

## ARTICLES

### THE SURPRISING ROLE OF RACIAL HIERARCHY IN THE CIVIL RIGHTS JURISPRUDENCE OF THE FIRST JUSTICE JOHN MARSHALL HARLAN

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#### ABSTRACT

*The first Justice John Marshall Harlan's status as one of the greatest Supreme Court Justices in American history rests largely upon his civil rights jurisprudence. The literature exploring the nuances of Harlan's civil rights jurisprudence is vast. Far less attention has been paid to the reasons for Harlan's strong civil rights views. Developing a rich sense of Harlan's thinking has been difficult because Harlan did not leave behind a large trove of non-judicial writings. There is, however, a remarkable source of Harlan's thought that has been largely overlooked by scholars: Harlan's constitutional law lectures at George Washington Law School of 1897–1898. These lectures are currently housed in the Harlan papers in the Library of Congress, but they have never been published, have rarely been cited, and are largely unknown.*

*These lectures provide extraordinary insight into Harlan's civil rights jurisprudence. In these lectures, Harlan lays out a remarkable and surprising theory of racial hierarchy—with Anglo-Saxons as the superior group—that seems to be at complete odds with his egalitarian civil rights jurisprudence. He also was a staunch opponent of the immigration of inferior racial groups to the United States—particularly the Chinese.*

*But Harlan's theory of racial superiority did not, for the most part, lead him to disregard the rights of those citizens whom he considered to be racially inferior. On the contrary, although Harlan argued that Anglo-Saxons were the superior racial group and that all other racial groups in the nation would eventually die out, he also contended that Anglo-Saxons would preserve their superior status only if they fulfilled their sacred duty to protect the liberty interests of those citizens who had traditionally been subjugated in America—particularly African Americans.*

*Accordingly, despite Harlan's embrace of a robust theory of racial supremacy, Harlan emerged as the greatest civil rights jurist of the late nineteenth and early twentieth centuries.*

#### I. INTRODUCTION

The first Justice John Marshall Harlan has been rightly regarded as the most important judicial proponent of the constitutional rights of African Americans of the late nineteenth and early twentieth centuries. Indeed,

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Harlan's status as one of the greatest Supreme Court Justices in American history rests largely upon his civil rights jurisprudence.<sup>1</sup> One can certainly question whether Harlan was consistent in his embrace of African-American rights—for example, he saw no constitutional impediment to anti-miscegenation laws<sup>2</sup>—but Harlan nevertheless deserves his place as the most vigorous judicial champion of black rights of his era.<sup>3</sup>

The literature exploring the nuances of Harlan's civil rights jurisprudence is extensive.<sup>4</sup> Far less attention has been paid to the reasons

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- 1 In 1970, a large group of law professors, historians, and political scientists identified Harlan to be one of the twelve "great" Justices in American history (and one of only four from the nineteenth century). HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 412 (3d ed. 1992). Ironically, many scholars and jurists largely ignored Harlan's work for several decades after his death. Henry J. Abraham, *John Marshall Harlan: A Justice Neglected*, 41 VA. L. REV. 871, 871–72 (1955). But Harlan's reputation soared following the Court's 1954 decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which was widely viewed as a vindication of Harlan's dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896). Harlan's reputation today rests in significant measure on his dissenting opinions in *Plessy* and the *Civil Rights Cases*, 109 U.S. 3, 26 (1883). In fact, Harlan's dissent in *Plessy* has achieved almost mythic status.
  - 2 Harlan's views on anti-miscegenation laws are largely unknown, because he never had occasion to consider such laws while serving on the Court, and his extra-judicial statements on the issue are obscure. Harlan did consider the constitutionality of imposing greater penalties on interracial fornication than on same-race fornication in *Pace v. Alabama*, 106 U.S. 583 (1883), and joined a unanimous Court in finding no constitutional impediment to such distinctions, but he never had cause, as a Justice, to consider the constitutionality of anti-miscegenation laws. *Id.* at 585. In 1907, Harlan, along with Charles Henry Butler, the Reporter of the United States Supreme Court, published a little-known and rarely cited treatise on marriage law that strongly suggested that state laws banning interracial marriage were constitutional. JOHN MARSHALL HARLAN & CHARLES HENRY BUTLER, MARRIAGE: A TREATISE (1907). On the question of whether the Fourteenth Amendment barred states from prohibiting marriage between citizens of different races, Harlan and Butler referred their readers to the relevant section of a 1903 constitutional law treatise by George F. Tucker that explained that "a statute prohibiting the marriage relation between white persons and persons of African descent *in no way impairs their legal rights or denies to them equal protection of the laws.*" George F. Tucker, *Constitutional Law*, in 8 CYCLOPEDIA OF LAW AND PROCEDURE 1074 (William Mack & Howard P. Nash eds., 1903) (emphasis added); see HARLAN & BUTLER, *supra*, at 26 n.36 (providing that for "[d]eprivation of equal protection of laws by such [anti-miscegenation] statutes," readers should consult the Tucker treatise).
  - 3 Similarly, Harlan was among the Court's strongest proponents of the constitutional rights of residents of territory acquired by the United States in the wake of the Spanish-American War, as reflected in a number of powerful dissenting opinions in cases in which Court majorities refused to extend constitutional rights to the residents of those territories. See *infra* notes 62–68 and accompanying text.
  - 4 As one example, see ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992) (discussing several of Harlan's noteworthy opinions in civil rights cases and their role in shaping the argument for a "color blind" Constitution).

for Harlan's strong civil rights views.<sup>5</sup> Developing a rich sense of Harlan's thinking has been difficult because Harlan did not leave behind a large trove of non-judicial writings. There is, however, a remarkable source of Harlan's thought that has been almost completely overlooked by scholars but that significantly expands our understanding of his civil rights jurisprudence: Harlan's constitutional law lectures of 1897–1898.

Harlan taught law for twenty years at Columbian University (which was renamed to George Washington University in 1904).<sup>6</sup> Indeed, at the end of his life, Harlan estimated that he had taught 10,000 law students,<sup>7</sup> and described his law school teaching as “part of my life-work—and the most interesting part.”<sup>8</sup> During the 1897–1898 academic year, Harlan taught a year-long course in constitutional law comprised of twenty-six lectures. Two law students took down the lectures in shorthand and later transcribed them, producing a typed manuscript of almost 500 pages.<sup>9</sup> These lectures are currently housed in the Harlan papers in the Library of Congress, but

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<sup>5</sup> *But see* James W. Gordon, *Did the First Justice Harlan Have a Black Brother?*, 15 W. NEW ENG. L. REV. 159, 161 (1993) (attempting to explain Justice Harlan's strong civil rights jurisprudence by arguing that Harlan may have had a black brother).

<sup>6</sup> *Columbian Law School Banquet*, WASH. POST, Apr. 24, 1897, at 9; Richard D. Harlan, *Justice Harlan and the Game of Golf*, 62 SCRIBNER'S MAG. 626, 627 (1917). Harlan's primary course at George Washington was constitutional law, but Harlan typically taught a second course, which, over the years, included commercial law, conflict of laws, corporate law, evidence, insurance law, international law, personal property, and torts. *See, e.g.* Florian Bartosic, *The Constitution, Civil Liberties and John Marshall Harlan*, 46 KY. L.J. 407, 414 n.41 (1958); *Busy Day for Bryan*, WASH. POST, Apr. 13, 1897, at 4; *Columbian University Law School*, WASH. POST, Oct. 14, 1900, at 24; *Lectures at Columbian: Well-Known Speakers Before the School of Jurisprudence and Diplomacy*, WASH. POST, Oct. 14, 1901, at 12; *University Notes*, WASH. POST, Jan. 8, 1900, at 12; Enoch Aquila Chase, *Some Recollections of Justice John Marshall Harlan* (unpublished and undated), *microformed on* JOHN MARSHALL HARLAN PAPERS, Reel 13 (Library of Cong.).

<sup>7</sup> Letter from E. Polk Johnson to John Marshall Harlan (Apr. 24, 1911), *microformed on* JOHN MARSHALL HARLAN PAPERS, *supra* note 6, at Reel 8.

<sup>8</sup> Letter from John M. Harlan to Walter C. Clephane (Aug. 4, 1910), *microformed on* JOHN MARSHALL HARLAN PAPERS, *supra* note 6, at Reel 13.

<sup>9</sup> Letter from George Johannes to Hon. John Marshal [sic] Harlan (Oct. 21, 1955), *microformed on* JOHN MARSHALL HARLAN PAPERS, *supra* note 6, at Reel 8. In 1955, one of these two students, George Johannes, sent the transcription to Harlan's grandson, John Marshall Harlan II, who had recently been appointed by President Dwight Eisenhower to serve on the United States Supreme Court. *Id.* The typed transcriptions, where it is possible to compare with simultaneous transcriptions by newspaper reporters, appear to have been highly accurate. A reporter from the *Washington Post* covered Harlan's February 19, 1898 lecture. The *Post* article quoted the final 250–300 words of Harlan's lecture in which the Justice addressed the national controversy that had erupted after the sinking of the *Maine*. *Justice Harlan's Advice: Americans Should Keep Cool and Avoid Hasty Conclusions*, WASH. POST, Feb. 26, 1898, at 1. The students' transcription and the *Post* reporter's transcription are remarkably similar.

they have never been published, have rarely been cited, and are largely unknown.<sup>10</sup>

Harlan's constitutional law lectures provide extraordinary insight into his civil rights jurisprudence. In these lectures, Harlan lays out a remarkable and surprising theory of racial hierarchy—with Anglo-Saxons as the superior group—that seems to be at complete odds with his egalitarian civil rights jurisprudence. But Harlan's theory of racial superiority did not, for the most part, lead him to disregard the rights of those persons whom he considered to be racially inferior. On the contrary, although Harlan argued that Anglo-Saxons were the superior racial group and that all other racial groups in the nation would eventually die out, he also contended that Anglo-Saxons would preserve their superior status only if they fulfilled what Harlan believed to be their sacred duty to protect the liberty of all persons subject to the jurisdiction of the United States, even those persons who had traditionally been subjugated in America such as African Americans. Accordingly, despite his embrace of a robust theory of racial supremacy, Harlan emerged as the greatest civil rights jurist of the late nineteenth and early twentieth centuries.

Part I of this Article considers Harlan's strong sense of racial hierarchy, and the obligation of Anglo-Saxons as the superior racial group to safeguard the rights of inferior groups as part of their sacred call to preserve Anglo-American traditions of liberty. Part II explores the tension between Harlan's robust support for race-based immigration policies and his deep commitment to the protection of the liberty of racial and ethnic minorities.

Harlan was a man of rich contradictions. Although Harlan stood largely alone among late nineteenth and early twentieth century jurists for his support of black rights, his civil rights vision was grounded upon an exceedingly complex and contradictory world view infused with racial hierarchy and racial paternalism.

## I. HARLAN'S NOTIONS OF RACIAL HIERARCHY

Harlan's well-known concern for the political and civil rights of African Americans went hand-in-hand with his little-known embrace of notions of racial and ethnic hierarchy, with Anglo-Saxons as the preeminent group. Harlan's 1897–1898 constitutional law lectures, delivered to an all-white audience, are particularly revealing.

Although Harlan recognized that the United States was comprised of persons of many different racial and ethnic backgrounds, he told his

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<sup>10</sup> Harlan's constitutional lectures will be published in 2013 by Carolina Academic Press. *THE CONSTITUTIONAL LAW LECTURES OF JOHN MARSHALL HARLAN* (Davison M. Douglas ed.) (forthcoming 2013) [hereinafter *CONSTITUTIONAL LAW LECTURES*].

students that Anglo-Saxons were the superior race, and that in time, every other racial group in North America would die out.<sup>11</sup> “To my mind, to my apprehension,” Harlan explained to his students in 1898, “it is as certain as fate that in the course of time there will be nobody on this North American continent but Anglo-Saxons. All other races are steadily going to the wall.”<sup>12</sup> Consistent with other contemporary proponents of racial destiny, Harlan singled out Native Americans as candidates for early extinction, explaining to his students that they are “a race that is disappearing and probably within the lifetime of some that are now hearing me, there will be very few in this country. In a hundred years you will probably not find one anywhere . . . .”<sup>13</sup> Harlan did not celebrate the demise of non-Anglo-Saxon racial groups in America, but nevertheless saw their elimination as inevitable.

Harlan’s claim about Anglo-Saxon dominance contained strong echoes of Josiah Strong’s widely-read book with which Harlan was undoubtedly familiar, *Our Country: Its Possible Future and Its Present Crisis*, first published in 1885, and republished in revised form in 1891. Consistent with Harlan’s views of Anglo-Saxon dominance, Strong—a prominent Protestant clergyman—argued that Anglo-Saxons would, in time, displace all other races:

Whether the extinction of inferior races before the advancing Anglo-Saxon seems to the reader sad or otherwise, it certainly seems probable . . . . Is there room for reasonable doubt that [the Anglo-Saxon] race . . . is destined to dispossess many weaker races, assimilate others, and mold the remainder, until . . . it has Anglo-Saxonized mankind?<sup>14</sup>

Harlan’s views expressed in his 1897–1898 constitutional law lectures were consistent with the Strong’s views about racial destiny.

Despite Harlan’s embrace of theories of racial supremacy, what distinguished him from other jurists of his era was his belief that Anglo-Saxons would sustain their superior place in the racial hierarchy only to the extent that they vigorously protected the constitutional liberty of all

11 See John Marshall Harlan, *Lecture 11 (Jan. 8, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10.

12 *Id.*

13 *Id.*

14 JOSIAH STRONG, *OUR COUNTRY: ITS POSSIBLE FUTURE AND ITS PRESENT CRISIS* 224–25 (1885). Strong wrote that “by the close of the [twentieth] century, the Anglo-Saxons will outnumber all the other civilized races of the world.” *Id.* at 213. Strong’s ideas would not have been novel to Harlan. As a boy, Harlan read the works of many nineteenth-century historians who wrote of the providential destiny of Anglo-Saxons in North America. LINDA PRZYBYSZEWSKI, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* 119 (1999). Harlan’s constitutional law lectures contain strong echoes of Strong’s ideas—the superiority of Anglo-Saxons to other racial groups, the special role of Anglo-Saxons in the preservation of liberty, the dangers posed by the immigration of non-Anglo-Saxons, the expected extinction of non-Anglo-Saxons in North America, and optimism about America’s future under the leadership of Anglo-Saxons.

American citizens, particularly African Americans, for whom the denial of liberty had been particularly profound.

In Harlan's famous dissenting opinion in *Plessy v. Ferguson*,<sup>15</sup> issued one year prior to his 1897–1898 constitutional law lectures, Harlan explained the role of Anglo-Saxons in the preservation of liberty. In that opinion, Harlan noted that “the white race”—a term synonymous with Harlan's conception of “the Anglo-Saxon race”<sup>16</sup>—“deems itself to be the dominant race in this country.”<sup>17</sup> Harlan agreed with that assessment of dominance: “And so it is, in prestige, in achievements, in education, in wealth and in power.”<sup>18</sup>

Harlan, however, believed that this Anglo-Saxon dominance would continue only so long as Anglo-Saxons remained faithful to their obligation to preserve Anglo-American traditions of liberty: “So, I doubt not, it will continue to be [the dominant race] for all time, *if it remains true to its great heritage and holds fast to the principles of constitutional liberty.*”<sup>19</sup> Hence, for Harlan, the protection of “the principles of constitutional liberty,” particularly for African Americans, whose rights had long been egregiously disregarded, was a sacred obligation for Anglo-Saxons and the key to their continued dominance.<sup>20</sup>

Harlan spent considerable time in his 1897–1898 constitutional law lectures explaining to his students the critical role that Anglo-Saxons had historically played in the protection of human liberty, dating back to the Magna Carta. In his opening lecture in October 1897, Harlan observed that Anglo-Saxons “are the custodians of the principles of liberty which must prevail to the end, that men shall enjoy that freedom of speech and action which is essential to the security of life, liberty, and property.”<sup>21</sup>

15 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

16 Harlan frequently referred to the “Anglo-Saxon race.” See, e.g., John Marshall Harlan, *Lecture 25 (Apr. 30, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10.

17 *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

18 *Id.*

19 *Id.* (emphasis added). Harlan noted in his *Plessy* dissent that “[e]very true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride. . . .” *Id.* at 554. So, for Harlan, with respect to the civil and political rights that every American citizen enjoyed, principles of equal treatment must be respected, but expressions of racial and ethnic pride were appropriate. Harlan himself certainly had great pride in his Anglo-Saxon ancestry.

20 For Harlan, lawyers played a critical role in this stewardship: “[I]t is true in the history of all the Anglo-Saxon race, and many other races, that it is the lawyer who has stepped forward and has put himself in the way of arbitrary power to defend the rights of man.” John Marshall Harlan, *Lecture 2 (Oct. 21, 1897)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10.

21 John Marshall Harlan, *Lecture 1 (Oct. 14, 1897)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10. For Harlan, the protection of “life, liberty, and property” was central to his concept of Anglo-Saxon liberty, and the jury was the central mechanism for ensuring that liberty was appropriately protected. Harlan explained his conception of the rights

Harlan believed that the United States would become the greatest nation on earth during the twentieth century—but only if it remained true to its call to preserve Anglo-American traditions of constitutional liberty. He told his students in 1898 that the United States was the nation most likely “to shape the destinies of Europe and [of] the far eastern countries and of the whole human race in the next century.”<sup>22</sup> “But,” said Harlan, “the nation would fulfill its role as world leader only if it maintained its position as the world’s greatest defender of the ‘rights of man.’”<sup>23</sup>

Central to Harlan’s constitutional jurisprudence was his view that the United States Constitution was part of God’s providential design to preserve the Anglo-Saxon tradition of liberty in America.<sup>24</sup> Harlan’s view of American history was heavily influenced by his belief that God was actively involved in human affairs and used certain individuals and events to help the nation fulfill its sacred destiny as the world’s great defender of human liberty. Hence, for Harlan, the preservation of Anglo-Saxon traditions of liberty in the United States was a sacred call and essential to the nation’s fulfillment of its destiny.

Harlan likened the settlement of Anglo-Saxons in North America in the seventeenth century to the coming of the Kingdom of God of which Jesus

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protected by the Constitution in a 1900 lecture at the University of Pennsylvania: “When I speak of liberty, I mean such liberty as is enjoyed in this country[that] recognizes the right of all persons within its jurisdiction, of whatever race, to the equal protection of laws in every matter *affecting life, liberty, or property*.” *Justice Harlan’s Oration*, PHILA. PRESS, Feb. 22, 1900, *microformed on* JOHN MARSHALL HARLAN PAPERS, *supra* note 6, at Reel 16 (emphasis added).

<sup>22</sup> John Marshall Harlan, *Lecture 26 (May 7, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10.

<sup>23</sup> In 1900, Harlan said of the United States: “The time is certain to arrive, if this people remain true to their great destiny, when our nation will be, if it has not already become, the most powerful factor in all movements that affect the peace of the world and the rights of man.” *Mr. Justice Harlan Reviews The Country’s Constitution*, N. AM. (Feb. 22, 1900), *microformed on* JOHN MARSHALL HARLAN PAPERS, *supra* note 6, at Reel 16.

<sup>24</sup> Harlan’s dual commitments to his Christian faith and constitutional liberty were central organizing principles in his life and in his work as a Supreme Court Justice. Justice David Brewer joked that Harlan went to sleep “with one hand on the Constitution and the other on the Bible.” *Justice Harlan Dined*, WASH. EVENING STAR, Dec. 10, 1902, *microformed on* JOHN MARSHALL HARLAN PAPERS, *supra* note 6, at Reel 16. Harlan, in response, noted: “I do not . . . remember to have gone to bed with the Bible in one hand and the Constitution in the other, but I fully believe in both the Bible and the Constitution.” James B. Morrow, *Talks with Notable Men: John M. Harlan*, PITTSBURGH GAZETTE, Feb. 25, 1906, *microformed on* JOHN MARSHALL HARLAN PAPERS, *supra* note 6, at Reel 16. At a tribute for Harlan following his death, Attorney General George Wickersham observed: “The Constitution and the Bible were the objects of his constant thought and consideration, and if the latter was to him always *vox Dei*, the former . . . was no less so.” *Proceedings on the Death of Mr. Justice Harlan*, 222 U.S. v, at xii (1911).

spoke.<sup>25</sup> He also explained that certain eighteenth-century historical figures such as George Washington and Thomas Jefferson had been “raised up” as a “special Providence” to help found the nation with its central commitment to liberty.<sup>26</sup>

Harlan saw the Civil War in similar terms. In Harlan’s view, the nation’s fundamental commitment to liberty, first articulated in the Declaration of Independence, had been profoundly betrayed by the nation’s ongoing embrace of slavery—an institution that in his view was the greatest evil in American history.<sup>27</sup> But, for Harlan, the Supreme Court’s 1857 decision in *Dred Scott v. Sanford*,<sup>28</sup> which helped provoke the war, was a

special Providence to this country in that it laid the foundation of a civil war which, terrible as it was, awful as it was in its consequences in the loss of life and money, was in the end a blessing to this country in that it rid us of the institution of African slavery.<sup>29</sup>

Harlan also saw both Abraham Lincoln and Ulysses S. Grant as providential figures raised up by God to help the nation rid itself of slavery.<sup>30</sup>

<sup>25</sup> Harlan compared “the planting of seeds of voluntary government” in British North America to the parable of the planting of the mustard seed that Jesus used to explain the concept of the Kingdom of God: “[Whereunto shall we liken the kingdom of God?] [A] mustard seed, which, when it is sown in the earth, [is] less than all the seeds that [be] in the earth. But when it is sown, it groweth up, and becometh greater than all . . . [the herbs, and] shooteth out great branches; so that the fowls of the air may lodge under the shadow of it.” John Marshall Harlan, *Lecture 2 (Oct. 21, 1897)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10 (quoting *Mark* 4:31–32 (King James)).

<sup>26</sup> John Marshall Harlan, *Lecture 20 (Mar. 19, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10. Harlan elaborated:

We sometimes are in the habit in our ordinary conversation of speaking of particular things which have occurred as Providence: ‘That was a special Providence.’ We say that George Washington was a special Providence, that he was raised up for the work he did, and that no other man could have done the work so far as we can tell that he did.

*Id.* Harlan also viewed Jefferson, author of the Declaration of Independence, as “a special Providence” who had done work “that no other man could have performed.” *Id.*

<sup>27</sup> John Marshall Harlan, *Lecture 26 (May 7, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10 (“It is well for us that [slavery] is gone, never to be restored. And whatever the perils may be against which this country will have to contend, they will be a less[er] evil than was the existence of African slavery in this country.”).

<sup>28</sup> 60 U.S. (19 How.) 393 (1857).

<sup>29</sup> John Marshall Harlan, *Lecture 20 (Mar. 19, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10.

<sup>30</sup> *Id.* Harlan’s strong statements on slavery are particularly striking, given his personal history as a member of a slaveholding family and as an early opponent of the Emancipation Proclamation and the Thirteenth Amendment. See TINSLEY E. YARBROUGH, *JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN* 61 (1995); Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 *YALE L.J.* 637, 638 (1957). Harlan’s views on race, however, underwent a significant transformation during the late 1860s and early 1870s. Harlan was appalled at the continuing violence against southern blacks during Reconstruction and viewed southern resistance to the new constitutional order as threatening to the Union. Accordingly,



A devout Calvinist who at one point considered resigning from the Supreme Court to devote his life to building a Presbyterian “cathedral” in Washington, D.C.,<sup>31</sup> Harlan saw his dual commitments to constitutional liberty and his Presbyterian faith as inextricably intertwined.<sup>32</sup>

## II. HARLAN AND THE IMMIGRATION OF NON-ANGLO-SAXONS TO THE UNITED STATES

Consistent with his views of racial hierarchy, Harlan expressed grave concern about the presence of non-Anglo-Saxon racial and ethnic groups in the United States who he feared were unlikely to assimilate to American democratic traditions and embrace the nation’s commitment to the protection of individual liberty. Indeed, in Harlan’s view, the greatest threat to the nation was the immigration to the United States of hundreds of thousands of non-Anglo-Saxons from Eastern and Southern Europe and China who were not steeped in the traditions of Anglo-American liberty.<sup>33</sup>

This concern about immigration posed a fundamental conflict for Harlan. Though he was the greatest promoter of constitutional liberty on the Supreme Court in the late nineteenth century, he was also one of his era’s great proponents of using the nation’s immigration laws to screen out what he believed to be undesirable racial and ethnic groups.

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Harlan became an enthusiastic supporter of the Fourteenth Amendment and of black rights during the 1870s. *See generally* Westin, *supra* note 30 (discussing the evolution of Justice Harlan’s civil rights jurisprudence over the span of his lifetime).

<sup>31</sup> *Justice Harlan May Quit Bench*, WASH. POST, Mar. 30, 1906, at 1.

<sup>32</sup> Late in his life, Harlan observed: “I never think of the American constitutional system without being proud of the Presbyterian Church. Liberty regulated by law and Presbyterianism are . . . so linked together historically that a Presbyterian, at least, cannot well think of one without thinking of the other.” *Nestor of the High Tribunal*, WASH. POST, Apr. 16, 1905, at E7. Harlan cited with approval historian James Froude who claimed that Calvinism, Harlan’s religious tradition, was “the creed of republics.” *Id.* (quoting JAMES ANTHONY FROUDE, *HISTORY OF ENGLAND FROM THE FALL OF WOLSEY TO THE DEATH OF ELIZABETH* 376 (1871)). Again, Harlan’s views track those of Josiah Strong, one of the most prominent Protestant clergymen of the late nineteenth century. Strong, in his widely read book, *Our Country: Its Possible Future and Its Present Crisis*, extolled Anglo-Saxon commitments to liberty in terms similar to Harlan:

The Anglo-Saxon is representative of two great ideas, which are closely related. One of them is that of civil liberty. Nearly all of the civil liberty of the world is enjoyed by Anglo-Saxons . . . . The other great idea of which the Anglo-Saxon is the exponent is that of a pure spiritual Christianity . . . . It follows, then, that the Anglo-Saxon, as the great representative of these two ideas . . . sustains peculiar relations to the world’s future, [and] is divinely commissioned to be, in a peculiar sense, his brother’s keeper.

STRONG, *supra* note 14, at 208–10 (emphasis in original).

<sup>33</sup> *See* John Marshall Harlan, *Lecture 14 (Jan. 29, 1898)*, in *CONSTITUTIONAL LAW LECTURES*, *supra* note 10 (describing immigration of non-Anglo-Saxons as a “real peril that is before us”).

Harlan's concerns about the immigration of non-Anglo-Saxons to the United States were widely shared. For example, Ellwood Cubberley, a distinguished social scientist at Stanford University, writing in the early twentieth century, described the effects of the increase in non-Anglo-Saxon immigration that took place during the final two decades of the nineteenth century: "About 1882, the character of our immigration changed in a very remarkable manner. Immigration from the north of Europe dropped off rather abruptly, and in its place immigration from the south and east of Europe set in and soon developed into a great stream."<sup>34</sup> In language with which Harlan would have agreed, Cubberley observed that:

These [S]outhern and [E]astern Europeans are of a very different type from the [N]orth Europeans who preceded them. Illiterate, docile, lacking in self-reliance and initiative, and not possessing the Anglo-Teutonic conceptions of law, order, and government, their coming has served to dilute tremendously our national stock, and to corrupt our civic life.<sup>35</sup>

Cubberley argued that "[o]ur task is to . . . assimilate and amalgamate these people as a part of our American race, and to implant in their children, so far as can be done, the Anglo-Saxon conception of righteousness, law and order, and popular government."<sup>36</sup> Whereas Cubberley counseled assimilation as the answer, Harlan worried that certain racial and ethnic groups—particularly the Chinese—would not, in fact, assimilate into American political and constitutional traditions.<sup>37</sup>

Harlan feared that political control in many of the nation's great cities had been captured by non-Anglo-Saxon immigrants who did not embrace American traditions of civil liberty. He told his students:

In the large cities that are the source of most of the dangers that threaten our American civilization, men are invested with the privilege of citizenship of the United States under these naturalization laws who have not the slightest idea about our institutions, who scarcely know our language, whose habits have been formed up past manhood in other lands, under other systems of government, and who never do understand our civilization as we . . . who were born here [understand it].<sup>38</sup>

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<sup>34</sup> ELLWOOD P. CUBBERLEY, CHANGING CONCEPTIONS OF EDUCATION 14 (Henry Suzzallo ed., 1909).

<sup>35</sup> *Id.* at 15.

<sup>36</sup> *Id.*

<sup>37</sup> See John Marshall Harlan, *Lecture 11 (Jan. 8, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10 (describing immigrants in large cities as "the source of most of the dangers that threaten our American civilization"); John Marshall Harlan, *Lecture 14 (Jan. 29, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10 (discussing the "real peril" created by large numbers of immigrants in U.S. cities).

<sup>38</sup> John Marshall Harlan, *Lecture 11 (Jan. 8, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10.

“There is not much danger to the future of this country, in my judgment,” Harlan explained, “[other than] the large cities of the country that dominate the states, whose votes [will] . . . decide the politics of this country for years to come.”<sup>39</sup>

For Harlan, ethnic-based machine politics in cities such as New York and Chicago were of particular concern. Harlan explained:

Go to the great city of New York. Why, some men have said that it is more European than American. [There is] a good deal of truth in it. The contests in [the] great states of this country have turned upon the votes of great cities. And those great cities have a majority of men—or [an] enormous percentage of men—not born and reared under our institutions, not born and reared under the institutions of other countries like England . . . understand[ing] what life, liberty, and property mean, but born under despotisms, who have been in the habit all their lives of bowing to titles and powers that did not know what liberty was, and who come to this country mistaking liberty for license and license for liberty.<sup>40</sup>

Because of the large number of non-Anglo-Saxon immigrants in certain states, Harlan told his students that he took comfort in the equal representation requirement in the U.S. Senate that operated to reduce the influence of certain states with large non-Anglo-Saxon immigrant populations, such as Illinois and New York.<sup>41</sup>

Though Harlan worried about immigration from Southern and Eastern Europe, he expressed even greater concern about the Chinese. Although Congress, in 1882, had enacted legislation imposing a moratorium on additional Chinese immigration,<sup>42</sup> Harlan feared that America’s borders,

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<sup>39</sup> *Id.* Harlan also thought that many of these Southern and Eastern European immigrants had unsavory backgrounds. He complained that  
our own doors are open practically to all the world, and the jails and penitentiaries of Europe are being emptied into this country, and large portions of them lodge in these great cities that are now becoming so large and so corrupt that they are substantially controlling the public policy of many of the states, despite what the people out in the country and away from such cities may want.

*Id.*

<sup>40</sup> John Marshall Harlan, *Lecture 4 (Oct. 30, 1897)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10. According to the 1900 census, each of the ten most populous cities in the United States had a substantial foreign-born population. Even when those persons born in the British Isles are excluded, the foreign-born population percentage in 1900 in the nation’s ten most populous cities was quite substantial: New York City (26%), Chicago (28%), Philadelphia (12%), St. Louis (14%), Boston (19%), Baltimore (11%), Cleveland (25%), Buffalo (24%), San Francisco (26%), and Cincinnati (14%). See I DEPARTMENT OF THE INTERIOR, TWELFTH CENSUS OF THE UNITED STATES, TAKEN IN THE YEAR 1900: POPULATION PART I, at clxvii–clxxix tbls. LXXVIII–LXXXIII (1901).

<sup>41</sup> John Marshall Harlan, *Lecture 14 (Jan. 29, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10.

<sup>42</sup> In 1882, Congress enacted the Chinese Exclusion Act that imposed a moratorium on additional immigration of Chinese into the United States. Chinese Exclusion Act, Pub. L. No. 47-71 (1882), *repealed by* Magnuson Act, Pub. L. No. 78-199; 57 Stat. 600 (1943); *see*

particularly its northern border with Canada, were vulnerable to the illegal immigration of persons of Chinese ancestry, a problem made worse by the fact that, to Harlan, the Chinese “all look alike.”<sup>43</sup> Harlan argued that it is “a little difficult to enforce that [exclusion] law, particularly because of the invisible line that separates this country from Canada. They can land at Victoria [in British Columbia] and there is a wide space of country all along between the United States and Canada through which they can come.”<sup>44</sup> Addressing his constitutional law students in 1898, at a time when the U.S. population was about seventy-five million, Harlan claimed that had Congress not chosen to bar future Chinese immigration in 1882, the American West would have been flooded with fifty million Chinese immigrants, and “[t]hey would have rooted out the American population” in that part of the country.<sup>45</sup>

Harlan favored the exclusion of Chinese from America on the grounds that they were “a race utterly foreign to us and never will assimilate with us.”<sup>46</sup> Harlan explained that the Chinese “are pagans in religion, so different from us that they do not inter-marry with us. And we don’t want to inter-marry with them. And wthey [sic] they die, no matter how long they have been here, they make arrangements to be sent back to their fatherland.”<sup>47</sup> Harlan believed that the Chinese, even those born within the United States, retained loyalty to their homeland and hence possessed an uncertain commitment to American democratic traditions.<sup>48</sup>

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also ANDREW GYOY, *CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT* 1–2 (1998).

43 John Marshall Harlan, *Lecture 14 (Jan. 29, 1898)*, in *CONSTITUTIONAL LAW LECTURES*, *supra* note 10.

44 *Id.* In fact, many Chinese immigrated to British Columbia, Canada, during the late nineteenth century and then crossed the border into the United States illegally. The port of Victoria in British Columbia was a particularly popular immigration site, and the United States-Canada border was not heavily guarded. ERIKA LEE, *AT AMERICA’S GATE: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943*, at 152–55 (2003).

45 John Marshall Harlan, *Lecture 20 (Mar. 19, 1898)*, in *CONSTITUTIONAL LAW LECTURES*, *supra* note 10.

46 *Id.*

47 *Id.*

48 Harlan’s oft-noted comments about the Chinese in his *Plessy v. Ferguson* dissent must be read through the prism of his anti-Chinese views. That the Louisiana segregation law at issue in *Plessy* imposed a much harsher regime on blacks than on Chinese deeply disturbed Harlan:

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 yet declared to be criminals . . . if they ride in a public coach occupied by citizens of the white race.

As a result of Harlan's concerns about non-Anglo-Saxon immigration, he was an enthusiastic proponent of race-based immigration policies, and believed that immigration reform was perhaps the most pressing issue in the nation.<sup>49</sup> Harlan applauded the nation's decision in 1882 to stop Chinese immigration and favored immigration policies that made explicit racial distinctions in determining which groups should be permitted to immigrate to the United States. Harlan explained: "The power of the government of the United States to exclude any particular people from our shores is beyond question. We could exclude any particular race anywhere on the earth from our country by an act of Congress . . . ."<sup>50</sup> As a Supreme Court Justice, Harlan joined the Court's 1892 decision in *Nishimura Ekiu v. United States*, which gave Congress broad latitude to make racial distinctions in its immigration policy.<sup>51</sup> Harlan returned to this immigration theme again and again throughout his constitutional law lectures, telling his students that "the greatest farce" of the nineteenth century has been the nation's

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*Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting). Though this observation about the Chinese was not essential to his conclusion about the constitutionality of the Louisiana segregation law, Harlan found it particularly galling that the law treated the Chinese more favorably than it did blacks. Harlan would continue to worry about what he perceived to be the Chinese menace for the remainder of his life. In 1908, three years before his death, Harlan, speaking of the Chinese, warned in a widely noted speech that it was inevitable that there would someday be a military conflict "between the yellow race and the white race that will shake the earth." *Harlan Prophecies A Great Race War*, N.Y. TIMES, Jan. 12, 1908, at 3. Accordingly, Harlan urged Congress to build the greatest navy in the world that could defend the nation and make every American port impregnable to Chinese attack. *Justice Harlan's Plans*, WASH. POST, Jan. 14, 1908, at 5. United States Senator Albert Beveridge congratulated Harlan on his speech on the Chinese threat, calling it a "bugle blast of Americanism." Letter from Albert J. Beveridge to John Marshall Harlan (Feb. 9, 1908), *microformed on JOHN MARSHALL HARLAN PAPERS*, *supra* note 6, at Reel 13.

<sup>49</sup> See John Marshall Harlan, *Lecture 11 (Jan. 8, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10. Harlan told his students that immigration reform was one of the most important issues facing the nation:

If there is any one duty resting upon this country at this time that is supreme in my opinion it is the necessity to reorganize that whole system [of naturalization] and to see to it that American citizenship does not become as cheap in the future as it has been in the past.

*Id.*

<sup>50</sup> John Marshall Harlan, *Lecture 14 (Jan. 29, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10.

<sup>51</sup> 142 U.S. 651 (1892). In *Nishimura Ekiu*, the Court noted with approval that Congress had plenary authority over immigration, was free to forbid "the immigration of particular classes of foreigners," and acted constitutionally when it barred Chinese immigration. *Id.* at 659–60; see also *The Chinese Exclusion Case*, 130 U.S. 581 (1889) (holding that the Chinese Exclusion Act was a constitutional exercise of legislative power).

permissive immigration laws that opened the nation's doors to so many non-Anglo-Saxons.<sup>52</sup>

Harlan also took the view that Congress had broad latitude in making race-based distinctions in granting citizenship rights. In *United States v. Wong Kim Ark*,<sup>53</sup> Harlan joined a dissenting opinion concluding that a child of Chinese parents, though born in the United States and hence within the ambit of the birthright citizenship language of Section 1 of the Fourteenth Amendment, was nevertheless not a citizen because, in his view, the child and his parents remained loyal subjects of the Emperor of China.<sup>54</sup> Harlan explained his decision in this case to his students: "My belief was [that we] never intended to embrace everybody in our citizenship . . . [such as] the child of parents who cannot, under the law, become naturalized [citizens] . . . of the United States."<sup>55</sup> Later, speaking of birthright citizenship, Harlan concluded that place of birth should not control: "Just because a cat has kittens in an oven is no sign they are biscuits."<sup>56</sup>

Although Harlan opposed immigration and citizenship rights for Chinese, he did dissent from opinions denying Chinese aliens lawfully living in the United States certain rights.<sup>57</sup> Moreover, while most of Harlan's judicial colleagues viewed Native Americans as non-citizens and hence

52 Harlan also joined opinions sustaining the constitutionality of certain immigration procedures tainted with racial classifications. For example, in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), Harlan joined the Court's opinion providing that Congress had plenary authority to determine the conditions under which an alien was expelled from the country, even if the expulsion process raised issues of racial discrimination. Justice Brewer condemned the majority, noting that the while "[t]he expulsion of a race may be within the inherent powers of a despotism," Congress had no authority to determine "whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory." *Id.* at 737–38 (Brewer, J., dissenting).

53 169 U.S. 649 (1898).

54 *Id.* at 705–06 (Fuller, J., dissenting, with whom Harlan, J., concurred). Justice Clarence Thomas has written that "on Harlan's principles Chinese and anyone who undertook the duties of citizenship could become citizens." Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 994 (1987). That assertion is inconsistent with Harlan's citizenship opinions regarding the Chinese.

55 John Marshall Harlan, *Lecture 26 (May 7, 1898)*, in CONSTITUTIONAL LAW LECTURES, *supra* note 10.

56 Enoch Aquila Chase, *Some Recollections of Justice John Marshall Harlan* (unpublished and undated), *microformed on JOHN MARSHALL HARLAN PAPERS*, *supra* note 6, at Reel 13 (Chase was a student in one of Harlan's classes).

57 *See, e.g., Baldwin v. Franks*, 120 U.S. 678, 694 (1887) (Harlan, J., dissenting) (disagreeing with Court's decision to release a man from custody who had forcefully removed lawful Chinese aliens from their homes). *See generally* Earl M. Maltz, *Only Partially Color-Blind: John Marshall Harlan's View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973, 999–1016 (1996) (noting the difference between Harlan's decisions in immigration cases, in which Harlan was very harsh towards the Chinese, and his decisions in cases involving the rights of lawful residents, in which he was very protective of the rights of the Chinese).

outside the protection of the Reconstruction-era amendments, Harlan disagreed. In *Elk v. Wilkens*,<sup>58</sup> the Court held that a Native American, though born in the United States and not living on a reservation, was not a citizen and hence enjoyed no voting rights unless he had been naturalized. Harlan dissented, concluding that the Civil Rights Act of 1866 and the Fourteenth Amendment granted citizenship rights to all Native Americans who “had severed their tribal connections.”<sup>59</sup> Similarly, in *Talton v. Mayes*,<sup>60</sup> Harlan was a lone dissenter in a case in which the Court held that the constitutional right to a grand jury indictment did not extend to Native Americans on trial in tribal courts.<sup>61</sup>

Harlan’s views on the application of the procedural protections of the Bill of Rights to tribal courts was consistent with his dissenting opinions in the *Insular Cases*,<sup>62</sup> in which Harlan argued that the protections of the Bill of Rights extended to persons living in U.S. territories acquired during the Spanish-American War. These dissenting opinions must be viewed through the prism of Harlan’s central commitment to the preservation of Anglo-American traditions of liberty for all persons subject to the jurisdiction of American law. In *Downes v. Bidwell*,<sup>63</sup> for example, the Court held that the Bill of Rights did not apply in the newly acquired U.S. territories. The Court justified its position by observing that “those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought,” and so, “the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible.”<sup>64</sup> The Court argued that “principles of natural justice inherent in the Anglo-

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58 112 U.S. 94 (1884).

59 *Id.* at 116 (Harlan, J., dissenting).

60 163 U.S. 376 (1896).

61 *Id.* Harlan dissented without opinion.

62 *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Dowdell v. United States*, 221 U.S. 325 (1911); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Dorr v. United States*, 195 U.S. 138 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Huus v. N.Y. & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *DeLima v. Bidwell*, 182 U.S. 1 (1901). The *Insular Cases* were a collection of several cases decided in the early twentieth century in which the U.S. Supreme Court considered the application of the Bill of Rights to territory acquired during the Spanish-American War. In these cases, the Court held that because it was not envisioned that these territories would ever enjoy statehood, the Bill of Rights did not apply. See Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RES. L. REV. 147, 148 (2006) (“[In the *Insular Cases*], the Supreme Court ruled that these lands were ‘foreign in a domestic sense’ and that they were not a part of the United States for all constitutional purposes.”).

63 182 U.S. 244 (1901).

64 *Id.* at 287.

Saxon character”<sup>65</sup> would offer sufficient protection of the interests of those persons living in the territories.

Harlan, in dissent, criticized the Court, claiming that its actions suggested the end of “the era of constitutional liberty.”<sup>66</sup> Harlan argued that:

The wise men who framed the Constitution, and the patriotic people who adopted it, were unwilling to depend for their safety upon what, in the opinion [of the Court], is described as “certain principles of natural justice inherent in Anglo-Saxon character . . . .” They well remembered that Anglo-Saxons across the ocean had attempted, in defiance of law and justice, to trample upon the rights of Anglo-Saxons on this continent . . . [and to] destroy the privileges that inhere in liberty.<sup>67</sup>

As for the problem of the assimilation of alien peoples—a problem with which Harlan was quite sympathetic—Harlan concluded that:

Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory . . . cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions. The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest . . . .<sup>68</sup>

For Harlan, in the same way that America’s treatment of African Americans was a test of the nation’s commitment to Anglo-American principles of liberty, so, too, America’s treatment of its subject peoples in its newly acquired territories was also a profound test of the nation’s commitment to liberty. Regardless of whether it was wise to exercise control over certain foreign territories, the United States was now obliged, in Harlan’s view, to extend to these peoples the full protection of the Bill of Rights.

## CONCLUSION

Harlan was the most passionate voice on the United States Supreme Court during the late nineteenth and early twentieth centuries for the rights of African Americans, and one of the most passionate voices defending the liberty interests of those non-white persons living in territories acquired in the aftermath of the Spanish-American War. Harlan’s contemporary reputation as one of the great defenders of civil rights is based largely on his dissenting opinions in these cases.

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<sup>65</sup> *Id.* at 280.

<sup>66</sup> *Id.* at 379 (Harlan, J., dissenting).

<sup>67</sup> *Id.* at 381.

<sup>68</sup> *Id.* at 384.



This strong commitment to protecting the liberty of “outsider” groups appears to be in sharp tension with Harlan’s embrace of a racial hierarchy with Anglo-Saxons as the superior racial group, and his opposition to the immigration of non-Anglo-Saxons to the United States. But Harlan’s conception of racial hierarchy operated within a framework of racial paternalism: Anglo-Saxons would maintain their racial dominance only to the extent that they fulfilled their sacred mission to protect Anglo-American traditions of constitutional liberty for all people living within the nation’s jurisdiction, even outsider groups destined for extinction. And so, John Marshall Harlan, a firm believer in racial supremacy and a strong opponent of the immigration of non-Anglo-Saxons, was nevertheless his era’s greatest judicial proponent of constitutional liberty.