THE FIRST JUSTICE HARLAN BY THE NUMBERS: JUST HOW GREAT WAS "THE GREAT DISSENTER?"

by

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During the centennial year of Justice John Marshall Harlan's most famous opinion, the remarkable dissent in *Plessy v. Ferguson*,[1] an article in the *Iowa Law Review*[2] suggested that Harlan was not a modern liberal on race issues. Rather than being a Brennan or Marshall with muttonchop sideburns and button shoes, the article argued that Harlan was a distinctly transitional figure, better than his brethren in some ways, but afflicted with significant blind spots. In particular, Harlan criticized the Chinese in his celebrated *Plessy* dissent itself. He contended that "[o]ur Constitution is color-blind"[3] and insisted that government should guarantee "equality before the law of all citizens of the United States, without regard to race."[4] But then he observed:

> 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 [cannot] . . . .[5]

The article also noted that Harlan had voted against Chinese litigants in other important cases.[6] The point was not simply to trash Harlan, but to suggest that Harlan's reputation has been "whitewashed" by scholars and courts who ignored the complexities of Harlan's words and voting record.[7] Specifically, while Harlan can be

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

[2] Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

[3] 163 U.S. at 559 (Harlan, J., dissenting).

[4] *Id*. at 560.

[5] *Id*. at 561.

[6] *See* Chin, *supra* note 2, at 157-66.

[7] *See id*. at 166-71. The article reported that the main constitutional law casebooks omitted the troublesome portion of the *Plessy* opinion. As the article was going to press, a new edition of one of those casebooks was published which included the language and a

credited with being uniquely supportive of African American civil rights, he was not a modern anti-racist because he did not object to racial discrimination against Chinese. Although Harlan may be of substantial historical interest, neither supporters of affirmative action like Laurence Tribe, Charles Lawrence, Cass Sunstein, and Kathleen Sullivan nor opponents like Charles Fried, William Bennett, Chief Justice Rehnquist, and Justices Scalia, Thomas, and Kennedy should invoke Harlan's views as a contemporary model for racial justice.[8]

Harlan's reputation does not seem to have suffered as a result of the critique. Justice Harlan's special authority continues to be invoked by state and federal courts,[9] and Harlan himself remains the subject of intense scholarly attention.[10] Of particular note was one scholar's suggestion that the argument was unfair to Justice Harlan.

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discussion of its import. *See* GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS SUNSTEIN & MARK TUSHNET, CONSTITUTIONAL LAW 114-15 (3d ed. 1996).

[8] Chin, *supra* note 2, at 152-54 (citing sources where each named scholar or judge relies on *Plessy* dissent).

[9] One judge of the Minnesota Court of Appeals invoked Harlan's example in support of his own decision to write separately: "It took 58 years to be persuasive, but his place in history is secure. We know his name. Without looking it up, name me all the majority writers in *Plessy*. Name me three? Name me one?" Granite Valley Hotel Ltd. Partnership v. Jackpot Junction Bingo and Casino, 559 N.W.2d 135, 190 (Minn. Ct. App. 1997). *See also, e.g.*, Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854, 862 (9th Cir. 1998); Smith v. Virginia Commonwealth Univ., 84 F.3d 672, 678 (4th Cir. 1996) (en banc) (citing *Plessy* dissent in case invalidating pay equity plan for female professors who were paid less as a group than male professors); Coalition to Save our Children v. State Bd. of Educ., 90 F.3d 752, 780 (3d Cir. 1996) (Sarokin, J., dissenting); Quilter v. Voinovich, 981 F. Supp. 1032, 1055-56 (N.D. Ohio 1997) (three judge court), *aff'd mem.*, 118 S. Ct. 1358 (1998); Price v. Short, 931 S.W.2d 677, 684 (Tex. Ct. App. 1996) (citing *Plessy* dissent in support of proposition that race-based peremptory challenges against members of any race were illegal; affirming judgment of judge named John Marshall); Cohen v. Little Six, Inc., 543 N.W.2d 376, 390-91 (Minn. Ct. App. 1996) (Randall, J., dissenting) (citing *Plessy* dissent in argument challenging Indian sovereignty), *aff'd*, 561 N.W.2d 889 (Minn. 1997).

[10] *See, e.g.*, Molly Townes O'Brien, *Justice John Marshall Harlan as Prophet: The* Plessy *Dissenter's Color-Blind Constitution*, 6 WM. & MARY BILL RTS. J. 753 (1998); Theolious Johnson, *Paradigms, Oxymorons and Color Blindness: Rethinking Black Entrepreneurship in the Specter of* Plessy, 26 CAP. U. L. REV. 301 (1997); Damon Keith, *One Hundred Years after* Plessy v. Ferguson, 65 U. CIN. L. REV. 853 (1997); Brook Thomas, Plessy v. Ferguson *and the Literary Imagination*, 9 CARDOZO STUD. L. & LITERATURE 45 (1997); Mark Tushnet, Plessy v. Ferguson *in Libertarian Perspective*, 16 L. & PHIL. 245 (1997). Books about Harlan also continue to appear; for example, the University of North Carolina Press is soon to publish an important new study authored by University of Cincinnati historian Linda Przybyszewski. *See* LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN (1999); *see also* Linda C.A. Przybyszewski, *Mrs. John Marshall Harlan's Memories: Hierarchies of Gender and Race in the Household and the Polity*, 18 LAW & SOC. INQUIRY 453 (1993).

Professor Louise Weinberg, William B. Bates Chair for the Administration of Justice at the University of Texas School of Law, writing in the *Michigan Law Review*,[11] demanded a closer analysis. In her essay, *Holmes' Failure*, she argued that Justice Oliver Wendell Holmes was "a failure"[12] in that he "became only a minor figure in the intellectual history of the common law, and failed to become an actor in the unfolding story of the common law itself. [With the exception of his First Amendment jurisprudence], Holmes was almost wholly irrelevant."[13]

Professor Weinberg perceptively and effectively criticized Holmes, but defended Harlan. "I find little support," she wrote, for the "argument that the first Justice Harlan's decency in civil rights cases did not extend to the civil rights of Chinese Americans."[14] While acknowledging that "Justice Harlan apparently shared Chief Justice Fuller's view that the Chinese were 'remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions and apparently incapable of assimilating with our people . . . .' *United States v. Wong Kim Ark*, 169 U.S. 649, 731 (1898) (Fuller, C.J., joined by Harlan, J., dissenting),"[15] Professor Weinberg insisted that "Harlan struggled to secure the rights of Chinese immigrants. *See, e.g.*, Chew Heong v. United States, 112 U.S. 536, 560 (1884) (Harlan, J.) (interpreting the Chinese Exclusion Acts as consistent with preexisting treaty obligations, thus enabling a Chinese laborer to return to this country)."[16]

How can Professor Weinberg's claim be answered? Citation of a single case in which Harlan wrote for a majority in favor of an Asian litigant hardly suggests that Harlan "struggled to secure the rights of Chinese immigrants." After all, just as a stopped clock is right twice a day, even at its worst, the Supreme Court did not reject each and every claim advanced by racial minorities and other disfavored groups. But if her citation of a single case does not end the issue, neither did citation of a small number of cases; the article cited biased words written by Harlan, including some from his *Plessy* dissent itself, but a few cracks alone, especially from the last century, are not conclusive proof of bias. For example, if it could be shown that Harlan had used racial slurs or engaged in stereotyping with respect to African Americans, that would not undermine the fact that he was better than his colleagues on the Court; that he was not perfect with respect to an issue does not mean he was not good. Implicitly, Professor Weinberg asked for a defense of the article's claims about Harlan's jurisprudence which more systematically accounted for Harlan's voting record as a whole. This essay will attempt to do that.

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[11] Louise Weinberg, *Holmes' Failure*, 96 MICH. L. REV. 691 (1997).
[12] *Id*. at 692.
[13] *Id*. at 722 (criticizing Chin, *supra* note 2).
[14] *Id*. at 709 n.72.
[15] *Id*.
[16] *Id*.

There may be no definitive scientific, quantifiable method of judicial evaluation. Evaluation of a judge's record necessarily involves a measure of subjectivity. Nevertheless, even a subjective analysis can marshal and present evidence more persuasively or less so. This essay proposes to defend the conclusion reached in the *Iowa* article using three categories of evidence.

The first category of evidence, and one which the *Iowa* article totally ignored, is Harlan's voting record as a whole compared to the Court. It is difficult to draw conclusions from a single case, even a singularly important case like *Dred Scott* or *Plessy*. In any given ruling, any given judge may feel duty-bound to come out a particular way, perhaps a way which is inconsistent with his or her personal political beliefs. At the same time, it has been a truism since the days of the realists that within the system of precedent many cases could be decided either way.[17] Thus, it is relevant to examine how Harlan voted in the broad run of cases dealing with civil rights claims advanced by Asian litigants, and to compare that record to his votes in the civil rights cases involving African Americans, where his reputation as a racial progressive was earned.

The second kind of evidence that is relevant to the evaluation of Harlan's judicial record is evidence of intent or motive; statements of reasons for votes or attitudes. For example, surely Harlan's *Plessy* dissent would not be as celebrated as it is if it had been based solely on an argument that the Court had no jurisdiction because the notice of appeal had been filed out of time; the merit of his opinion rests on its advanced understanding of the equal protection clause.

Finally, leading cases warrant special attention. An example is Justice Harlan's dissent in *Plessy* which was a vote that the Jim Crow system was unconstitutional. Therefore, that vote might be regarded as much more significant than his vote in *Cumming v. Board of Education*[18] upholding a school district's decision to offer high school educations to whites only. By the time he wrote *Cumming*, Harlan's anti-segregation position had already lost in *Plessy*, and it is not entirely fair to criticize a judge for applying a rule he was on record as opposing.[19] On the other hand, twenty votes holding schools or public facilities separate and unequal on the facts might not outweigh a single vote in favor of the institution of separate but equal in the first place.

Considering these kinds of evidence together may offer an informed picture of a judge's disposition. By these measures, Harlan cannot be regarded as a defender of

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[17] *See, e.g.*, Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 710-13 (1998).

[18] 175 U.S. 528 (1899).

[19] *Id.* at 543-44 (noting that no challenge to segregation "was made in the pleadings . . . [w]e must dispose of this case as it is presented by the record.").

Asian civil rights. Based on his voting record, he was the most ardent defender of African American civil rights. By contrast, his record in Asian cases was one of the worst. His votes in favor of African American civil rights were in critical cases. In most of the critical cases with respect to Asian litigants, he voted against them.

I. COUNTING CASES: AN ARITHMETICAL ANALYSIS OF HARLAN'S SUPPORT FOR CIVIL RIGHTS

In order to assess whether Harlan's concern for civil rights extended to Asian Americans, two groups of cases were assembled and examined.[20] The first group consists of cases decided during Harlan's long service on the Court (1877-1911) which involved statutory or constitutional civil rights claims by or on behalf of African Americans.[21] Typical examples of these cases involved African Americans who

[20] Cases were identified by reading the results of three Westlaw searches. To obtain the Asian American cases, the SCT-OLD database was searched using the following terms: "date(aft 1876) and date(bef 1912) and Chinese or Japanese or Chinaman or Japan or China". To obtain the African American cases, the following searches were used: "Date(aft 1876) and date(bef 1912) and 'civil rights' ", and "Date(aft 1876) and date(bef 1912) and 'Equal Protection' and 'Fourteenth Amendment' and African race Negro black". The resulting lists were checked against cases annotated in the West *Supreme Court Digest*, topic "Aliens," Key Numbers 19-38; topic "Civil Rights," Key Numbers 1-17; and topic "Constitutional Law," Key Numbers 214-223. Any cases not produced in the Westlaw search were examined. Finally, any cases not yet identified which were listed in a study of Justice David Brewer's voting patterns were read. *See* J. Gordon Hylton, *The Judge Who Abstained in* Plessy v. Ferguson: *Justice David Brewer and the Problem of Race*, 61 MISS. L.J. 315, 320-22 (1991).

[21] *See* Bailey v. Alabama, 219 U.S. 219 (1911) (sustaining 13th Amendment claim); Franklin v. South Carolina, 218 U.S. 161 (1910) (rejecting claim of racial discrimination in selection of criminal grand jury); Marbles v. Creecy, 215 U.S. 63 (1909) (rejecting due process claim); United States v. Shipp, 214 U.S. 386 (1909) (sustaining contempt charge against officials who participated in lynching); United States v. Powell, 212 U.S. 564 (1909) (rejecting claim that civil rights statutes applied to private conduct); Thomas v. Texas, 212 U.S. 278 (1909) (rejecting discriminatory jury selection claim); Bailey v. Alabama, 211 U.S. 452 (1908) (rejecting constitutional challenge to state statute); Berea College v. Kentucky, 211 U.S. 45 (1908) (rejecting challenge to state educational segregation statute); United States v. Shipp, 203 U.S. 563 (1906) (upholding civil rights prosecution of state officials); Hodges v. United States, 203 U.S. 1 (1906) (invalidating civil rights prosecution); Keen v. Keen, 201 U.S. 319 (1906) (rejecting equal protection challenge to distribution of estate); Kentucky v. Powers, 201 U.S. 1 (1906) (invalidating removal based on allegation of discrimination in criminal prosecution); Martin v. Texas, 200 U.S. 316 (1906) (rejecting discriminatory jury selection claim); Riggins v. United States, 199 U.S. 547 (1905) (sustaining prosecution under civil rights laws); Clyatt v. United States, 197 U.S. 207 (1905) (rejecting civil rights claim); Selden v. Montague, 194 U.S. 153 (1904) (rejecting voting claim); Jones v. Montague, 194 U.S. 147 (1904) (rejecting voting claim); Rogers v. Alabama, 192 U.S. 226 (1904) (sustaining discriminatory jury selection claim); James v. Bowman, 190 U.S. 127 (1903) (rejecting civil rights claim; statute unconstitutional);

claimed discrimination in selection of a criminal trial jury or grand jury,[22] claimed discrimination in their right to vote,[23] or were prosecuted for violation of a segregation law.[24] Other cases raised the question of the application or constitutionality of a civil rights statute designed to protect African Americans.[25]

The second group involved claims advanced by Asian American litigants.[26] Some of

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Giles v. Harris, 189 U.S. 475 (1903) (rejecting voting claim); Brownfield v. South Carolina, 189 U.S. 426 (1903) (rejecting grand jury claim); Tarrance v. Florida, 188 U.S. 519 (1903) (rejecting grand jury claim); Chesapeake & Ohio Railway v. Kentucky, 179 U.S. 388 (1900) (rejecting challenge to conviction for violation of segregation law); Carter v. Texas, 177 U.S. 442 (1900) (sustaining discriminatory jury selection claim); Cumming v. Bd. of Educ., 175 U.S. 528 (1899) (rejecting challenge to segregation conviction); Williams v. Mississippi, 170 U.S. 213 (1898) (rejecting grand jury discrimination claim); Plessy v. Ferguson, 163 U.S. 537 (1896) (rejecting challenge to segregation conviction); Murray v. Louisiana, 163 U.S. 101 (1896) (rejecting grand jury claim); Smith v. Mississippi, 162 U.S. 592 (1896) (rejecting jury selection claim); Gibson v. Mississippi, 162 U.S. 565 (1896) (rejecting jury selection claim); Mills v. Green, 159 U.S. 651 (1895) (rejecting voting discrimination claim), *aff'g* 69 F. 852 (4th Cir. 1895); Andrews v. Swartz, 156 U.S. 272 (1895) (rejecting equal protection claim in criminal case); Wood v. Brush, 140 U.S. 278 (1891) (rejecting jury selection claim); Louisville, N.O. & Texas Ry. Co. v. Mississippi, 133 U.S. 587 (1890) (rejecting challenge to segregation statute); *Ex parte* Yarborough (The Ku Klux Cases), 110 U.S. 651 (1884) (sustaining constitutionality of civil rights laws); Civil Rights Cases, 109 U.S. 3 (1883) (invalidating civil rights statutes as unconstitutional); Bush v. Kentucky, 107 U.S. 110 (1883) (sustaining jury selection challenge); United States v. Harris, 106 U.S. 629 (1883) (invalidating civil rights statutes); Pace v. Alabama, 106 U.S. 583 (1883) (rejecting equal protection challenge to criminal statute); Dubuclet v. Louisiana, 103 U.S. 550 (1880) (rejecting voting discrimination claim); Neal v. Delaware, 103 U.S. 370 (1880) (sustaining jury selection challenge); *Ex parte* Virginia, 100 U.S. 339 (1879) (sustaining prosecution for violation of civil rights laws); Virginia v. Rives, 100 U.S. 313 (1879) (denying applicability of civil rights laws); Strauder v. West Virginia, 100 U.S. 303 (1879) (upholding civil rights statute and claim of discriminatory jury selection); Hall v. DeCuir, 95 U.S. 485 (1878) (invalidating state anti-discrimination statute).

[22] *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879) (upholding claim of discrimination in jury selection).

[23] *See, e.g.*, Jones v. Montague, 194 U.S. 147 (1904) (rejecting voting claim).

[24] *See, e.g.*, Pace v. Alabama, 106 U.S. 583 (1883) (rejecting equal protection challenge to criminal statute).

[25] *See, e.g.*, Virginia v. Rives, 100 U.S. 313 (1879) (holding that removal statute did not apply to discrimination by actors other than the legislature).

[26] *See* Goon Shung v. United States, 212 U.S. 566 (1909) (rejecting immigrant's claim); Liu Hop Fong v. United States, 209 U.S. 453 (1908) (sustaining immigrant's claim); Chin Yow v. United States, 208 U.S. 8 (1908) (sustaining immigrant's claim); Ah Sin v. Wittman, 198 U.S. 500 (1905) (rejecting discrimination claim by criminal defendant); United States v. Ju Toy, 198 U.S. 253 (1905) (rejecting immigrant's claim); United States v. Sing Tuck, 194 U.S. 161 (1904) (rejecting immigrant's claim); Tom Hong v. United States, 193 U.S. 517 (1904)

them raised issues similar to the African American cases, such as discrimination in jury selection,[27] discriminatory enforcement of the law,[28] or the applicability of civil rights laws.[29] However, many of these cases involved a category of claims which African Americans rarely needed to consider: The constitutionality and interpretation of immigration laws.[30] While the interpretation of these laws does not necessarily raise the question of race or discrimination directly, the cases are similar to the Jim Crow cases in the following sense: most of the cases involve the interpretation of the Chinese Exclusion Act and its progeny, a race-specific statute which was designed to limit non-white presence and influence in the United States.

The point of analyzing the two groups of cases is to develop a sense of the relative sympathy of the justices to the respective claims of each group. It would be difficult or

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(sustaining immigrant's claim); Ah How v. United States, 193 U.S. 65 (1904) (rejecting immigrant's claim); Kaoru Yamataya v. Fisher, 189 U.S. 86 (1903) (rejecting immigrant's claim); Chin Ying v. United States, 186 U.S. 202 (1902) (rejecting immigrant's claim); Chin Bak Kan v. United States, 186 U.S. 193 (1902) (rejecting immigrant's claim); Lee Lung v. Patterson, 186 U.S. 168 (1902) (rejecting immigrant's claim); Lee Gon Yung v. United States, 185 U.S. 306 (1902) (rejecting immigrant's claim); Fok Young Yo v. United States, 185 U.S. 296 (1902) (rejecting immigrant's claim); United States v. Lee Yen Tai, 185 U.S. 213 (1902) (rejecting immigrant's claim); Li Sing v. United States, 180 U.S. 486 (1901) (rejecting immigrant's claim); United States v. Gue Lim, 176 U.S. 459 (1900) (ruling in favor of immigrant); United States v. Wong Kim Ark, 169 U.S. 649 (1898) (sustaining 14th Amendment claim to citizenship by racial Chinese born in the United States); Wong Wing v. United States, 163 U.S. 228 (1896) (sustaining due process claim by criminal defendant); Lem Moon Sing v. United States, 158 U.S. 538 (1895) (rejecting immigrant's claim); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (rejecting immigrant's claim); Lau Ow Bew v. United States, 144 U.S. 47 (1892) (sustaining immigrant's claim); Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (rejecting immigrant's claim); Wan Shing v. United States, 140 U.S. 424 (1891) (rejecting immigrant's claim); Quock Ting v. United States, 140 U.S. 417 (1891) (rejecting immigrant's claim); *In re* Sibuya Jugiro, 140 U.S. 291 (1891) (rejecting claim of discriminatory jury selection); Chinese Cases (No. 1), 140 U.S. 676 (1891) (dismissing immigrant's claims on procedural grounds); Chinese Cases (No. 2), 140 U.S. 676 (1891) (rejecting immigrant's claim); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (rejecting immigrant's claim); United States v. Jung Ah Lung, 124 U.S. 621 (1888) (sustaining immigrant's claim); Baldwin v. Franks, 120 U.S. 678 (1887) (invalidating civil rights statute as unconstitutional); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (sustaining claim of discriminatory prosecution); Soon Hing v. Crowley, 113 U.S. 703 (1885) (rejecting claim of discriminatory prosecution); Cheong Ah Moy v. United States, 113 U.S. 216 (1885) (rejecting immigrant's claim); Chew Heong v. United States, 112 U.S. 536 (1884) (sustaining immigrant's claim); *Ex parte* Tom Tong, 108 U.S. 556 (1883) (rejecting criminal defendant's civil rights argument); *Ex parte* Hung Hang, 108 U.S. 552 (1883) (same).

[27] *See, e.g.*, Jugiro v. Brush, 140 U.S. 291 (1891).

[28] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[29] *See, e.g.*, Baldwin v. Franks, 120 U.S. 678 (1887).

[30] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893).

impossible to decide which cases were "correctly" decided for our time or for then; thus, there is no claim that any individual vote is right or wrong, justly motivated, or biased. The lists of cases were intended to be as inclusive as reasonably possible (although no claim is made that all of the cases which reasonably could be included were identified). The lists include short per curiam dispositions, companion cases, multiple decisions in the same case, and procedural dispositions. The lists exclude interlocutory procedural orders, and cases which involved racial minorities as parties but presented legal issues other than civil rights claims or immigration claims.

A. Harlan and African Americans

The Court decided 45 cases involving African American civil rights during Harlan's service; every one of the 28 justices with whom Harlan served on the Court voted in at least one of those cases. In 11 of those 45 cases (24%), the Court sustained the civil rights claim.[31] As Appendix 1 shows (Appendices begin on page 648), Harlan's votes in favor of civil rights in 20 of the 44 cases in which he participated give him a pro-civil rights percentage of about 45%, well above average, but not even in the top five overall.

Although these numbers may accurately reflect Harlan's strong sympathy by showing him to be almost twice as likely as the Court as a whole to support African American civil rights, they may be misleading with respect to other justices because they reflect the distorting influence of the fact that all of the other justices served on only a subset of Harlan's cases. Thus, Justice Hughes' perfect record in favor of civil rights, like Justice Jackson's perfect record against, is based on a single vote in a single case.

Appendix 2 reflects a slightly different analysis: each justice is ranked by the percentage of votes they cast in favor of civil rights, whether as part of a majority or in dissent, compared to how the majority voted in those cases. Justice Harlan is first by this measure; he was 182% as likely to vote in favor of civil rights as his colleagues. Justice Brown is a close second.

These results may be more probative than raw votes, because they show more directly the extent to which particular justices deviated from the pack. Just over one-half of the justices have scores of 100 because they voted no more and no less favorably in the cases on which they sat than did the majority (every one of them matched the Court by never dissenting, rather than dissenting for and against civil rights in equal numbers of cases). This analysis probably should not be the last word because it is questionable whether the honor of being the justice second most in favor of civil

[31] Cases were counted as pro-civil rights if the individual Asian or African American prevailed on their constitutional or statutory civil rights argument, if a segregation statute was held unconstitutional, if a civil rights statute was held to be constitutional or applicable to a particular situation, or if a civil rights prosecution was allowed to proceed.

rights can go to Henry Billings Brown, the author of *Plessy*. This oddity is explained by the fact that the 24 cases Brown sat on were generally not successful for the African American litigants--about 10% won, compared to almost 25% for the cases as a whole. Indeed, comparing Brown's record to Harlan's on those same 24 cases shows that Harlan dissented in favor of civil rights five times to Brown's two (as well as joining the majority the three times it supported civil rights).

Appendix 3 looks at the data another way, ranking the justices by evaluating how many of their votes were dissents in favor of civil rights. By this measure, Harlan is in a class by himself; more than one out of five of his votes was a dissent in favor of civil rights. He voted in favor of civil rights in nine cases in which the majority rejected the claim.[32]

There were a total of 16 dissenting votes in favor of the civil rights position in this body of cases; nine (56%) were Harlan's. By contrast, of the 14 anti-civil rights dissenting votes (i.e., dissents where the majority favored the civil rights position) none were Harlan's.

Appendix 4 analyzes the votes another way, comparing the frequency of dissents to votes with the majority against civil rights. Harlan is first by this measure, also.

This analysis also shows that Justices Harlan, Bradley, Day, Brewer, and Brown were, compared to the Court as a whole, more likely to vote for African American civil rights than the Court as a whole, and that Harlan was the least likely, over the long run of cases, to vote against civil rights.

B. Harlan and the Asian American Cases

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[32] *See* Bailey v. Alabama, 211 U.S. 452, 455 (1908) (Harlan, J., dissenting) (arguing that Court should hear involuntary servitude claim in spite of procedural objection); Berea College v. Kentucky, 211 U.S. 45, 58 (1908) (Harlan, J., dissenting) (arguing that corporation or natural person had right to offer integrated educational program); Hodges v. United States, 203 U.S. 1, 20 (1906) (Harlan, J., dissenting) (arguing that Congress had power to prohibit violent interference with African American employment); Clyatt v. United States, 197 U.S. 207, 222 (1905) (Harlan, J., dissenting) (arguing that evidence of transportation of African Americans from Florida to Georgia to compel them to work was sufficient to present a jury question of peonage); James v. Bowman, 190 U.S. 127, 142 (1903) (Harlan, J., dissenting without opinion); Giles v. Harris, 189 U.S. 475, 488 (1903) (arguing that federal courts had jurisdiction to order state officials to comply with Constitution and register eligible African American voters); Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (arguing that state segregation statute was unconstitutional); Louisville, N.O. & Texas Ry. Co. v. Mississippi, 133 U.S. 587, 592 (1890) (Harlan, J., dissenting) (arguing that railroad had right to offer integrated services); Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting) (arguing that Congress had power to prohibit discrimination in public accommodations).

During Harlan's tenure, the Court handed down 37 decisions involving Asian American civil rights. Only 21 justices participated in the decisions. African American litigants won 24% of their cases; Asian American litigants' 10 wins gave them a slightly better success rate of 27%. While no justice who voted in more than one case supported African Americans more than one-half of the time, Appendix 5 shows that Justices Peckham and Brewer consistently supported Asian litigants, voting in their favor more than twice as often as the Court as a whole. Justice Harlan, by contrast, was less likely to support Asian civil rights claims than the Court as a whole, ranking 13th out of 21 justices. He dissented in three cases, twice against and once in favor of civil rights.[33]

Just as the raw percentages are not fully explanatory in the African American cases, here also the wide range of percentages obscures that fact that most justices voted with the majority most of the time. Appendix 6 ranks the justices in order of how likely they were to vote in favor of civil rights compared to the majority in the cases in which they participated. Appendix 6 shows that Peckham and Brewer's high rankings in Appendix 5 were not anomalous; they supported civil rights for Asian Americans even in cases when other justices did not. By contrast, Justice Harlan was somewhat less likely to support civil rights for this group than the Court as a whole. Given the fact that most justices voted with the majority, this puts Harlan fourth from the bottom.

Appendix 6 reflects that fully 14 of the 21 justices who voted in one or more Asian American cases were neither more nor less supportive of civil rights than the Court as a whole; that is, they had no net dissents in favor or against the civil rights position.

Appendix 7 examines how often a justice dissented in favor of civil rights compared to their votes as a whole. For the top-ranked Justice Peckham, more than one out of every two votes was a dissent in favor of Asian civil rights. Justice Harlan ranks 18th out of 21 Justices.

Appendix 8 compares the number of dissents in favor of civil rights to the number of votes with the majority rejecting a civil rights claim. Justice Peckham dissented in favor of civil rights more then three times as often as he joined a decision against a civil rights claim. Justice Harlan again ranked 18th out of 21 Justices.

C. Looking at the Numbers

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[33] *See* United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898) (Fuller, J., joined by Harlan, J., dissenting) (arguing that persons of Chinese descent born in the United States were not citizens); United States v. Jung Ah Lung, 124 U.S. 621, 635 (1888) (Harlan., J., dissenting) (arguing that statute prohibited Chinese immigrant who lost his papers from entering the United States); Baldwin v. Franks, 120 U.S. 678, 694 (1887) (Harlan, J., dissenting) (arguing that civil rights statute protecting Chinese was constitutional).

The numbers suggest that Harlan was less sympathetic to Asian American civil rights than the Court as a whole, and less sympathetic to Asian American civil rights than he was to African American civil rights. Harlan was the clear champion of African American civil rights on the Court. He joined every decision of the Court vindicating African American civil rights, and dissented more frequently than any other justice when the majority denied them.

With Asian American claims, he has one of the four worst records. Although the Court as a whole ruled for Asian American litigants slightly more often than African American litigants (27% versus 24%), Justice Harlan was almost twice as likely to vote for the African American civil rights position than the Asian American (45% versus 25%).

The dissents also tell a stark tale. Because most justices voted with the majority in every case,[34] dissents are significant. Harlan was responsible for more than one-half of the dissenting votes in favor of African American civil rights-9 out of 16-and none of the 14 votes against African American civil rights in cases where the majority held for the individual. By contrast, Harlan was responsible for 25% of a smaller number (8) of dissenting votes against Asian American civil rights, and only one of the 28 dissenting votes in favor of Asian American civil rights.

Numerically, Justice Rufus Peckham is the anti-Harlan, strongly supporting Asians, slightly less sympathetic than the Court as a whole to claims by African Americans. However, there were justices who more systematically supported civil rights. Justices Brewer and Day voted in favor of civil rights more often than the Court with respect to both Asian Americans and African Americans.

There are, of course, alternative interpretations of the data. It is possible that the Court which vindicated about a quarter of the claims advanced by each group was wrong and Harlan was right, that the Asian cases were unworthy and the African American cases were righteous. But with dozens of cases in each group, it is reasonable to hypothesize that the idiosyncracies of individual cases would average out, and that Harlan's record-better than the court's with respect to African Americans, worse than the Court's with respect to Asians-reflects an actual difference in sympathies.

Further, it might be true that Harlan was a strong supporter of civil rights for Chinese Americans, just as he was for African Americans, yet had a less favorable record than the Court as a whole, if the Court as a whole was *extremely* favorably

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[34] Justices Blatchford, Hughes, Hunt, Jackson, Lamar, J., Lurton, Moody, Miller, Matthews, Shiras, Strong, Swayne, VanDevanter and Woods joined the majority decision in each case from both groups in which they participated.

disposed to Chinese American civil rights, at least compared to African American civil rights. However, the Court of the period is perceived by many as giving little respect to Chinese American rights. In sum, the most reasonable interpretation of Harlan's voting record as a whole suggests that he did not support Asian American civil rights as strongly as he supported those of African Americans.

II. EVALUATING CASES BY SIGNIFICANCE.

Part I concluded that Harlan was nearly twice as likely to vote for an African American as an Asian American litigant, that no justice dissented more *in favor of* African American litigants, yet only Justice Field dissented more *against* Asian American litigants. However, that analysis did not look at the content of any particular case; the reasons for any vote, or the impact of any decision Harlan joined or rejected. Looking at Harlan's votes in the context of specific cases will offer an additional piece of evidence about the extent of his support for Chinese American civil rights.

Starting with *Plessy*, it is difficult to deny that Harlan's comments about the Chinese, "a race so different," he said, "from our own," strike the modern ear as racist.[35] Certainly, Harlan was well aware of the discrimination imposed upon Chinese by the national government; they could neither immigrate nor become citizens--disadvantages imposed on no other race at that time. Harlan must also have known that this federal discrimination perpetuated a system of disadvantage imposed by the states. Aliens "ineligible to citizenship," a category that was essentially limited to Asians,[36] were subject to various legal disabilities, such as prohibitions on entering licensed professions[37] and owning real property.[38]

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[35] *See supra* notes 3-5, and accompanying text.

[36] Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 13-14 (1998). For a description of racial discrimination in American naturalization law, see Elizabeth Hull, *Naturalization and Denaturalization, in* ASIAN AMERICANS AND THE SUPREME COURT 403-24 (Hyung-chan Kim ed., 1992). *See also* GABRIEL J. CHIN, SUMI CHO, JERRY KANG & FRANK WU, BEYOND SELF-INTEREST: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE 13-17 (1996) (describing historical discrimination against Asian Americans), *reprinted in* 4 UCLA ASIAN PAC.-AM. L.J. 129 (1999).

[37] The leading cases on this point are *In re Hong Yen Chang*, 24 P. 156, 157 (Cal. 1890) and *In re Takuji Yamashita*, 70 P. 482, 483 (Wash. 1902), in which the naturalization proceedings undergone by Asian graduates of American law schools were deemed void because Asians were racially ineligible for naturalization. *See also* Philip T. Nash, *Asian-Americans and Their Rights for Employment and Education, in* ASIAN AMERICANS AND THE SUPREME COURT, supra note 36, at 897-908 (discussing statutory discrimination against Asians in employment and education).

[38] *See* Thomas E. Stuen, *Asian Americans and their Rights for Land Ownership, in* ASIAN AMERICANS AND THE SUPREME COURT, *supra* note 36, at 603-30 (discussing statutory prohibitions on Asian land ownership).

However, Harlan's reaction to disadvantages imposed on Chinese by law was not that they should be invalidated according to his color-blindness principle. In this respect, Harlan's response failed to comport with modern arguments about the anti-subordination purpose of the Fourteenth Amendment. Moreover, it did not even satisfy the notion of simple formal equality. Instead, Harlan made what seems to have been an early "underinclusiveness" argument similar to that found in modern equal protection analysis: the law was irrational because it burdened one despised minority but not another, and the one that was not burdened was even more worthy of segregation from Caucasians.

Harlan's vote in *United States v. Wong Kim Ark*[39] was potentially the most damaging to the Chinese and other immigrants. In that case, the Justice Department unsuccessfully tested its theory that the Citizenship Clause of the Fourteenth Amendment[40] did not apply to persons of Chinese racial ancestry born in the United States. Wong Kim Ark, a native San Franciscan, was refused admission to the United States upon his return from an overseas visit on the ground that he was not a citizen, and could not be admitted as an immigrant because of the Chinese Exclusion Act.[41]

While the majority held that Wong Kim Ark was a citizen, Harlan agreed with the Solicitor General that Chinese could not become citizens simply by being born in the United States and that because Chinese were racially ineligible for naturalization,[42] there were no circumstances under which people with Chinese blood could become Americans.

> The Justice Department appealed explicitly to race, in addition to legal technicalities: 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. Are Chinese children born in this country to share with the descendants of the patriots of the American Revolution the exalted qualification of being eligible to the Presidency of the nation, conferred by the Constitution in recognition of the importance and

[39] 169 U.S. 649 (1898).

[40] U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside.").

[41] Act of May 6, 1882, ch. 126, 22 Stat. 58, *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600.

[42] Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (limiting naturalization to "free white persons"), *amended by* Act of July 14, 1870, ch. 254, 16 Stat. 254, 256 (extending naturalization privileges to persons of African descent).

> dignity of citizenship by birth? If so, then verily there has been a most degenerate departure from the patriotic ideals of our forefathers; and surely in that case American citizenship is not worth having.[43]

In this case, Justice Harlan should have joined the majority. In *Plessy*, he wrote: "[T]he recent amendments of the supreme law . . . established universal civil freedom, gave citizenship to all born or naturalized in the United States, and residing here, [and] obliterated the race line from our systems of governments."[44] Instead, Harlan joined the dissenting opinion of Chief Justice Fuller, who concluded that Chinese "cannot become citizens nor acquire a permanent home here, no matter what the length of their stay may be."[45]

Harlan and Fuller relied on racial characterizations of the Chinese, warning of "the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people."[46] "It is not to be admitted," concluded Harlan and Fuller, "that the children of persons so situated become citizens by accident of birth."[47]

Harlan joined many decisions of the Court supporting the power of the United States to exclude members of particular races because of their perceived defects. In *Chae Chan Ping v. United States*,[48] the Court upheld a ban on Chinese immigration. The Court explained that the Chinese "remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any changes in their habits or modes of living."[49] Therefore, exclusion of the Chinese was appropriate:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. . . . If,

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[43] *See* Brief for the United States at 34, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (No. 95-904), *reprinted in* 14 LANDMARK BRIEFS AND ARGUMENTS OF THE UNITED STATES SUPREME COURT: CONSTITUTIONAL LAW 37 (Philip B. Kurland & Gerhard Casper eds., 1975).

[44] Plessy v. Ferguson, 163 U.S. 537, 563 (1896) (Harlan, J., dissenting); *see also* Elk v. Wilkins, 112 U.S. 94, 110 (1884) (Harlan, J., dissenting) (arguing that citizenship clause applies to Native American who has severed connections with tribe).

[45] *Wong Kim Ark*, 169 U.S. at 731 (Fuller, C.J., joined by Harlan, J., dissenting).

[46] *Id.* (quoting Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893)).

[47] *Id.*

[48] 130 U.S. 581, 609 (1889).

[49] *Id.* at 595.

> therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.[50]

Harlan did not participate in *Fong Yue Ting v. United States*,[51] where a majority of the Court upheld the constitutionality of a statute providing that any Chinese person in the United States was presumed to be unlawfully present unless he or she could prove lawful presence with a federal registration certificate.[52] During this period, no other aliens were required to register or otherwise prove lawful presence.[53] However, Harlan's frequent citation of *Fong Yue Ting* betrayed no lack of sympathy for its reasoning or result.[54]

Harlan is justly famous for his perceptive appreciation of the situation of African Americans and the intent and effect of the laws aimed at them. His due process jurisprudence with respect to Chinese immigrants does not necessarily betray direct racism, but it does suggest a wholly different level of sympathy. In *The Japanese Immigrant Case* (*Yamataya v. Fisher*),[55] a would-be Japanese immigrant in exclusion proceedings[56] claimed that she had been denied due process by the immigration authorities. Harlan agreed that even in immigration proceedings the government could

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[50] *Id.* at 606.

[51] 149 U.S. 698 (1893).

[52] *See id.* at 728-32. Harlan was in Paris when *Fong Yue Ting* was argued. *See id.* at 698 (noting that case was argued on May 10, 1893); 149 U.S. iii n.1 ("Mr. Justice Harlan, having been appointed an Arbitrator on the part of the United States in the Behring Sea Fur-Seal arbitration in Paris, heard argument for the last time, this term, on Monday, December 5, 1892, and left for Paris soon after.").

[53] The United States imposed a general registration requirement on all resident aliens only in 1940. *See* Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (June 28, 1940).

[54] Justice Harlan relied most plainly on the merits of *Fong Yue Ting* in his opinions in *Yamataya v. Fisher* and *Lem Moon Sing*. *See* Yamataya v. Fisher, 189 U.S. 86, 97, 100-01 (1902) (Harlan, J.) (relying on *Fong Yue Ting* for principle that race-based exclusion is constitutional, and that judicial review of executive action may be sharply curtailed); Lem Moon Sing v. United States, 158 U.S. 538, 544-46 (1894) (Harlan, J.) (discussing *Fong Yue Ting* at length with approval); *see also* La Abra Silver Mining Co. v. United States, 175 U.S. 423, 460 (1889) (Harlan, J.) (citing *Fong Yue Ting*); ICC v. Brimson, 154 U.S. 447, 488 (1894) (Harlan, J.) (citing *Fong Yue Ting*).

[55] 189 U.S. 86 (1902).

[56] The case was heard in 1903; it took the United States another four years to impose a blanket exclusion of Japanese through the so-called "Gentlemen's Agreement." *See* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990, at 207-12 (1993) (reprinting portions of Gentlemen's Agreement).

not "disregard the fundamental principles that inhere in 'due process of law.' "[57] Part of due process was an "opportunity, at some time, to be heard."[58] Astonishingly, the fact that the proceeding was conducted in English, a language unfamiliar to the defendant, did not strike Harlan as a constitutional infirmity.

> If the appellant's want of knowledge of the English language put her at some disadvantage in the investigation conducted by that officer, that was her misfortune, and constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the court by habeas corpus. We perceive no ground for such intervention,-none for the contention that due process of law was denied to appellant.[59]

Of course, modern courts do not agree that a hearing in an unfamiliar language satisfies the requirements of due process of law.[60]

In *United States v. Jung Ah Lung*,[61] Harlan used his rhetorical powers to criticize the majority's interpretation of a statute that required Chinese residents of the United States to produce a government certificate authorizing re-entry after a foreign visit. Because Jung Ah Lung's certificate had been stolen, the majority held that other government records could be examined to establish his identity and right to enter.[62] Harlan disagreed, concluding that only the certificate itself was sufficient evidence under the statute: "If appellee's certificate was forcibly taken from him by a band of pirates . . . that is his misfortune. That fact ought not to defeat what was manifestly the intention of the legislative branch of the Government."[63] It is difficult to reconcile this hard-hearted dissent with the humanitarian evident in portions of the *Plessy* dissent.

Harlan may have believed that the Chinese were racially unsuited to live in the United States. One piece of evidence-admittedly inconclusive-is the draft argument Harlan wrote for his son, James, who was preparing for a debate at Princeton.[64] The father wrote:

> [W]e are not bound, upon any broad principle of humanity, to harm our own country in order to benefit the Chinese who may arrive here.... Now, if by introduction of Chinese labor we [jeopardize] our own laborers, why not

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[57] *Yamataya*, 189 U.S. at 100.

[58] *Id*. at 101.

[59] *Id*. at 102.

[60] *See, e.g.*, STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 66 (2d ed. 1997); THOMAS A. ALEINIKOFF, DAVID MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP 797 (4th ed. 1998).

[61] 124 U.S. 621 (1888).

[62] *See id*. at 634-35.

[63] *Id*. at 639 (Harlan, J., dissenting).

[64] *See* Letter from Justice Harlan to his son, James (Jan. 21, 1883) (unpublished manuscript, available in John Marshall Harlan Papers, Library of Congress).

> restrict immigration of Chinese. The Chinese are of a different race, as distinct from ours as ours is from the negro.... [S]uppose there was a tide of immigration ... of uneducated African savages-would we not restrict their coming? Would we desist because they are human beings & upon the idea that they have a right to better their condition? ... [Chinese] will not assimilate to our people. If they come, we must admit them to citizenship, then to suffrage--what would become of the country in such a contingency.... Under the ten year statute [i.e., the first Chinese Exclusion Act] we have an opportunity to test the question whether it is safe to let down the bars and permit unrestricted immigration-The Chinese here will, in that time, show of what stuff they are made. Our policy is to keep this country, distinctively, under American influence. Only Americans, or those who become such by long stay here, understand American institutions.[65]

Conceivably, Harlan's transcendence in *Plessy* and failure in the Asian American cases can be explained by the nature of the cases. Most of the Asian American cases involved an exercise of power by the national government over immigration; most of the African American cases involved state laws or state action. Of course, the Fourteenth Amendment by its terms applies only to the states, and there is no equal protection clause in the Fifth Amendment. Accordingly, Harlan might have reasoned that the equal protection clause, and its rationale, bound the states but did not limit federal power. If this explanation is true, then the dissent's status as an honored text is undeserved. It means that Harlan's insight was not prejudice, but preemption; if there were discrimination to be done, then the federal government, with its much broader powers would do it, not the states.

This explanation is refuted by the language of the *Plessy* dissent. The dissent does not focus on the special obligations of states, or the constitutional limitations imposed upon them. Instead, he seems to argue that denial to African Americas of equal treatment is wrong. But if Harlan is entitled to credit for voting against segregation in *Plessy* because segregation was wrong, it remains a mystery why his anti-discrimination principle was not uniformly applicable.

Perhaps Harlan's sympathy for African Americans and lack of sympathy for Asian Americans is explained by pragmatic distinctions drawn between Asians and African Americans by Congressional opponents of Chinese immigration. They argued, in essence, that African Americans had to be provided for because they were here. By contrast, the Asian problem was still avoidable.[66] If this explanation is true, then Harlan's reputation is again undeserved. This is a weak rationale for equal treatment which, even if it had been accepted, would have offered little protection to African Americans and none to anyone else. It would hardly have been a model for enlightened

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[65] *Id.*

[66] *See* Chin, *supra* note 36, at 33-36.

contemporary jurisprudence.

CONCLUSION

Justice Harlan's voting record is revealing and points in the same direction as other evidence of his attitude toward Asian Americans. In the broad run of cases, the Great Dissenter was less likely to vote for Asian American litigants than the Court as a whole, and much less likely to do so than he was for African Americans. Harlan's negative votes in the Asian American cases involved critical civil rights issues. And to the extent that reasons for Harlan's votes can be discerned, they appear to be motivated not only by constraint of "neutral principles" of law, but also by a belief that anti-Chinese policy was wise and, perhaps essential. Again, that Harlan was not perfect certainly does not mean that he was not good. It does mean that the legal doctrine he advanced should be regarded as a museum piece, not a blueprint.

Appendix 1

Rank of Justices by Percentage of Votes in Favor of Civil Rights, African American Cases:

(E.g., 100% of Justice Hughes' votes supported civil rights)

1. Hughes	100	[1/1]
2. Lamar, J.	100	[1/1]
3. VanDevanter	100	[1/1]
4. Hunt	50	[3/6]
5. Strong	50	[2/4]
6. Swayne	50	[2/4]
7. Bradley	46.15	[6/13]
8. Harlan	45.45	[20/44]
9. Woods	42.86	[3/7]
10. Miller	41.67	[5/12]
11. Matthews	40	[2/5]
12. Day	36.36	[8/22]
13. Blatchford	28.57	[2/7]
14. Waite	27.27	[3/11]
Court as a whole:	24.44	[11/45]
15. Brown	20.83	[5/24]
16. McKenna	20.83	[5/24]
17. Brewer	19.35	[6/31]
18. Holmes	18.18	[4/22]
19. Clifford	16.67	[1/6]
20. Gray	16.67	[3/18]
21. White. E.	15.63	[5/32]
22. Fuller	15.15	[5/33]
23. Peckham	14.81	[4/27]
24. Shiras	10	[1/10]
25. Field	5.26	[1/19]
26. Jackson	0.0	[0/1]
27. Lamar, L.	0.0	[0/2]
28. Lurton	0.0	[0/1]
29. Moody	0.0	[0/5]

Appendix 2

Rank of Justices by Votes in Favor of African American Civil Rights, as a Percentage of Decisions in Favor of Civil Rights by the Majority in Such Cases.

(E.g., Justice Harlan voted in favor of civil rights 20 times, 182% as often as the 11 times the majority did in the cases upon which he sat.)

1. Harlan	182	[20/11]
2. Brown	167	[5/3]
3. Day	160	[8/5]
4. Brewer	120	[6/5]
5. Bradley	120	[6/5]
6. Blatchford	100	[2/2]
7. Fuller	100	[5/5]
8. Hughes	100	[1/1]
9. Hunt	100	[3/3]
10. Jackson	100	[0/0]
11. Lamar, J.	100	[1/1]
12. Lamar, L.	100	[0/0]
13. Matthews	100	[2/2]
14. Miller	100	[5/5]
15. Moody	100	[0/0]
16. Shiras	100	[1/1]
17. Strong	100	[2/2]
18. Swayne	100	[2/2]
19. VanDevanter	100	[1/1]
20. Woods	100	[3/3]
21. McKenna	83	[5/6]
22. White	83	[5/6]
23. Peckham	80	[4/5]
24. Holmes	80	[4/5]
25. Gray	75	[3/4]
26. Waite	60	[3/5]
27. Clifford	33	[1/3]
28. Field	20	[1/5]
29. Lurton	0	[0/1]

Appendix 3

Rank of Justices by Frequency of Dissents For (Against) African American Civil Rights.

(E.g., one out of every 4.89 of Justice Harlan's votes was a dissent in favor of African American civil rights.)

1. Harlan	1/4.89	[9/44]
2. Day	1/7.33	[3/22]
3. Brown	1/12	[2/24]
4. Bradley	1/13	
5. Brewer	1/31	
Court as a whole:	1/196.5	[393 total votes; 16 dissenting votes for, less 14 against]
6. Blatchford	0/7	
7. Fuller	0/33	
8. Hughes	0/1	
9. Hunt	0/7	
10. Jackson	0/1	
11. Lamar, J.	0/1	
12. Lamar, L.	0/2	
13. Matthews	0/5	
14. Miller	0/12	
15. Moody	0/5	
16. Shiras	0/10	
17. Strong	0/4	
18. Swayne	0/4	
19. VanDevanter	0/1	
20. Woods	0/7	
21. White	(1/32)	
22. Peckham	(1/27)	
23. McKenna	(1/24)	
24. Holmes	(1/22)	
25. Gray	(1/18)	
26. Waite	(1/5.5)	[2/11]
27. Field	(1/4.75)	[4/19]
28. Clifford	(1/3)	[2/6]
29. Lurton	(1/1)	

Appendix 4

Rank of Justices by Frequency of Dissents For (Against) African American Civil Rights Compared to Votes with Majority Against Civil Rights

(E.g., Justice Harlan dissented from a majority decision against civil rights once for every 2.67 he joined a majority decision against civil rights.)

1. Harlan	1/2.67	[9/24]
2. Day	1/4.67	[3/14]
3. Bradley	1/7	
4. Brown	1/9.5	[2/19]
5. Brewer	1/25	
6. Blatchford	0/5	
7. Fuller	0/28	
8. Hughes	0/0	
9. Hunt	0/3	
10. Jackson	0/1	
11. Lamar, J.	0/0	
12. Lamar, L.	0/2	
13. Matthews	0/3	
14. Miller	0/7	
15. Moody	0/5	
16. Shiras	0/9	
17. Strong	0/2	
18. Swayne	0/2	
19. VanDevanter	0/0	
20. Woods	0/4	
21. White	(1/26)	
22. Peckham	(1/22)	
23. McKenna	(1/18)	
24. Holmes	(1/17)	
25. Gray	(1/14)	
26. Field	(1/3.5)	[4/14]
27. Waite	(1/3)	[2/6]
28. Clifford	(1/1.5)	[2/3]
29. Lurton	(1/0)	

Appendix 5

Rank of Justices by Percentage of Votes in Favor of Civil Rights, Asian American Cases:

(E.g., 84.21% of Justice Peckham's votes were in favor of Asian American civil rights.)

1. Peckham	84.21	[16/19]
2. Brewer	70.37	[19/27]
3. Moody	66.67	[2/3]
4. Day	44.44	[4/9]
5. Matthews	37.5	[3/8]
6. Waite	37.5	[3/8]
7. Holmes	33.33	[3/9]
8. Gray	30.43	[7/23]
9. White	30	[6/20]
10. Blatchford	29.41	[5/17]
11. Woods	28.57	[2/7]
12. McKenna	27.78	[5/18]
Court as a whole	27.03	[10/37]
13. Harlan	25	[9/36]
14. Shiras	25	[3/12]
15. Fuller	24.14	[7/29]
16. Miller	22.22	[2/9]
17. Field	21.05	[4/19]
18. Brown	20	[5/25]
19. Bradley	13.3	[2/15]
20. Lamar, L.	11.11	[1/9]
21. Jackson	0.0	[0/2]

Appendix 6

Rank of Justices by Votes in Favor of Asian American Civil Rights as a Percentage of Decisions in Favor of Civil Rights by the Majority in Such Cases.

(E.g., Justice Brewer voted in favor of Asian American civil rights 19 times, 317% as often as the six times the majority did in the cases upon which he sat.)

1. Brewer	317	[19/6]
2. Peckham	267	[16/6]
3. Day	133	[4/3]
4. Blatchford	100	[5/5]
5. Brown	100	[5/5]
6. Fuller	100	[7/7]
7. Gray	100	[7/7]
8. Holmes	100	[3/3]
9. Jackson	100	[0/0]
10. Matthews	100	[3/3]
11. McKenna	100	[5/5]
12. Miller	100	[2/2]
13. Moody	100	[2/2]
14. Shiras	100	[3/3]
15. Waite	100	[3/3]
16. White	100	[6/6]
17. Woods	100	[2/2]
18. Harlan	90	[9/10]
19. Field	80	[4/5]
20. Bradley	75	[2/3]
21. Lamar, L.	50	[½]

Appendix 7

Rank of Justices by Frequency of Dissents For (Against) Asian American Civil Rights

(E.g., one out of every 1.9 of Justice Peckham's votes was a dissent in favor of Asian American civil rights.)

1. Peckham	1/1.9 [10/19]
2. Brewer	1/2.08 [13/27]
3. Day	1/9
Court as a whole:	1/16.2 [324 total votes; 28 dissenting votes for, less 8 against]
4. Blatchford	0/17
5. Brown	0/25
6. Fuller	0/29 [one dissenting vote for, less one dissenting vote against]
7. Gray	0/23
8. Holmes	0/9
9. Jackson	0/2
10. Matthews	0/8
11. McKenna	0/18
12. Miller	0/9
13. Moody	0/3
14. Shiras	0/12
15. Waite	0/8
16. White	0/20
17. Woods	0/7
18. Harlan	(1/36) [two dissenting votes against, less one dissenting vote for]
19. Field	(1/18) [three dissenting votes against, less two dissenting votes for]
20. Bradley	(1/15)
21. Lamar, L.	(1/9)

Appendix 8

Rank of Justices by Frequency of Dissents For (Against) Asian American Civil Rights Compared to Votes with Majority Against Civil Rights.

(E.g., Justice Peckham dissented 3.33 times from a majority decision against Asian American civil rights for every time he joined a majority decision against civil rights.)

1. Peckham	3.33/1 [10/3]
2. Brewer	1.63/1 [13/8]
3. Day	1/5
4. Blatchford	0/12
5. Brown	0/20
6. Fuller	0/21 [one dissenting vote against, less one dissenting vote for]
7. Gray	0/16
8. Holmes	0/6
9. Jackson	0/2
10. Matthews	0/5
11. McKenna	0/13
12. Miller	0/7
13. Moody	0/1
14. Shiras	0/9
15. Waite	0/5
16. White	0/14
17. Woods	0/5
18. Harlan	(1/25) [two dissenting votes against, less one dissenting vote for]
19. Bradley	(1/12)
20. Field	(1/12) [three dissenting votes against, less two dissenting votes for]
21. Lamar, L.	(1/7)