendment conferred upon every citizen the right to a trial by a "jury selected and impaneled without discrimination against his race or color.[lvii] The issue, therefore, was not whether blacks had the right to a jury of other blacks, but whether

black citizens were eligible for empanelling in the jury pool. Because the intent of the Fourteenth Amendment was to remove race from the equation in civil matters, the Court concluded that the Fourteenth Amendment was designed to assure that blacks be allowed to enjoy all of the civil rights enjoyed by whites.

ii. *Civil Rights Cases*

The Civil Rights Act, passed on March 1, 1875, provided that, "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theatres, and other places of amusement . . . applicable alike to citizens of every race and color, regardless of any previous condition of servitude."[lviii] In the *Civil Rights Cases*, six cases were consolidated from five states in which blacks had sued theaters, hotels, and transit companies that had excluded them from "white only" facilities.[lix] The primary issue in the *Civil Rights Cases* was whether Congress had the right to enact a law requiring equal access to public accommodations under its Fourteenth Amendment powers.

In an 8-1 vote, in which only Justice Harlan dissented, the Court held that the language of the Fourteenth Amendment, which prohibited denial of equal protection by state governments, did not give Congress power to regulate private acts.[lx] That is, Congress lacked the constitutional authority under the enforcement provisions of the Fourteenth Amendment to outlaw racial discrimination by private individuals and organizations. Holding that the Civil Rights Act of 1875 was unconstitutional, the *Civil*

Rights Cases espoused the position that Congressional legislation can only be corrective, and that no laws could infringe on the States' ability to govern themselves.[lxi]

In his dissent, Justice Harlan challenged the Court's narrow interpretation of the Fourteenth Amendment.[lxii] He maintained that Congress, through the 1875 Civil Rights Act, was attempting to overcome the refusal of the states to protect those rights denied to blacks that white citizens took as their birthright. As Justice Harlan noted, "the one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of their legal right to take that rank, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained."[lxiii] In his dissent, Justice Harlan correctly predicted the consequences of the decision in the *Civil Rights Cases*. The ruling ushered in widespread segregation in housing, employment, and public life that confined blacks to second-class citizenship until the passage of civil rights legislation in the 1960s.

III. Justice Harlan and the Fuller Court

a. Background

Chief Justice Fuller was nominated to the Supreme Court by President Grover Cleveland on April 30, 1988, to replace Chief Justice Waite.[lxiv] He was confirmed by the Senate on July 20, 1888.[lxv] Justice Harlan's presence on the Fuller Court spanned more than two decades. Of the three Chief Justices under whom he served, his tenure on the Fuller Court was the longest. Justice Harlan was also the only associate justice to have served for the duration of the Fuller Court.[lxvi]

Chief Justice Fuller is generally recognized as one of the most prolific writers and one of the best administrators the Supreme Court has ever had.[lxvii] He was also known for perpetuating good working relationships with the associate justices and excelled at the social leadership role in the Court.[lxviii] What he enjoyed in social leadership, however, he may have lacked in intellectual brilliance and almost always voted with the majority.[lxix]

When Fuller became Chief Justice, the United States was experiencing significant economic change, particularly the growth of industry and corporate enterprise.[lxx] As a result of the economic importance of the times, the Fuller Court was characterized by its "dedication to economic liberty as the preeminent constitutional value."[lxxi] In addition to the economic issues of the era, the Fuller Court also addressed significant issues related to civil rights and immigration. There was still a push to establish "white rule" in the South,[lxxii] and there was growing apprehension about the flood of immigrants in the late nineteenth century. The subsections that follow, first, provide a quantitative analysis of those cases in which both Chief Justice Fuller and Justice Harlan participated; second, provide a qualitative analysis of those cases in which Chief Justice Fuller and Justice Harlan recorded divergent opinions; and third, examine immigration and civil rights issues in *Fong Yue Ting*[lxxiii] and *Plessy*.[lxxiv]

b. Quantitative Analysis

A total of 4,724 Supreme Court cases were decided during the period in which Chief Justice Fuller and Justice Harlan served contemporaneously. Of these decisions, 3,961 (84 percent) were decided unanimously. While the degree of unanimity during the

Fuller era was significantly lower than in the Waite era (92 percent v. 84 percent, $p<0.001$), the statistical significance represents little practical significance and is most likely due to the large number of cases under scrutiny. The consistent agreement during this era, which spanned more than two decades, suggests that Chief Justice Fuller probably wielded very little intellectual influence over the associate justices. Like in the Waite era, the high proportion of unanimous decisions suggests either that the cases coming before the Court were uncomplicated or that all of the Justices enjoyed comparable decisionmaking skills.

Of these 4,724 cases, Justice Harlan voted with the majority 94 percent of the time (n=4,439), while Chief Justice Fuller sided with the majority 97 percent of the time (n=4,589). Justice Harlan authored the majority opinion nine percent of the time (n=444), while Chief Justice Fuller wrote the majority opinion in 758 cases (16 percent). During this time frame, Justice Harlan authored 41 concurring (less than one percent) and 285 (six percent) dissenting opinions, while Chief Justice Fuller wrote seven (less than one percent) concurring and 135 (three percent) dissenting opinions.

Justice Harlan and Chief Justice Fuller cast similar votes in 4,392 cases (93 percent), opposing each other in 332 cases (seven percent). When Chief Justice Waite sided with the majority, Justice Harlan authored a dissenting opinion in 241 cases. When Justice Harlan sided with the majority, Chief Justice Fuller authored 91 dissenting opinions. A qualitative exploration of these 332 cases follows below.

c. Qualitative Analysis

Like with Chief Justice Waite, the qualitative analysis of those cases in which Justice Harlan and Chief Justice Fuller voiced divergent opinions yielded no evidence in support of the hypothesis that the Chief Justice influenced Justice Harlan's decisionmaking. Justice Harlan did, however, remain consistent in his judicial thought throughout his tenure on the Fuller Court. Like during the Waite era, this intellectual consistency suggests that Justice Harlan's contributions to the Court were made independent of any external influence by Chief Justice Fuller.

d. Case Studies

i. *Fong Yue Ting v. United States*

In *Fong Yue Ting*, a Chinese laborer who had been working legally in the United States applied to the Internal Revenue Service for a certificate of residence. Denied because his witnesses were Chinese, he was subsequently arrested for violating the Act of 1892, part of which reiterated the bar on new Chinese laborers into the United States.[lxxv] In addition, the Act called for deportation. The plaintiff's deportation was then ordered after he could not prove, with a white witness, that he had been living in the United States legally.[lxxvi]

The Supreme Court was faced with deciding whether the deportation provision of the Act was constitutional because it granted Congress the right to expel persons who do not comply with the requirements to become citizens. The Court, in a 6-3 decision in which Justice Harlan sided with the majority and Justice Fuller authored a dissenting opinion, ruled that Congress did have the right to deport the plaintiff.[lxxvii] Relying on the

foreign affairs power, the majority acknowledged that there was little place for the judiciary in the immigration process. *Fong Yue Ting* explicitly held that the power to deport aliens rests upon the same ground as the exclusion power and is equally "absolute and unqualified."[lxxviii]

In his dissent, Justice Fuller stated that the judiciary did have the power to review Congressional legislation that affected Chinese laborers who are lawfully within the United States.[lxxix] Challenging the notion that aliens are entitled to avail themselves of the Constitution for all matters except those related to their expulsion, Chief Justice Fuller argued that deportation without a trial amounted to criminal punishment, and was thus a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Specifically, he maintained that "a legislative sentence of banishment . . . contains within it the germs of the assertion of an unlimited and arbitrary power . . . incompatible with the immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written constitution by which that government was created, and those principles secured."[lxxx] *Fong Yue Ting* thus represents a jurisprudential difference between Chief Justice Fuller and Justice Harlan, with the former advocating judicial review in all constitutional matters and the latter, consistent with Know-Nothing rhetoric, voting against the expansion of immigrant rights.

ii. *Plessy v. Ferguson*

Immediately after the end of the Civil War, the Federal government provided some protection for the civil rights of the newly freed slaves. When Reconstruction ended in 1877 and Federal troops were withdrawn, however, Southern state governments

began passing "Jim Crow" laws that prohibited blacks from using the same public accommodations as whites. Louisiana had passed a law requiring "equal but separate" accommodations for whites and blacks on railroads, including separate railway cars .[lxxxi] On June 7, 1892, Homer Plessy, who was seven-eighths white, purchased a first-class ticket on the East Louisiana Railway. After Plessy had taken a seat in the whites-only railway car, he was asked to sit in the blacks-only car. He refused and was arrested and subsequently convicted and fined.

In a 7-1 decision, with Justice Brewer not participating and Justice Harlan dissenting, the Court upheld the Louisiana statute. The Court examined whether the "separate but equal" doctrine was a violation of the Thirteenth and Fourteenth Amendments.[lxxxii] Because the Louisiana statute had nothing to do with slavery, the majority reasoned, the Thirteenth Amendment was not implicated.[lxxxiii] Moreover, the Court held that the Fourteenth Amendment was not violated because the creation of "separate" parts within society did not necessarily mean that one race was deemed inferior to the another.[lxxxiv]

The majority in *Plessy* believed that the Louisiana statute was a reasonable regulation and that State legislatures should be given wide discretion in how they addressed race relations. Writing for the majority in which Chief Justice Fuller assented, Justice Henry B. Brown noted that segregation and discrimination were two entirely different things – the law, therefore, was neutral.[lxxxv] The Court thus rejected the view that the Louisiana law fostered inferiority of blacks, but held rather that the law merely separated the races as a matter of social policy.[lxxxvi] The majority also drew a distinction

between social and civil/political rights, effectively guaranteeing blacks political rights, but denying them social equality.[lxxxvii]

In his famous dissent, Justice Harlan argued that the Fourteenth Amendment prohibited the regulation of the use of a public highway solely on the basic of race. He advocated for "color-blindness" when interpreting the law.[lxxxviii] That is, if the law was not color blind, it was necessarily a violation of the Fourteenth Amendment, and the Louisiana statute, which specifically articulated a distinction based on race, was color-focused. Harlan declared, ". . . but in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. 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 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."[lxxxix] The case helped cement the legal foundation for the doctrine of "separate but equal," which permitted separation of the races, but only as long as facilities for both races were of equal quality. Practically, however, Southern state governments refused to provide blacks with genuinely equal facilities and resources in the years after the *Plessy* decision.

The decision in *Plessy*, like *Fong Yue Ting*, also represents a significant jurisprudential difference between Chief Justice Fuller and Justice Harlan. Justice Harlan's positions in these two cases, however, are curious and potentially incongruous. While the majority opinion in *Fong Yue Ting* is consistent with his past anti-immigrant political affiliations, his dissent in *Plessy* represents a confrontation with personal and United States history and a subsequent overcoming of discriminatory ideals. While

Justice Harlan owned slaves prior to their emancipation, he was nevertheless able to reconcile this inequity and ultimately come to the conclusion that color-based distinctions under the law are ethically unsound and constitutionally prohibited.

IV. Justice Harlan and the White Court

a. Background

Chief Justice Fuller died on July 4, 1910, having served as Chief Justice for twenty-two years.[xc] President William Howard Taft nominated Justice Edward D. White to succeed Fuller as Chief Justice, the first time that a sitting Justice had been elevated to the position of Chief. White was appointed to the Court, as an associate justice, on January 15, 1894, and was confirmed as Chief Justice on December 12, 1910.[xci] He assumed the role of Chief Justice on January 3, 1911.[xcii]

Chief Justice White is recognized as an efficient administrator and social leader, though these characteristics were considerably more evident during the early part of his time as Chief.[xciii] The first several years of the White Court addressed issues similar to those in the Fuller Court: labor, antitrust litigation, and social and civil rights reform. Shortly thereafter, however, the White Court was forced to address problems related to the First World War and the United States' foray into the international arena. While the White Court experienced many new and different issues relative to the Waite and Fuller Courts, Justice Harlan served on the White Court for less than one year before his death. The subsections that follow, first, provide a quantitative analysis of those cases in which both Chief Justice White and Justice Harlan participated; second, provide a qualitative analysis of those cases in which Chief Justice White and Justice Harlan recorded

divergent opinions; and third, assess Justice Harlan's contributions to *Standard Oil Company*.[xciv]

b. Quantitative Analysis

A total of 130 Supreme Court cases were decided during the time in which Chief Justice White and Justice Harlan served contemporaneously. Of these decisions, 114 (88 percent) were decided unanimously. As with the Waite and Fuller eras, this unanimity suggests that Chief Justice White probably wielded very little intellectual influence over the associate justices. Rather, the high majority of unanimous votes suggests either that the cases coming before the Court were straightforward or that all of the Justices on the Court enjoyed comparable intellectual acumen.

Of the 130 cases, Justice Harlan voted with the majority in 119 cases (92 percent), while Chief Justice White sided with the majority in all 130 cases. Justice Harlan authored the majority opinion 11 percent of the time (n=14), while Chief Justice White wrote the majority opinion in 20 cases (15 percent). During this time frame, Justice Harlan authored no concurring and 11 (nine percent) dissenting opinions, while Chief Justice White wrote one (less than one percent) concurring opinion.

Justice Harlan and Chief Justice White voted similarly in 119 cases (92 percent), opposing each other in 11 cases (8 percent). All 11 cases involved Chief Justice White siding with the majority and Justice Harlan dissenting. A qualitative exploration of these 11 cases follows below.

c. Qualitative Analysis

Given the short time in which Chief Justice White and Justice Harlan served on the Court together, there was limited opportunity for meaningful qualitative analyses. That said, the available data suggest that, like with Chief Justices Waite and Fuller, Chief Justice White did not influence Justice Harlan's decisionmaking. Like during the Waite and Fuller eras, however, Justice Harlan did voice consistent opinions throughout his short tenure on the White Court, suggesting that his contributions were made independent of any potential influences by the Chief Justice.

d. Case Study

i. *Standard Oil Company v. United States*

Standard Oil was a large oil producing, transporting, and refining organization founded in 1863 by John D. Rockefeller. In January 1870, Rockefeller created one large company – the Standard Oil Company – and aggressively competed for refinery business, buying out rival companies.[xcv] By 1878, Standard Oil held about 90 percent of the refining capacity in the United States.[xcvi]

In 1882, Congress passed the Sherman Antitrust Act which, based on Congress's constitutional power to regulate interstate commerce, declared illegal every contract, combination (in the form of trust or otherwise), or conspiracy in restraint of interstate and foreign trade.[xcvii] Standard Oil's quasi-monopolistic position had developed from aggressively competitive business practices, including purchasing competitors and engaging in volume-discount transportation deals with the railroad companies to ensure it could undercut smaller competitors' prices. It did this by ensuring it owned and

controlled all aspects of the trade. As the public became more aware of the Standard Oil monopoly, there was more support calling for its dissolution.

In *Standard Oil Company*, a unanimous Court declared the trust to be an "unreasonable" monopoly under the Sherman Antitrust Act.[xcviii] Chief Justice White stated that Standard Oil was illegal, "because the unification of power and control over petroleum and its products which was the inevitable result of . . . aggregating so vast a capital, gives rise . . . to the . . . dominancy over the oil industry . . . and its products in the channels of interstate commerce."[xcix] Justice Harlan concurred in part and dissented in part. While agreeing with the majority that Standard Oil had violated the Sherman Antitrust Act, Justice Harlan objected to the modifications made by Court to the holding of the Circuit Court.[c] He traced the original purpose of the Sherman Antitrust Act as, "the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country."[ci] He then criticized the majority for creating an exception that had not been envisioned by Congress – that "reasonable" or "undue" restraints of interstate commerce may not necessarily conflict with the Sherman Antitrust Act.[cii] Rather, he maintained, Congress created the simple rule that "there should be *no* restraint of trade, *in any form*."[ciii]

Conclusion

Taken collectively, there is little evidence to suggest that the three Chief Justices with whom Justice Harlan served had a significant impact on his decisionmaking. First, his reputation both before appointment and during his time on the Court has generally been

characterized by individualism.[civ] While it is difficult to know the extent to which he valued the intellectual capacity of the Chief Justices with whom he served, his reputation is one of a man dedicated to making his own decisions.

Second, the high majority of Supreme Court cases that were decided unanimously (greater than 85 percent in each of the three eras) offers little support for the hypothesis that a single justice ruled the Court. It would be unreasonable to believe that all three Chief Justices were intellectually persuasive with every justice in almost every case. Rather, the high prevalence of temporal unanimity suggests that the issues were relatively straightforward and, as a result, the justices almost always agreed on the outcome.

Third, findings from the quantitative analysis indicate that Justice Harlan authored dissenting opinions at a consistent rate across the three eras. He dissented in two percent of the Waite era cases (n=2,672), in six percent of the Fuller era cases (n=4,724), and in nine percent of the White era cases (n=130). Though these differences are statistically significant (p<0.001), this significance is most likely due to the large samples or, alternatively, to Justice Harlan's greater rejection of conformity as he aged. The uniformity suggests that, in none of the three eras, did the Chief Justice likely influence Justice Harlan to the point where the prevalence of his dissenting opinions declined to any practically significant degree.

Fourth, both the qualitative analyses and the individual case studies suggest that Justice Harlan's rationales for decisionmaking were consistent over time. This temporal consistency suggests that, despite serving in three eras characterized by complex and divergent issues, his judicial philosophy was not swayed by the three different Chief Justices with whom he served.

Several methodological limitations to the current analysis should be noted. First, while there is little if any quantitative or qualitative evidence to suggest that Justice Harlan was intellectually influenced by the Chief Justices with whom he served, this lack of evidence does not necessarily preclude the existence of such a relationship. It is possible that an accurate answer to the research question may be too difficult given available sources. While it is more reasonable to believe that the intellectual relationship between associate justices and their Chief Justice is reciprocal, it is equally plausible that the Chief Justice wields *some* cerebral influence over the associate justices. It is the *degree* of influence, however, that is difficult to measure.

Second, like with all qualitative research methods, interpretations will vary by the researcher undertaking the investigation. Different researchers may interpret the Supreme Court decisions in these three eras differently, which may lead to both divergent results and alternative conclusions.

Third, the external validity of the findings is an empirical question that can only be answered with future research. Assuming arguendo that the results of the current study represent an accurate assessment of the intellectual relationship between Justice Harlan and the three Chief Justices with whom he served, these results are not necessarily generalizable to other associate justices who served under multiple Chief Justices. As mentioned previously, there have been twenty-two associate justices to have served under at least three Chief Justices.[cv] As assumption that the results from the current study would mirror those of other associate justices would be an unsubstantiated one.

During the dinner to commemorate Justice Harlan's twenty-fifth anniversary on the Supreme Court, President Theodore Roosevelt noted that he had "exercised over the

judicial statesmanship of the country of a kind such as is possible only under our own form of Government."[cvi] Having served nearly thirty-four years on the Supreme Court, Justice John Marshall Harlan I had ample opportunity to express his opinions on a host of legal questions. Perhaps his most lasting legacy will be his decisions in the area of civil rights. During the post-Civil War era, there was widespread discrimination against blacks in American society. Despite the newly passed guarantees espoused in the Thirteenth, Fourteenth, and Fifteenth Amendments, blacks were not accorded the equality of the laws to which they were entitled. Both the *Civil Rights Cases*[cvii] and *Plessy*[cviii] were landmark opinions in the field of race relations, each stamping blacks as second-class citizens.[cix] Within the past fifty years, however, his dissenting positions have been vindicated.[cx] While known as "The Great Dissenter," he is, unquestionably, part of the Court's majority on issues related to race relations today.

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[ii] Donald G. Stephenson, *The Waite Court: Justice, Rulings, and Legacy* (Santa Barbara: ABL-CLIO, Inc., 2003); Stephen P. Elliott, *A Reference Guide to the United States Supreme Court* (New York: Facts on File Publications, 1986).

[iii] *Id*.

[iv] Justices William Cushing, William Patterson, James M. Wayne, Nathan Clifford, Noah H. Swayne, David Davis, Joseph P. Bradley, Joseph McKenna, William R. Day, Willis Van Devanter, Jams C. McReynolds, Louis D. Brandeis, Frank Murphy, Robert H. Jackson, and Harold H. Burton served under three Chief Justices; Justices Samuel F. Miller, Stephen J. Field, Oliver Wendell Holmes, Jr., Stanley F. Reed, and Felix Frankfurter served under four Chief Justices; Justices Hugo L. Black and William O. Douglas served under five Chief Justices.

[v] Robert J. Steamer, *Chief Justice: Leadership and the Supreme Court* (Columbia: University of South Carolina Press, 1986); Donald G. Stephenson, "The Chief Justice as Leader: The Case of Morrison Remick Waite," *William and Mary Law Review* 14 (1973): 899; Walter F. Murphy, "Marshaling the Court: Leadership, Bargaining, and the Judicial Process," *University of Chicago Law Review* 29 (1962): 640.

[vi] 100 U.S. 303 (1879).

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

[viii] 149 U.S. 698 (1893).

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

[x] 221 U.S. 1 (1911).

[xi] Henry J. Abraham, "John Marshall Harlan: The Justice and the Man," *Kentucky Law Journal* 46 (1957): 448; Florian Bartosic, "The Constitution, Civil Liberties and John Marshall Harlan," *Kentucky Law Journal* 46 (1957): 407; R.T.W. Duke, "John Marshall Harlan," *Virginia Law Register* 42 (1911): 497.

[xii] David G. Farrelly, "A Sketch of John Marshall Harlan's Pre-Court Career," *Vanderbilt Law Review* 10 (1956): 209.
[xiii] Henry J. Abraham, "John Marshall Harlan: A Justice Neglected," *Virginia Law Review* 41 (1955): 871; E.J. Edwards, "Members of the Supreme Court as Human Beings: When Not on the Bench They Are Pretty Much Like Other People – Characteristic Stories about Them," *New York Times*, 15 May 1910, p. SM6.
[xiv] Duke, *supra* note 11; James W. Ely, *The Fuller Court: Justices, Rulings, and Legacy* (Santa Barbara: ABL-CLIO, Inc., 2003); Louis Filler, "John M. Harlan," in *The Justices of The U.S. Supreme Court 1789-1995: Their Lives And Major Opinions*, eds. L. Friedman and F.L. Israel (New York: Chelsea House, 1997).
[xv] *Id*.
[xvi] *Id*.
[xvii] Malvina S. Harlan, *Some Memories of a Long Life, 1854-1911* (New York: Modern Library, 2003).
[xviii] *Id*.
[xix] *Elliott*, supra note 2.
[xx] Agnes G. McGann, *Nativism in Kentucky to 1860* (Washington, DC: Catholic University of America, 1944).
[xxi] *Id*.
[xxii] *Id*.
[xxiii] *Id*.
[xxiv] *Supra* note 12.
[xxv] *Id*.
[xxvi] *See* http://www.nps.gov/fosu/.
[xxvii] Duke, *supra* note 11.
[xxviii] *Id*.
[xxix] Ellis M. Coulter, *The Civil War and Readjustment in Kentucky* (Chapel Hill: University of North Carolina Press, 1926).
[xxx] Abraham, *supra* note 11.
[xxxi] *Id*.
[xxxii] *Id*.
[xxxiii] *Id*.
[xxxiv] "Supreme Court Golf," *New York Times*, 30 November 1907, p. 7.
[xxxv] Abraham, *supra* note 13.
[xxxvi] *Id*.
[xxxvii] *Id*.
[xxxviii] Duke, *supra* note 11.
[xxxix] *Id*.
[xl] Abraham, *supra* note 13.
[xli] *Id*.
[xlii] *Id*. at 876.
[xliii] Abraham, *supra* note 13.
[xliv] Bartosic, *supra* note 11.
[xlv] Elliott, *supra* note 2.
[xlvi] Stephenson, *supra* note 2.
[xlvii] *Id*.
[xlviii] Stephenson, *supra* note 5; C. Peter Magrath, *Morrison R. Waite: The Triumph of Character* (New York: The Macmillan Company, 1963).
[xlix] Stephenson, *id*.
[l] *Id*.
[li] *Id*. at 907.
[lii] *Id*. at 918.
[liii] *Id*. at 927.
[liv] *Supra* note 6.
[lv] *Supra* note 7.
[lvi] *Supra* note 6.
[lvii] *Id*. at 305.

[lviii] Civil Rights Act of 1875, 18 Stat. 335, at § 2 (1875).
[lix] *Supra* note 7.
[lx] *Id*.
[lxi] *Id*.
[lxii] *Id*.
[lxiii] *Id*. at 62.
[lxiv] Elliott, *supra* note 2.
[lxv] *Id*.
[lxvi] Ely, *supra* note 14.
[lxvii] James W. Ely, *The Chief Justiceship of Melvin W. Fuller, 1888-1910* (Santa Barbara: ABL-CLIO, Inc., 2003); James A. Thomson, "Swimming in the Air: Melville W. Fuller and the Supreme Court 1888-1910," *Cumberland Law Review* 27 (1997): 139.
[lxviii] *Id*.
[lxix] *Id*; Robert P. Reeder, "Chief Justice Fuller," *University of Pennsylvania Law Review* 59 (1910): 1-14.
[lxx] *Id*.
[lxxi] *Id*. at 3.
[lxxii] Thomson, *supra* note 67.
[lxxiii] *Supra* note 8.
[lxxiv] *Supra* note 9.
[lxxv] *Id*.
[lxxvi] *Id*.
[lxxvii] *Id*.
[lxxviii] *Id*. at 707.
[lxxix] *Supra* note 8.
[lxxx] *Id*. at 763.
[lxxxi] *Supra* note 9.
[lxxxii] *Id*.
[lxxxiii] *Id*.
[lxxxiv] *Id*.
[lxxxv] *Id*.
[lxxxvi] *Id*.
[lxxxvii] *Id*.
[lxxxviii] *Id*. at 559.
[lxxxix] *Id*.
[xc] Elliott, *supra* note 2.
[xci] Rebecca Shoemaker, *The White Court: Justices, Rulings, and Legacy* (Santa Barbara: ABL-CLIO, Inc., 2004).
[xcii] *Id*.
[xciii] Walter E. Joyce, "Edward Douglass White: The Louisiana Years, Early Life and on the Bench," *Tulane Law Review* 41 (1967): 751; W.O. Hart, "Edward Douglass White – A Tribute," *Loyola Law Journal* 7 (1926): 150.
[xciv] *Supra* note 10.
[xcv] *Supra* note 10.
[xcvi] *Id*.
[xcvii] William H. Taft, *Anti-Trust Law and the Supreme Court* (New York: Hein and Co., Inc., 1993).
[xcviii] *Supra* note 10.
[xcix] *Id*. at 75.
[c] *U.S. v. Standard Oil Co. of New Jersey*, 173 F. 177 (C.C. Mo. 1909).
[ci] *Supra* note 10, at 85.
[cii] *Supra* note 10, at 103.
[ciii] *Id*.
[civ] Duke, *supra* note 11.
[cv] *Supra* note 4.
[cvi] "Justice Harland Honored," *New York Times*, 10 December 1902, p. 9.
[cvii] *Supra* note 7.

[cviii] *Supra* note 9.
[cix] Alan F. Westin, "John Marshall Harlan and the Constitutional rights of Negroes: The Transformation of a Southerner," *Yale Law Journal* 66 (1957): 637-710.
[cx] *See e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954).