**Summary for Session 3 of Book Group on**

***The Great Dissenter:***

***The Story of John Marshall Harlan, America’s Judicial Hero***

1. **Self-inflicted Wounds** (pp 447-457)
   * In the last year of JMH’s life, SCOTUS reversed itself in its ***E. C. Knight* decision** that the **Sherman Antitrust Act** did not allow regulation of manufacturing monopolies (the majority), but only commercial ones. The new ruling led to breakups of Standard Oil & American Tobacco Company, long case against U.S. Steel, and establishment of Federal Trade Commission in 1914.
   * Reversal added fuel to speculation that SCOTUS might also reconsider ***Pollock* income tax ruling**, as federal government’s reliance on ever-higher tariffs for funds was strangling the economy. When the House passed another Pollock-like tax law, Senate opponents sought an agreement to seek a constitutional amendment instead, generally a more difficult hurdle. Popular support allowed hurried passage, ratifying a 16th Amendment in 1913, and congress quickly passed an income tax just in time for WWI.
   * ***Lochner*** Era striking down state laws which sought worker protections (e.g. minimum wage & limited hours) lasted 1905🡪1936, ultimately frustrating Roosevelt’s New Deal Programs, as “Four Horsemen” anchored the pro-business wing of SCOTUS
   * In 1936, when Roosevelt won 46/48 states and Democrats a 5:1 House majority and a 4:1 Senate majority, he threatened to appoint a new justice for every justice over 70 who refused to retire (potentially 6). Swing voter *“Owen Roberts switched sides, leaving the Four Horsemen in the dust.”* (p 456) Came to be known as “switch in time that saved nine.”
   * Within weeks, SCOTUS has approved the Social Security Act and National Labor Relations Act, two of the most consequential New Deal programs.
   * Defeat of Lochner−”*often ranked as one of the three great turning points in American law, along with the advent of the Post Civil War amendments and the civil rights movement of the 1960s. Of all of these three momentous turning points, John Marshall Harlan is the only point of connection.”* (p 457)
2. **A Vicarious Atonement** (pp 458-469)
   * Robert Jr.−lawyer, business owner, and senior civil servant−found himself under racist Woodrow Wilson’s administration with segregated bathrooms/eating areas and reduced salary. His son, Robert III, ultimately suffered financial ruin.
   * In 30s, NAACP brought cases of Blacks denied entry to law schools where no alternative existed. Despite legal victories, little changed, and efforts diminished during WWII, as its inter-racial board worried about appearing unpatriotic.
   * NAACP’s Legal Defense Fund under Thurgood Marshall determined to attack *Plessy* head on, declaring JMH’s views that separate were NOT equal were correct and should become the law of the land.
   * *Brown v Board of Education* was argued in 1953 but carried over to 1954, during which time Chief Justice Vinson died and was replaced by Earl Warren. He wrote the unanimous opinion, declaring that, “*in the field of public education, the doctrine of ‘separate but equal’ has no place.”* This had been JMH’s argument 58 years earlier.
3. **Justice Harlan Concurring (pp 470-484)**
   * ***Brown v Board of Education*** - NYTimes noted that *“there was not one word in Chief Justice Warren’s opinion that was inconsistent with the earlier views of Justice Harlan.”* (p 470) *“The application of the Bill of Rights to state actions would be one of the greatest expansions of liberty in US history…The one justice [JMH] proved to be more prescient than the other forty-two.”* Six months after the ruling, Eisenhower nominated grandson JMH II to SCOTUS.(p 472)
   * **Civil Rights Act of 1964** – Banned discrimination in public accommodations. SCOTUS ruled it was justified under Congress’s power to regulate interstate commerce, reflecting JMH’s 81-year-old dissent overturning the *Civil Rights Cases of 1883*.
   * **Affirmative Action** – *Bakke* case (white student successfully challenged 16% minority quota at UC Davis in 5:4 ruling). Thurgood Marshall argued, “Affirmative action is an issue today because our Constitution was not color blind in the sixty years between *Plessy* and *Brown*.” (p 477)
   * **Insular Cases** – JMH’s dissent that “Constitution follow the flag” returned in Guantanamo cases.
   * **Bipartisan Appeal** – Liberals [*e.g.* Thurgood Marshall] admire the “sheer humanity of his jurisprudence−the way he cut through the doctrinal thicket to show how cases impacted real lives−while conservatives [*e.g.* Antonin Scalia] applaud his faithfulness to the original intent of the Constitution.” (p 481)
   * **Ed Johnson Project** – Seeks to remind society that JMH stepped in toseek justice over when Chattanooga leaders abetted a lynching.

**Epilogue - Our Basic Legal Creed**

* **Legacy** - JMH *“the first, and only, father of equal protection under the law.”* (p. 486) *“He built the legal foundation for the midcentury revolution that brought civil rights to millions…The fact that one white man, rather than none, believed that the national charter could support a diverse nation built on equality under the law−in fact, demanded it−sustained the faith of Black people for generations…In the history of the Supreme Court, there is no parallel to Harlan’s career…no one stood so consistently against his brethren, only to be vindicated in later times.”* (p 487)
* **Uniqueness** – Stems more from the *“sensitivities of his life than any strategic vision of the law.”* (p 488) *“Robert’s life proceeded to be an all-encompassing refutation of the notion of white supremacy…To John’s northern-born colleagues, acceptance of segregation was the price of peace in the South…”* (p 489)
* **Family Legacy** – Robert’s great-grandson was sworn into the bar of the Supreme Court in 1957 before Justice JMH II.
* **DNA Test** – Ultimately inconclusive. *“Looking at Robert only in terms of his relationship to John or James Harlan diminishes him, suggesting that his experiences are important only in reference to his proximity to them…The irony that the first Robert may have enjoyed more satisfaction than the fifth seems a perfect benediction for a story about the tragic price of segregation.”* (p 493)

**QUESTIONS FOR DISCUSSION:**

1. WWII seemed to provide a turning point in addressing the “separate but equal doctrine.” Why/why not WWI?
2. What do you think of that last quote above from p. 493?
3. Where is affirmative action today? Where should it be?
4. Is SCOTUS the appropriate place to seek racial justice in America?
5. How much should SCOTUS look at changes in society to re-interpret the constitution and how much weight should SCOTUS give to the original intent of the constitution?
6. How do you feel about court packing?