

GETTING TO KNOW HARLAN: A NEW APPROACH TO JUDICIAL BIOGRAPHY?

THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN. By Linda Przybyszewski.¹ University of North Carolina Press. 1999. Pp. xii, 286. Hardcover, \$49.95; Paper, \$19.95.

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Is there reason to rejoice? Clearly, there ought to be only one answer: Yes. Although “[m]any aspects of Harlan’s life and work remain unexplored” in *The Republic According to John Marshall Harlan*,³ this apparent weakness of Professor Linda Przybyszewski’s biography engenders pleasure, not regret. “[A]bsence” of these details serves as “an invitation for others to join the conversation” that this biography has “tried to begin.”⁴ (p. 9) In an endeavor “to try something different,” (p. 9) *The Republic According to John Marshall Harlan* casts aside “the dilemma of judicial biography” (p. 8) created by “the search for” (p. 1) or “pursuit of [judicial] greatness.”⁵ (p. 8) Traditionally,

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3. Linda Przybyszewski, *The Republic According to John Marshall Harlan* 9 (U. of North Carolina Press, 1999). For initial reviews see Mary Frances Berry, *Book Review*, 87 J. Am. Hist. 1050 (2000); Tony A. Freyer, *Prophet or Example*, 24 J. Sup. Ct. Hist. 325 (1999).

4. Other scholarship by Przybyszewski on Harlan includes *Mrs John Marshall Harlan’s Memories: Hierarchies of Gender and Race in the Household and Polity*, 18 L. & Soc. Inquiry 453 (1993); *The Evolution of John Marshall Harlan the Elder*, in Walter D. Pederson and Norman W. Provizer, eds., *Great Justices of the U.S. Supreme Court: Ratings and Case Studies* 101-23 (Peter Lang Publishing, 1993); *John Marshall Harlan*, in Melvin I. Urofsky, ed., *The Supreme Court Justices: A Biographical Dictionary* 205-13 (Garland Publishing, 1994); *Book Review*, 16 L. & Hist. Rev. 191 (1998); *The Religion of a Jurist: Justice David J. Brewer and the Christian Nation*, 25 J. Sup. Ct. Hist. 228 (2000); *The Republic According to John Marshall Harlan: Race, Republicanism, and Citizenship* (Ph.D. diss., Stanford University, 1989). See also, Linda Przybyszewski, *The Dilemma of Judicial Biography Or Who Cares Who Is the Great Appellate Judge? Gerald Gunther on Learned Hand*, 21 L. & Soc. Inquiry 135 (1996).

5. Other biographies include Loren P. Beth, *John Marshall Harlan: The Last Whig Justice* (U. Press of Kentucky, 1992); Tinsley E. Yarbrough, *Judicial Enigma: The First*

two interrelated objectives have motivated judicial biographers: to provide “models of civic behavior” (p. 206) and to prove that the judge is great. Achieving both, Przybyszewski suggests, has depended on how a judge performs when assessed against “five tests” for greatness: “wisdom, economic progressivism, vindication by history, integrity, and Holmes.”⁶ (p. 5) However, this “definition of greatness” (p. 8) creates rather than solves the dilemma of conventional judicial biography. The reason is obvious: greatness and its criteria are a contingent “historical artifact.” (p. 8) Consequently, by confining their attention to issues and evidence relevant to those matters, judicial biographers are too selective in their objectives and methodologies. Inevitably, “topics” of “importance” to the judge are “neglected.” (p. 8) At least from Przybyszewski’s perspective, the traditional failure to consider “historical circumstances” demands a new and different approach to judicial biography. (p. 8)

Professor Przybyszewski adopts different methodologies and objectives, as well as an “alternative” interpretation of the Civil War’s effect “on legal thought.” (p. 11) This attempt to push judicial biography into new and perhaps unexplored domains, however, relies on familiar rather than unexpected means. Neglected source materials, for example, illuminate specific aspects of Harlan’s life and beliefs. Chronological sequencing and detailed doctrinal narratives are deliberately eschewed. Instead, Harlan’s ruminations on law and the nation as well as his nonjudicial activities are accorded greater prominence and more significance than in traditional judicial biographies. Indeed, Professor Przybyszewski’s conclusions are based on the connections between these issues and Harlan’s judicial opinions. For example, Professor Przybyszewski describes Harlan’s constitutional ju-

Justice Harlan (Oxford U. Press, 1995). Revival of scholarly interest in Harlan is demonstrated by Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 Iowa L. Rev. 151 (1996); Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great was “The Great Dissenter?”*, 32 Akron L. Rev. 629 (1999); Molly Townes O’Brien, *Justice John Marshall Harlan as Prophet: The Plessy Dissenter’s Color-Blind Constitution*, 6 Wm. & Mary Bill Rts. J. 753 (1998); C. Ellen Connally, *Justice Harlan’s “Great Betrayal”? A Reconsideration of Cumming v. Richmond County Board of Education*, 25 J. Sup. Ct. Hist. 72 (2000); David E. Bernstein, *Plessy versus Lochner: The Berea College Case*, 25 J. Sup. Ct. Hist. 93 (2000); Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 Ohio St. L.J. 1457, 1463-1515 (2000); Samuel H. Pillsbury, *Harlan, Holmes and the Passions of Justice*, in Susan A. Bandes, ed., *The Passions of Law* 330-62 (New York U. Press, 1999); Mark Curridan and Leroy Phillips, Jr., *Contempt of Court: The Turn-of-the-Century Lynching that Launched 100 Years of Federalism* (Faber and Faber, Inc., 1999).

6. For further elaboration see Przybyszewski, 21 L. & Soc. Inquiry at 135-52 (cited in note 4).

risprudence as an endeavor to preserve and protect the Union. If this required decisions curtailing corporate power or eroding white supremacy, Harlan delivered the necessary opinions, though often in dissent. (pp. 2, 9, 11, 12)

Inevitably, in the presence of previous methodological contests over judicial biography,⁷ Professor Przybyszewski's suggested "new approach" raises an obvious question: Does *The Republic According to John Marshall Harlan* succeed? Professor Przybyszewski's alternative approach rests on three interwoven premises. First, "primary sources" provide a basis from which to extract interpretations and explanations of a Justice's "ideas," "experiences" and "transformation."⁸ (pp. 2, 11) Second, those sources ought to include "nonjudicial thoughts and actions," for example "religious faith or literary accomplishments," which are "importan[t]," but "neglected," in judicial biographies. (pp. 2, 8, 9) Third, "[e]ach chapter" of *The Republic According to John Marshall Harlan* "relies on particular primary sources that have been neglected by other historians." (p. 9)

Repetition of one word—"neglected"—(pp. 2, 3, 8, 9, 45) invites two questions: What are the "neglected" primary sources? Have they in fact been "neglected"? Arguably, three sources have been neglected: Malvina Shanklin Harlan's memoirs;⁹ "a verbatim transcript [of some 500 pages] of Harlan's

7. See generally J. Woodford Howard, Jr., *Alpheus T. Mason and the Art of Judicial Biography*, 8 Const. Comm. 41 (1991); Clyde Spillenger, *Lifting the Veil: The Judicial Biographies of Alpheus T. Mason*, 21 Rev. Am. Hist. 723 (1993); G. Edward White, *The Renaissance of Judicial Biography*, 23 Rev. Am. Hist. 71 (1995); Michael J. Gerhardt, *The Art of Judicial Biography*, 80 Cornell L. Rev. 1595 (1995); Symposium: *National Conference on Judicial Biography*, 70 N.Y.U. L. Rev. 485-809 (1995); John C. Jeffries, *The Athlete as Judge*, 66 U. Chi. L. Rev. 495 (1996); Stephen J. Wermel, *Writing Supreme Court Biography: A Single Lens View of a Nine-Sided Image*, [1994] J. Sup. Ct. Hist 9; Laura Kalman, *The Power of Biography*, 23 L. & Soc. Inquiry 479 (1998); Gerald Gunther, *A Model Judicial Biography*, 97 Mich. L. Rev. 2117 (1999). For debates about techniques in other biographical scholarship see Harry Watson, *Lies and Times: The Changing Genre of Biography*, 28 Rev. Am. Hist. 45 (2000); Hermione Lee, *Tracking the Unrackable*, April 12, 2001, N.Y. Rev. of Books 53 (reviewing Richard Holmes, *Sidetracks: Explorations of a Romantic Biographer* (Pantheon, 2000)); David Ellis, *Literary Lives: Biography and the Search for Understanding* (Routledge, 2000); Paul R. Bakscheider, *Reflections on Biography* (Oxford U. Press, 2000).

8. For locations and descriptions of the Harlan Papers, see, e.g., Alexandra K. Wigdor, *The Personal Papers of Supreme Court Justices: A Descriptive Guide* 114-17 (Garland Publishing, 1986); Yarbrough, *Judicial Enigma* at 271-72 (cited in note 5). Some Harlan papers have been published. See, e.g., Ellwood Lewis, *The Appointment of Mr Justice Harlan*, 29 Ind. L.J. 46 (1953); Alan F. Westin, *The First Justice Harlan: A Self-Portrait from His Private Papers*, 46 Ky. L.J. 321 (1958). This is only a fragment compared to publication of other justices' papers. Compare, e.g., G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 591-93 (Oxford U. Press, 1993).

9. Malvina S. Harlan, *Some Memories of a Long Life, 1854-1911* (1915) (repro-

1897-98 lectures on constitutional law” delivered at Columbian University (subsequently George Washington University) in Washington, D.C.,¹⁰ and “a list drawn up by Harlan in 1910 of [his majority and dissenting Supreme Court] opinions that he wanted republished together in a single volume.”¹¹

Mrs Harlan’s memoirs are almost exclusively confined to their nearly fifty years of marriage. As Professor Przybyszewski clearly conveys, its narrative descriptions of their household activities and domestic arrangements reveal Justice Harlan’s ubiquitous paternalism. Did that influence his civil rights positions, including deviations from a color-blind standard? Without equivocation, *The Republic According to John Marshall Harlan* provides an affirmative response. (pp. 42, 43) In contrast, two law students’ “verbatim transcript” of Harlan’s lectures are an analysis and dissection of each clause in the U.S. Constitution and corresponding Supreme Court interpretations. (p. 44) Even so, for Professor Przybyszewski, these recitations provide much more: a judicial philosophy of legal formalism, a panoramic optimist’s view of American history, and faith in the Constitution. (pp. 44-72) Comparatively, Harlan’s chronological list of 83 of his judicial opinions is much sparser. Professor Przybyszewski nevertheless treats that concise list as an invitation to engage in a careful exegesis of each opinion and to search for a more pano-

duced in 26 J. Sup. Ct. Hist. 109-211 (2001)). This was “a 188 page typescript autobiography.” Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 Yale L.J. 637, 642 n.15 (1957). It is partially reproduced in Westin, 46 Ky. L.J. at 329-32 (cited in note 8). For a description, discussion and analysis see Przybyszewski, *Mrs John Marshall Harlan’s Memories* (cited in note 4); Przybyszewski, *Harlan* at 15-43 (cited in note 3). See also *id.* at 29 (noting that the Harlans were married for “almost fifty-five years”).

10. Przybyszewski, *Harlan* at 3, 44 (cited in note 3) (referring to John Marshall Harlan, *Constitutional Law Lectures, 1897-98* (unpublished manuscript, John Marshall Harlan Papers, Library of Congress, Manuscript Division)). For a description, discussion and analysis see Przybyszewski, *Harlan* at 44-72 (cited in note 3). Professor Przybyszewski is “preparing an edition of these lectures.” *The Evolution* at 120 n.32 (cited in note 4). Also at Columbian University, “Harlan began teaching domestic relations, torts, and commercial law in 1891” but “no notes or lectures on Harlan’s domestic relations course . . . seem to have survived.” (pp. 85, 226 n. 24)

11. Przybyszewski, *Harlan* at 3 (cited in note 3); see *id.* at 209-11 (reproducing the list). “The list is undated, but Harlan probably wrote it during the summer of 1910. The last decision listed was delivered in the spring of 1910.” The absence of two decisions, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911) and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911) leads Professor Przybyszewski to conclude that Harlan drafted the list in 1910 and never revised it in 1911. Przybyszewski, *Harlan* at 174, 178. Professor Przybyszewski “cannot imagine that [Harlan] would have left the Great Trust Cases of 1911 out of an accounting of his legacy to the nation.” (*Id.* at 178) Harlan died, in office, on Saturday, October 14, 1911. For a description, discussion and analysis of this list, see *id.* at 147-87.

ramic understanding of Harlan's "coherent legal vision." (p. 152)

It is not plausible to contend that Malvina Harlan's memoirs have been neglected. Scholars have frequently used and reproduced them.¹² According to Professor Przybyszewski, however, previous biographers' motivation "to prove that John [Marshall Harlan] was a great judge" rendered that use "far less cautious." (p. 18) Only the other sources, which Professor Przybyszewski describes as "treasures" and "extraordinary documents," have escaped close scholarly attention. (p. 3) Previous publications have disclosed that Harlan gave lectures, including a constitutional law course at Columbian University.¹³ Indeed, other Justices, including Story, Wilson, Miller, and Brewer, have done the same.¹⁴ The difference is the perspective and significance that *The Republic According to John Marshall Harlan* extracts from those lectures.¹⁵

Much less, if any, prior attention has focused on Harlan's list of opinions. Given this neglect and that these 83 opinions represent a miniscule fraction of the 14,226 cases in which Harlan participated,¹⁶ how and why does Przybyszewski justify

12. See, e.g., Westin, 66 Yale L.J. at 638 (cited in note 9); David Farrelly, *Harlan's Formative Period: The Years Before the War*, 46 Ky. L.J. 367 (1958).

13. See, e.g., Alan F. Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 Colum. L. Rev. 633, 665 (1962) (listing Harlan's bibliography "Lectures on Constitutional Law, Transcript of Law Lectures for 1897-1898, Columbian Law School"); Yarbrough, *Judicial Enigma* at 213-15 (cited in note 5) (teaching from 1891-1910); Beth, *John Marshall Harlan: The Last Whig Justice* at 144, 171 (cited in note 5) (suggesting that Harlan began teaching at Columbian Law School in 1884 and that he "taught at the summer session of the University of Virginia Law School, and gave a series of lectures on the Constitution at Northwestern University"); Florian Bartosic, *The Constitution, Civil Liberties and John Marshall Harlan*, 46 Ky. L.J. 407, 413-14 (1958).

14. See, e.g., R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* 253-62 (U. North Carolina Press, 1985) (Harvard Law School lectures); Michael J. Brodhead, *David J. Brewer: The Life of a Supreme Court Justice, 1837-1910* at 131-32 (Southern Illinois U. Press, 1994) (Columbian University lectures); Westin at 62 Colum. L. Rev. at 648-50 (cited in note 13) (noting Justices Story, Wilson, and Baldwin's constitutional law lectures); Przybyszewski, *Harlan* at 58, 252 (cited in note 3) (Miller's lectures).

15. "Linda Carol Przybyszewski devotes considerable attention to an analysis of Harlan's lectures. Arguably, however, his judicial opinions offer considerably greater insight into his judicial and constitutional philosophy." Yarbrough, *Judicial Enigma* at 266 n.43 (cited in note 5).

16. The list is "fifty-nine majority opinions and twenty-four dissents." Przybyszewski, *Harlan* at 148 (cited in note 3). For the 14,226 cases see Alan F. Westin, *Mr. Justice Harlan*, in Allison Dunham and Philip B. Kurland, eds., *Mr. Justice* 93, 117 (U. Chicago Press, rev. ed. 1964). See also Westin, 66 Yale L.J. at 699 n.283 (cited in note 9) (similar figures). Compare the different total numbers of Harlan's opinions given in Bartosic, 46 Ky. L.J. at 408 (cited in note 13); Henry J. Abraham, *John Marshall Harlan: A*

this list's prominence? Harlan's perspective is paramount. Were these 83 opinions "his favorite decisions" or do they constitute something more: his "legacy"? (p. 147) By focusing on them, can a biographer "understand how [Harlan] conceived of his work on the [Supreme] Court"? (p. 148) Indeed, should significance be attributed to the appearance on this list of individual, albeit now famous, opinions such as *Plessy*? (p. 148) If so, does sheer numerical weight—the repetition of more obscure opinions dealing with the same subject matter, such as, the states' police power over "health, safety and morals"(p. 149)—mean even more?

On each issue *The Republic According to John Marshall Harlan* provides an affirmative answer. Professor Przybyszewski relentlessly builds upon this foundation to reach three predictable conclusions. First, Harlan had "a coherent legal vision." (p. 152) Indeed, Harlan attained this coherence by simultaneously advancing substantive due process and nationalization of the Bill of Rights. For Harlan, free labor ideology and civil rights were compatible, not contradictory. Second, pushed by the Thirteenth and Fourteenth Amendments and the Civil War, one objective was responsible for Harlan's vision: "nationalism."¹⁷ (p. 152) In this context, Przybyszewski suggests that Harlan's private letters provide supporting evidence. (pp. 148, 170-178) Third, Harlan recognized and, via his list of opinions, publicly acknowledged a disjuncture between his civil rights decisions. For example, the *Civil Rights Cases*¹⁸ and *Plessy*¹⁹ were to be "remembered" but others, such as *Cumming v. Richmond County Board of Education*,²⁰ were "failures." (p. 117)

Even if these conclusions are purely conjectural, this use of Harlan's list, Harlan's lectures and private letters,²¹ and Malvina

Justice Neglected, 41 Va. L. Rev. 871, 872 (1955) (similar figures). Przybyszewski utilizes Westin's figures and discusses one Harlan circuit court opinion. Przybyszewski, *Harlan* at 76, 147, 169-70, 236 n.1 (cited in note 3) (discussing *Arthur v. Oakes*, 63 Fed. 310 (1894) (7th Cir.)).

17. For Harlan's changing views—from anti to pro—"the Civil War amendments" see Westin, 66 Yale L.J. at 653-63 (cited in note 9). But see Yarbrough, *Judicial Enigma* at 162 (cited in note 5) (agreeing with Felix Frankfurter's view that this change was motivated to quell opposition to Harlan's Supreme Court appointment).

18. 109 U.S. 3 (1883).

19. 163 U.S. 537 (1896).

20. 175 U.S. 528 (1899).

21. For example, *Harlan* notes that "only one income tax decision [*Pollock v. Farmers Loan and Trust Co.*, 158 U.S. 601 (1895)] is listed, but Harlan's letters tell us it meant a lot to him." Przybyszewski, *Harlan* at 148 (cited in note 3). See also *id.* at 170-78 (discussing case and letters and concluding that "Harlan's private correspondence shows how much the Civil War had shaped his understanding of what had happened in the In-

Harlan's memoirs leads Professor Przybyszewski to something more. At least compared to other scholarship, *The Republic According to John Marshall Harlan* provides different interpretations of Harlan's judicial opinions and their larger, undisclosed motivations, reasons, and causes.

At this juncture, a more fundamental question emerges: does Professor Przybyszewski deliver "a new approach to the study of judges"? (p. 11) *The Republic According to John Marshall Harlan* may move future judicial biographies away from a quest for greatness and toward an explanation of jurists within their historical context and milieu. For example, Professor Przybyszewski unabashedly elides endeavors to connect or disassociate Harlan and his "color-blind" characterization of the Constitution in *Plessy*²² from contemporary perspectives of *Brown*²³ or affirmative action.²⁴ In this context, speculation about what Harlan would have done in 1996, the centenary of *Plessy*, is characterized as "silly." (p. 203) The reason is obvious. Harlan can only be understood and explained "through the historical circumstances in which he lived. It's impossible to rip him out of those circumstances, stick him in ours, and watch him go." (p. 203) Instead, Professor Przybyszewski uses Malvina Harlan's memoirs to interpret what Harlan's *Plessy* dissent meant to him and his Supreme Court colleagues.

Two factors are paramount: Harlan's paternalism and racism. Professor Przybyszewski believes that racism in particular explains why Harlan, despite being prepared to enforce and espouse racial equality in relation to civil and political rights such as travelling on public transport, jury service, and voting, (p. 97) "hesitated" and preferred "avoiding" to do so when social rights such as "interracial marriages or schools" were involved. (pp.

come Tax Case").

22. "Our Constitution is color-blind, and neither knows or tolerates classes among citizens." *Plessy* 163 U.S. at 559. For the origins and three different interpretations of this sentence, see James A. Thomson, *Swimming in the Air: Melville W. Fuller and the Supreme Court 1888-1910*, 27 *Cumb. L. Rev.* 139, 168 n.191(1997). For a bibliography of *Plessy* and differing interpretations of its majority and dissenting opinions, see Thomson at 173 n.212, 177-84; Chin, 82 *Iowa L. Rev.* at 630 n.10 (cited in note 5) (subsequent scholarship); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 *Vand. L. Rev.* 881 (1998); Michael J. Klarman, *The Plessy Era*, 1998 *Sup. Ct. Rev.* 303; Michael J. Klarman, *Neither Hero, Nor Villain: The Supreme Court, Race and the Constitution in the Twentieth Century* (Chapter 1: The *Plessy* Era) (Oxford U. Press, forthcoming).

23. *Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954).

24. For the reversal of positions (from the 1940s to the 1990s) of liberals and conservatives over the relationship between *Plessy* and *Brown* and between *Plessy* and race-conscious affirmative action, see Thomson, 27 *Cumb. L. Rev.* at 168-70, 180-84 (cited in note 22).

116, 117) Ultimately, Professor Przybyszewski maintains that paternalism and racism solve what other Harlan biographers leave as an unanswered puzzle: an apparently irreconcilable contradiction in Harlan's decisions and opinions between the *Civil Rights*,²⁵ *Plessy*²⁶ and *Berea College*²⁷ cases and the *Pace*²⁸ and *Cumming*²⁹ cases. (p. 116)

Whatever its other merits, Professor Przybyszewski's exposition is neither startling nor novel. This tripartite rights structure—civil, political, and social—was not unusual.³⁰ Its existence has been known to other scholars.³¹ Of course, Harlan, without undermining that structural edifice,³² moved public accommodation (in the *Civil Rights Cases*) and transport (in *Plessy*) from social to civil rights.³³ To that extent, Harlan can be praised as exceptional.³⁴ However, even Professor Przybyszewski concedes that more than this cannot be claimed:

Harlan was unwilling to make further alterations [for example, in *Pace* and *Cumming*] in the three-part system of [civil, political, and social] rights In fact, clutching at greatness

25. 109 U.S. 3 (1883) discussed in Przybyszewski, *Harlan* at 90-95 (cited in note 3).

26. 163 U.S. 537 (1896) (discussed in Przybyszewski, *Harlan* at 95-99 (cited in note 3)).

27. 211 U.S. 45 (1908) (upholding, on non-constitutional grounds, Kentucky law requiring racial segregation in private schools) discussed in Przybyszewski, *Harlan* at 106-09 (cited in note 3); Bernstein, 25 J. Sup. Ct. Hist. (cited in note 5); and Westin, 66 Yale L.J. at 690, 708-09 (cited in note 9). But see Yarbrough, *Judicial Enigma* at 162 (cited in note 5) (noting that Harlan's dissent expressly did not address the constitutionality of segregation in public state schools); Charles Nesson, *The Harlan-Frankfurter Connection: An Aspect of Justice Harlan's Education*, 36 N.Y.L. Sch. L. Rev. 179, 183-85 (1991) (Felix Frankfurter's view that Harlan would have upheld the constitutional validity of segregation in public schools).

28. 106 U.S. 583 (1882) (holding that Alabama law, which more severely punished interracial adultery than that between same-race persons, did not contravene 14th Amendment's equal protection clause) discussed in Przybyszewski, *Harlan* at 109-15 (cited in note 3).

29. 175 U.S. 528 (1899) (refusal to grant injunction to compel the County Board of Education, via the denial of tax-support, to close the white public high school until the Board reopened the black high school) discussed in Przybyszewski, *Harlan* at 99-102 (cited in note 3); Connally, 25 J. Sup. Ct. Hist. (cited in note 5); and Westin, 66 Yale L.J. at 689 (cited in note 9).

30. Przybyszewski, *Harlan* at 81, 84 (cited in note 3) ("Nineteenth-century white Americans spoke of three kinds of rights: civil, political, and social" and "the common three-part system of rights").

31. *Id.* at 81-85.

32. However, this might indicate that "Harlan demonstrated that ideas about rights had a dynamism of their own." *Id.* at 84.

33. *Id.* at 84.

34. *Id.* at 86, 117. Others, such as "congressional Republicans like [Senator Charles] Sumner who tried to reposition the line between social and civil rights," must also be included. *Id.* at 83.

is especially inappropriate here [in the context of Harlan's understanding of race and its relationship to rights] because it turns out that the beliefs that made Harlan's famous dissents possible also underlay his less-admired decisions.³⁵

In addition, Professor Przybyszewski recounts "three stories" (p. 86) concerning Harlan's non judicial activities. First is "the struggle of Harlan and his black ally Reverend Francis J. Grimke to prevent segregation in the [New York Avenue] Presbyterian Church [in Washington D.C.] in 1905." (p. 86) Next, "Harlan and other white Presbyterians [attempted] to uplift and evangelise blacks while maintaining a clear social separation from them." (p. 87) Finally, Harlan discussed "the issue of inter-racial sexual relations" in a way which demonstrated his "ambivalence." (p. 87) These stories, together with Malvina Harlan's memoirs, may well reveal "how Harlan viewed the black race and the rights it possessed." (p. 86) They also demonstrate "how Harlan's religious and legal ideas reinforced each other."³⁶ (p. 86)

Unfortunately, the more important and interesting question remains: Why did Harlan perpetuate that tripartite civil, political and social rights structure? Why could Harlan not completely abandon it? Professor Przybyszewski offers three versions of an unsurprising answer. At its softest: "Racial identity would have been lost if social equality existed." (p. 117) Next, especially when the undertones of white Protestant superiority are heard, is its more strident intonation: Harlan's "belief in an Anglo-Saxon heritage." (p. 116) Finally and bluntly the clear answer emerges: "Harlan's racialism." (p. 116) Of course, as Professor Przybyszewski recognizes this racialism not only "made [Harlan's] egalitarianism possible," but it "also accounts for the inconsistencies in his civil rights decisions." (p. 116) That is, "Harlan's racialism" was simultaneously liberating and constraining. "[W]hite paternalism and Anglo-Saxon racial identity both justified his famous dissents and limited his definition of civil rights." (p. 118) However, even for Harlan there was no liberating element for Native Americans or Chinese.³⁷

35. Id. at 85.

36. At least one other scholar has suggested that Harlan "allegedly went to sleep with one hand upon the Constitution and the other on the Bible, and thus secured the untroubled sleep of the just and the righteous." G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* 129 (footnote omitted) (Oxford U. Press, 1988 expanded ed.).

37. See Przybyszewski, *Harlan* at 118-22 (cited in note 3); Chin, 82 Iowa L. Rev. at

Indeed, these conclusions—Harlan’s limited application of civil and political equality only to public accommodation and transport and private schools but not to public schools or inter-racial adultery and his racism—resonate with other scholars’ conclusions.³⁸ Starkly, however, they almost reverse conclusions promulgated by earlier scholars who sought to revive Harlan’s reputation. Under a sub-heading—“The Psychological Bases of Harlan’s Civil Rights Opinions”³⁹—is one example:⁴⁰

Just why Harlan gave such undeviating support to Negro civil rights is worth probing [H]e . . . became the most fervent Republican of them all [because] . . . the Negro was not a minor or occasional theme in his life; it had run like a leitmotif through his Kentucky career

When Harlan joined the Court in 1877 . . . he arrived as a man whose most vivid experience apart from battle had been his conversion on the civil rights issue. To justify his basic shift in philosophy in 1868, Harlan had to convince himself that he had been wrong—completely and dangerously wrong—in his earlier pro-slavery views [J]ust as a religious or political convert will hold his faith more strongly, even more combatively, than the born believer, so Justice Harlan had become a staunch supporter of Negro civil rights In addition . . . Harlan came to associate his warm personal memories of the Civil War with the cause of the Negro [Harlan] assimilate[d] his attitude toward Negroes into the moral and political fundamentalism that was his basic framework.⁴¹

In the context of this transformation thesis,⁴² one effect of Professor Przybyszewski’s conclusions is obvious: Harlan’s personal “civil rights odyssey”⁴³—from slavery apologist to “staunch supporter of Negro civil rights”⁴⁴—cannot be sustained.⁴⁵ Again,

151 (cited in note 5); Chin, 32 Akron L. Rev. at 629 (cited in note 5). But see Abraham, 41 Va. L. Rev. at 880-81 (cited in note 16) (Harlan “had come to feel genuine concern for the plight of the Negro, a concern that he continually echoed for other minorities as well, such as the Chinese and the American Indians”) (footnotes omitted); Henry J. Abraham, *John Marshall Harlan: The Justice and the Man*, 46 Ky. L.J. 448, 466 (1958) (same).

38. See, e.g., Yarbrough, *Judicial Enigma* at 160-62 (cited in note 5); Chin, 32 Akron L. Rev. (cited in note 5).

39. Westin, 66 Yale L.J. at 697 (cited in note 9).

40. See also Abraham, 41 Va. L. Rev. at 880-86 (cited in note 16); Abraham, 46 Ky. L.J. at 465-70 (cited in note 37).

41. Westin, 66 Yale L.J. at 697-99 (cited in note 9).

42. Note the title of Westin, 66 Yale L.J. (cited in note 9).

43. *Id.* at 638.

44. *Id.* at 698.

it is not uncommon for biographers to promulgate a transformation thesis which other scholars endeavor to refute. Classic examples in this genre include biographies of Justices Holmes and Frankfurter and Chief Justice Warren.⁴⁶ Of course, moving from one position to another, even if it involves being inconsistent, can often be a virtue, rather than a vice.

The Republic According to John Marshall Harlan is not confined to blacks' civil rights. Rather, Professor Przybyszewski uses Harlan's lectures, letters, extra-judicial speeches, and list of cases to analyze, probe, and provide interpretations and conclusions over an extensive domain of public life and law. Seminal cases are obvious: *Lochner*,⁴⁷ the Insular cases,⁴⁸ and the Income Tax cases.⁴⁹ Professor Przybyszewski also discusses *Smyth v. Ames*;⁵⁰ *Hurtado v. People of California*;⁵¹ and *Robertson v. Baldwin*.⁵² Again, Harlan is placed within, not extrapolated from, his surrounding historical context: "Even Harlan's criticism of corporate power was couched in free labor ideology. The Whig turned Republican had learned his lessons well

45. *Harlan* (cited in note 3) repudiates the latter, rather than the earlier, part of the thesis.

46. See, e.g., White, *Holmes: Law and the Inner Self* at 450-53 (cited in note 8); Melvin I. Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* (Twayne Publishers, 1991); James A. Thomson, *Capturing the Future: Earl Warren and Supreme Court History*, 32 *Tulsa L.J.* 843, 873-74 (1997); Michael E. Parrish, *Earl Warren and the American Judicial Tradition*, 1982 *Am. Bar Found. Res. J.* 1179. For dangers inherent in this genre see Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 *Nw. U.L. Rev.* 921, 926-30 (2001) (critiquing scholarship which promulgates novel or counterintuitive ideas).

47. 198 U.S. 45 (1905). Discussed in Przybyszewski, *Harlan* at 149-52 (cited in note 3). See generally Thomson, 27 *Cumb. L. Rev.* at 174 n.212, 185-90 (cited in note 22) (bibliography and various interpretations).

48. *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Gavieres v. United States*, 220 U.S. 338 (1911); *Dowdell v. United States*, 221 U.S. 325 (1911). Discussed in Przybyszewski, *Harlan* at 123-46 (cited in note 3). See generally James E. Kerr, *The Insular Cases: The Role of the Judiciary in American Expansionism* (Kennikat Press, 1982).

49. *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895); *Pollock v. Farmers' Loan and Trust Co. (Rehearing)*, 158 U.S. 601 (1895). Discussed in Przybyszewski, *Harlan* at 170-73, 177-78 (cited in note 3). See generally James W. Ely, Jr., *The Chief Justiceship of Melville W. Fuller 1888-1910* at 118-23 (U. South Carolina Press, 1995).

50. 169 U.S. 466 (1898) (Harlan's substantive due process fair-value formula to assess the reasonableness of railroad rates set by states or state agencies).

51. 110 U.S. 516 (1884) (Harlan's dissent using 14th Amendment's due process clause to apply Bill of Rights to the states). Discussed in Przybyszewski, *Harlan* at 162-66 (cited in note 3).

52. 165 U.S. 275 (1897) (Harlan's dissent uses the 13th Amendment in relation to a sailor who had deserted and was returned by a U.S. marshal to the ship). Discussed in Przybyszewski, *Harlan* at 169 (cited in note 3). See generally Yarbrough, *Judicial Enigma* at 156-57, 227 (cited in note 5).

Like many Americans of his generation, Harlan retained a simplified view of economic class even as others were complicating their views. There were people who worked and people who lived off their investments (which they were likely to have acquired in some underhand way).⁵³

That leads Professor Przybyszewski to an inevitable and unsurprising conclusion:

Instead of trying to identify Harlan as a man who transcended history and was later vindicated by it, [*The Republic According to John Marshall Harlan*] has tried to show that he was a man with a history Harlan drew on the traditions in which he was raised, struggled through his own experiences, and came to an explanation of what had happened and what would happen to himself and his country

Judicial biographers' desire to prove that they are writing about great judges was inspired in part by the oldest justification for biography: the attempt to supply models of civic behavior. . . . [*The Republic According to John Marshall Harlan*] offer[s] Harlan's history less as a model and more as evidence of the importance of the individual choices made by those participating in the republican project.⁵⁴

Ironically, Harlan would have rebuffed Professor Przybyszewski's new approach to judicial biography. Harlan was aspiring to greatness. On November 20, 1897, he explained to his constitutional law class:

I cannot tell, except from the feeling of the ambition that is planted in the breast of every man to live after he is dead and gone in the memory of his fellow citizens . . . I can understand why a man may be willing to give his whole life, and lead a life of poverty and self-denial if by doing so he can make a great name in his country.⁵⁵

Immediately after quoting that statement, Professor Przybyszewski succinctly summarizes Harlan's position: "By serving the Union, a man could achieve civic immortality." (p. 190) Not recognized or commented upon is an obvious implication: Harlan, unlike Professor Przybyszewski, would have supported

53. Przybyszewski, *Harlan* at 184 (cited in note 3) (footnote omitted).

54. *Id.* at 206-07.

55. Harlan, *Constitutional Law Lectures* (cited in note 10) (quoted in Przybyszewski, *Harlan* at 190 (cited in note 3)).

and advocated biographies seeking and extolling greatness in judges.

Especially because it confronts the strength and longevity of traditional approaches, *The Republic According to John Marshall Harlan* is a bold and courageous undertaking. Whether it will or should accomplish Professor Przybyszewski's larger objective—the transformation from traditional to new biographical approaches—is much more debatable. Fortunately, however, this is not an all-or-nothing proposition. Hopefully, as Professor Przybyszewski envisages, at least a “conversation” (p. 9) will ensue. If that leads to better judicial biographies, much will have been achieved.⁵⁶

56. For a suggestion that this may have already occurred within the parameters of Professor Przybyszewski's biographical scholarship see Wildenthal, 61 Ohio St. L.J. at 1464-65 n.40 (cited in note 5) (concluding that Przybyszewski, *Harlan* (cited in note 3) “is one of the most intriguing and inspiring accounts ever written on the formation and expression of any judge's legal philosophy and work product” but “[b]ecause [that] book substantially modifies [Przybyszewski, *The Republic According to John Marshall Harlan* (cited in note 4)] in certain ways, [Professor Wildenthal] . . . cite[s] to both [that] book and that [Ph.D.] dissertation, as appropriate”).