**Summary for Session 2 ofBook Group on  
*The Great Dissenter:***

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

**Book 2 – Chapters 10-20 (SCOTUS Years, 1877🡪1911)**

**10. Destiny (pp 233-255)**

* Confederates return to government and Ku Klux Klan strengthens its grip on rural communities
* Great Railroad Strike of 1877 led to class conflict and increasing violence in North & Midwest
* SCOTUS “tasked with charting the dimensions of the postwar amendments to the Constitution -- a fundamental reordering of the relationship between the federal government & the states, and the states and the individual.” (p 241)
* SCOTUS banned bigamy and exclusion of Blacks on juries
* Robert’s position in society worsens as federal troops were removed from South
* Garfield elected president and prodded SCOTUS to enforce Black rights, but he was son assassinated
* JMH’s daughter Edith died of typhoid fever

**11. Standing Alone (pp 256-270)**

* Civil Rights Cases of 1883 (bundle of 5 cases on Black exclusion from private businesses -- theatres, hotels, etc.) resulted in overturning Civil Rights Act of 1875, judged to be an “unconstitutional overreach by Congress” by his 8 colleagues. 14th Amendment applied only to actions of state governments.
* JMH’s first big, lone dissent saw majority “nullifying the efforts of postwar Congresses and statesmen who struggled…to put in place a working system of constitutional protections for freed men and women.” (p 263)
* Decision ignited “celebrations in many white precincts of the South and almost funereal convergences in Black neighborhoods of cities and towns across the country.” (p 267)

**12. The Colonel Has Indeed Surprised Us (pp 271-293)**

* Politician Robert, realizing that Republican zeal for reconstruction and animus toward Confederacy had waned, began working to use parties’ need of Black votes as leverage to increase numbers of Black candidates
* Robert finally made the Ohio Republican legislative slate (only Black) but was only one not elected.
* Became delegate to National Colored Committee, where JMH’s dissent became NCC’s official position, making him nation’s leading white defender of Black equality
* 1886 – Robert finally won a seat in the Ohio House of Representatives after two decades in politics
* Discrimination worsened and expanded. Chinese Exclusion Act, by agreement with Imperial Chinese Government, disallowed Chinese workers coming to gold rush from becoming naturalized. When economic tide turned and Whites turned on Chinese, SCOTUS failed to prosecute civil rights violations against aliens, and JMH again was sole dissent.

**13. In Trusts We Trust (pp 295-307)**

* Sugar Trust - Spreckels, American Sugar, and two other refineries, cornered 98% of U.S. refining capacity. Railroad Trusts and others followed.
* 1890 Sherman Anti-Trust Act passed, but little action was taken
* When Justice Dept. finally filed suit against Sugar Trust, SCOTUS ruled that “Congress lacked the power to regulate a manufacturing monopoly, only a commercial monopoly, and the government had failed to prove that the Sugar Trust restrained commerce.” (p 304)
* Again, JMH makes loud, lone dissent, accusing “the court’s majority of construing Congress’s power so narrowly as to deprive the democratically elected representatives of the tools to address a pressing national concern.” (p 304)
* A drought in antitrust actions would last another 7 years, until Teddy Roosevelt

**14. Requiem for the Gilded Age (pp 308-328)**

* “If trust-busting was a frontal attack on giant industrial combines, the creation of a federal income tax was a rearguard action against the accumulation of wealth among Gilded Age moguls.” (p 309)
* Wilson-Gorman Tariff Act of 1894 cut tariffs dramatically, filling revenue void with an income tax.
* SCOTUS struck down the tax on unearned income (*Pollock* case), and JMH again loudly, solely dissented,
  + accused justices of biased “antipathy for the tax and…sensitivity to the class-based fears it aroused.” (p 323)
  + said decision “denies to the general government a power which is or may become vital to the very existence and preservation in a national emergency” (p 234)
  + claimed moral failure, as “the prime instruments of wealth will now be beyond taxation, while the more meager incomes of working classes remained subject to levies.” (p 234)
* 1913 – 16th Amendment (income tax) ratified, overruling the *Pollock* decision

**15. The Humblest and Most Powerful (pp 329-351)**

* In 1890, LA passed Separate Car Act, requiring railroad companies to segregate rail compartments. Wealthy Creoles grew alarmed at growing suicides. Jim Crow crept northward as Whites, who supported political and economic equality, drew the line at racial mixing.
* Test case in TX ruled federal law (Interstate Commerce Act of 1887 on interstate railroad travel) superseded state law, so Separate Car Act overruled on interstate travel, and LA Supreme Court agreed. In-state LA travel could still be segregated.
* Homer Plessy, a light-skinned, mixed-race, middle-class shoemaker from New Orleans challenged the “Jim Crow car” as:
  + Imposed a “a badge of servitude” on people of color
  + Offered no workable definite of Black and white, “arbitrarily changing race of ‘octoroons’ like Plessy from white to Black” (p 342)
* LA Supreme Court upheld the law 5:0 as providing “separate but equal” cars
* 1896 – SCOTUS ruled Separate Car Act a “’reasonable’ exercise of the state’s police powers…to impose regulations for public health and safety.”
* Opinion-writer Justice Brown and 6 colleagues (one absent for family emergency) saw “North & South on road to recovery and the lion’s share of white opinion unbothered by racial segregation.” (p 343)
* “Brown accepted that the very state of nature required that the two races would compete, disagree, and sometimes dislike each other thereby justifying Louisiana’s decision to keep them separate.” (p 343)
* JMH wrote scathing, lone dissent, arguing SCOTUS acceptance of “separate but equal doctrine” would haunt American for decades.
  + *“In my opinion, the judgement this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case.”* (p 347)
  + *“Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.”* (p 348)
* JMH’s greatest contribution -- saw that “society follows the law, not vice versa. Justice promotes peace..” (p 349)
* Jim Crow flourished. “When the decision in *Plessy* was announced, there were 130,334 registered Black voters in Louisiana. Eight years later, there were only 1,349.” (p 350)

**16. The Walls of Segregation (pp. 352-370)**

* Through 1890s, Black’s “rights to vote and participate with any semblance of equality in civil life were essentially nullified in all the states of the former Confederacy.” (p 353)
* Frederick Douglas died in 1895. JMH and Sen. Sherman only prominent white to appear at funeral. President Cleveland and top congressional/judicial leaders didn’t show up. Robert unable to preside due to illness.
* Robert lost his OH legislative seat in Republican primary. He found work as special inspector of customs at Treasury. Blacks felt betrayed by Republican party. Died in 1897, remembered for advocacy of civil rights and founding of Cincinnati’s first school for colored children.
* GA school district decided to close all-Black Ware public High school in order to spend money on vocational training at “common schools” for younger children. Parents filed suit. SCOTUS (with JMH concurring!) agreed with GA that Black high schoolers could attend religious high school at lower cost.
* JMH found that plaintiffs had not claimed racial discrimination, tying court’s hands. Author felt that JMH feared a ruling strengthening separate but equal doctrine, so supported a narrower decision limited to this situation. (p 367)
* More troubling was JMH dissent granting a child of Chinese workers birthright citizenship, arguing that “subject to the jurisdiction thereof” in 14th Amendment meant that parents had to be more than just visiting US. (p 368)

**17. The Constitution Follows the Flag (pp 371-392)**

* Late 1890s under President McKinley, US supported coup in Hawaii and extracted Cuba, Puerta Rico, Philippines, and Guam from Spain. Fact that these were non-white colonies helped alleviate guilt of contradictions with democracy and national self-determination underlying US revolution.
* McKinley’s landslide re-election in 1900 w/ Teddy Roosevelt as VP, gave boost of popular approval to colonialism.
* Revealed question of application of constitutional rights to territories; John Marshall had insisted rights followed flag, and JMH asserted the same in public address before issue came before SCOTUS, known as “Insular Cases.”
* Brown’s majority opinion “brushed away every manifest abuse of British colonialism in Africa and Asia for more than a century, suggesting that the ‘Anglo-Saxon character’*—*and not freedom or democracy*—*would safeguard the ‘real interests’ of people in their lands.” (p 382)
* JMH’s dissent countered that the framers “*proceeded upon the theory—the wisdom of which experience has vindicated—that the only safe guarantee against government oppression was to withhold or restrict the power to oppress. They well remembered that Anglo-Saxons across the ocean had attempted, in defiance of law and justice, to trample upon the rights of Anglo-Saxons on this continent.”* (p 383)

**18. Freedom in the Workplace (pp 393-410)**

* Early 1900s brought immigrants, industrialization, and urbanization, all reducing demand for low-skilled workers and thus lowering wages. Republican progressives sought to limit labor abuses—long hours, unsafe conditions.
* Gilded Age moguls and laissez-faire economists saw government regulation as interference in free-enterprise.
* SCOTUS developed legal concept of “liberty/right of contract” and grew quite comfortable striking down laws that impeded business owners.
* *Lochner v. NY*—decided 5:4—struck down attempt to limit baker’s hours. JMH dissented that the case, *“will seriously cripple the inherent power of the states to care for the lives, health, and well-being of their citizens.”* (p 409)

**19. I Am an Innocent Man (pp 411-424)**

* In 1906, JMH stayed the execution in TN of Ed Johnson on grounds of denial of fair process, ordering a review of the case.
* Vigilantes broke into a purposely-lightly-guarded jail and lynched Johnson
* JMH, with support from Roosevelt who sent FBI to investigate, got Justice to bring charges against sheriff who gave his deputies night off, his deputies who knowingly went along, and the mob leaders.
* One and only time that SCOTUS served as an actual trial court, and Sheriff and 5 others were convicted—sheriff convicted to 90 days in prison. (p 423)

**20. Ever May His Name Be Said in Reverence (p 425-444)**

* *Berea v. KY* – Legislature passed law to prohibit private school Berea from educating Black and white students together, arguing it was promoting a social good to prevent conflict.
* Weakened dissent was JMH’s last one on race, reflected his weariness.
* JMH briefly named by Taft as Acting Chief Justice when previous chief died.
* In *Standard Oil* case, SCOTUS finally ruled in support of antitrust actions.
* As SCOTUS was beginning Oct 1911 session, JMH fell ill and died. Many Black churches in Washington DC held memorial services for him.
* His nemesis Justice Brown (author of *Plessy* opinion & others) wrote, “While judging from the past, the dissents of Mr. Justice Harlan will probably share the general fate and will not result in many changes in the law.”

**Discussion Questions:**

1. Which of the cases covered did you find the most interesting/troubling/inspiring? Why?
2. Did JMH’s positions on the Ware high school and/or the birthright citizenship of children of Chinese workers change your opinion of JMH? If so, how?
3. In discussing *Plessy*, the author argues that Harlan saw how society follows the law, thus not how the law follows society. Do you agree with this? Consider e.g. Ginsburg’s cases on women’s rights; *Obergefell; etc.* Does the court sometimes try to lead society, and sometimes follow society?
4. What do you think the role of the court is? To call ‘balls and strikes’ as Roberts has stated, or to try to lead the country?
5. Given Harlan’s view of the *Lochner* decision (liberty of contract theory stops state wage/hour laws), how do you think he would view today’s abortion debate?
6. Did JMH evolve during his SCOTUS years? If so, how?
7. Does this case history make you feel we’ve made judicial progress as a society or no? In what areas?