

TOWARD A MORE THOROUGH & HONEST APPRAISAL OF JUSTICE JOHN MARSHALL HARLAN'S COLORBLIND CONSTITUTIONALISM

Jamel K. Donnor, Ph.D.¹

ABSTRACT

The purpose of this essay is to properly contextualize U.S. Supreme Court Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*, espousing colorblind Constitutionalism. An integral messaging instrument in the American Right's present-day dismantling of diversity and affirmative action programs in higher education, colorblindness has been utilized to deflect, obfuscate, and conceal their racist motives. Employing Melvin A. Eisenberg's (2022) rule-based legal reasoning framework, this essay discusses the malleability of common law rules and rule-based reasoning, most notably stare decisis, in tandem with the American Right's deliberate manipulation and distortion of Justice John Marshall Harlan's colorblind Constitution argument. The essay closes with an appraisal of Justice Harlan as a legal realist, as he was keenly aware to exposit in his *Plessy* dissent that white people would ceaselessly leverage bureaucratic agencies and weaponize state legislative bodies to curtail Black advancement as a result of the verdict.

¹ Fred Huby Memorial Professor of Education, William & Mary School of Education; Faculty Affiliate, William & Mary Law School; Founding Executive Director, The Institute for the Study of Education, Democracy & Justice.

TABLE OF CONTENTS

Introduction.....	3
<i>Plessy v. Ferguson</i>	7
I. The Decision.....	7
II. The Dissent.....	11
III. Conclusion.....	15

INTRODUCTION

“Sixty Million [sic] Whites Are In No Danger From the Presence of Eight Million Blacks.”²

- Justice John Marshall Harlan, Dissenting Opinion, *Plessy v. Ferguson*.

“If most Americans know anything about [Justice John Marshall] Harlan’s dissent, it is the color-blind language.”³

In delivering the conservative majority’s opinion for the U.S. Supreme Court in *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College* (*SFFA v. Harvard*), and *Students for Fair Admissions, Inc., v. University of North Carolina* (*SFFA v. UNC*)—two anti-racial diversity/affirmative action cases concerning higher education admissions—Chief Justice John Glover Roberts, Jr.,⁴ wrote “[p]ermitting ‘past societal discrimination’ to ‘serve as the basis for rigid racial preferences would be to open the door to competing claims for remedial relief’ for every disadvantaged group. Opening that door would shutter another—’[t]he dreams of a Nation of equal citizens...would be lost,’ we observed, in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.”⁵ The Court’s ruling is the culmination of a protracted 70-year legal battle by the American Right⁶ to stymie the educational progress and

² *Plessy v. Ferguson*, 163 U.S. 537 (1896) at 560.

³ T. Alexander Aleinikoff, *Re-Reading Justice Harlan’s Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. Ill. L. Rev. 961 (1992) at 962.

⁴ It bears pointing out that in addition to Chief Justice Roberts, the high Court’s “conservative majority” (e.g., Clarence Thomas, Samuel A. Alito, Neil M. Gorsuch, Brett M. Kavanaugh, and Amy Coney Barrett) are members of the Federalist Society, an “organization of 90,000 conservative and libertarian lawyers, law students, and other individuals dedicated to reforming the current legal order” (see <https://fedsoc.org/about-us>).

⁵ *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. (2023) at 35.

⁶ By the American Right, I am referring to an amalgamation of seemingly disparate political, religious, ideological, social, and intellectual groups, individuals, and organizations that share: (1) an inexorable commitment to advancing the alleged genetic superiority of white people, white identity, and Western Civilization (e.g., White Supremacy), (2) “belief in an ineluctable, unalterable racialized difference between whites and non-whites” (e.g., eugenics) (see Howard Winant, *Behind Blue Eyes: Whiteness and Contemporary US Racial Politics*. (1997) at 75), (3) visceral and systematic reactionary disdain toward racial diversity, racial inclusion, and racial equality as ideas or concepts (e.g., hate), (4) a conviction to White Evangelical Christian theology and doctrine (White Christian Nationalism), (5) an “absolutism and systematicity” in libertarian principles whereby a “market economy is not merely a useful form of social organization: it is a moral imperative based on a unified philosophy of individual freedom” (Matt Zwolinski & John Tomasi, *The Individualists: Radicals, Reactionaries, and the Struggle for the Soul of Libertarianism*. (2023) at 3), and (6) an obdurate adherence to an originalist understanding of the Constitution (e.g., originalism).

academic advancement of Black people in the United States since the *Brown v. Board of Education* decision of 1954 (e.g., *Brown I*).⁷

An argumentative cudgel and messaging instrument central to the American Right's success in upending the constitutionality of affirmative action and admissions practices encouraging racial diversity in higher education, has been their sustained advocacy for a colorblind interpretation of the U.S. Constitution (e.g., colorblind constitutionalism), which posits that "racial classifications by the government are [strictly] prohibited by the Equal Protection Clause of the Fourteenth Amendment."⁸ The etymological origin of a colorblind constitutionalism argument can be traced to U.S. Supreme Court Justice John Marshall Harlan's dissenting opinion in *Plessy v. Ferguson*,⁹ whereby he expressed,

[o]ur 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 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.¹⁰

Despite being cited in approximately 3,286 legal cases and 4,977 law review articles and law journals,¹¹ Justice Harlan's color-blind phrase—ironically—has been overwhelmingly overrepresented in the legal briefs, pleadings, and motions filed by right-wing and conservative legal opponents of affirmative action since the 1970's.¹²

⁷ 347 U.S. 483 (1954).

⁸ Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 Cornell. L. Rev. 203, at 203 (2008). Interestingly, the Fourteenth Amendment neither contains the phrase colorblind, *nor* references race explicitly.

⁹ *Supra* note 1, at 537-538.

¹⁰ *Supra* note 1, at 559.

¹¹ This figure is derived from a search on Nexis Uni database using the following query "how many times has John Marshall Harlan's dissent been cited?"

¹² This is based on a search on Perplexity using the following query "how times has justice john Marshall Harlan's dissent been cited in briefs, pleadings, and motions opposing affirmative action?" Retrieved from: <https://www.perplexity.ai/search/how-times-has-justice-john-mar-hpXJyg5dQ.a5q5SAU84SQw>. Using the same

The American Right's utilization of colorblindness as a legal argument in tandem with its advocacy for colorblind constitutionalism is not simply rhetorically duplicitous, but also proscriptively anti-Black¹³ in the *Herrenvolkian* sense.¹⁴ Meaning, since *Brown I*, the American Right, through sociopolitical movements, such as massive resistance,¹⁵ the Southern Strategy,¹⁶ and the conservative legal movement,¹⁷ have not simply misconstrued Justice Harlan's dissenting opinion, but rather deliberately propagandized¹⁸ his colorblind constitutionalism assertion from *Plessy* to deflect, obfuscate, and conceal their racial antipathy towards Black educational equality and Black academic advancement.

The purpose of this legal essay is to properly contextualize U.S. Supreme Court Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*, espousing colorblind Constitutionalism utilizing Melvin A. Eisenberg's (2022) "rule-based legal reasoning."¹⁹ My reasons for using Eisenberg's rule-based legal reasoning are twofold. The first reason is to highlight the malleability

search term, Nexi Uni put the figure at 178. Retrieved from: <https://advance-lexis-com.us1.proxy.openathens.net/search/?pdmfid=1519360&crid=478540ae-20ad-4494-abcf-efa84f44dacb&pdsearchtype=SearchBox&pdtypeofsearch=searchboxclick&pdstartin=&pdsearchterms=how+times+has+justice+john+Marshall+Harlan%27s+dissent+been+cited+in+briefs%2C+pleadings%2C+and+motions+opposing+affirmative+action%3F&pdtimeline=&pdpsf=&pdquerytemplateid=&pdpsf=&comp=wxbhkkk&prid=79748eee-a465-4ce9-b051-9db6cd77f870>.

¹³ By anti-Black, I am referring to the following propositions in isolation or in tandem: the perpetual questioning *or* the ceaseless propagation by White American of Black Americans' inherent un-deservedness and/or un-qualification for fundamental political, educational, legal, and civil/civic rights, civil liberties, and opportunities in proportion to their White counterparts.

¹⁴ By *Herrenvolkian*, I am specifically referring to "the principle of differentiation by race to its logical outcome...in which people of color [e.g., African Americans] however numerous or acculturated they may be, are treated as permanent aliens or outsiders" (see George M. Fredrickson, *White Supremacy: A Comparative in American and South African History* xi-xii, (1981).

¹⁵ See Numan V. Bartley, *The Rise of Massive Resistance: Race and Politics in the South During the 1950's*, (1999).

¹⁶ See Kevin Phillips, *The Emerging Republican Majority*, (2015).

¹⁷ Steven Teles refers to the conservative legal movement as a coalition of conservative groups and organizations with "particular grievances" that coalesced beginning in the early 1970s around a "shared opposition to liberal judges, professors, and public interest lawyers and by a unified call for 'strict constructionism' and 'judicial restraint.'" (see Steven M. Teles, *The Rise of the Conservative Legal Movement* 2 (2008).

¹⁸ At its core, propaganda are epistemic claims that are knowingly false and made insincerely (see Jason Stanley, *How Propaganda Works*, (2015)).

¹⁹ Melvin A. Eisenberg, *Legal Reasoning* ix (2022).

of common law rules and rules-based reasoning, most notably *stare decisis* (e.g., precedent), while the second and more pertinent reason for employing Eisenberg's rule-based legal reasoning is to help me identify and articulate the Right's use of colorblindness. Stated differently, the American Right's decision to incorporate Justice Harlan's colorblind constitutionalism argument into its anti-affirmative action and anti-diversity crusade is *neither* altruistic *nor* sincere. Rather, the American Right's utilization of colorblindness as a legal argument in tandem with its advocacy for colorblind constitutionalism is a sinister form of resistance toward²⁰ higher education's contributory role in Black people's human capital development and social mobility within a pluralistic, multiracial, liberal democratic society.

This legal essay is comprised of three parts. Part I provides a robust contextualization overview of the *Plessy* decision written by Justice Henry Billings Brown. Part II exposit on Justice Harlan's dissent, including his less publicized prophecy that state-sanctioned "compulsory segregation"²¹ (e.g., Jim Crow) would result from the ruling. Part III—the conclusion—contends that Justice Harlan was a legal realist, as he was keenly aware to exposit in his *Plessy* dissent that white people would ceaselessly leverage bureaucratic agencies and weaponize state legislative bodies to curtail Black advancement as a result of the verdict. In forecasting the approaching racial headwinds of Jim Crow (e.g., *de jure* segregation), Justice Harlan knew the *Plessy* ruling "will in time, prove to be quite pernicious as the decision made by this tribunal

²⁰ In identifying the motivations for why individuals (and organizations) resist legality, Brisbin points out that "[p]eople who chose resistance...must attribute how some aspect of legality caused their situation of social marginality or arbitrary treatment." (see Richard A. Brisbin, Jr., *Resistance to Legality*, (2010) at 28). In the case of the American Right and its resistance to affirmative action and admissions practices promoting racial diversity's legality, accusations of "reverse discrimination" from white applicants are invoked to assign blame and responsibility for non-admission into the professional school or four-year college or university of their preferred choice. Ergo by proxy, admitted African Americans are labeled as undeserving recipients and unqualified beneficiaries of arbitrary rules, procedures, and actions.

²¹ C. Vann Woodward, *The Strange Career of Jim Crow* (2nd ed.), (1966)

in the *Dred Scott*²² case.”

PLESSY V. FERGUSON

“I have to tell you that, according to Louisiana law, I am a colored man.”

-Homer Adolph Plessy²³

I. *The Decision*

Arrested on June 7, 1892—and subsequently convicted—for purposely violating the State of Louisiana’s 1890 Statute No. 111, “requiring railway companies carrying passengers in their coaches in that State, to provide equal, but separate, accommodations for white and colored races...and providing that no person shall be permitted to occupy seats in coaches other than the ones assigned to them, in account of the race they belong to.”²⁴ Mr. Homer Adolph Plessy an American citizen of “mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood,”²⁵ petitioned the U.S. Supreme Court for writs of prohibition and certiorari against New Orleans District Court Judge John H. Ferguson for upholding his conviction and the State’s law despite the passage of the Thirteenth Amendment and Fourteenth Amendment to the Constitution. According to Mr. Plessy’s petition, “he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws.”²⁶ Among the Constitutional questions presented before the high Court was whether the State of Louisiana’s 1890 Act No. 111 “conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.”²⁷

²² 60 U.S. 393 (1856).

²³ See Harvey Fireside, *Separate and Unequal: Homer Plessy and the Supreme Court Decision that Legalized Racism*, (2004) at 1.

²⁴ *Supra* note 1, at 537 to 538.

²⁵ *Supra* note 1, at 538.

²⁶ *Supra* note 1, at 538.

²⁷ *Supra* note 1, at 542.

Delivering the Court's opinion upholding the constitutionality of the Louisiana 1890 statute and Mr. Plessy's conviction, Justice Henry Billings Brown wrote, "it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude...is too clear for argument. Slavery implies involuntary servitude — a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services."²⁸ According to Justice Brown,

[a] statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude...we do not understand that the Thirteenth Amendment is strenuously relied by the plaintiff in error in this connection.²⁹

With regards to the State of Louisiana 1890 statute's constitutionality under the Fourteenth Amendment, Justice Brown wrote, "[t]he object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinction based on color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power."³⁰

²⁸ *Supra* note 1, at 542.

²⁹ *Supra* note 1, at 543.

³⁰ *Supra* note 1, at 544.

To reach the aforementioned ruling, Justice Brown relied upon common law reasoning whereby judges have the autonomy to either “rel[y] on their own past actions, which they [can] modif[y] under the pressure of changing times and changing patterns of litigation”³¹ or follow the judicial principle of stare decisis (i.e., precedent).³² According to Eisenberg, “legal rules are either canonical or malleable.”³³ A canonical legal rule—according to Eisenberg—is fixed: it may not be expressed in different ways, cannot evolve, and cannot be made subject to exceptions. Statutes are the paradigm form of canonical legal rules. A malleable rule, in contrast, according to Eisenberg, can be expressed in different ways, can evolve, and can be made subject to exceptions.”³⁴

In *Plessy*, Justice Brown surreptitiously chose to carve out a private rights-positive rights distinction³⁵ as a constitutional middle ground as the legal methodology for ruling in Judge Ferguson’s favor, rather than declaring the 1890 Statute unconstitutional.³⁶ According to Justice Brown,

[p]ositive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against state laws and proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such supposed state laws and state proceedings, and be directed to the correction of their operation and effect.³⁷

Selecting the *Civil Rights Cases*³⁸ of 1883 to serve as part of the Court’s doctrinal authority for upholding the constitutionality of the separation of Black and White passengers, Justice Brown

³¹ Lawrence M. Friedman, *A History of American Law* xxi (4th ed. 2019).

³² *Id.* at xxi. For an explanatory definition of precedent, see Thomas G. Hansford and James F. Spriggs, *The Politics of Precedent on the U.S. Supreme Court* (2006).

³³ *Supra* note 15, at 64.

³⁴ *Supra* note 15, at 64.

³⁵ David S. Bogen, *Why the Supreme Court Lied in Plessy*, 52 Vill. L. Rev. 411 (2007).

³⁶ *Supra* note 1, at 547.

³⁷ *Supra* note 1, at 547.

³⁸ 109 U.S. 3.

was able to publicly acknowledge that the Fourteenth Amendment “was held [as] an act of Congress, entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theatres and other public places of public amusement, and made applicable to the citizens of every race and color, regardless of any previous condition of servitude...;”³⁹ while simultaneously “making new law”⁴⁰ by expositing “as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature.

In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable...”⁴¹ The U.S. Supreme Court — vis-à-vis Justice Brown — did not simply engage in a clever form of syllogistic reasoning in *Plessy*, but transmogrified the original meaning *and* intention of the Fourteenth Amendment to reflect a conservative racist ideology⁴² committed to stalling Black social equality and imputing onto the aforementioned class of birthright citizens, the liminal status of racial serf to white and Caucasian people.

³⁹ *Supra* note 1, at 546.

⁴⁰ *Supra* note 28, at xxi.

⁴¹ *Supra* note 1, at 550-551.

⁴² Among the “recurrent substantive themes of conservative social and political include...historical institutions and practices, which are inculcated primarily through custom and habit...the legitimacy of inequality, and the need for elites, cultural, political, and economic...” see Jerry Z. Muller, *Conservatism: An Anthology of Social and Political Thought from David Hume to the Present*, (1997) at 18.

II. The Dissent

“Since the Supreme Court had never considered the constitutionality of racially segregated transportation under the Fourteenth Amendment, the Court chose to examine the record for legal precedents...the court was searching for authority which would buttress a weak opinion.”⁴³

Dissenting opinions by Supreme Court Justices of the United States are more than a “public expression of disagreement with the outcome and reasoning of the majority opinion.”⁴⁴ To the contrary, dissenting opinions by Justices on the Supreme Court, “send a strong signal that a justice believes her colleagues decided the case incorrectly.”⁴⁵ In *Plessy v. Ferguson*, U.S. Supreme Court Justice John Marshall Harlan — the lone dissenter⁴⁶ — writes “[e]very one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.”⁴⁷ At the time of the *Plessy* case and its ruling, the sociopolitical status of Black people as sovereign citizens was in flux. Consider, for instance, that upon his inauguration to the Governorship of Louisiana in 1877, Francis Tillou Nicholls had “denounced racial bigotry, appointed blacks to [political] office, and attracted many to his [political] party. Then, in 1890, he signed into law the state’s first railroad segregation statute. Two years later, Nicholls, now the state’s Chief Justice, upheld the law’s constitutionality...”⁴⁸

⁴³ Barton J. Bernstein, *Case Law in Plessy v. Ferguson*, *Journal of Negro History*, (1962) at 193.

⁴⁴ Pamela C. Corley, Amy Steigerwalt, and Artemus Ward, *When Dissent Matters: Judicial Dialogue Through U.S. Supreme Court Opinions*, (2023), at 8.

⁴⁵ *Id.*, at 9

⁴⁶ Justice David J. Brewer “did not hear the argument or participate in the decision.” *Supra* note 1, at 564.

⁴⁷ *Supra* note 1, at 557.

⁴⁸ Derrick Bell, *Race, Racism, and American Law* 35 (1992).

The fleeting withdrawal of white support, white recognition, and white affirmation of Black people's civil, political, and Constitutional rights during the "*Plessy* Era,"⁴⁹ was the product of a confluence of exogenous factors associated with southern whites' political recalcitrance against Reconstruction under the racist aegis of "Redemption," in conjunction with the macroeconomic exigencies and concomitant calamities linked to industrialization, finance capitalism, and the burgeoning Gilded Age (i.e., the political economy of the late nineteenth century).⁵⁰ On the matter of Southern white Redemption, the historian C. Vann Woodward writes that

the South's capitulation to extreme racism was due not so much to a conversion as it was to a relaxation of the opposition. All the elements of fear, jealousy, proscription, hatred, and fanaticism had long been present, as they are present in various degrees of intensity in any society. What enabled them [Redeemers] to rise to dominance was not so much cleverness or ingenuity as it was a general weakening and discrediting of the numerous forces that had hitherto kept them in check. The restraining forces included not only Northern liberal opinion in the press, the courts, and government, but also internal checks imposed by the prestige and influence of Southern conservatives, as well as by the idealism and zeal of the Southern radicals...And since the Negro was the symbol of sectional strife, the liberals joined in deprecating further agitation of his cause and in defending the Southern view of race in its less extreme forms.⁵¹

Indeed, from the 1880s to the 1900s, civil, statutory, and constitutional disfranchisement "aimed primarily at African Americans"⁵² in the South had been well underway. According to Michael J. Klarman, by 1890, "[t]he number of blacks lynched each year rose dramatically. The same Democratic politicians who had earlier campaigned for black votes now demanded disfranchisement. States adopted poll taxes and literacy tests to suppress any black voting not already nullified by fraud and violence...Blacks seldom sat on juries any longer. Black officeholding waned, then disappeared. Racial disparities in educational funding increased in the

⁴⁹ Michael J. Klarman, *From Jim to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 8 (2004).

⁵⁰ see Jill Lepore, *These Truths: A History of the United States*, (2018).

⁵¹ *Supra* note 17, at 69-70.

⁵² Michael Perman, *Struggle for Mastery: Disfranchisement in the South, 1888-1908*, (2001) at 6.

1890s...Legislatures adopted new measures for coercing black agricultural labor...In New Orleans in the 1880s, there had been interracial labor solidarity, interracial clienteles in brothels, and interracial sporting competitions. Virtually all this integration disappeared in the 1890s.”⁵³

With regards to the political economy of the late nineteenth century, a constellation of forces involving: (1) the free labor movement,⁵⁴ (2) the growing influence of race science (e.g., eugenics),⁵⁵ and (3) the creation of corporations related to industrialization, intersected and coalesced to “create the regressive [racial] climate of the [*Plessy*] era.”⁵⁶ For example, by the 1880s or a mere 15 years after the Civil War, “black Americans were not simply subsumed into the debate about white workers’ control of government,”⁵⁷ but their still relatively nascent status as sovereign citizens (e.g., freedpeople) “raised larger questions about the nation’s political economy regarding free labor and the idea of class struggle.”⁵⁸ Moreover, as the United States transitioned from a predominantly agrarian economy into an industrial economy, whereby “new factories” in major cities, such as New York, Chicago, and Philadelphia relied upon low-skill workers and European immigrants, along with state and federal policies emphasizing laissez-faire legislation, economic competition, and the freedom to contract, the *Plessy* Court, in other words, was not operating within sociopolitical vacuum when it “capitulated to [white] racism by subscribing to the doctrine that legislation is powerless to eradicate racial instincts.”⁵⁹ Consider, for example, that prior to expositing his colorblind constitution assertion, Justice Harlan noted that the “fundamental objection...to the [New Orleans] statute is that it interferes with the personal freedom of citizens.

⁵³ *Supra* note 44, at 11.

⁵⁴ Jill Lepore, *These Truths: A History of the United States*, (2018).

⁵⁵ Thomas C. Leonard, *Illiberal Reformers: Race, Eugenics and American Economics in the Progressive Era*, (2016).

⁵⁶ *Supra* note 44, at 9.

⁵⁷ Heather Cox Richardson, *The Death of Reconstruction: Race, Labor, and Politics in the Post-Civil War North, 1865-1901*, (2001) at xiv.

⁵⁸ *Id.*, at xiii.

⁵⁹ *Supra* note 17, at 71.

“personal liberty,’...If a white man and black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each...It is quite another thing for the government to forbid citizens of the white and black races from traveling in the same public conveyances...”⁶⁰

In essence, Justice Harlan viewed Justice Brown’s private rights-positive rights distinction as both a judicial sleight of hand and an overt contravention of the Fourteenth Amendment when he postulated the following hypothetical questions,

“ [i]f a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign white to one side of a courtroom and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day?

Far from advocating for a colorblind interpretation of the Constitution, Justice John Marshall Harlan was a legal realist for not only explaining law’s manipulability and malleability, but also for forecasting the pernicious outcomes of Equal Protection lawsuits involving Black petitioners. In addition to adjudicating that the *Plessy* ruling “will in time, prove to be quite pernicious as the decision made by this tribunal in the *Dred Scott case*,”⁶¹ Justice John Marshall Harlan presciently foresaw the racial headwinds of Jim Crow and the “dark traits”⁶² of white supremacists in remarking “[s]tate enactments, regulating the enjoyment of civil rights, upon the basis of race, and

⁶⁰ Supra note 1, at 557.

⁶¹ Supra note 1, at 559.

⁶² Edward Bell et al., *Political Hearts of Darkness: The Dark Triad as Predictors of Political Orientations and Interest in Politics*, 11 Behav. Sci. 169 (2021).

cunningly devised to defeat legitimate results of the [Civil] war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.”⁶³ In summary, Supreme Court Justice John Marshall Harlan was anything but a colorblind jurist. To the historically accurate *and* factual contrary, Justice Harlan recognized the unrelenting nature of white supremacists when he also included the following in his famous dissent “[m]ay it not now be reasonably expected that astute men of the dominant [white] race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperiled, by contact on public highways with black people...”⁶⁴

III. CONCLUSION

The American Right — having abandoned overt stratagems of White superiority and Black inferiority to justify its racism over time — in reaction to *Brown I* has not simply “reinstitutionalized”⁶⁵ the Supreme Court through the conservative legal movement, and “political epistemic networks,”⁶⁶ such as the Federalist Society, but fundamentally alter its jurisprudence on race and racial inequality by deliberately manipulating and mangling of U.S. Supreme Court Justice John Marshall Harlan’s colorblind Constitution argument in *Plessy*. Having intellectual roots in its opposition toward *Brown I*, the American Right’s racist campaign against affirmative action in higher education began earnestly under the Reagan Administration, and Republican led state legislatures have successfully managed to scaffold a legal and statutory structure that will lock in racial inequality in higher education for at least a century. The task ahead for advocates of

⁶³ *Supra* note 1, at 560.

⁶⁴ *Supra* note 1, at 562.

⁶⁵ Tahi L. Mottl, *The Analysis of Countermovements, Social Problems*, vol. 27, No. 5 (1980).

⁶⁶ Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*, (2015).

affirmative action and supporters of diversity in higher education will be to only conduct a thorough *and* honest appraisal of the American Right's legal victories, and to also cultivate and incubate ideas until they become mainstream, like its use of Justice Harlan's colorblind Constitution argument. In other words, in order to win the war of ideas against the American Right, there *first* needs to be a revolution in ideas.