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ONLY PARTIALLY COLOR-BLIND: JOHN MARSHALL HARLAN'S VIEW OF RACE AND THE CONSTITUTION

Earl M. Maltz[†]

INTRODUCTION

As the one-hundredth anniversary of *Plessy v. Ferguson*¹ approaches, one can expect an outpouring of admiration for Justice John Marshall Harlan. Virtually all discussions of the constitutional status of race relations prominently feature Harlan's dissent in *Plessy*.² Based largely on this dissent, Harlan has become a kind of constitutional icon, with many modern scholars lavishly praising him as a man whose advocacy of the "color-blind Constitution" stood in sharp contrast to his racist colleagues on the Fuller Court and prefigured modern constitutional theories dealing with race discrimination.³

This Essay places the *Plessy* opinion in the context of Harlan's overall record on race-related cases, and contends that such characterizations dramatically overstate Harlan's commitment to racial equality. Admittedly, he was less willing than other members of the Waite and Fuller Courts to countenance state action that denied rights to African-Americans. Conversely, he was less hostile to federal statutes that were designed to protect the rights of the freed slaves. However, even in this area, his commitment to racial equality was less robust than is often suggested. Moreover, in cases involving the rights of Native-Americans and Chinese immigrants, Harlan showed even less

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1. 163 U.S. 537 (1896).

2. *E.g.*, DERRICK BELL, RACE, RACISM AND AMERICAN LAW 115-16 (3d ed. 1992); ANDREW KULL, THE COLOR-BLIND CONSTITUTION 118-30 (1992); DONALD E. LIVELY, THE CONSTITUTION AND RACE 52-53 (1992); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1524-25 (2d ed. 1988).

3. *E.g.*, KULL, *supra* note 2, at 118-30; CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 195 (1987).

sympathy for the plight of racial minorities in a Eurocentric society.

I. HARLAN'S ROAD TO THE COURT

John Marshall Harlan was born in Kentucky on June 1, 1833. Harlan's early life and political career gave little clue that he would ultimately emerge as a champion of the rights of free blacks on the Court.⁴ A slaveowner himself until shortly before the Civil War, he opposed the adoption of the Thirteenth Amendment and did not join the Republican Party until the process of Reconstruction was well under way. As a Republican, he reversed course, strongly defending not only the Thirteenth but also the Fourteenth Amendment. This course of action did not bring Harlan success in statewide elections; nonetheless, it brought him substantial notoriety in national Republican politics. Thus, when President Rutherford B. Hayes determined to appoint a southerner to replace retiring Justice David Davis in 1877, Harlan was a logical choice. Harlan's jurisprudence reflected a staunch nationalism and strong respect for property rights; however, he is best remembered for his actions in cases involving the rights of free blacks.

A. *Harlan and the Rights of Free Blacks*

Although Harlan is best known for his dissenting opinions in cases involving the rights of free blacks, the first major decisions in which he participated—the jury discrimination cases—actually found him in agreement with the majority of the Court.⁵ Two of these cases, *Ex Parte Virginia*⁶ and *Strauder v. West Virginia*,⁷ presented constitutional challenges to efforts to require states to allow blacks to serve on juries. *Ex Parte Virginia* involved a petition for a writ of habeas corpus from a state judge indicted for allegedly violating the Civil Rights Act of 1875 by

4. LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE (1992) and TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN (1995) discuss Harlan's early life in detail.

5. The discussion of the jury discrimination cases is taken from Earl M. Maltz, *The Civil Rights Act and the Civil Rights Cases—Congress, Court and Constitution*, 44 FLA. L. REV. 605, 628-32 (1992).

6. 100 U.S. 339 (1879).

7. 100 U.S. 303 (1879).

systematically excluding blacks from jury lists that he prepared.⁸ The case raised two analytically distinct problems of federal-state relations. The first was the substantive question of whether the federal government could constitutionally require the states to allow blacks to serve on juries.⁹ The second was the institutional question of whether federal law could punish a state official for performance of the duties required of him by state law.¹⁰

The majority opinion in *Ex Parte Virginia* focused primarily on the nationalizing impact of the Fourteenth Amendment. Speaking for the Court, Justice William Strong asserted that “[the Reconstruction Amendments] were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress,”¹¹ and that enforcement of the rights guaranteed by the amendments “is no invasion of State sovereignty.”¹² While conceding “in the general” that “the selection of jurors for her courts and the administration of her laws belong to each State,”¹³ Strong found justification for the Civil Rights Act of 1875 in the flip-side of American federalism—the principle that “in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power.”¹⁴ Turning to the institutional concern with federal coercion of state officials, Strong contended:

A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws.¹⁵

He concluded, therefore, that Congress must have authority to impose penalties on those officials who violate the principles of the Fourteenth Amendment.¹⁶

In *Strauder*, Strong focused more specifically on the relationship between jury selection and the Equal Protection

8. *Ex Parte Virginia*, 100 U.S. at 340.

9. *Id.* at 344-48.

10. *Id.* at 348-49.

11. *Id.* at 345.

12. *Id.* at 346.

13. *Id.*

14. *Id.*

15. *Id.* at 347.

16. *Id.* at 348.

Clause. *Strauder* dealt with a statute derived from the Civil Rights Acts of 1866 and 1870, which provided for removal of state court actions to federal court by defendants who would be denied or could not enforce a right secured to them by a "law providing for . . . equal civil rights."¹⁷ In the trial, *Strauder*, a West Virginia black man, was accused of killing his wife.¹⁸ Under West Virginia state law, only whites were allowed to serve on juries.¹⁹ The defendant claimed that this exclusion was inconsistent with both the Civil Rights Act of 1866 and the Fourteenth Amendment, and that he was therefore entitled to the benefit of the removal provision.²⁰ The state court denied his motion, and *Strauder* was convicted of murder.²¹ He argued that the state court's refusal to remove the case to federal court vitiated his conviction.²²

Concluding that the case should have been removed, Strong's reasoning tracked the arguments of those who had supported the inclusion of the jury discrimination provision in the Civil Rights Act of 1875. He first contended:

The very fact that [black] people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.²³

Strong also asserted that the statute denied equal protection to black defendants themselves, contending:

It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former.²⁴

17. *Strauder v. West Virginia*, 100 U.S. 303, 311 (1879).

18. *Id.* at 504.

19. *Id.*

20. *Id.* at 305, 310-12.

21. *Id.* at 304.

22. *Id.* at 304-05.

23. *Id.* at 308.

24. *Id.* at 309.

Harlan's votes in *Ex Parte Virginia* and *Strauder* are certainly consistent with his image as a champion of racial justice; however, his action in the companion case of *Virginia v. Rives*²⁵ is more problematic from this perspective. Like *Strauder*, *Rives* challenged the refusal of a state court to grant a petition for removal that was based upon a claim that blacks were improperly excluded from a jury in a criminal case.²⁶ In *Rives*, however, the relevant state statutes did not prohibit blacks from serving on juries; instead, the gravamen of the defendant's claim was that the presiding judge made an independent decision to limit jury service to whites, in direct contravention of state law.²⁷

The disposition of *Rives* was strongly influenced by the reformulation of the Removal Statute during the compilation project that culminated in the passage of the Revised Statutes of 1875.²⁸ In theory, the purpose of the compilation was only to systematize and clarify existing law; the compilers were not to make substantive changes. However, the compilers inexplicably made a major change in the removal provision. As initially formulated in 1866, the provision incorporated by reference the procedures of the Habeas Corpus Suspension Act of 1863, which in turn allowed both pre-trial and post-judgment removal—a point clearly reflected in the only systematic exposition of the removal process by Senator Lyman Trumbull, the drafter of the Civil Rights Act of 1866.²⁹ However, the Revised Statutes provided only for pre-trial removal.³⁰ Against this background, the Court unanimously held that removal was not available in *Rives*.³¹

Once again speaking for the united Republican majority,³² including Harlan, Strong noted that the Removal Statute required a defendant to demonstrate *before trial* that he was unable to enforce his "equal civil rights" in the judicial tribunals of the state.³³ He argued that where, as in *Rives*, state statutes

25. 100 U.S. 313 (1879).

26. *Id.* at 315-16.

27. *Id.* at 314-16.

28. *See, e.g., id.* at 316-17.

29. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1759 (1866).

30. *See Rives*, 100 U.S. at 318-19.

31. *Id.* at 322-24.

32. *Id.* at 314-24.

33. *Id.* at 318-19.

forbade discrimination against blacks, one should presume that the defendant could vindicate his rights in either the state trial courts or the state appellate courts.³⁴ Thus, he concluded, in those cases, removal to federal court should not be available.³⁵

Some commentators have suggested that *Rives* is best understood as a reflection of the Justices' willingness to sacrifice the interests of blacks in order to reinforce both the political settlement of 1877 and the traditional structure of federalism.³⁶ As Benno C. Schmidt has persuasively argued, such contentions are probably overstated.³⁷ Nonetheless, Harlan's willingness to concur in *Rives* stands as a rejection of a facially plausible interpretation that would have greatly advanced the interests of free blacks. Of course, the case did not have any direct implications for constitutional doctrine; however, at the very least, it suggests that Harlan was willing to sacrifice the interests of racial justice to conventions of legal interpretation. Indeed, in subsequent years, Harlan would be the author of a number of important opinions that relied on principles of statutory interpretation to limit the scope of removal jurisdiction in cases that raised *Strauder*-type issues.³⁸

Three years after the jury discrimination decisions, the *Civil Rights Cases*³⁹ provided the occasion for the decisive break between Harlan and his Republican brethren on the Waite Court. These cases arose from criminal charges against the owners of two hotels and two theatres, respectively, and a civil action against a railroad company. In each case, the gravamen of the allegations was that a patron had been discriminated against on the basis of his race, and that the discrimination violated the Civil Rights Act of 1875.⁴⁰

Speaking for the Court, Justice Joseph P. Bradley treated the owners of the facilities as indistinguishable from other private parties. Bradley did not expressly reject the theory that access to

34. *Id.* at 320-22.

35. *Id.* at 322.

36. *E.g.*, HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 494-95 (1982).

37. Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1433-40 (1983).

38. *E.g.*, *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Bush v. Kentucky*, 107 U.S. 110 (1882).

39. 109 U.S. 3 (1883).

40. *Id.* at 4-8.

common carriers, inns, and places of amusement was a basic civil right protected by the Fourteenth Amendment.⁴¹ Indeed, one part of his argument conceded the possibility that the Fourteenth Amendment guaranteed such access, and that Congress could require states to enforce the rights of blacks in this regard.⁴² However, Bradley concluded that Congress lacked authority to act directly against the owners of the facilities themselves.⁴³ In part, this conclusion rested on a formal argument about the nature of rights themselves:

[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, . . . but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.⁴⁴

Bradley bolstered this argument with an appeal to the basic concept of federalism, contending that a contrary position would allow Congress to "establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them."⁴⁵

Harlan's dissent brought together three themes that would consistently recur in his race-related jurisprudence. The first was a judicial nationalism that manifested itself in a broad definition of the powers of Congress.⁴⁶ The second was a recognition that the freed slaves occupied a special place in constitutional analysis.⁴⁷ The third was a relatively broad definition of fundamental rights.⁴⁸ Each of these factors played an important role in his argument.

41. *Id.* at 9-10.

42. *Id.* at 10-11.

43. *Id.* at 10-13.

44. *Id.* at 17.

45. *Id.* at 13.

46. *Id.* at 26-62.

47. *Id.* at 32-36.

48. *Id.* at 44-62.

Harlan contended that the challenged provisions of the Civil Rights Act were defensible under the enforcement clauses of both the Thirteenth and Fourteenth Amendments.⁴⁹ He began his analysis by emphasizing the need to defer to congressional judgment in most cases:

Whether the legislative department of the government has transcended the limits of its constitutional powers, "is at all times . . . a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. . . . The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." . . . "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."⁵⁰

Later in the opinion, he invoked Chief Justice Marshall's famous language in *McCulloch v. Maryland*⁵¹ to support this view:

The sound construction of the Constitution . . . must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.⁵²

From this starting point, Harlan deployed *Prigg v. Pennsylvania*⁵³ against Bradley's argument that, even assuming that the rights protected by the Civil Rights Act were themselves guaranteed by the Thirteenth and Fourteenth Amendments, Congress could not act against private individuals who interfered with the ability of the freed slaves to enjoy those rights.⁵⁴

49. *Id.* at 26-62.

50. *Id.* at 27-28 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 128 (1810) and *The Sinking Fund Cases*, 99 U.S. 700, 718 (1878)).

51. 17 U.S. (4 Wheat.) 316 (1819).

52. *The Civil Rights Cases*, 109 U.S. 3, 51 (1883) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

53. 41 U.S. (16 Pet.) 539 (1842).

54. *Civil Rights Cases*, 109 U.S. at 34-37.

Ironically, in relevant part, *Prigg* was a challenge to the constitutionality of the Fugitive Slave Act of 1793, which prohibited private parties from interfering with the apprehension of fugitive slaves.⁵⁵ The source of authority for the statute was Article IV, Section 2 of the Constitution, which contains no specific enforcement language, but provides simply that “[n]o Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall [be returned to the master].”⁵⁶ In rejecting the claim that Congress possessed no power to pass the Fugitive Slave Act, Justice Joseph Story declared:

The fundamental principle applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted.

. . . .

. . . It would be a strange anomaly, and forced construction, to suppose that the national government meant to rely for the due fulfillment of its own proper duties and the rights which it intended to secure, upon state legislation; and not upon that of the Union.⁵⁷

Harlan noted that, like the Fugitive Slave Clause at issue in *Prigg*, the Thirteenth and Fourteenth Amendments by their terms each provided constitutional protection for specific rights and prohibited state interference with those rights.⁵⁸ In addition, he noted that the argument for congressional control over private action was much stronger in the *Civil Rights Cases* because, unlike the Fugitive Slave Clause, the Reconstruction Amendments *expressly* provided Congress with enforcement authority.⁵⁹ Thus, focusing specifically on the Thirteenth Amendment, he argued:

We have seen that the power of Congress, by legislation, to enforce the master's right to have his slave delivered up on

55. See *Prigg*, 41 U.S. (16 Pet.) at 616-19.

56. U.S. CONST. art. IV, § 2, cl. 3.

57. *Prigg*, 41 U.S. (16 Pet.) at 615, 623.

58. The Civil Rights Cases, 109 U.S. 3, 26-28 (1883) (Harlan, J., dissenting).

59. *Id.* at 28-37.

claim was *implied* from the recognition of that right in the national Constitution. . . . [More generally, t]his court has uniformly held that the national government has the power, whether expressly given or not, to secure and protect rights conferred or guaranteed by the Constitution. That doctrine ought not now to be abandoned, when the inquiry is not as to an implied power to protect the master's rights, but what may Congress, under powers expressly granted, do for the protection of freedom, and the rights necessarily inhering in a state of freedom.⁶⁰

Having concluded that Congress possessed constitutional authority to criminalize private interference with the exercise of rights guaranteed by the Reconstruction Amendments, Harlan next turned to a definition of those rights. He made two separate but related arguments, contending first that the Civil Rights Act was founded on the congressional authority to strike at the "badges" and "incidents" of slavery under the Thirteenth Amendment,⁶¹ and second that the statute was authorized by the analogous power to protect the rights guaranteed by the Fourteenth Amendment.⁶² The basic concepts underlying the two arguments were strikingly similar. Harlan juxtaposed both amendments to the decision in *Dred Scott v. Sandford*,⁶³ and emphasized the fact that they were primarily designed to ameliorate the condition of blacks in America.⁶⁴ Thus, while recognizing that "[t]he terms of the Thirteenth Amendment are absolute and universal,"⁶⁵ Harlan also noted:

[I]t is historically true that that amendment was suggested by the condition, in this country, of that race which had been declared, by this court [in *Dred Scott*] to have had—according to the opinion entertained by the most civilized portion of the white race, at the time of the adoption of the Constitution—"no rights which the white man was bound to respect"⁶⁶

60. *Id.* at 33-34 (citation omitted).

61. *Id.* at 35-43.

62. *Id.* at 43-59.

63. 60 U.S. (19 How.) 393 (1856).

64. *Civil Rights Cases*, 109 U.S. at 30-37 (Harlan, J., dissenting).

65. *Id.* at 33.

66. *Id.*

Conversely, Harlan noted that the citizenship clause of the Fourteenth Amendment "introduced all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the 'People of the United States.'"⁶⁷

Harlan also saw the specific rights established by the two amendments as largely congruent. He argued that the Thirteenth Amendment protected such civil rights as were fundamental to freedom, which he associated with "the privileges or immunities secured by [the Constitution] to citizens of the United States."⁶⁸ Similarly, his Fourteenth Amendment argument rested on the view that Section 1 had constitutionalized rights "which are fundamental in citizenship in a free republican government"⁶⁹—those which were protected by the privileges and immunities clause of Article IV, Section 2.⁷⁰

Against this background, Harlan had little trouble in upholding the congressional ban on segregation of public conveyances and inns. He emphasized the special status of both public conveyances and inns at common law, as well as the authorities that characterized the right of access to these facilities as an inherent part of the fundamental right to "personal locomotion."⁷¹

Harlan conceded that application of the Civil Rights Act to places of public amusement posed a somewhat more difficult problem. As he noted, these facilities stood on a somewhat different footing at common law.⁷² Nonetheless, relying on *Munn v. Illinois*,⁷³ he asserted that, because these institutions were "established and maintained under direct license of law" they were "affected with a public interest."⁷⁴ For this reason, in Harlan's view, Congress had the power to prohibit places of amusement from discriminating on the basis of race.⁷⁵ He reasoned that to hold otherwise would be to allow state governments to "discriminate or authorize discrimination against

67. *Id.* at 46.

68. *Id.* at 33.

69. *Id.* at 47.

70. U.S. CONST. art. IV, § 2, cl. 1.

71. *Civil Rights Cases*, 109 U.S. at 37-41 (Harlan, J., dissenting).

72. *Id.* at 41-43.

73. 94 U.S. 113 (1876).

74. *Civil Rights Cases*, 109 U.S. at 41-42 (Harlan, J., dissenting).

75. *Id.* at 41-42.

a particular race, solely because of its former condition of servitude."⁷⁶ By linking federal power to the licensing authority, Harlan was able to uphold the statute, while at the same time avoiding the most radical theories of congressional power over private action, which would have authorized regulation of even purely private commercial activity.

The pattern of the *Civil Rights Cases* would be consistently repeated during Harlan's tenure on the Court. The majority of the Court would vote to strike down statutes designed to protect the rights of the freed slaves, and Harlan would dissent—often alone.⁷⁷ In other race-related contexts, however, Harlan played a more ambiguous role.

II. THE ROAD TO *PLESSY*

*Plessy v. Ferguson*⁷⁸ would be the culmination of the debate over the constitutional status of public transportation that began with the *Civil Rights Cases*. Obviously, Bradley's opinion in that case dealt a severe blow to efforts to desegregate the nation's transportation system. However, the *Civil Rights Cases* at least strongly implied that any attempt by states to *require* segregation in these facilities would still be held unconstitutional. In fact, *Hall v. DeCuir*⁷⁹—a case decided before Harlan came to the Court—seemed to suggest that, at least in some circumstances, any such state mandate would face severe constitutional difficulties beyond those posed by the Reconstruction Amendments themselves.

Hall did not involve a state statute requiring carriers to provide separate facilities for the races; instead, it was a challenge to a Louisiana statute that *forbade* racial segregation by those transporting passengers within the state.⁸⁰ A Fourteenth Amendment challenge to this statute was almost unthinkable; instead, the owner of a steamboat engaged in interstate traffic argued that the state requirement ran afoul of

76. *Id.* at 41.

77. *E.g.*, *Hodges v. United States*, 203 U.S. 1 (1906) (Harlan, J., dissenting) (arguing Congress may constitutionally prohibit private interferences with basic rights); *James v. Bowman*, 190 U.S. 127 (1903) (Harlan, J., dissenting) (arguing, without written opinion but by inference, Congress may constitutionally prohibit private, racially motivated interference with the right to vote).

78. 163 U.S. 537 (1896).

79. 95 U.S. 485 (1877).

80. *Id.* at 485-86.

the dormant commerce clause. In unanimously striking down the statute, the Court characterized the requirement as a "direct burden upon inter-state commerce,"⁸¹ arguing that "[w]hile [the statute] purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage."⁸² Noting the difficulties that might arise if other states in which the steamboat operated passed statutes *requiring* segregation, the Court concluded that "[c]ommerce cannot flourish in the midst of such embarrassments,"⁸³ and that "[u]niformity in the regulations by which [the interstate traffic in passengers] is to be governed . . . is a necessity . . . and to secure it Congress, which is untrammelled by State lines, has been invested with the *exclusive* legislative power of determining what such regulations shall be."⁸⁴

This analysis, consistent with other dormant commerce clause decisions of the same era, clearly implied that no state could adopt any regulation which either required or prohibited racial segregation by interstate carriers. The race-related nature of the regulation was not, however, critical to the decision. Instead, the Court analogized the Louisiana statute to other barriers to the free flow of interstate commerce.⁸⁵ The logic of the decision was therefore inherently self-limiting.

This point was soon made clear in *Louisville Railway v. Mississippi*.⁸⁶ *Louisville Railway* was a dormant commerce clause challenge to a Mississippi statute that required carriers to maintain separate but equal facilities for passengers of different races.⁸⁷ A majority of the Court rejected this challenge, distinguishing *Hall* on the ground that the Mississippi courts had limited the applicability of the statute to intrastate traffic.⁸⁸ Thus, the majority concluded that the limitations imposed on the states by the commerce clause were not implicated.⁸⁹

81. *Id.* at 488.

82. *Id.* at 489.

83. *Id.*

84. *Id.* at 489-90 (emphasis added).

85. *Id.* at 488-89.

86. 133 U.S. 587 (1890).

87. *Id.* at 587-88.

88. *Id.* at 589-90.

89. *Id.* at 592.

Dissenting, Harlan took a different view of the statute, arguing that it applied to all trains operating within the state—even those engaged in interstate commerce.⁹⁰ From this perspective, he saw the case as indistinguishable from *Hall*, declaring “[i]t is difficult to understand how a state enactment, requiring the separation of the white and black races on interstate carriers of passengers, is a regulation of commerce among the States, while a similar enactment forbidding such separation is not a regulation of that character.”⁹¹

Of course, *Louisville Railway* did not end the controversy over the constitutionality of state-imposed racial segregation in public transportation. While rejecting one line of attack, the majority in that case expressly refused to foreclose other potential constitutional challenges. The Court noted that because the action had been initiated by the railroad itself rather than an individual passenger “there [was] no question of personal insult or alleged violation of personal rights.”⁹² Thus, *Louisville Railway* left open the possibility that the Mississippi regulation might be held to violate the Fourteenth Amendment. It was against this background that *Plessy v. Ferguson*⁹³ was decided.

III. PLESSY AND BEYOND

In *Plessy*, the Court considered the constitutionality of a Louisiana statute that required railroads to maintain separate but equal accommodations for the “white and colored races” and to enforce the segregation of the races.⁹⁴ The statute was challenged by a man of mixed racial background who was refused the right to sit in the car reserved for white passengers.⁹⁵ By a seven-to-one margin, the Fuller Court upheld the constitutionality of the Louisiana statute.⁹⁶

Speaking for the majority, Justice Henry B. Brown first rejected a Thirteenth Amendment challenge to the statute, declaring that “[a] statute which implies merely a legal distinction between the white and colored races . . . has no

90. *Id.* at 592-93 (Harlan, J., dissenting).

91. *Id.* at 594.

92. *Id.* at 589.

93. 163 U.S. 537 (1896).

94. *Id.* at 540-41.

95. *Id.* at 541-42.

96. *Id.* at 551-52.

tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."⁹⁷ Turning to the Fourteenth Amendment, Brown began by sketching in general terms his vision of the reach of the Amendment.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.⁹⁸

The key question, of course, was how one was to define the phrase "equality . . . before the law." In part, Brown's treatment of this issue reflected the evolution of the Republican position on race during the Reconstruction era. At the time the Fourteenth Amendment was drafted, many Republicans drew a sharp distinction between civil rights and political rights, and the drafters made a conscious decision not to directly protect political rights.⁹⁹ For Brown, by contrast, political equality was an essential element of equality before the law, and he cited the jury discrimination struck down in *Strauder v. West Virginia* as the classic example of a forbidden racial classification.¹⁰⁰ Outside the area of political rights, however, Brown was far more willing to countenance the use of race in governmental decisionmaking. He cited a series of state court cases that had upheld school segregation as paradigms for the view that some racially based laws did not violate Fourteenth Amendment principles.¹⁰¹

Having established the parameters of his analysis, Brown next turned to the case law that had dealt specifically with the issue of segregation by common carriers, concluding that the right of access to public conveyances did not merit special constitutional protection.¹⁰² He then applied a rational basis test, noting that "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the

97. *Id.* at 543.

98. *Id.* at 544.

99. See EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 99 (1990).

100. *Plessy*, 163 U.S. at 545.

101. *Id.* at 544 (citing *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), as the leading case in this line of case law).

102. *Id.* at 548.

promotion [of] the public good, and not for the annoyance or oppression of a particular class."¹⁰³ Characterizing the Louisiana statute as an appropriate measure to ensure "good order" and the comfort of passengers of all races,¹⁰⁴ Brown then proceeded to the most widely quoted portion of his opinion:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.¹⁰⁵

Harlan's dissenting opinion, with its ringing endorsement of the view that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens,"¹⁰⁶ is normally juxtaposed with Brown's treatment of the claim that the Louisiana statute did not imply that blacks were an inferior race. Unlike Brown, however, Harlan was not addressing the reasonableness of the statute. Indeed, he explicitly disclaimed the notion that the classification could be invalidated simply because the Court found it "unreasonable."¹⁰⁷

To Harlan, *Plessy* stood on a somewhat different footing. It involved the denial of rights that even the majority in the *Civil Rights Cases* had suggested that the states were under a constitutional obligation to protect.¹⁰⁸ Thus, Harlan's position was nothing more than a logical extension of his *Civil Rights Cases* dissent. His argument for federal power had been premised on the view that the right to be free from segregation on common

103. *Id.* at 550.

104. *Id.*

105. *Id.* at 551-52.

106. *Id.* at 559 (Harlan, J., dissenting).

107. *Id.* at 558-59.

108. *Id.* at 554-57.

carriers was a fundamental right protected by the Fourteenth Amendment, and therefore, Congress had authority to directly secure that right by legislation.¹⁰⁹ Given that position, he could hardly countenance a state statute which explicitly violated that right.

Against this background, it should not be surprising that many aspects of Harlan's *Plessy* dissent bear striking similarities to his *Civil Rights Cases* dissent. As in the *Civil Rights Cases*, Harlan linked the Thirteenth and Fourteenth Amendment to "a common purpose, namely, to secure 'to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy[s].'"¹¹⁰ Once again, his argument emphasized the fundamental nature of the right at issue; indeed, his *Plessy* dissent begins, not with a condemnation of race discrimination generally, but rather with a renewed demonstration of the special status of public railways at common law¹¹¹—a demonstration that, later in the opinion, Harlan once again linked to Blackstone's right of "personal locomotion."¹¹² Moreover, although analogizing the case to *Strauder*,¹¹³ Harlan was careful to limit his invocations of the principle of color-blindness to situations involving "civil rights," those which he saw as "common to all citizens,"¹¹⁴ concluding that "[t]he arbitrary separation of citizens, on the basis of race, *while they are on a public highway*, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."¹¹⁵ Thus, by its terms, Harlan's opinion left open the possibility that he might view other state-imposed racial classifications as constitutional.¹¹⁶

Harlan's reasoning in *Berea College v. Kentucky*,¹¹⁷ his other major assault on state-imposed segregation, was even more clearly limited. *Berea* was an attack on the constitutionality of a Kentucky statute that prohibited private schools from providing

109. *Id.* at 557-59.

110. *Id.* at 555-56 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879)).

111. *Id.* at 552-57.

112. *Id.* at 557.

113. *Id.* at 556-58.

114. *Id.* at 554.

115. *Id.* at 562 (emphasis added).

116. OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 362-70 (1993), also emphasizes the importance of the concept of fundamental rights in Harlan's analysis in *Plessy*.

117. 211 U.S. 45, 58-70 (1908) (Harlan, J., dissenting).

racially integrated education.¹¹⁸ The carefully crafted opinion of the majority upheld the statute as applied to corporations, which were chartered by the state.¹¹⁹ Taking the view that the Court should answer the more general question of whether the state could mandate segregation in private schools,¹²⁰ Harlan dissented. His primary focus, however, was not on the impact of the statute on nonwhite students, but rather on the rights of those who operated private schools.¹²¹

The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property—especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States.¹²²

Moreover, Harlan explicitly stated that his analysis would be inapplicable to state-supported educational facilities.¹²³

This reservation becomes particularly significant when read against the background of Harlan's opinion in *Cumming v. Richmond County Board of Election*.¹²⁴ In *Cumming*, a group of African-American parents launched a Fourteenth Amendment challenge to the use of their tax dollars to support a high school for whites when no analogous institution was provided for the education of African-Americans.¹²⁵ Speaking for a unanimous Court, Harlan rejected the African-American parents' contentions. The specific basis for his ruling was that, even if there were a Fourteenth Amendment violation in the allocation of funds, an injunction that undermined the white school was not an appropriate remedy.¹²⁶ At the same time, however, the

118. *Id.* at 46, 59.

119. *Id.* at 58.

120. *Id.* at 67.

121. *Id.* at 67-68.

122. *Id.*

123. *Id.* at 69.

124. 175 U.S. 528 (1899). For a detailed discussion and analysis of *Cumming*, see J. Morgan Kousser, *Separate but not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J.S. HIST. 17 (1980).

125. *Cumming*, 175 U.S. at 542-44.

126. *Id.* at 544-45.

opinion seemed to implicitly approve the concept of segregated schools¹²⁷ and closed with this language:

[W]hile all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.¹²⁸

Even some of Harlan's most ardent admirers see his opinion in *Cumming* as rather troubling.¹²⁹ However, taken alone, his language in the opinion could be viewed as an aberration; after all, he did not explicitly hold that the maintenance of segregated schools would be constitutional. Harlan's vote in *Pace v. Alabama*,¹³⁰ by contrast, cannot be so easily explained.

Pace was a challenge to the sentencing provisions of an Alabama statute punishing "adultery [and] fornication."¹³¹ If the parties engaging in the prohibited acts were members of the same race, the punishment for the first offense was imprisonment for not more than six months.¹³² If, however, one of the parties was white and the other black, the punishment was imprisonment for between two and seven years.¹³³ Harlan concurred silently in Justice Stephen Field's opinion rejecting an equal protection challenge to the sentencing provisions. Field reasoned that when either intraracial or interracial acts were involved, the blacks and whites engaged in the acts were subject to the same penalties.¹³⁴ Thus, he concluded, the "discrimination . . . made in the punishment prescribed . . . is directed against the offence designated and not against the person of any particular color or race."¹³⁵

127. *Id.* at 545.

128. *Id.*

129. See BETH, *supra* note 4, at 235.

130. 106 U.S. 583 (1883).

131. *Id.* at 583.

132. *Id.* at 584.

133. *Id.* at 583-84.

134. *Id.* at 585.

135. *Id.*

Harlan's concurrence in *Pace* belies the notion that he viewed the Constitution as "color-blind" in any strong sense. Conversely, it is entirely consistent with the theory that fundamental rights were at the core of his race discrimination jurisprudence. Neither adultery nor fornication generally were fundamental rights in nineteenth century jurisprudence; thus, sorting by race would only have been unconstitutional if it had resulted in a disparity in penalties. Since the Alabama statute created no such disparity, in Harlan's view, the statute was constitutionally unobjectionable.

Despite Harlan's vote in *Pace*, if only cases involving free blacks were considered, he might still be appropriately described as having been relatively progressive on racial issues. Even given the limitations of his analysis, he was still more clearly supportive of free blacks than any other Justice with whom he served. A more complex picture emerges, however, when one also considers Harlan's opinions in cases involving other racial minorities.

IV. HARLAN AND THE RIGHTS OF INDIANS

During Harlan's tenure, the cases dealing with Indian rights typically revolved around the unique relationship between Indian tribes and the federal government. The Court had been grappling with the structure of this relationship since the early nineteenth century. In 1823, *Johnson v. McIntosh*¹³⁶ established the principle that, in the absence of treaties, the federal government had the right to dispose of property that had hitherto been occupied by Indians;¹³⁷ however, the problem of defining the political status of the tribes themselves had created some difficulty. In *Worcester v. Georgia*,¹³⁸ Chief Justice John Marshall seemed to suggest that the Cherokee Indians possessed a substantial degree of sovereign authority over their lands, declaring that the agreements between the federal government and the Indians "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only

136. 21 U.S. (8 Wheat.) 543 (1823).

137. *Id.* at 603-05.

138. 31 U.S. (6 Pet.) 515 (1832).

acknowledged, but guarantied by the United States."¹³⁹ Later, however, in *United States v. Rogers*,¹⁴⁰ Chief Justice Roger Brooke Taney took a different view, asserting:

The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.¹⁴¹

Because Section 1 of the Fourteenth Amendment was directed almost entirely toward the states, it had little impact on the jurisprudence of Indian rights in the late nineteenth century. *Elk v. Wilkins*¹⁴² is an important exception. *Elk* arose from the situation of an Indian who had voluntarily separated himself from his tribe and then attempted to vote in the State of Nebraska.¹⁴³ The case turned on the question of whether he should be considered a citizen of the state under Section 1 of the Fourteenth Amendment,¹⁴⁴ which confers that status on "all persons born . . . in the United States, and subject to the jurisdiction thereof."¹⁴⁵ Speaking for the majority, Justice Horace Gray concluded that Elk was not a citizen and, therefore, could constitutionally be prevented from voting in state elections.¹⁴⁶ Gray began with the premise that one could only become a citizen by virtue of either birth or naturalization.¹⁴⁷ At the time of his birth, Elk was subject to the jurisdiction of an Indian tribe, which Gray described as "an alien, though dependent, power"¹⁴⁸ and could therefore not claim birthright citizenship in the United States. Since Elk had never been naturalized, in Gray's view he failed both tests for citizenship—a

139. *Id.* at 557.

140. 45 U.S. (4 How.) 567 (1846).

141. *Id.* at 572.

142. 112 U.S. 94 (1884).

143. *Id.* at 98-99.

144. *Id.* at 99.

145. *Id.* at 98 (quoting U.S. CONST. amend. XIV, § 1).

146. *Id.* at 109.

147. *Id.* at 101.

148. *Id.* at 102.

conclusion Gray supported by reference to a variety of historical evidence which suggested that Indians born subject to tribal jurisdiction could only obtain citizenship through naturalization.¹⁴⁹

In his dissent,¹⁵⁰ Harlan argued that the legislative history of both the Civil Rights Act of 1866 and the Fourteenth Amendment itself suggested that Elk should be considered a citizen of the United States.¹⁵¹ He also made a textual argument, noting that Section 1 by its terms did not require that persons be "born subject" to the jurisdiction of the United States.¹⁵² By leaving his tribe, Elk had become "subject to the complete jurisdiction of the United States" because Indian land should be deemed part of the United States.¹⁵³ These two factors led Harlan to the conclusion that Elk had satisfied the requirements of the Fourteenth Amendment and should therefore be considered an American citizen.¹⁵⁴

Harlan also took a different view from the majority in *Talton v. Mayes*.¹⁵⁵ *Talton* was a challenge to a conviction for murder in a Cherokee tribal court.¹⁵⁶ The defendant argued that the conviction was invalid because he had not been indicted by a grand jury as required by the Fifth Amendment.¹⁵⁷ The Court rejected this challenge on the ground that the Bill of Rights was not applicable to proceedings in Cherokee tribunals.¹⁵⁸ Speaking for the majority, Justice Edward White first noted that the defendant in *Talton* was charged with a violation of Cherokee tribal law, rather than a statute of the United States.¹⁵⁹ While reaffirming the plenary power of the federal government over Cherokee affairs, White also noted that the power of the Cherokees to govern themselves existed prior to the Constitution and the establishment of the federal government.¹⁶⁰ He reasoned that, because the authority of the Cherokees was not

149. *Id.* at 103-09.

150. *Id.* at 110-23 (Harlan, J., dissenting).

151. *Id.* at 112-19.

152. *Id.* at 121.

153. *Id.* at 121-22.

154. *Id.* at 122-23.

155. 163 U.S. 376 (1896).

156. *Id.* at 379.

157. *Id.*

158. *Id.* at 384.

159. *Id.* at 381.

160. *Id.* at 384.

derived from the federal government, the Fifth Amendment, which bound *only* the federal government, did not constrain the actions of tribal courts.¹⁶¹

Harlan dissented without opinion.¹⁶² In the abstract, this vote might be characterized in a variety of different ways. For example, it might be viewed as reflecting a solicitude for Indian rights. Alternatively, it might be seen as a manifestation of Harlan's fierce devotion to the Bill of Rights—a devotion most clearly evidenced by his well-known dissent in *Hurtado v. California*.¹⁶³

Both *Elk* and *Talton* might also be viewed in a less flattering light, however. Both votes can be seen as premised on the theory that the tribes and tribal governments should be seen as little more than subdivisions of the government of the United States. This view in turn is antithetical to the notion that the tribes should be accorded sovereign or quasi-sovereign status. On occasion, as in *Elk* and *Talton*, this theory might redound to the benefit of individual Indians. At the same time, however, it could hardly be viewed as favorable to the long-term interests of Indians as a group. This point emerged clearly in the most significant late nineteenth century constitutional decisions dealing with the rights of Indian tribes: *United States v. Kagama*,¹⁶⁴ *Cherokee Nation v. Southern Kansas Railway*,¹⁶⁵ and *Lone Wolf v. Hitchcock*.¹⁶⁶

Kagama was a challenge to the constitutionality of the Major Crimes Act of 1885, which provided that a number of crimes committed by one Indian against another within the geographical limits of Indian reservations could be tried in the federal courts under the laws of the United States.¹⁶⁷ Harlan joined in a unanimous opinion that held the Major Crimes Act constitutional.¹⁶⁸ Speaking for the Court, Justice Samuel Miller clearly embraced the *Rogers* analysis, rejecting any implications of

161. *Id.* at 384-85.

162. *Id.* at 385.

163. 110 U.S. 516, 538-58 (1884) (Harlan, J., dissenting).

164. 118 U.S. 375 (1886).

165. 135 U.S. 641 (1890).

166. 187 U.S. 553 (1903).

167. See generally SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* (1994) (describing in detail events that ultimately led to *Kagama* decision).

168. *Kagama*, 118 U.S. at 384-85.

residual Indian sovereignty that might have been inherent in *Worcester*.¹⁶⁹ Miller dismissed the Indian Commerce Clause as a source for congressional authority, and conceded that no specific constitutional provision provided Congress with authority to pass the Major Crimes Act.¹⁷⁰ Instead, he found authority for the statute in the basic principle that Congress had sovereign authority over all persons and property within the territorial boundaries of the United States.¹⁷¹

[T]hese Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two.

....

... These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. ... From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

....

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.¹⁷²

While Harlan did not write separately in *Kagama*, he gave no indication that he disagreed with any aspect of Miller's approach. Moreover, four years later, he explicitly adopted the *Kagama* analysis in *Cherokee Nation v. Southern Kansas Railway*.¹⁷³ In that case, a federal statute granted the railroad a right of way through the Cherokee reservation, and also provided a mechanism for determining the compensation due the Cherokees

169. *Id.* at 380-84.

170. *Id.* at 378-79.

171. *Id.* at 379.

172. *Id.* at 379, 383-85.

173. 135 U.S. 641 (1890).

for the use of their land.¹⁷⁴ Dissatisfied with the compensation, the Cherokees filed a lawsuit in which they alleged that they had sovereign authority over reservation land and thus could prevent the railroad from using that land without their consent.¹⁷⁵ Speaking for a unanimous Court, Harlan rejected this contention, concluding:

The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no [legal] support From the beginning of the government to the present time, they have been treated as "wards of the nation," "in a state of pupilage," "dependent political communities" [No] treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits.¹⁷⁶

This analysis was reinforced and extended in *Lone Wolf v. Hitchcock*.¹⁷⁷ The complex fact situation of *Lone Wolf*¹⁷⁸ revolved around the Medicine Lodge Treaty of 1867, which provided that the heads of families of the Kiowa and Comanche tribes could claim 320 acres from the common land of the reservation as separate property, and provided further that reservation land could not be ceded without the consent of three-fourths of the male adult Indians occupying the land.¹⁷⁹ Later, the Apache tribe was brought under the same regime.¹⁸⁰ In 1892, 456 adult males signed a treaty ceding over two million acres of reservation land in exchange for a payment of two million dollars to be held in trust; the Indian agent certified that at the time, the three tribes contained 562 male adults.¹⁸¹ After

174. *Id.* at 642-46.

175. *Id.* at 646-50.

176. *Id.* at 653-54.

177. 187 U.S. 553 (1903).

178. See Ann Laquer Estlin, *Lone Wolf v. Hitchcock: The Long Shawdow*, in *THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S*, at 215-45 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984) (discussing *Lone Wolf v. Hitchcock* in detail).

179. *Lone Wolf*, 187 U.S. at 554, 563-64.

180. *Id.* at 554.

181. *Id.* at 554-55.

Congress adopted implementing legislation, members of the relevant tribe sought to void the agreement.¹⁸² They alleged that the count of eligible adult males was wrong, and that less than three-quarters had in fact signed the agreement.¹⁸³ Moreover, they contended that the signatures had been fraudulently obtained because the translator had misled them regarding the amount that they would receive.¹⁸⁴ Finally, they asserted that the implementing legislation unlawfully changed the agreement that was signed. Under these circumstances, the Indians argued that implementation of the agreement would violate the Fifth Amendment by depriving them of a property interest that was established by treaty.¹⁸⁵

Once again, the Court unanimously rejected the Indians' argument. Speaking for the majority, Justice Edward White quoted at length from *Kagama* and reemphasized the plenary authority of Congress over Indian affairs—even in the face of contrary treaty language:

When . . . treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.

. . . .

. . . Congress [has full administrative power] over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who . . . were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation.¹⁸⁶

182. *Id.* at 556, 561.

183. *Id.*

184. *Id.* at 556.

185. *Id.* at 564.

186. *Id.* at 566, 568.

While not issuing an opinion in *Lone Wolf*, Harlan noted that he concurred only in the result.¹⁸⁷ Thus, his views of the appropriate analysis may have differed substantially from those expressed by the majority. Nonetheless, the fact that he, like the majority, apparently did not even consider the *Lone Wolf* allegations as raising issues of constitutional dimensions can only be interpreted as reflecting a lack of sympathy for Indian rights generally—particularly when considered in light of his concurrence in *Kagama* and opinion in *South Kansas Railway*. Against this background, Harlan's dissents in *Talton* and *Elk* should not be seen as the embodiment of a particularly powerful concern for Indian rights. Instead, they are best understood as the expressions of marginal differences between Harlan and a majority who shared the same basic understanding of the place of Indians and Indian tribes in late nineteenth century American society. Given the Court's treatment of Indian claims during this era, this is hardly the mark of a man committed to racial justice generally.

V. HARLAN AND THE RIGHTS OF THE CHINESE

Harlan's treatment of cases involving the constitutional rights of the Chinese in America is, if anything, even more damning than his approach to Indian rights. In the Indian rights cases, he was, at least, no less sympathetic than other Justices to the claims of the relevant racial minority. In the Chinese-related cases, by contrast, Harlan proved even more reactionary than most of his contemporaries.

As in the Indian cases, the constitutional jurisprudence of Chinese rights was shaped in large measure by the special political status of the Chinese in late nineteenth and early twentieth century America.¹⁸⁸ Under the ideology embodied in the Reconstruction Amendments, native-born Americans were automatically entitled to the status of citizenship and the full rights appurtenant to that status.¹⁸⁹ However, virtually all the Chinese in America during Harlan's era were immigrants, and the only conceivable route to citizenship for immigrants was

187. *Id.* at 568.

188. This discussion is taken from Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL'Y 223 (1994).

189. *Id.* at 227.

through the process of naturalization. This mechanism in turn was barred to the Chinese by the existing naturalization statute, which limited access to naturalization to "free white persons"¹⁹⁰—a limitation that had been inserted in the first naturalization act passed by Congress.¹⁹¹

Early in the Reconstruction era, Congress took a number of actions that reinforced this distinction and emphasized its significance. First, while the Burlingame Treaty of 1868 provided that "Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may be enjoyed by the citizens or subjects of the most favored nation,"¹⁹² the Senate added a provision—apparently unique—which provided that none of the provisions of the treaty required the United States to extend naturalized citizenship to Chinese immigrants.¹⁹³ Second, while the Civil Rights Act of 1870 specifically protected aliens from racial discrimination in many of the same rights guaranteed to black citizens by the Civil Rights Act of 1866, the 1870 Act did not make any reference to property rights.¹⁹⁴ This difference was not accidental; the right to obtain and hold real estate was associated with citizenship in nineteenth century legal thought, and the decision to omit it from the Act was a conscious one.¹⁹⁵ Finally, in the comprehensive Naturalization Reform Act of 1870,¹⁹⁶ Congress rejected proposals that would have eliminated all racial barriers to naturalization, but lifted the bar on "aliens of African nativity and . . . persons of African descent."¹⁹⁷

Beginning in the 1870s, the political situation of the Chinese in America deteriorated rapidly. In 1876 the platforms of both major political parties contained anti-Chinese planks;¹⁹⁸ in the

190. Uniform Rule of Naturalization Act, 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795).

191. *Id.*

192. Maltz, *supra* note 188, at 229 (quoting Burlingame Treaty).

193. CONG. GLOBE, 41st Cong., 2d Sess. 4275-76 (1870) (remarks of Rep. Sargent). Sargent's account was not questioned, and is largely corroborated by CONG. GLOBE, 40th Cong., 3d Sess. 1011 (1869) (remarks of Sen. Doolittle) and CONG. GLOBE, 42d Cong., 2d Sess. 910 (1872) (remarks of Sen. Nye).

194. Civil Rights Enforcement Act of 1870, ch. 114, 16 Stat. 140.

195. CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870).

196. Naturalization Reform Act of 1870, ch. 254, 16 Stat. 254.

197. *Id.* § 7, 16 Stat. at 256.

198. Republican Platform of 1876, *reprinted in* NATIONAL PARTY PLATFORMS, 1840-1972, at 54 (Donald B. Johnson & Kirk H. Porter, comp., 5th ed. 1973) (calling for

same year, a congressional committee was established to investigate the Chinese problem. While a minority of the committee members defended the Chinese and favored continued unfettered immigration,¹⁹⁹ the majority report advocated the renegotiation of the Burlingame Treaty to permit the restriction of Chinese entry.²⁰⁰ A bill limiting the number of Chinese who could be carried by a single vessel to the United States passed both houses of Congress in 1878,²⁰¹ only to be vetoed by President Rutherford B. Hayes on the ground that the limitation was inconsistent with existing treaty obligations.²⁰² However, in 1882 a ten-year moratorium on the entrance of Chinese into the United States was passed by Congress and signed into law by President Chester A. Arthur.²⁰³ Subsequently, in 1888 the ban was extended to include Chinese who had come to the United States, departed, and later attempted to return.²⁰⁴ Finally, in 1892 the Geary Act both extended the moratorium and imposed stringent requirements on Chinese who had entered the country prior to the 1882 moratorium.²⁰⁵

Harlan rather plainly shared the widespread prejudice against the Chinese that led to the passage of the Exclusion Acts and the Geary Act. This attitude was clearly reflected in *Plessy*, where he disparaged the Chinese in remarks whose tenor was strikingly different than his pronouncements regarding free blacks. On one hand, he declared:

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

investigation of problems created by Chinese immigration); Democratic Platform of 1876, reprinted in NATIONAL PARTY PLATFORMS, 1840-1972, at 50 (Donald B. Johnson & Kirk H. Porter, comp., 5th ed. 1973) (calling for end to Chinese immigration).

199. *Views of the Late Oliver P. Morton on the Character, Extent, and Effect of Chinese Immigration to the United States*, S. MISC. DOC. NO. 20, 45th Cong., 2d Sess. (1878).

200. S. REP. NO. 689, 44th Cong., 2d Sess. (1877).

201. 8 CONG. REC. 1400, 1796 (1878).

202. 7 MESSAGES AND PAPERS OF THE PRESIDENT 514-20 (James D. Richardson ed., 1899).

203. See An Act to Execute Certain Treaty Stipulations Relating to Chinese, ch. 126, 22 Stat. 58-61 (1882).

204. See An Act in Supplement to an Act Titled, "An Act to Execute Certain Treaty Stipulations Relating to Chinese," ch. 1064, 25 Stat. 504 (1888).

205. See An Act to Prohibit the Coming of Chinese Persons into the United States, ch. 60, 26 Stat. 25-26 (1892).

all shall not permit the seeds of race hate to be planted under the sanction of law.²⁰⁶

By contrast, he used the fact that the Louisiana statute did *not* bar Chinese from sitting in “white” cars to buttress his attack on the statute:

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union [are required to sit in segregated cars].²⁰⁷

Obviously, this attitude did not predispose Harlan to support Chinese claims of constitutional rights. At the same time, however, Harlan remained committed to the concept that the Constitution protected natural rights, and to a broad conception of federal power to enforce those rights. Given these sometimes conflicting factors, it is not surprising that Harlan’s voting record on cases involving the rights of the Chinese was somewhat mixed. On one hand, he showed a relatively strong commitment to the protection of lawfully present Chinese from oppression by state governments and private individuals. On the other hand, however, he was an even stronger supporter of the power of Congress to determine the conditions under which the Chinese could be admitted to and remain in the United States.

A. *State and Private Oppression of Legally Present Chinese*

In some respects, the legal issues that arose from the plight of the Chinese paralleled those raised by the mistreatment of free blacks. One set of issues involved the impact of the Fourteenth Amendment on the power of states to discriminate on the basis of race. Other cases raised the question of federal power to prevent and punish private discrimination.²⁰⁸

206. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

207. *Id.* at 561.

208. The relevant case law is described in detail in FISS, *supra* note 116, and CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* (1994).

1. *The Fourteenth Amendment and State Power*—*Yick Wo v. Hopkins*²⁰⁹

Economic discrimination was one of the most important obstacles faced by the Chinese in America. Prejudice against them sharply limited their employment opportunities.²¹⁰ In a few less desirable industries, however, they came to dominate the market.²¹¹ The commercial laundry industry was one such area of Chinese dominance.²¹² For example, in 1880 it was estimated that of 320 laundries in San Francisco approximately 240 were owned by Chinese,²¹³ and in 1882 one anti-Chinese group of trade unionists estimated that commercial laundries in San Francisco employed 5,107 Chinese and only 615 whites.²¹⁴ This industry thus presented a tempting target for the anti-Chinese political movement. Against this background, in 1880 the City of San Francisco adopted an ordinance that required the approval of the city board of supervisors in order to operate a laundry in a building not constructed of brick or stone.²¹⁵ Harlan joined the unanimous Court that struck down this ordinance in *Yick Wo v. Hopkins*.²¹⁶

Under the Court's view of the ordinance, the supervisors had unfettered discretion to grant or deny applications.²¹⁷ Moreover, the supervisors had denied consent to each of the two hundred Chinese who had applied for permission to operate laundries in wooden buildings; conversely, eighty non-Chinese had been granted such permission, while only one white had been denied approval.²¹⁸

209. 118 U.S. 365 (1886). The discussion of *Yick Wo* and the *Chinese Exclusion Case* is taken from Maltz, *supra* note 188.

210. See generally PING CHIU, *CHINESE LABOR IN CALIFORNIA, 1850-1880* (1963) (discussing in detail economic problems and opportunities of the Chinese community).

211. ALEXANDER P. SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 168 (1971).

212. Paul Ong, *The Chinese and the Laundry Laws, The Use and Control of Urban Space* 32-65 (1977) (unpublished M. thesis, University of Washington) (describing the development of Chinese involvement in the laundry industry).

213. *Yick Wo*, 118 U.S. at 358-59.

214. SAXTON, *supra* note 211, at 170; see also JACK CHEN, *THE CHINESE OF AMERICA* 58 (1980) (stating Chinese dominated commercial laundry industry in San Francisco by 1870).

215. *Yick Wo*, 118 U.S. at 357-58.

216. *Id.* at 374.

217. *Id.* at 366-67.

218. *Id.* at 359; TRIBE, *supra* note 2, at 1483 n.3 (noting that facts of *Yick Wo* may not in fact have so clearly reflected discrimination against the Chinese).

Race played little direct role in most of Justice Stanley Matthews's opinion. Instead, the opinion focused primarily on the arbitrary nature of the decisionmaking process. Justice Matthews began by noting that, while not citizens, Chinese immigrants could claim the benefit of both the Burlingame Treaty and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and that the Civil Rights Act of 1870 had reaffirmed this protection.²¹⁹ Matthews then emphasized that an aspect of "the fundamental rights to life, liberty, and the pursuit of happiness,"²²⁰ was at stake, declaring:

[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.²²¹

In characterizing the *Yick Wo* ordinance as imposing just such a requirement, the Court analogized the situation to cases involving the arbitrary fixing of utility rates²²² and the forced removal of a steam engine from a box-maker's shop.²²³ Thus, the Court suggested that the ordinance was unconstitutional on its face.²²⁴

It was only at this point that race entered directly into the Court's argument. Justice Matthews noted that, because the record reflected the actual operation of the challenged ordinances, "we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration."²²⁵ He concluded:

[W]hatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws Though the law itself

219. *Yick Wo*, 118 U.S. at 368-69.

220. *Id.* at 370.

221. *Id.*

222. *Id.* at 371.

223. *Id.* at 372.

224. *Id.* at 373.

225. *Id.*

be fair on its face and impartial in its appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

. . . No reason whatever, except the will of the supervisors, is assigned why [the Chinese] should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. . . . No reason for [the discriminatory pattern] is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal²²⁶

Despite this language, the structure of the opinion limits its usefulness as a measure of sympathy for the plight of the Chinese generally. First, Matthews's argument was not directed solely at racial discrimination. Instead, the use of the ordinance to discriminate against the Chinese was seen as a specific example of a more general problem—the likelihood that officials with unfettered discretion would use that discretion to create the functional equivalent of the “class legislation” condemned in *Soon Hing v. Crowley*.²²⁷ The same reasoning would apply to the use of official discretion to place any small, identifiable group at a disadvantage.

Further, the *Yick Wo* opinion was explicitly limited to deprivations of rights that the Court deemed “fundamental,” the rights to “life, liberty, and the pursuit of happiness”—terms which, in the late nineteenth century, were limited to natural or vested rights.²²⁸ The opinion explicitly recognized that “in many cases . . . the responsibility [for final decisionmaking] is purely political, [with] no appeal lying except to the ultimate tribunal of the public judgment.”²²⁹ Thus, Harlan's concurrence in the decision cannot be viewed as presaging a generalized rejection of governmentally imposed discrimination against the Chinese.

226. *Id.* at 373-74.

227. 113 U.S. 703, 711 (1885).

228. *Yick Wo*, 118 U.S. at 370. For a fuller discussion of the nineteenth century theory of fundamental rights, see MALTZ, *supra* note 99, at 99.

229. *Yick Wo*, 118 U.S. at 370.

2. *Federal Power to Protect the Chinese from Private Discrimination*—*Baldwin v. Franks*²³⁰

Like free blacks, the Chinese were subject to private as well as state-imposed discrimination. A number of federal statutes arguably reached such private actions. The applicability and constitutionality of these statutes was at issue in *Baldwin v. Franks*.²³¹

Baldwin began as a petition for a writ of habeas corpus.²³² The petition was filed by a man arrested on allegations that he had participated in a conspiracy that resulted in the forcible removal of a number of lawfully resident Chinese from their homes and had forced them to leave the county in which they resided, thus depriving the Chinese of "the privilege of conducting their legitimate business and of the privilege of laboring to earn a living."²³³ Three sections of the Revised Statutes of 1874 were potentially relevant. Section 5519, derived from the Ku Klux Klan Act of 1871, provided for the punishment of those who "in any state or territory conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . ."²³⁴ Section 5508, derived from the Enforcement Act of 1870, provided for the punishment of those who "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States" or to "go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured."²³⁵ Finally, section 5536, once again derived from the Ku Klux Klan Act, provided for the punishment of those who conspire "by force to prevent, hinder, or delay the execution of any law of the United States."²³⁶

230. 120 U.S. 678 (1887).

231. *Id.* at 680-81. Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The Unusual Case of Baldwin v. Franks*, 3 LAW & HIST. REV. 349 (1985), provides a detailed discussion and analysis of *Baldwin*.

232. *Baldwin*, 120 U.S. at 680.

233. *Id.* at 681 (quoting the warrant issued by a commissioner of the circuit court).

234. *Id.* at 683-84 (quoting Revised Statutes of 1874, ch. 7, § 5519, 18 Stat. 1070).

235. *Id.* at 684 (quoting Revised Statutes of 1874, ch. 7, § 5508, 18 Stat. 1067).

236. *Id.* (quoting Revised Statutes of 1874, ch. 2, § 5536, at 1037).

Speaking for the majority, Chief Justice Morrison R. Waite held that none of these provisions provided sufficient basis for holding the petitioner in custody.²³⁷ He first noted that in *United States v. Harris*,²³⁸ the Court had held that section 5519 could not constitutionally be applied to private conspiracies against citizens, and that the statute itself made no distinction between offenses against citizens and aliens, respectively.²³⁹ Thus, he concluded that *Harris* governed this portion of *Baldwin* as well.²⁴⁰ By contrast, Waite conceded that section 5508 could constitutionally be applied to protect aliens; however, he argued that the reference to "citizens" in the first clause of section 5508 indicated that the entire provision was limited to invasions of the rights of citizens, and that the section therefore did not provide protection for the Chinese.²⁴¹ Finally, Waite concluded that section 5336 applied only to interference with the government or its officials, rather than violence against private individuals.²⁴² Thus, the majority found that the petitioners had not been charged with the violation of any enforceable federal statute.

Harlan disagreed with Waite's analyses of both sections 5519 and 5508.²⁴³ He had not reached the merits in *Harris*,²⁴⁴ and took *Baldwin* as an occasion to argue that the Court had unduly limited the scope of federal power in that case.²⁴⁵ Harlan also contended that, in holding that section 5508 did not apply to wrongs done to aliens, the Court had improperly disregarded the plain language of the statute.²⁴⁶ Under this view, the application for the writ of habeas corpus would have been denied.²⁴⁷

In part, Harlan's opinion in *Baldwin* no doubt reflected considerations that were independent of the issue of Chinese rights. Because of his position in *Harris*, Harlan was provided

237. *Id.* at 694.

238. 106 U.S. 629 (1883).

239. *Baldwin*, 120 U.S. at 685-86.

240. *Id.* at 685-90.

241. *Id.* at 690-92.

242. *Id.* at 692-94.

243. *Id.* at 694-701 (Harlan, J., dissenting).

244. *United States v. Harris*, 106 U.S. 629, 644 (1883).

245. *Baldwin*, 120 U.S. at 698-701.

246. *Id.* at 694-98.

247. *Id.* at 701-07. Justice Stephen Field also dissented. While suggesting that he shared Harlan's view of section 5508, Field primarily relied on the view that section 5336 criminalized the conduct of the petitioners. *Id.* at 706-07.

with his first opportunity to defend the constitutionality of the Ku Klux Klan Act in *Baldwin*. While in *Baldwin* itself the Act was invoked to protect the Chinese, it was aimed primarily at violence against blacks in the ex-Confederate states. Thus, this portion of Harlan's opinion embodied his solicitude for federal power to protect free blacks more than his attitude toward the rights of the Chinese.

By contrast, Harlan's treatment of the Enforcement Act of 1870 cannot be understood in these terms. Interpreting the Enforcement Act to protect aliens was of no particular benefit to the freed slaves; with the adoption of the Fourteenth Amendment, they had become citizens of the United States. The Chinese were therefore the primary beneficiaries of Harlan's construction of the Act. In short, if only *Yick Wo* and *Baldwin* were considered, Harlan could well be characterized as a champion of the Chinese as well as free blacks.

However, this characterization would be misleading. While state and private discrimination created major problems for the Chinese in the late nineteenth century, the restrictions imposed by federal legislation posed an even more important threat. The Court was often called upon to evaluate constitutional challenges to these statutes. Harlan's record in these cases can hardly be characterized as reflecting either sympathy for the Chinese or distaste for discrimination against them.

B. The Immigration and Naturalization Cases

In the late nineteenth century, all of the Justices on the Court agreed that certain basic principles governed the constitutional power of Congress to deal with the Chinese. On one hand, Congress had virtually unfettered authority to prevent Chinese nationals from entering the United States. On the other hand, Chinese people who were already present in this country were protected by the provisions of the Bill of Rights.

The first principle was established by the famous (or infamous) *Chinese Exclusion Case*.²⁴⁸ There a Chinese laborer petitioned for a writ of habeas corpus that would have allowed him to enter the United States. The laborer had previously been a resident of this country, but had returned temporarily to China after receiving an official certificate that purported to allow him re-

248. 130 U.S. 581 (1889).

entry to the United States.²⁴⁹ Nonetheless, he was denied re-entry pursuant to the 1888 statute that forbade Chinese laborers to enter the country under these circumstances. He argued that the denial violated both the treaty obligations of the United States and the federal Constitution.²⁵⁰ The Court unanimously rejected both of these arguments.²⁵¹

The Court conceded that the denial was inconsistent with the provisions of existing treaties between the United States and China.²⁵² However, citing the established principle that “‘so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal,’”²⁵³ the Court held that the 1888 statute effectively overrode the treaty.²⁵⁴ Thus, the controlling question in the case was whether the statute itself was consistent with the Constitution.²⁵⁵ Here, the Court based its decision on a sweeping conception of congressional power over immigration, declaring that “[i]f . . . the government of the United States, through its legislative department, considers the presence of foreigners of a different race . . . to be dangerous to its peace and security . . . [the decision to exclude them] is conclusive upon the judiciary.”²⁵⁶ In short, the *Chinese Exclusion* Court held that the Constitution imposed no constraints on congressional power to prevent noncitizens from entering the United States.

Wong Wing v. United States,²⁵⁷ by contrast, established the outer limits of congressional authority to deal with persons illegally present in the United States. Under the Geary Act, an immigration officer's determination that a Chinese person was unlawfully present in the country not only led to that person's deportation, but also condemned him to up to a year's imprisonment.²⁵⁸ In *Wong Wing*, the Court unanimously held

249. *Id.* at 582.

250. *Id.* at 584-89.

251. *Id.* at 604-11.

252. *Id.* at 600.

253. *Id.* (quoting *The Head Money Cases*, 112 U.S. 580, 599 (1884)).

254. *Id.* at 600-03.

255. *Id.* at 603.

256. *Id.* at 606.

257. 163 U.S. 228 (1896).

258. *Id.* at 230-31 (citing Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25).

the latter provision inconsistent with the Bill of Rights.²⁵⁹ Speaking for the Court, Justice George Shiras reaffirmed plenary congressional authority over immigration²⁶⁰ and conceded that Congress could make the continued presence of Chinese people a crime, and could also provide for their temporary detention as an adjunct to deportation.²⁶¹ However, analogizing the case to *Yick Wo*,²⁶² he noted that illegal aliens were nonetheless persons within the purview of the Bill of Rights²⁶³ and declared that "when Congress sees fit to . . . promote [its] policy by subjecting . . . aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused."²⁶⁴

Although all the members of the Fuller Court agreed on the basic principles established by the *Chinese Exclusion Cases* and *Wong Wing*, they remained deeply divided on other important issues relating to the rights of the Chinese. The divisions on the Court emerged clearly in *Fong Yue Ting v. United States*²⁶⁵ and *United States v. Wong Kim Ark*.²⁶⁶

Fong Yue Ting was a constitutional challenge to the stringent requirements that the Geary Act had imposed on those Chinese who had entered the country prior to the passage of the Chinese Exclusion Acts.²⁶⁷ Arguing that aliens who had been lawfully admitted to the United States had a protectable liberty interest in not being deported, the dissenting opinions of Chief Justice Melville Fuller²⁶⁸ and Justices Stephen Field²⁶⁹ and David Brewer²⁷⁰ sharply denounced the provisions of the Geary Act. Declaring that "[a]lliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property

259. *Id.* at 237.

260. *Id.*

261. *Id.* at 235.

262. I am indebted to my colleague Linda Bosniak for calling my attention to the relationship between *Wong Wing* and *Yick Wo*.

263. *Wong Wing*, 163 U.S. at 238.

264. *Id.* at 237.

265. 149 U.S. 698 (1893).

266. 169 U.S. 649 (1898).

267. *Fong Yue Ting*, 149 U.S. at 702-04.

268. *Id.* at 761-63 (Fuller, C.J., dissenting).

269. *Id.* at 744-61 (Field, J., dissenting).

270. *Id.* at 732-44 (Brewer, J., dissenting).

which are secured to native-born citizens,”²⁷¹ Field launched a strong attack on both the substance and procedure of the Act. Noting that “deportation is . . . imposed for neglect to obtain a certificate of residence,”²⁷² he declared that:

The punishment is beyond all reason in its severity. It is out of all proportion to the alleged offence. It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted. The laborer may be seized at a distance from his home, his family and his business, and taken before the judge for his condemnation, without permission to visit his home, see his family, or complete any unfinished business.²⁷³

Asserting that, in his view, “[e]very step in the procedure . . . tramples upon some constitutional right,”²⁷⁴ Field also focused on the requirement that a white witness provide the necessary exculpatory evidence, noting that “the government undertakes to exact of the party arrested the testimony of a witness of a particular color, though conclusive and incontestible testimony from others may be adduced.”²⁷⁵ This emphasis is particularly striking coming from one of the two dissenters in *Ex Parte Virginia*²⁷⁶ and *Strauder v. West Virginia*,²⁷⁷ in which the Court had held unconstitutional the exclusion of blacks from juries.²⁷⁸

The issue of race discrimination was emphasized even more strongly in Justice Brewer's dissenting opinion. Noting that “[t]he expulsion of a race may be within the inherent powers of a despotism,”²⁷⁹ he argued that, in the United States, “among the powers reserved to the people and not delegated to the government is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be

271. *Id.* at 754 (Field, J., dissenting).

272. *Id.* at 758.

273. *Id.* at 759.

274. *Id.* at 760.

275. *Id.* at 759.

276. 100 U.S. 339, 349-370 (1879) (Field, J., dissenting).

277. 100 U.S. 303, 312 (Field, J., dissenting).

278. *Id.* at 346-49.

279. *Fong Yue Ting*, 149 U.S. at 737 (Brewer, J., dissenting).

driven from our territory."²⁸⁰ He later observed "[i]t is true this statute is directed only against the . . . Chinese; but if the power exists, who shall say it will not be exercised to-morrow against other classes and other people?"²⁸¹

All these arguments left the majority of the Justices (including Harlan) unmoved. Speaking for the Court, Justice Horace Gray analogized the right to expel aliens to the right to exclude aliens, and held the Geary Act a valid exercise of the plenary federal power over immigration.²⁸² *Yick Wo* was distinguished on the ground that it involved state authority over lawfully resident aliens, rather than congressional power over their continued residence.²⁸³

By concurring silently with the majority in *Fong Yue Ting*, Harlan implicitly rejected the dissenters' condemnation of the racial classification in the Geary Act. Moreover, only two years later, Harlan spoke for a divided Court in *Lem Moon Sing v. United States*,²⁸⁴ which emphatically reaffirmed support for Gray's analysis.²⁸⁵ Thus, he firmly aligned himself with the most anti-Chinese forces on the Court and in the political process.

Harlan showed no greater sympathy for Chinese rights in *United States v. Wong Kim Ark*.²⁸⁶ Wong Kim Ark was a man who had been born in the United States to Chinese parents.²⁸⁷ After visiting China, he was denied the right to re-enter the United States under the terms of the Exclusion Act.²⁸⁸ He argued that the terms of the Act did not apply to him because, having been born in the United States, he was a citizen of this country.²⁸⁹

In purely doctrinal terms, *Wong Kim Ark* turned on the proper interpretation of the language of Section 1 of the Fourteenth Amendment, which provides that "[a]ll persons born . . . in the

280. *Id.* at 738.

281. *Id.* at 743.

282. *Id.* at 724, 732.

283. *Id.* at 725.

284. 158 U.S. 538 (1895).

285. *Id.* at 544-47.

286. 169 U.S. 649 (1898); see Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 ASIAN L.J. 33 (1995) (describing in detail the background of *Wong Kim Ark*).

287. *Wong Kim Ark*, 169 U.S. at 652.

288. *Id.* at 653.

289. *Id.*

United States, and subject to the jurisdiction thereof, are citizens of the United States.”²⁹⁰ Wong Kim Ark contended that this language embodied the common-law principle that birth within the territorial boundaries of a nation conferred citizenship in that nation.²⁹¹ He argued simply that as a person born in the United States, he was entitled to citizenship under the plain language of the Fourteenth Amendment.²⁹² This interpretation also draws support from the legislative history of this provision of Section 1; opponents of the amendment attacked the citizenship language precisely because it would confer citizenship on persons such as Wong Kim Ark,²⁹³ and at least one prominent Republican senator conceded the point.²⁹⁴

The counterargument focused on the requirement that persons born in the United States must also be “subject to the jurisdiction thereof.” Relying on the Roman principle that a child’s citizenship followed that of its parents, this argument rested on the contention that a child of Chinese parents born in the United States should be viewed as subject to the jurisdiction of the Chinese government, rather than that of the United States. Dicta in the *Slaughterhouse Cases* seemed to support this view.²⁹⁵

Of course, in the context of *Wong Kim Ark*, this argument had a clear racial subtext. The point emerged clearly in an amicus brief opposing Wong Kim Ark’s claim:

For the most persuasive reasons we have refused citizenship to Chinese subjects; and yet, as to their offspring, who are just as obnoxious, and to whom the same reasons for exclusion apply with equal force, we are told that we must accept them as fellow-citizens, and that, too, because of the mere accident of birth. There certainly should be some honor and dignity in American citizenship that would be sacred from the foul and corrupting taint of a debasing alienage.²⁹⁶

290. *Id.* (quoting U.S. CONST. amend. XIV, § 1).

291. *Id.* at 653.

292. *Id.* at 692-94.

293. CONG. GLOBE, 39th Cong., 1st Sess. 2939 (remarks of Sen. Hendricks); *id.* at 2890 (remarks of Sen. Cowan).

294. *Id.* at 2891 (remarks of Sen. Conness).

295. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 72-81 (1872).

296. McClain, *supra* note 286, at 40-41 (quoting from Brief on Behalf of the Appellant at 34, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 904)).

It was against this background that a divided Court held that Wong Kim Ark was in fact a citizen of the United States.²⁹⁷ Once more speaking for the majority, Justice Horace Gray essayed a detailed review of the common-law precedents dealing with the issue of birthright citizenship.²⁹⁸ After noting that the relevant language from the *Slaughterhouse Cases* was *dictum*, Gray then observed that a contrary decision would threaten the claims of not only the descendants of the Chinese, but also the citizenship of descendants of immigrants from many other countries.²⁹⁹ Gray also made a pointed reference to the impropriety of distorting legal principles in order to accommodate race-based legislation.

Whatever considerations, in the absence of a controlling provision of the Constitution, might influence the legislative or the executive branch of the Government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the Fourteenth Amendment³⁰⁰

In contrast to *Fong Yue Ting*, Harlan did not join Gray's majority opinion in *Wong Kim Ark*; instead, he concurred in Chief Justice Fuller's dissent.³⁰¹ Fuller spent most of his dissent canvassing the legal precedents on citizenship, ultimately concluding that they did not support Gray's position. However, Fuller ended his dissent by noting that what was at stake in *Wong Kim Ark* was congressional authority to make color-based distinction in citizenship determinations.³⁰² Thus, once again, the influence of the race issue on legal analysis was only thinly disguised.

Taken together, Harlan's positions in *Fong Yue Ting* and *Wong Kim Ark* create a dramatic counterpoint to his famous dissents in *Plessy* and the *Civil Rights Cases*. In the latter cases, he stood

297. *United States v. Wong Kim Ark*, 169 U.S. 647, 704-05 (1897).

298. *Id.* at 692-703.

299. *Id.* at 694.

300. *Id.*

301. *Id.* at 705-32 (Fuller, C.J., dissenting). Harlan's position in *Wong Kim Ark* is particularly striking because he was one of only two justices to take a liberal view of the right of Native Americans to citizenship in *Elk v. Wilkins*, 112 U.S. 94, 110-23 (1884) (Harlan, J., dissenting).

302. *Wong Kim Ark*, 169 U.S. at 732.

alone in advocating stronger protection for the rights of free blacks. By contrast, he was the only Justice to join both the majority in *Fong Yue Ting* and the dissent in *Wong Kim Ark*. Moreover, Harlan took a consistently anti-Chinese position on other constitutional issues that came to the Court.³⁰³ In short, Harlan seems to have had little sympathy for the plight of Chinese people seeking to either enter or remain in America.

CONCLUSION—THE HARLAN MYTH AND ITS LESSONS FOR LEGAL SCHOLARSHIP

A number of different lessons emerge from a close examination of Harlan's record on issues related to the rights of African-American, Native-American, and Chinese people. This record demonstrates that modern commentators have often overstated Harlan's distaste for race-based classifications. First, if one were to identify a dominant theme in Harlan's race-related jurisprudence, it would be support for a relatively broad conception of federal power in a wide variety of contexts. Second, his sympathy for the situation of free blacks should be characterized as no more than that—sympathy for free blacks *specifically*. Finally, even in this context, Harlan's view was limited to a particular conception of fundamental rights. In short, in Harlan's view, the Constitution was only partially color-blind.

Even more importantly, the pattern of Harlan's votes in the Indian and Chinese cases illustrates the inadequacy of a model that treats racial minorities in America as a homogeneous group whose experiences and treatment has been analogous to that of free blacks. Obviously, minority races have shared a substantial common experience of racism in America. However, the example of the development of legal doctrines dealing with the Chinese in particular belies the premise of minority homogeneity. Harlan's record on these issues exemplifies the degree to which a single Justice might have different attitudes toward the plight of different minority races.³⁰⁴

303. See, e.g., *United States v. Ju Toy*, 198 U.S. 253 (1905); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895).

304. The behavior of two of Harlan's colleagues—Stephen Field and David Brewer—reflected precisely the opposite pattern. Field consistently opposed the interests of African-Americans, even dissenting in *Strauder v. West Virginia*, 100 U.S. 303, 349-71 (1879) (Field, J., dissenting), but was the only Justice to support the Chinese in *Baldwin v. Franks*, 120 U.S. 678, 701-07 (1887) (Field, J., dissenting), *Fong Yue Ting v. United States*, 149 U.S. 698, 744-61 (1893) (Field, J., dissenting), and *United*

Moreover, the special obstacles faced by minorities other than African-Americans has had a substantial impact on the overall development of the law. *Yick Wo* is a landmark by any standard, and the doctrines developed in the immigration cases from the *Chinese Exclusion Cases* to *Fong Yue Ting* and *Wong Wing* continue to be a powerful influence on the structure of modern immigration law. Yet all these cases were in some measure a reaction to the unique plight of the Chinese in American society.

Ultimately, the lesson to be learned is that an adequate understanding of the development of the legal system cannot not be based on a simple, bipolar view of American society—whites on one side, minority races on the other. Such a view drastically understates the complexity of the history of race relations in America. Moreover, in the case of non-African-American minorities, it further marginalizes the experience of groups that have historically been faced with enormous hostility from mainstream American society.

States v. Wong Kim Ark, 169 U.S. 649 (1897). Similarly, Brewer showed no sympathy for African-Americans. *See, e.g.*, *Berea College v. Kentucky*, 211 U.S. 45 (1908) (holding that state may require private schools that are administered by corporations to be segregated); *Hodges v. United States*, 203 U.S. 1 (1906) (prohibiting Congress from constitutionally prohibiting private interferences with basic rights); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that states may require railroads to be segregated). However, Justice Brewer was the most persistent supporter of Chinese rights in the 1890s and early 1900s. *See, e.g.*, *United States v. Ju Toy*, 198 U.S. 253, 264-80 (1905) (Brewer, J., dissenting); *United States v. Sing Tuck*, 194 U.S. 161, 170-82 (1904) (Brewer, J., dissenting); *Chin Ying v. United States*, 186 U.S. 202 (1902) (Brewer, J., dissenting); *Lem Moon Sing v. United States*, 158 U.S. 538, 550 (1895) (Brewer, J., dissenting); *Quock Ting v. United States*, 140 U.S. 417, 422-24 (1891) (Brewer, J., dissenting).