

John Marshall Harlan: The Original Originalist

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South Texas College of Law's Josh Blackman

"I have often been astounded to meet with lawyers who have actually never read the Constitution of the United States, although it can be read within the time that is wasted at a street corner some afternoon discussing the last game of baseball or the last prize fight....Now, I beg you that this may not be said of any member of this law class that he allow this week to pass without reading the Constitution....Freedom and free institutions cannot long be entertained by a people who do not understand the nature of the government under which they live.

—Justice John Marshall Harlan I, October 14, 1897.

During the 1897-98 school year at Columbian College of Law, now George Washington University School of Law, an 18-year-old government clerk named George Johannes and an unknown classmate carefully transcribed verbatim in shorthand 27 lectures on constitutional law by the first Justice John Marshall Harlan. More than 100 years later, a trio of lawyers joined to discover just what kind of law professor was the Great Dissenter.

The lawyers found that Harlan eschewed the newly developing Socratic method of teaching and could be considered a proto-originalist who would find common ground in some of the views of the Supreme Court's current originalist, Justice Antonin Scalia.

They also discovered that Harlan's views were decades ahead of the court's jurisprudence in

such areas as the incorporation doctrine, Congress's powers under the Commerce Clause, the Erie doctrine and vertical comity, as well as separation of powers.

And they revealed a very human Harlan who struggled financially but only gave up a night-time teaching job he loved and performed for 20 years after the law school, suffering financial problems, reduced his salary, cut his course hours and made his surroundings, in his own words, "very disagreeable."

Josh Blackman of South Texas College of Law and Brian Frye of the University of Kentucky College of Law were on separate career paths when they independently began examining Harlan's lectures on constitutional law.

"I was a little bit ahead of Josh, if only because I started law school ahead of him," Frye recalled. "I was in NYU in 2004-05, taking a lot of legal history classes, and got interested in Justice Harlan."

He discovered Harlan's lectures while reading *The Republic According to John Marshall Harlan* by Linda Przybyszewski, who had relied on his lectures, which she found in the Library of Congress.

George Johannes and Harlan's classmate had made a typewritten copy of each lecture and a letterpress copy on Japanese paper. In all, they transcribed about 500 pages of lectures. After a long career in government service and later in private practice with a Washington firm, Johannes in 1955 sent his letterpress copy of the lectures to Harlan's grandson at the Supreme Court, the second Justice John Marshall Harlan. That justice eventually donated the copy to the Library of Congress.

Blackman, Frye and Michael McCloskey of the Harlan Institute recount Johannes' story in their law review article, "John Marshall Harlan: Professor of Law," *George Washington Law Review*, July 2013.

"I was looking around for projects as a student and was in D.C. for a while," Frye said. "I went ahead and ordered a copy of the micro filmroll and made pdfs and printouts of all the material." After graduating from New York University School of Law and completing two clerkships, Frye became an associate with [Sullivan & Cromwell](#). "During my spare time, I would just type in the notes as I was working on them, thinking I would pursue it as a project," he said. "But ultimately it sort of fell by the wayside for a while because I was working on other projects. I did ultimately copy all 500 pages into a series of Word files, but I wasn't exactly sure what I was going to do with them. Tackling the annotations seemed like a project a little too daunting at the time. I also was trying to get an academic job and was advised that going on the job market as a legal historian was probably not wise."

Frye did get a visiting teaching position at Hofstra in 2010 and then in 2012 joined the faculty at the University of Kentucky College of Law, which initially was founded from a law program at Transylvania University, from which Harlan himself had graduated.

"I had all this material on the lectures so I threw everything up on the Internet so other people would have access to it," he said.

Enter Josh Blackman. "Within six hours of posting, I got a note from Josh saying he was looking to finalize his article on Harlan as law professor and he asked if I would be interested in collaborating on the article and the lecture note project. I said, 'Fantastic.' I had someone to light a fire under me."

With the help of law students, they completed the annotations of the lectures, ending with more than 500 footnotes. "It was little bit like detective work," Frye said. "The idea was basically to provide information when necessary to help the reader understand the historical context. There are a lot of instances where Harlan alluded to cases or historical circumstances or people who wouldn't be obvious to the contemporary reader."

The article offers a fascinating look into Harlan as a teacher, a judge and a "seer."

"As a teacher, I think his style is just very, very different from what we're used to today," said Frye. "He didn't use the Socratic method we are familiar with. He kind of comes off as being something of a public intellectual of his day. The way he interacts with his student is very much in line with the way the media-kind of law professor interacts with students. He was in the newspapers; he was a public figure who people were familiar with and would talk to. It's interesting to see how he talks to and interacts with his students, who were mostly clerks and government employees attending law school at night."

Frye said he found amusing Harlan's hypotheticals, which seemed very specific. "I realized before very long he would give a hypothetical with effectively the facts of a case he had recently decided—from a Harlan opinion or dissent."

Frye also found surprising Harlan's use of the word "bodacious."

"I had no idea it dated from the 19th century," he said. "I thought it was an invention of Bill & Ted. That was a small surprise as it were."

The bigger surprises, he added, were hearing Harlan talk about racial issues, African Americans and especially what he says about Native Americans and their relationship with federal government. "I think it's easy today to look at his opinions superficially and see a very kind of modern perspective on civil rights and individual rights. But if you dig deeper—and the lecture notes help—you see that his perspective has a much older pedigree that draws on early 19th century ideas."

Frye, whose legal research focuses on artists and arts organizations, is also a filmmaker and a journalist. In collaboration with Penny Lane, he has a feature-length documentary debuting on CNN on August 1: *Our Nixon*, based on the Super-8 home movies of H.R. Haldeman, John Ehrlichman and Dwight Chapin.

"Being a law professor is great because it rewards a range of interests," he said. "The different activities I engage in kind of seed the things I do."