

“Pursuing ‘Equity’ Over Equality Reveals the Nation’s Moral Regression”

George Will - July 30, 2021

In 1958, Chief Justice Earl Warren [wrote](#) that the Eighth Amendment’s proscription of “cruel and unusual” punishments “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Warren’s confidence was that “evolving” is a synonym for “improving.”

The theory that a wisdom ratchet clicks irreversibly in the direction of improvement is, however, now being refuted by the nation’s moral regression. This is being driven by progressives who are recoiling, in the name of “equity,” against the aspiration of colorblind equality.

To understand how radically reactionary this is, consult a splendid new biography that arrives at a moment when its subject, although still praised, is being implicitly repudiated by policies. Peter S. Canellos’s “[The Great Dissenter: The Story of John Marshall Harlan, America’s Judicial Hero](#)” covers the still-resonant career of a son of a Kentucky slaveholding [family](#), born in 1833 and [named](#) for the jurist who ranks as the most important American who never was president.

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Harlan never thought of Kentucky as Robert E. Lee thought of Virginia, as his “[country](#).” Rather, one formative influence on Harlan were the nation-building principles by which his namesake strengthened national power, and hence national identity over states’ rights. Another influence was Kentucky Sen. Henry Clay’s sense of national destiny. A third influence was his brother, if such he was: Robert Harlan, the son of an enslaved mother and White father, presumably John’s, became one of the most successful Black Americans of the 19th century, and a constant reminder to his jurist brother of the potentialities of former slaves.

Harlan’s reputation rests primarily on his prescient — or so it seemed until very recently — 1896 dissent in *Plessy v. Ferguson*. Harlan supplied the credo of the mid-20th century civil rights movement. In a 7-to-1 [decision](#), the court validated the doctrine of “separate but equal” public facilities, giving a patina of constitutionality to Jim Crow segregation. Harlan [demurred](#):

“Our Constitution is color-blind. ... 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.”

Looking back at slavery, which was for them a living memory, Harlan’s fellow justices [saw](#) “separate but equal” as dramatic progress, hence benign. Looking forward, Harlan saw what the nation would at last affirm with the 1964 [Civil Rights Act](#): That a condition is especially intolerable — a constant insult — when it is defended as not quite as odious as slavery.

Harlan’s *Plessy* dissent reflects modernity’s break with pre-modern politics. This break has had three components: Treating citizens as individuals rather than as members of collectivities (guilds, classes,

etc.). Guaranteeing the equal rights of citizens in, and against, the state. And equal opportunity — all careers open to talents.

Equal opportunity is an aspiration forever imperfectly realized. But the steady pursuit of it is as noble as today's progressive abandonment of this aspiration in favor of "equity" is ignoble. This regression involves ascribing all disparities in social outcomes to racism, and requiring government to use explicitly racial criteria when allocating supposedly remedial benefits. Examples are the Biden administration's racial preferences when distributing [restaurant revitalization](#) and [farm relief](#) funds. Or states and localities having racial preferences regarding [vaccinations](#) and [scholarships](#).

Harlan's *Plessy* dissent insisted that the Constitution's post-Civil War amendments forbid "the imposition of any burdens or disabilities that constitute badges of slavery or servitude." Today, 125 years later, multiplying departures from colorblind government — myriad race-based preferential treatments — are becoming a different but also invidious badge: of permanent incapacity.

Laws or administrative policies adopted for (in the [words](#) of today's chief justice, John G. Roberts Jr.) the "sordid" practice of "divvying us up by race" can be deleterious *for the intended beneficiaries*. Benefits allocated to a specially protected racial cohort might come to be seen as a badge of inferiority. Such preferences might seem to insinuate that recipients of government-dispensed special privileges cannot thrive without them.

Government spoils systems, racial or otherwise, wound their beneficiaries. Getting used to special dependency, and soon experiencing it as an entitlement, the beneficiaries might come to feel entitled to preferences *forever*. Hence, progressives working to supplant equality of opportunity with "equity" — race-conscious government allocation of social rewards — are profoundly insulting, and potentially injurious, to African Americans and other favored groups.

Canellos's stirring biography resoundingly establishes that Harlan was a hero. So, what are those who today are trying to erase the great principle of colorblindness that Harlan championed?