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THE HARLAN-FRANKFURTER CONNECTION: AN ASPECT OF JUSTICE HARLAN'S JUDICIAL EDUCATION*

CHARLES NESSON**

As a student at Harvard Law School in the early sixties, I was taught the principles of federalism by Henry Hart, Paul Freund, Ernest Brown, and Al Sacks, in effect by the spirit of Felix Frankfurter as then embodied in the Harvard Law School faculty. They communicated their approval and regard for Justice Harlan, who had taken on the cause from Frankfurter of espousing and defending the principles of federalism. Now, many years later, I have taken this occasion to read through many of Harlan's papers, which he left to Princeton University, his alma mater.[1] His papers eloquently show the tremendous shaping influence that Frankfurter had upon him, and add delightful texture to the picture of Harlan receiving the ideals of federalism from Frankfurter and making them his own. Frankfurter was Harlan's teacher. Within the framework of their relationship, Harlan built much of his sense of himself as a Supreme Court Justice.

Frankfurter deliberately set out to become Harlan's teacher. He began this relationship when Harlan was nominated to fill Augustus Hand's vacated seat on the Second Circuit Court of Appeals in 1954. Frankfurter wrote to Harlan, emphasizing their connection through Emory Buckner, who had been Frankfurter's best friend in law school,[2] and who was Harlan's great mentor in New York law practice.[3] Invoking Buckner's

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1. The John Marshall Harlan papers are at the Seeley G. Mudd Library, Princeton University. All letters, notes, memoranda, and other unpublished materials cited in this article are located therein, unless otherwise noted.

2. When Frankfurter was appointed to the law school faculty, Buckner wrote to Roscoe Pound describing Frankfurter as "the closest friend I have and the real thing." MARTIN MAYER, EMORY BUCKNER 4 (1968) (quoting Letter from Emory Buckner to Roscoe Pound (Nov. 29, 1914)). The Buckner-Frankfurter friendship continued unabated until Buckner's premature death in 1941. *Id.*

3. Buckner trained Harlan as a litigator at Root, Clark, Buckner & Ballantine. When he became U.S. Attorney in New York, he hired Harlan as an Assistant District Attorney. Buckner later returned to Root, Clark, where he helped Harlan become the firm's top litigator. *See* David L. Shapiro, *Biographical Note* to THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN xvii, xvii-xx

name and memory with Harlan was akin to invoking a deity.

Frankfurter wrote to Harlan:

> My Dear John: Hardly a day passes that something does not turn up that makes me miss Buck. How he would rejoice to have you on the Court of Appeals! I do, because of my confidence that you will be worthy of the great company of the past whom you are joining.[4]

Frankfurter went on to name the great judges of the Second Circuit and to express his high expectation for Harlan's prospective judicial opinions.[5] Harlan replied:

> If I am able to realize even in small measure some of the expectations you have been good enough to express I shall be more than satisfied. It is indeed a sobering and humbling thing to think of oneself as joining the galaxy of distinguished men referred to in your letter. . . . While I was not so fortunate as to have sat at your feet at the Harvard Law School, I have always felt some sort of special bond with you through our mutual and devoted friend ERB.[6]

Harlan had served on the Second Circuit for less than a year when President Eisenhower nominated him to the Supreme Court.[7] After Harlan joined the Supreme Court, Frankfurter actively pursued the mentor's role. They overlapped as colleagues on the Court from March, 1955, when Harlan took his seat, until August, 1962, when Frankfurter retired after his second stroke. Over this period Frankfurter wrote to Harlan often.

Frankfurter was a man who loved to communicate in writing. He wrote with remarkable fluency and little restraint, at least when writing to a confidant. He also barraged Harlan with talk and calls. One gets a sense of Frankfurter's intensity in a comment Harlan made to a Frankfurter biographer: "You had to make it clear," Harlan said, "that you did not like telephone calls at five in the morning."[8]

(David L. Shapiro ed., 1969).

4. Letter from Felix Frankfurter to John M. Harlan (Jan. 26, 1954).

5. *See id.*

6. Letter from John M. Harlan to Felix Frankfurter (Feb. 2, 1954).

7. *See* Shapiro, *supra* note 3, at xxiii. President Eisenhower nominated Harlan on Nov. 8, 1954. *Id.*

8. LIVA BAKER, FELIX FRANKFURTER 215 (1969).

Frankfurter's early assessment of Harlan as a colleague on the Supreme Court was condescending and none too charitable. In a letter to Learned Hand, Frankfurter wrote:

> [Harlan] makes me wince when he talks about questions being "in the First Amendment area" and having "an instinct" that this or that "power of Congress is extremely limited." . . . With all his judicial aims and character, he really has not had the appropriate intellectual background of reading and reflection for the ultimate task of passing on constitutionality. . . .
>
> When he went off the other day I put a copy of J.B. Thayer's essay . . . into his hands, with the remark, "Please read it, then reread it, and then read it again, and then think about it long."[9]

Frankfurter also commented unflatteringly to Hand about Harlan's character:

> He is not meant for battle. [He] represents at its best what I'm told (by an esteemed Princetonian) is the dominant Princeton ideal, to be nice, and is just the kind of person who is too ready to have a bully like Black and a martinet like Warren have their way.[10]

Frankfurter was referring to Harlan's undergraduate career at Princeton, where his achievements were outstanding. In the understated words of *The Daily Princetonian*, Harlan was "perhaps the most distinguished undergraduate here in his Senior year."[11] He chaired the Princeton Senior Council, was president of his class, president of the Ivy Club, and chairman of the *Princetonian*.[12] He was voted "most respected" by his class, and honored by a lyric in the Faculty Song: "Here's to Johnny Harlan—he runs the University."[13] Frankfurter apparently thought that Harlan garnered these accolades for being "nice."

Frankfurter mistook Harlan's civility for weakness of character. He worried that Harlan would be a compromiser. He warned Harlan:

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9. Letter from Felix Frankfurter to Learned Hand (June 30, 1957) (Felix Frankfurter Papers, Langell Library, Harvard Law School).

10. *Id.*

11. Shapiro, *supra* note 3, at xviii (quoting THE DAILY PRINCETONIAN, Nov. 9, 1954, at 1).

12. *See id.*

13. Noel F. Busch, Supreme Court Justice John Marshall Harlan 9 (1964) (unpublished manuscript, Harlan Papers).

> John, you can always have what is called peace if you yield to the bullies and the irrationalists. I don't mean to be extravagant but because of such yielding to Hitler the world is now what it is.[14]

Indeed, Harlan was sometimes nicer to Frankfurter than the latter deserved. Frankfurter, for example, felt free to instruct Harlan even on the pettiest of matters. When Harlan wrote "Mr. Justice Harlan, *with* whom Mr. Justice X joins, dissenting," Frankfurter thought the "with" superfluous and told Harlan to drop it. Harlan complied but employed the same "with whom" phrasing in a later opinion. Frankfurter prodded him with notes pushing him to drop it, even though Frankfurter was not the Justice joining Harlan. With similar officiousness, Frankfurter instructed Harlan on the impropriety of indicating that certiorari had been denied when citing lower court opinions.[15] Many men would have told Frankfurter to mind his own business, but Harlan graciously welcomed the instruction.

Frankfurter purported to teach Harlan substance as well as form. Harlan's first serious outing on the Court came in *Ellis v. Dixon*,[16] in which Harlan wrote the opinion for a bare 5-4 majority. A peace group concerned about the Korean War had been denied use of the Yonkers Public Schools for evening meetings, though meetings held by other groups on other subjects had been allowed.[17] The Supreme Court had granted certiorari.[18]

Frankfurter wanted to dismiss the case on a procedural technicality, and argued his position to Harlan in a remarkable eleven page Socratic dialogue in which Frankfurter literally took the part of Socrates.[19] The dialogue (which Frankfurter printed and circulated only to Harlan) begins with Socrates's question:

> Socrates: Tell me, my dear Marshall, what is all this fuss in Yonkers about?[20]

Frankfurter (Socrates) then patronizingly spells out his analysis to his pupil, John *Marshall* Harlan.

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14. Letter from Felix Frankfurter to John M. Harlan (Feb. 22, 1956) (Frankfurter Papers).

15. Letter from Felix Frankfurter to John M. Harlan (Nov. 18, 1955).

16. 349 U.S. 458 (1955).

17. *See id.* at 459, 460 & n.3.

18. Ellis v. Dixon, 347 U.S. 926 (1954).

19. *See* Memorandum from Felix Frankfurter to John M. Harlan (May 17, 1955).

20. *Id.*

In response to Frankfurter's Socratic dialogue, Harlan sent him a note citing a case which foreclosed Frankfurter's line of analysis. But Harlan did what Frankfurter wanted. He simply found another technicality upon which to base the dismissal. Frankfurter joined Harlan's opinion, praising it with a condescending private note, "Hallelujah! Unto us this child is born!!"[21]

Another equally curious example of Frankfurter's teaching technique with Harlan occurred the following year. Frankfurter assaulted the stature of Harlan's famous grandfather, the first Mr. Justice Harlan (Harlan-I, as opposed to Harlan-II), renowned for his dissent in *Plessy v. Ferguson*,[22] in which he stated that "[o]ur Constitution is color-blind."[23]

Frankfurter wrote to Harlan with no apparent purpose other than to provoke, asserting that Harlan's grandfather's reputation as "the great dissenter" was undeserved. Frankfurter asserted, "there is no evidence whatever that Harlan-I thought that segregation was unconstitutional."[24] "Harlan-I would have sustained segregation, had the issue squarely come before the Court in his day."[25]

Frankfurter supported this assertion with two arguments. First, Harlan-I repeatedly emphasized in his *Plessy* dissent that the case dealt with transportation, as if there was something special about segregation in railway cars that did not extend to schools.[26] Second, Harlan-I wrote an opinion three years after *Plessy*, *Cumming v. County Board of Education*,[27] in which he sidestepped an opportunity to attack segregated schools.[28] To Frankfurter, this was clear evidence that Harlan-I would have sustained racial segregation in public schools.[29]

Harlan responded, diplomatically:

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21. Note from Felix Frankfurter to John M. Harlan on a draft opinion of *Ellis v. Dixon*, circulated June 2, 1955.

22. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

23. *Id.* at 559.

24. Letter from Felix Frankfurter to John M. Harlan (July 12, 1956).

25. *Id.*

26. *See Plessy*, 163 U.S. at 553 (Harlan, J., dissenting) (defining the issue as whether it is consistent with the Constitution for a state to regulate the use of a public highway by citizens solely upon the basis of race); *id.* at 554, 561.

27. 175 U.S. 528 (1899).

28. *See id.* at 543 (stating that the Court need not consider whether segregated schools in Georgia comport with the Constitution because that issue was not presented in the pleadings).

29. *See* Letter from Felix Frankfurter to John M. Harlan (July 6, 1956).

> I recognize the inferences that may be drawn from *Cumming*, but I still think the most that can be said is that *Plessy* is little basis for thinking that the old boy would have voted against school segregation. While he did say in *Cumming* that a state system of education was a state matter he also qualified it by stating that it could not run afoul of the Constitution—and earlier he went out of his way to note the anti-segregation argument and left it open. I can't prove it, but my instinct is that he would have been against segregation—voted against it, I mean.[30]

Frankfurter did not let the subject drop. Like a debater, he pinned down Harlan's concession and then pressed ahead.

> You and I are not in disagreement that Harlan-I's dissent in *Plessy v. Ferguson* gives no justification for assuming that he would have found segregation unconstitutional. While you say that that's the most that can be drawn from his dissent, I would say that's the least that could be drawn from it.[31]

Harlan replied, defending his grandfather, but offering to end the disagreement by declaring a draw:

> I think you push things too far. Against what you point out, his language in *Plessy* is undeniably sweeping. He repeatedly talks about all "civil rights" being caught by the 14th Amendment, and I find nothing to indicate that he would not have considered the right to attend state-maintained schools as a "civil right." In short, I think that the argument is pretty much of a stand-off; I am not at all sure that the popular view of *Plessy* is not correct. To be sure it cannot be demonstrated.[32]

But Frankfurter would not relent, insisting on the last word:

> Duly mindful of all you say about *Plessy*, I am sorry to have to stand my ground. I can not get away from the incongruity that a fellow who indulged in the broad rhetoric that the "Constitution is colorblind" should have sponsored such a narrow result in *Cumming*. Both opinions must be read in light of the intellectual habits of Harlan-I. If I were dealing with a Brandeis, whose decisions practically always sailed close to the harbor of the

30. Letter from John M. Harlan to Felix Frankfurter (July 12, 1956).

31. Letter from Felix Frankfurter to John M. Harlan (July 18, 1956).

32. Letter from John M. Harlan to Felix Frankfurter (July 28, 1956).

> specific facts of the case, a wearisome reiteration in the *Plessy* dissent that it was concerned with rights on a public highway and the intimation in *Cumming* that the case was confined to the particular pleadings, would be merely characteristic of the writer. But whatever virtues may be attributed to Harlan-I, no one, I submit, would credit—or charge—him with having been a close reasoner, more particularly, a writer who confined himself to the narrow limits of a particular case.[33]

Why would Frankfurter choose to attack Harlan's grandfather? Frankfurter professed only a scholar's interest in the question, offering Harlan the following rationalization:

> I need hardly tell you that the notion is widely prevalent that Harlan anticipated striking down school segregation in his *Plessy v. Ferguson* dissent. That this isn't so is, of course, important as a matter of historic accuracy.[34]

Frankfurter's true message to Harlan seems to have been: "Thou shalt have no other gods before me."[35]

Condescension seemed to come naturally to Frankfurter. He wrote Harlan in 1956:

> Word that you were "off for Williamsburg" is the best communication I've had from you since you came down here. For it lightens a concern of mine, a concern that has been weighing on me long before B. Hand told me of his real anxiety after learning from you of your unrelenting absorption in the Court's work . . . . He asked me, "Can't you do something about it" to which absurdity I replied, "Of course I can't—unless, perchance, I could persuade him of which I profoundly believe, that if he worked less he will make a better judge!" An idle brain is, I know, the devil's workshop. But it is no less true that all work and no play makes Jack a dull boy. To be consciously at it all the time and not to indulge in other interests, stifles the unconscious brooding faculties of man and limits his artistic faculties. . . . Such exclusive preoccupation with the immediate problems of law gives no opportunities for cultivating insight and imagination. And these basics—insight and imagination—mark essential

33. Letter from Felix Frankfurter to John M. Harlan (July 31, 1956).

34. Letter from Felix Frankfurter to John M. Harlan, *supra* note 31.

35. *Exodus* 20:3 (King James).

> differences between the great men in the Court's history and the ordinary and pedestrian.[36]

Harlan responded with unfailing politeness:

> Many thanks for your letter, so full of good philosophy. The last thing I want to do is be the cause of any worry to you and B. Hand. . . . Actually I've been doing no more than following the habits of a Wall St. lawyer in his approach to a new and challenging job.[37]

Notwithstanding Frankfurter's sometimes overbearing character, Harlan was a willing student to Frankfurter. He treated Frankfurter with tremendous respect and caring. He was open to Frankfurter's ideas and clearly respected the tradition and wisdom Frankfurter represented. They had their disagreements, for example over the Court's certiorari policy and what Harlan saw as "the rule of four" (which constrained him from voting to dismiss a case as improvidently granted if the four who voted to grant certiorari wanted a decision on the merits). This and many other disagreements play out in their correspondence. Two features characterize these disagreements. Substantively, Harlan never disagreed with Frankfurter concerning the basic philosophy of federalism and separation of powers. On this they were as one, with Frankfurter the teacher and link for Harlan to the judicial philosophy of Brandeis and Cardozo. Second, the disagreements between them were entirely without rancor. They espoused the style of affectionate debaters for whom the exchange was more important than the outcome. Harlan hardly ever betrayed himself with a harsh word in any direction. Frankfurter was the hungrier of the two for exchange. He was the one who most often initiated and kept exchanges going, sometimes too long. But Harlan never lost patience or took offense, instead delighting in a relationship that grew in warmth through the years of their association. If Frankfurter was, in Alexander Bickel's words, the "Michelangelo of friendship,"[38] Harlan was fully capable of reciprocating.

I met Frankfurter only once. Midway through my clerkship year, 1965, Frankfurter came to Harlan's chambers for a visit. In a wheelchair, eighty-one years old, recovering from his second stroke and obviously impaired by it, Frankfurter sat, hunched over to one side of the chair, a tiny frail figure. Harlan, with his proudest smile, pushed Frankfurter's

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36. Letter from Felix Frankfurter to John M. Harlan (Feb. 1956).

37. Letter from John M. Harlan to Felix Frankfurter (Feb. 16, 1956).

38. Alexander M. Bickel, *Frankfurter and Friend*, NEW REPUBLIC, Feb. 3, 1968, at 27, 27.

chair from the main hallway through the doorway to our clerks' office, where they chatted with us about the Court. Frankfurter flashed anger very easily. When mention was made of Justice Goldberg, who had replaced Frankfurter on the Court, Frankfurter hissed an epithet, the meaning of which I gathered only from his intensity: "Goldberg, that dance-hall lawyer!" Harlan responded lightly to bridge the awkward moment, still perhaps the "nice guy" from Princeton who thought the old man was too outspoken with his feelings. But Harlan, I knew, shared many of Frankfurter's feelings about the Court and differed with him primarily in his degree of circumspection.

Harlan came to the Supreme Court with an open attitude and without any overarching philosophy, ready to engage with his colleagues in a joint deliberative process. He was fully capable of making liberal decisions, as shown, for example, by his early opinions in *NAACP v. Alabama ex rel. Patterson*[39] and *Poe v. Ullman*.[40] But he was also a man of deep modesty, both in his personal life and especially in his instinctive conception of his role as a judge. The Warren Court majority, with its anti-collegial manners and its rush to overturn precedent, offended him. He thought it cabalistic, arrogant, disrespectful of the past, and too much in a hurry. He became upset with the majority when it acted as if its power to generate new constitutional rules was virtually unconstrained.[41]

Frankfurter fostered and applauded this reaction, and in Frankfurter's teaching, Harlan found ammunition to respond. The values of federalism gave Harlan a framework within which to articulate his disagreement with the Warren Court majority in a way that transcended his own personal outrage. Judicial restraint was his objective.[42] He tried to restrain the majority with every legal argument he could muster—history, logic, policy—all, apparently, to no immediate effect.

What would Harlan's position have been had he been among judges whose approach to law he trusted? I suspect he would have been more balanced about deciding issues of social change, more willing to recognize that respect for the dictates of the past is a policy to be assessed in

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39. 357 U.S. 449 (1958).

40. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

41. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 625 (1963) (Harlan, J., dissenting) (criticizing the "current mistaken view of the Constitution and the constitutional function of this Court. . . . that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act"); John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943, 943 (1963) (challenging "the view of the judicial function that . . . . all deficiencies in our society which have failed of correction by other means should find a cure in the courts").

42. *See* Harlan, *supra* note 41.

context. Harlan might have been willing to override precedent when he considered stability in the law less important than establishing good new law. That judges should exercise such power, however, is a proposition Harlan would recognize only in the company of those he trusted. In fact, he found himself in the company of people who appeared to him unseemingly eager to change the law. He saw them as dangerously arrogant, and therefore assumed the role of dissenter, steadfastly defending precedent, federalism, and judicial restraint.[43]

Justice Brennan was counterpoint to Frankfurter as a shaping force on Harlan. Brennan was Eisenhower's next appointment after Harlan, and Harlan welcomed him warmly to the Court.[44] They struck an immediate social friendship that Harlan cultivated by nominating and sponsoring Brennan for membership in the Century Club. Their friendship continued through the years and times of their most heated judicial disagreements, a tribute to both of them. Yet a gulf separated them in their work. Harlan's negative reaction to Brennan's opinions was so marked that it changed Harlan's most fundamental concept of his role, and pushed him sharply in Frankfurter's direction.

Harlan came to the Supreme Court thinking of it as a collegial body of good men working together. He prized civility and harmony. I doubt very much that he had any inkling he would wind up at an extreme. Harlan himself made this clear in a talk he gave in New York in 1956:

> I am inclined to think that dissenting opinions are sometimes due as much to inadequate advocacy of opposing views within the court as they are to basic differences of opinion among the judges. And when that is so, dissenting opinions are often apt to be little more than vehicles for expressing ideas that should have been threshed out within the conference. For my part, such opinions are better left unwritten.[45]

This statement assumes a model of the Court in which a group of judges with a common central core of understanding about deliberation and the role of reason work in dialogue with each other to achieve the best results. Justice Brennan disillusioned him. Harlan came to believe that

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43. *See supra* note 41.

44. *See* Stanley H. Friedelbaum, *Justice William J. Brennan, Jr.: Policy-Making in the Judicial Thicket*, *in* THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 100, 102 (Charles M. Lamb & Stephen C. Halpern eds., 1961). Justice Brennan joined the Court in 1957. *Id.*

45. Shapiro, *supra* note 3, at xxv-xxvi (quoting John M. Harlan, Some Impressions and Observations of a Newcomer to the Federal Bench, Address Delivered Before the New York Patent Law Association (Mar. 14, 1956)).

Brennan and his confederates in the Warren Court majority twisted both the law and the facts to achieve whatever result they wanted.

Harlan's first shock from Brennan came in a case in which Harlan did not participate. Harlan's biggest and most important case prior to becoming a judge was *United States v. E.I. duPont de Nemours & Co.*,[46] a giant antitrust suit brought by the United States against duPont. The suit charged anticompetitive effects from duPont's ownership of twenty-three percent of General Motors, an acquisition duPont had made more than thirty years before.[47] The government's main contention was that duPont's acquisition and continued retention of the GM stock gave it an illegal preference over competitors in the sale to GM of automotive finishes and fabrics.[48] Harlan, before he joined the bench, had been chief counsel for the duPont interests.[49] His defense of duPont and GM in this immense and important case was the pinnacle of his litigating career. He tried the case for seven months in a federal court in Chicago and won a resounding victory. At the conclusion of the trial the judge dismissed the government's charges, ruling that duPont's acquisition of the GM stock had not been anticompetitive.[50]

Harlan was appointed to the Second Circuit and then to the Supreme Court while the case was making its way to the Supreme Court. Harlan did not, of course, participate in the argument or decision of the case in the Supreme Court, but watched its progress and waited for the outcome with intense interest. duPont lost.[51] Brennan wrote the opinion of the Court, basing the decision on a novel legal theory that he virtually imported into the case, combined with a factual premise that the record did not support.[52]

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46. 126 F. Supp. 235 (N.D. Ill. 1954), *rev'd*, 353 U.S. 586 (1957).

47. *See id.* at 237, 240.

48. *See id.* at 237.

49. *See id.* at 236. Harlan at this time was a partner at Root, Ballantine, Harlan, Bushby & Palmer. *Id.*

50. *See id.* at 335.

51. *See duPont*, 353 U.S. at 607.

52. *See id.* at 588 n.5; *The Supreme Court, 1956 Term—Leading Cases*, 71 HARV. L. REV. 85, 166 n.427 (1957). Brennan interpreted the Clayton Act to extend to vertical acquisitions, despite contrary interpretations by the Federal Trade Commission and Congress, *see id.* at 166 nn.430-31, and to retention of acquisitions even though the initial acquisition was perfectly lawful. He asserted as his central factual premise that automotive finishes and fabrics were sufficiently different from other finishes and fabrics to make them a distinct line of commerce. *See duPont*, 353 U.S. at 593-94. Only if the market was defined in this narrow way was duPont's share of the market significant. Professor Areeda, in his treatise on antitrust law, suggests that this market differentiation was not real. *See* 2 PHILIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST

Harlan was dismayed and devastated by the *duPont* decision. He wrote to Frankfurter that he could hardly recognize the case from Brennan's opinion.[53] He confided to Frankfurter that nothing had disillusioned him more since he had come to the Court.[54] This letter of Harlan's was the single most striking document in his papers, clearly expressing a heartfelt, critical view of another Justice in a manner sufficiently out of character for Harlan to emphasize the depth of his feeling.

Frankfurter had earlier tried to disabuse Harlan of his collegial image of the Court, and to warn him against the hazards of disillusionment. Frankfurter wrote to Harlan:

> I beg of you not to allow yourself to go in for heartbreaks by operating under the illusion that everybody has the same belief in the processes of law that guide you. There is all the difference in the world between starting with a result and clothing it in some appropriate verbal garb, and starting with a problem and letting it lead where it will.[55]

Frankfurter liked to knock Brennan. "Cock-sure" was Frankfurter's favorite sobriquet for him. "I wish [Bill] were less shallow and thereby less cock-sure," he wrote to Harlan.[56]

> "Too much ego in his cosmos." When Paul Freund was here recently—and Paul Freund is as wise as any member of the profession I know—he asked, "Is my classmate Bill as cocksure as his opinions indicate?" Cocksuredness begets [in]sensitiveness . . . .[57]

Such barbs at Brennan salt the correspondence:

> I wish I could think as well of what I write as does Bill B. of his opinions![58]

PRINCIPLES AND THEIR APPLICATION ¶ 535, at 418 (1978) (stating that "[t]he specific evidence relied upon by the Court was quite insufficient to support this conclusion").

53. *See* Letter from John M. Harlan to Felix Frankfurter (undated, 1957).

54. *See id.*

55. Letter from Felix Frankfurter to John M. Harlan, *supra* note 14.

56. Letter from Felix Frankfurter to John M. Harlan (undated, 1957).

57. Letter from Felix Frankfurter to John M. Harlan (Sept. 12, 1957).

58. Letter from Felix Frankfurter to John M. Harlan (undated, 1960).

And again:

> The underlying difference between Bill Brennan and me is, I suspect, a different conception of opinion-writing. He thinks a big case—that is, one in which the public has a lively interest—calls for a big opinion.[59]

Frankfurter's embrace of Harlan at Brennan's expense was reflected by Harvard Law School's similar reaction. Henry Hart, Professor at Harvard Law and disciple of Frankfurter, wrote his famous *Time Chart of the Justices* as the foreword to the *Harvard Law Review* in 1959.[60] His thesis was that the Court was so overwhelmed with business that the quality of its work was falling.[61] He spoke urgently of the need for collective deliberation as an essential part of the judicial process.[62] "[T]oo many of the Court's opinions," he said, "are about what one would expect could be written in twenty-four hours."[63] "These failures are threatening to undermine the professional respect of first rate lawyers for the incumbent Justices of the Court."[64]

Hart illustrated his thesis of breakdown by shredding Brennan's opinion for the Court in *Irvin v. Dowd*.[65] Irvin, convicted of murder and sentenced to death, escaped while his motion for a new trial was pending.[66] Because of his escape, the Indiana courts denied Irvin relief, as did the lower federal court when Irvin, back in custody, tried to raise federal issues on habeas.[67] The case in the Supreme Court raised a tough question of habeas jurisdiction: what should happen when a state prisoner precludes himself, by escaping, from getting a ruling on his federal claims by the state's highest court. Brennan, writing for a bare majority of the Court, brushed aside the impediments to habeas corpus jurisdiction.[68] Harlan led the dissenters.[69]

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59. Letter from Felix Frankfurter to John M. Harlan (Feb. 23, 1960).

60. *See* Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

61. *See id.* at 84.

62. *See id.* at 100.

63. *Id.*

64. *Id.* at 101.

65. 359 U.S. 394 (1959).

66. *Id.* at 400.

67. *See id.* at 402-03.

68. *See id.* at 406.

69. *See id.* at 412 (Harlan, J., dissenting).

Hart's critique of Brennan's opinion was unmerciful. "To explicate in short compass all that is wrong with [Brennan's] reasoning is not easy," declared Hart.[70] Hart's invectives included "simply unbelievable,"[71] "transparently indefensible,"[72] "fudged,"[73] "befuddling,"[74] "fiat,"[75] "gratuitous,"[76] "intolerable,"[77] and "a technical mistake of a kind which ought not to be made in an opinion of the Supreme Court"[78]—one that "twists facts and words at its pleasure"[79] and "triples the confusion."[80]

While holding Brennan's opinion up to ridicule, Hart described Harlan, by contrast, as having written an "elaborately reasoned dissent,"[81] containing "careful analysis"[82] and "convincing demonstration."[83] Hart's basic attack was premised on the question why Harlan's opinion, joined by three other Justices, did not commend itself to the majority even enough to merit a response.[84]

In fact, Harlan's papers do reflect a communication from Brennan to Harlan about the case that Hart, had he known about it, would undoubtedly have used it for further ammunition. Brennan clipped a newspaper item titled "Today's Chuckle" and sent it to Harlan with a note saying:

> I can't find a place in my opinion in *Irvin v. Dowd* for the attached, but perhaps you can fit it somewhere in your opinion.[85]

The item read as follows:

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70. Hart, *supra* note 60, at 108.
71. *Id.* at 110.
72. *Id.*
73. *Id.* at 118.
74. *Id.* at 119.
75. *Id.* at 113.
76. *Id.* at 110.
77. *Id.*
78. *Id.* at 114.
79. *Id.* at 110.
80. *Id.* at 111.
81. *Id.*
82. *Id.* at 119.
83. *Id.*
84. *See id.*
85. Letter from William J. Brennan to John M. Harlan (Apr. 15, 1959).

> "I'll carry this case to the highest court in the land," said the lawyer to the prisoner, "but in the meantime you'd better try to escape."[86]

What Hart saw as a breakdown in the process of collective decision making became institutionalized when Arthur Goldberg replaced Frankfurter,[87] giving Brennan a lock majority. The heyday of the Warren Court had begun. To use Richard Posner's words, "[t]he Brennan chambers were the cockpit of the revolution."[88] One revolutionary procedure that deeply offended Harlan was the practice of circulating draft majority opinions on a limited basis to the five members of the majority and getting the necessary joins to make it an opinion of the Court before ever exposing it to dissenting critique. Once the majority was locked, the majority opinion-writer cared very little about what was said in dissent. This dynamic explains, I suspect, why Brennan's opinion in *Irvin* is unresponsive to Harlan's dissent. Brennan probably had his majority before Harlan's dissent ever circulated.

Harlan was pushed in Frankfurter's direction by the attitudes and practices of Brennan and the Warren Court majority. Increasingly, Harlan found himself on a Court with fellow judges who did not share his values and did not respect his views. Brennan and his colleagues seemed contemptuous of history and disdainful of judicial restraint. To quote Richard Posner again, "a majority of the U.S. Supreme Court disdained the principles of conventional legal reasoning symbolized by the Harvard Law School in its heyday."[89] Harlan, though not himself a graduate of Harvard, agreed with those principles of conventional legal reasoning. He came by them through Buckner, and was applauded by Frankfurter's disciples at Harvard for exhibiting them. Harvard virtually adopted Harlan as its prince on the Court, in clear preference to Brennan even though Brennan was a Harvard alumnus. Harvard awarded Harlan an honorary degree in 1964, calling him a "judge's judge."

John Lord O'Brian, senior partner at Covington & Burling, gave a flavor of the approbation of the bar for Harlan in a letter congratulating him on receiving Harvard's honorary degree. O'Brian wrote:

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86. *Id.*

87. Goldberg was nominated by President Kennedy on August 31, 1962, to replace Frankfurter, who retired on August 28, 1962. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 277-78 (2d ed. 1985).

88. Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 13 (1990).

89. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 429 (1990).

> I sometimes wonder if you realize what a unique place you hold in the minds of members of the Bar generally. All of them envy your courage as well as your power of expression, particularly in the recent dissenting opinions. I especially appreciate this because of my sympathy with the Brandeis view, which was perpetuated by Felix and now is being expressed by you. You can have no idea how many lawyers look upon you as the main stay of the present Court. . . . For the Bar generally regard you as their chosen representative on the Court. . . . I know that in saying this I am voicing the opinion of a vast number of lawyers who do not know you personally, but who have very much at heart the preservation of the prestige of the Court.[90]

The passing of the torch from Frankfurter to Harlan came with the reapportionment cases.[91] The need for the Supreme Court to stay out of the "political thicket" of reapportionment was fundamental to Frankfurter's judicial philosophy. He regarded his opinion in *Colegrove v. Green*,[92] in which he coined the metaphor of the political thicket,[93] as one of his wisest. Harlan shared Frankfurter's attitude toward reapportionment completely. After the argument in *Baker v. Carr*[94] in the fall of 1961, Harlan wrote a letter to Justices Whittaker and Stewart, with a blind copy to Frankfurter.[95] Harlan appears to have been acting here at least in part on Frankfurter's behalf, Harlan being the more diplomatic of the two and much more likely than Frankfurter to receive a good audience. Harlan opened his letter by observing that Whittaker and Stewart's votes would very likely determine the outcome of the case, which, he said, involved implications for the future of the Court of importance unmatched by "any case coming here in my time."[96] "The independence of the Court, and its aloofness from political vicissitudes have always been the mainspring of its stability and vitality."[97] Harlan saw the Court's independence being threatened, and predicted that the States would not reapportion themselves, even under federal threat. For

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90. Letter from John Lord O'Brian to John M. Harlan (June 19, 1964).

91. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962); Colegrove v. Green, 328 U.S. 549 (1946).

92. 328 U.S. 549 (1946).

93. *See id.* at 556.

94. 369 U.S. 186 (1962).

95. *See* Letter from John M. Harlan to Charles E. Whittaker and Potter Stewart (Oct. 11, 1961).

96. *Id.*

97. *Id.*

this reason, he considered Frankfurter's opinion in *Colegrove* to be "among the wisest and farsighted decisions of the Court."[98] "The responsibility is entirely in our laps,"[99] he concluded. "It would be a sad thing were we by our own act to place this institution into what would bid fair, as time goes on, to erode its stature."[100] Harlan did not ask Whittaker and Stewart to respond, but awaited their vote on the circulated opinions.

Brennan circulated an opinion in *Baker v. Carr* for a tentative majority which effectively overruled *Colegrove* and opened the way for subsequent reapportionment cases by declaring the issue of legislative apportionment to be justiciable. Frankfurter put his last judicial energies into a dissent, blasting away with all guns.[101] With other votes in doubt, Warren made a strong speech in conference in an effort to bring his authority as Chief Justice to bear in favor of Brennan's opinion. Tom Clark, who had previously joined Frankfurter's dissent, withdrew and decided to concur with the majority,[102] as did Stewart.[103] Whittaker did not vote.

Frankfurter was distressed by Warren's effectiveness. Following the conference Frankfurter wrote Harlan:

> Dear John: What powerfully emerged for me this afternoon is that men who so readily impose their will on the nation and its fifty states by exultingly overruling their most distinguished predecessors behave like subservient children when lectured by a martinet with a papa-knows-best complacency. At the core of the sad performance was—is—a failure to appreciate the intrinsic and acquired majesty of the Court's significance in the affairs of the country and of the correlative responsibility of every member of the Court to maintain and further this significance.
>
> Why do I bother you with this? I suppose to prove the tenet of a German saying that when the heart is full it spills over. And so it spills over to you—who alone gives me comfort.[104]

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98. *Id.*

99. *Id.*

100. *Id.*

101. *See* Baker v. Carr, 369 U.S. 186, 266 (Frankfurter, J., dissenting).

102. *See id.* at 251 (Clark, J. concurring); Letter from Tom C. Clark to Felix Frankfurter (Feb. 7, 1962).

103. *See Baker*, 369 U.S. at 265 (Stewart, J., concurring).

104. Letter from Felix Frankfurter to John M. Harlan (Mar. 5, 1962).

When the Court's opinion came down three weeks later, Frankfurter and Harlan were alone in dissent. A week later, Frankfurter collapsed in his office with his second stroke, effectively ending his judicial career.

Harlan's dissent in *Baker v. Carr*[105] was measured. He left to Frankfurter the display of anger and high rhetoric, consciously holding himself back. He noted this in his letter to Frankfurter joining Frankfurter's dissent:

> I am going to let things simmer for a few days, and then see what comes out on paper. I feel so deeply about what is in prospect, that before adding anything to what you have so well said, I want to make sure that I am not letting my emotions run away with me.[106]

In the next few years, with Frankfurter gone from the Court, Harlan let his emotions out. Harlan's dissents in *Wesberry v. Sanders*[107] and *Reynolds v. Sims*[108] show very little emotional restraint. These opinions embody Harlan's break with the Court and the emergence of his matured concept of himself as a dissenter, an outsider, whose job it was to preserve the values of reason and restraint inherent in a proper understanding of federalism and judicial role.

Did Harlan see himself this way? The best answer comes from Harlan's own words. When Frankfurter died, Harlan sought to describe his friend's greatness. Harlan's words seem a statement of his own ideal. It is not unreasonable to think that what Harlan saw as Frankfurter's greatest qualities he would hold as his own aspiration.

> He did not hesitate to withhold his assent to results which he personally believed to be good when he felt that they could be achieved only at the expense of ignoring or taking impermissible shortcuts through what had gone before. . . .
>
> . . . .
>
> . . . Few men in our history have had as great perception of the values of American federalism or as sensitive an understanding of the subtleties that make for its healthy working. Over and over again his dedication to it is reflected in his constitutional opinions. I shall be greatly mistaken if history does not place his belief in federalism at the forefront of his

105. *Baker*, 369 U.S. at 330 (Harlan, J., dissenting).

106. Letter from John M. Harlan to Felix Frankfurter (Feb. 5, 1962).

107. 376 U.S. 1, 20 (1964) (Harlan, J., dissenting).

108. 377 U.S. 533, 589 (1964) (Harlan, J., dissenting).

> constitutional thinking and rank him high among those who have made lasting contributions to its preservation in the context of their times.[109]

Harlan played a great role in dissent, regardless of one's ultimate judgment on the merits of specific cases. The Justices of the Supreme Court are, as Rostow said, "teachers in a vital national seminar."[110] The Supreme Court educates as well as judges; the dialogue among the Justices is a symbolic discourse for the country, a kind of seminar in law and public policy. Issues that come before the Court often present questions, not of right or wrong, but rather of competing wisdoms, the question being, what is the wisest course? Often there is wisdom even in the path not chosen, wisdom that can be heard by the present generation and preserved for future generations only through the voice of a reasoned dissenter, wisdom that is lost if only the voice of the majority is heard. Harlan was a great dissenter because he maintained a balance in the dialectic of the Court, articulating and preserving the wisdom of the past.

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109. THE EVOLUTION OF A JUDICIAL PHILOSOPHY, *supra* note 3, at 304 (quoting John M. Harlan, *Introduction* to ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER ix, ix-x (Morris D. Forkosch ed., 1966)).

110. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).