# The Great Dissenter's Greatest Dissents: The First Justice Harlan, The "Color-Blind" Constitution and the Meaning of his Dissents in the *Insular Cases* for the War on Terror

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The first Justice John Marshall Harlan is famous for his preternatural ability to articulate the ideals inherent in the Constitution before the nation fully recognized them.[1] Although the Supreme Court would later validate the principles Harlan expressed in many of his passionate dissents in favor of the rights of freed slaves,[2] none of his opinions better justifies his prophetic reputation than his most famous dissent in *Plessy v. Ferguson*.[3] While the opinion of the Court endorsed the doctrine of "separate but equal," Harlan predicted that the decision would one day be regarded as "more pernicious than... *Dred Scott*."[4] In language later echoed during the Civil Rights Movement, he declared that the "Constitution is 'color-blind,' and neither knows nor tolerates classes among citizens."[5] Hence it could not tolerate a doctrine which allowed the state to separate citizens on the basis of race.

Less well known, however, is that near the end of a dissent which passionately endorsed racial equality in the eyes of the law, Harlan observed "[t]here 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."[6] Two legal scholars, Gabriel Chin and Earl Maltz have examined this seemingly anomalous phrase, as well as Harlan's jurisprudence regarding the rights of Chinese immigrants, and argued that Harlan's attitudes toward the Chinese was anything but "color-blind."[7] Harlan approved or joined opinions which questionably

1. *See infra* notes 24-39 and accompanying text.

2. *See infra* notes 29-31 and accompanying text.

3. 163 U.S. 537 (1896) (Harlan, J., dissenting).

4. *Id.* at 559.

5. *Id.*

6. *Id.* at 561.

7. Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996); Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great was "The Great Dissenter?"*, 32 AKRON L. REV. 629 (1999); Earl M. Maltz, *Only Partially Colorblind: John Marshall Harlan's View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973 (1996).

interpreted the text of the Constitution in order to deprive Chinese immigrants access to due process[8] and Chinese born in America access to citizenship.[9] Moreover, his most recent biographers have uncovered private correspondence and notes from lectures to the law school class he instructed which indicate that Harlan endorsed these opinions in part because he accepted the racist notions common to his era that the Chinese were simply incapable of assimilating into American institutions.[10]

The discrepancies between Harlan's jurisprudence toward blacks and toward the Chinese led both Chin and Maltz to suggest that Harlan's sympathies toward the rights of minorities did not extend beyond the freed slaves.[11] No articles have appeared directly challenging this conclusion and the only Harlan biography written since the articles were published cited Chin and Maltz without refuting them.[12] According to the current literature, therefore, Harlan is a false prophet of the "color-blind" Constitution and future generations have used Harlan's language in *Plessy* to endorse principles which he did not share.[13] Indeed, Chin argued that it would be more accurate to describe the legal doctrines Harlan advanced in *Plessy* as a "museum piece" rather than a "blueprint" for racial equality.[14]

This article, in contrast, will assert that Chin and Maltz overlooked a series of cases, known as the *Insular Cases*, which contradict their argument. Decided shortly after *Plessy*, the *Insular Cases* determined that the inhabitants of the territories conquered during the Spanish-American War were not entitled to the full protection of the Constitution.[15] Harlan's dissents in these cases show that he did not share the pervading racist assumptions underlying the majority opinions. Instead, he was the Court's most passionate and consistent defender of the unpopular notion that the people of the acquired territories, which included Asian Filipinos and the Chinese, Japanese and native inhabitants of Hawaii, were entitled to all the constitutional rights of United States citizens. Moreover, the language of Harlan's dissents, as well as speeches he delivered on the Spanish-American War, indicate that during the period in which the *Insular Cases* were decided, Harlan himself may have rejected the racism he seemingly endorsed in *Plessy* and the *Chinese Immigrant Cases*. The Spanish-American War and the ensuing territorial acquisitions may have facilitated Harlan's realization that the values he so eloquently articulated in

8. Fong Yue Ting v. United States, 149 U.S. 698 (1893).

9. Wong Kim Ark v United States, 169 U.S. 649 (1898).

10. LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 120-121 (1999); TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN, 190-191 (1995); *see infra* notes 85-88 and accompanying text.

11. Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 173 (1996); PRZYBYSZEWSKI, *supra* note 10, at 121-122.

12. PRZYBYSZEWSKI, *supra* note 10, at 121.

13. Chin, *supra* note 11, at 174.

14. Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great was "The Great Dissenter?"*, 32 AKRON L. REV. 629, 647 (1999).

15. *See infra* notes 121-126 and accompanying text.

*Plessy* applied to all races under United States jurisdiction, instead of just whites and blacks.

In addition, this article argues that Harlan's dissents in the *Insular Cases* may prove to be as prophetic as his dissent in *Plessy*. In the *Insular Cases*, Harlan not only came closest to a full realization of a universal "color-blind" Constitution, his dissents also declared that the Constitution limits the government's power over every territory and over every person subject to the authority of the United States. In *Rasul v Bush*,[16] the recent case in which the Court decided that the federal courts have jurisdiction to consider the legality of the detention of foreigners at the naval base in Guantanamo Bay Cuba, the Court took a significant step toward vindicating Harlan's vision.[17] As the Court struggles to determine the rights available to suspects in the War on Terror, it should glean further inspiration from the core principle Harlan expressed in the *Insular Cases* - war and expansion abroad should not be allowed to alter the meaning of the fundamental values enshrined in the Constitution. Harlan's opinions in the *Insular Cases*, therefore, might provide another example of his seemingly uncanny ability to articulate ideals inherent in the Constitution to be recognized by future generations.

Harlan's most recent biographer invited others to join the exploration of Harlan's life and ideology that she began.[18] This article accepts that invitation. It analyzes one famous Justice's complex views on race, war and the applicability of the Constitution beyond the borders of the United States. It argues that the Great Dissenter may have delivered his greatest and most relevant dissents in the *Insular Cases*.

The first section of Part I summarizes the praise that Harlan has received from modern scholars for his passionate dissents in *Plessy* and other cases involving the rights of freed slaves. The second section of Part I examines the works of scholars who have contrasted Harlan's defense of black rights with his failure to extend the "color-blind" Constitution to the Chinese. Part II discusses the majority opinions in the *Insular Cases* and the racist notions which motivated the Court to deny the inhabitants of the territories conquered during the Spanish-American War full constitutional rights, and analyzes Harlan's dissents in the *Insular Cases*. It shows that Harlan passionately advocated for the extension of full constitutional protections to the inhabitants of the territories, regardless of race. Part II also attempts to reconcile Harlan's opinions in the *Chinese Immigrant Cases* and the *Insular Cases* by arguing that American expansion abroad facilitated the development of Harlan's expanded notion of the "color-blind" Constitution. It also offers a possible explanation for Chin and Maltz's failure to mention the *Insular Cases* in their articles. Finally, Part III argues that the doctrine Harlan advanced and the values he articulated in the *Insular Cases* have important resonance for the legal issues our nation confronts as it wages the War on Terror.

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16. Rasul v. Bush, 542 U.S. 466, 470 (2004).

17. *See infra* notes 207 and accompanying text.

18. PRZYBYSZEWSKI, *supra* note 10, at 9.

## PART I

### *Plessy v. Ferguson* and Harlan's Prophecy on Race and the Constitution

*Plessy v. Ferguson*[19], the 1896 Supreme Court decision which upheld a Louisiana statute mandating "separate but equal" accommodations for black and white patrons of a railroad, "stands next to *Dred Scott*"[20] as the "second most disheartening moment in the Supreme Court's checkered efforts to reconcile...the goals of equality, liberty and freedom for all without distinction by race with the sad legacy of slavery."[21] Only one justice dissented from the Court's determination that "separate but equal" did not violate the Fourteenth Amendment.[22] Justice John Marshall Harlan castigated his colleagues for failing to recognize that:

> ...in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.[23]

Since *Brown v. Board of Education*[24] overturned *Plessy*, Harlan's dissent has achieved an almost mythic stature. One commentator described it as:

> righteous and prophetic, announcing the proper understanding of the Equal Protection Clause of the Fourteenth Amendment years ahead of its time... Martin Luther King Jr.'s hope that his children would be evaluated on the content of their character, not the color of their skin, is seen as but a gloss on Harlan's theme.[25]

Others have described it as "heroic," "justly famous" and a reflection of "ideals essential to our national creed."[26] Its language has been used to support opinions that range the ideological spectrum, including, most recently, in landmark cases deciding the constitutionality of anti-sodomy laws[27] and affirmative action in college and graduate admissions.[28]

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19. 163 U.S. 537, 541 (1896).

20. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

21. Nathaniel R. Jones, *The Harlan Dissent: The Road Not Taken – An American Tragedy*, 12 GA. ST. U. L . REV. 951, 951 (1996).

22. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

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

24. 347 U.S. 483 (1954).

25. T. Alexander Aleinikoff, *Symposium on Race Consciousness and Legal Scholarship: Re-Reading Justice Harlan's Dissent In Plessy v. Ferguson: Freedom, Antiracism and Citizenship*, 1992 U. ILL. L. REV. 961, 961 (1992).

26. Chin, *supra* note 11, at 151 n.3.

27. Lawrence v. Texas, 539 U.S. 558, 584 (2003) (O'Connor, J., concurring).

28. Grutter v. Bollinger, 539 U.S. 306, 378 (2003) (Thomas, J., dissenting).

Of course, Harlan's opinion in *Plessy* was only the most famous of his passionate dissents in favor of the rights of the former slaves.[29] Throughout his tenure, which encompassed the period that has been referred to as the "climax of segregation and statutory discrimination" against blacks[30] the majority of the Court repeatedly struck down statutes designed to protect the rights of freed slaves, and Harlan frequently dissented, often alone.[31] Harlan's interpretation of the equal protection clause did not reflect the modern understanding and his record for defending the civil rights of blacks was far from perfect.[32] Nevertheless, many modern scholars praise him as a man whose advocacy of the "color-blind" Constitution stood in sharp contrast to his racist colleagues and prefigured modern constitutional theories dealing with race discrimination.[33]

Indeed, future generations would vindicate several of Harlan's most important constitutional doctrines. "By the end of the 20th Century, the Supreme Court had adopted most of Harlan's positions on extending the safeguards of the Bill of Rights to the states, accepted his belief that the Thirteenth Amendment was an adequate basis for congressional assaults on all forms of racial discrimination... and also came close to accepting Harlan's argument that congressional authority under the Fourteenth Amendment extended to private as well as state interferences with the rights its provisions guaranteed."[34] Harlan himself was not afraid to predict the future. As he argued in his *Plessy* dissent, "...the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case."[35]

Harlan's enlightened and forward looking jurisprudence toward the rights of freed slaves seems even more remarkable considering his biography. Harlan was born into a prominent Kentucky slave-owning family and though he joined the Union Army to fight secession during the Civil War, he originally denounced emancipation and opposed the Thirteenth Amendment.[36] Apparently, however, he underwent an ideological transformation during Reconstruction and by the time he was appointed to the

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29. See, e.g., Civil Rights Cases, 109 U.S. 8, 37-41 (Harlan, J., dissenting).

30. RICHARD E. WELCH JR., RESPONSE TO IMPERIALISM: THE UNITED STATES AND THE PHILIPPINE- AMERICAN WAR, 1899-1902 103 (1979).

31. Maltz, *supra* note 7, at 984.

32. *See* Cumming v. Richmond County Board of Education, 175 U.S. 628 (1899). By rejecting black parents' challenge to the use of their tax dollars to support a high school for whites without an analogous institution for blacks, Harlan, who wrote the opinion for the Court, seemingly endorsed segregation in schools. *See also* Pace v. Alabama 106 U.S. 583 (1883), in which Harlan concurred in the Court's decision to uphold a statute which punished "fornication and adultery" more severely if the acts were committed by members of different races than the same race.

33. Maltz, *supra* note 7, at 973.

34. YARBROUGH, *supra* note 10, at viii.

35. *Plessy* v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

36. http://college.hmco.com/history/readerscomp/rcah/html/ah_040200_harlanjohnma.htm (last visited May 27, 2006).

Court in 1877 he had become an ardent supporter of legal equality for freed slaves.[37] Far from a momentary flip-flop for political gain, however, Harlan would later prove the authenticity of his conversion during his dissents in favor of black civil rights, well after the Court and the country had abandoned the spirit of Reconstruction.

It is easy to understand, therefore, why Harlan has been referred to as "the founding father of modern constitutional law"[38] and judicial specialists have ranked him among the twelve greatest justices.[39] A consistent, passionate and prophetic defender of the Bill of Rights and equality of the races, Harlan's opinions seemed to articulate the nation's ideals before the nation fully recognized them.

## The Blind Spot: The "Color-Blind" Constitution and the Rights of the Chinese

In *Plessy*, after declaring the Constitution "color-blind" and arguing that the Thirteenth, Fourteenth and Fifteenth Amendments "... removed the race line from our governmental systems,"[40] Harlan also mentioned, almost in passing that:

> 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, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.[41]

Few are aware of this passage, perhaps because constitutional law casebook editors often excise this seemingly anomalous digression from their excerpts of what has become a seminal piece of American law.[42] Yet it reveals an often overlooked aspect of Harlan's jurisprudence - the same justice who coined the phrase "color-blind" Constitution believed it was "legitimate to preserve superior and inferior ranks of persons in the country by denying certain classes of people access to citizenship. And in Harlan's understanding, these discriminations could be made tenably on the basis of race."[43]

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37. Przybyszewski, supra note 10, at 41.

38. Jacob W. Landynski, *John Marshall Harlan and the Bill of Rights: A Centennial View*, 49 J. SOC. RESEARCH 899, 899 (1982).

39. YARBROUGH, *supra* note 10, at viii.

40. *Plessy*, 163 U.S. at 555.

41. *Id.* at 561.

42. Chin, *supra* note 11, at 167.

43. Hadley Arkes, *Survey of Books Relating to the Law; IX. Casebooks: The Shadow of Natural Rights, or a Guide From the Perplexed*, 86 Mich. L. Rev. 1492, 1518 (1988) (reviewing WALTER MURPHY JAMES FLEMING & WILLIAM HARRIS II., AMERICAN CONSTITUTIONAL INTERPRETATION (1986)).

Two legal scholars, Gabriel Chin and Earl Maltz, conducted in depth examinations of Harlan's record in cases concerning Chinese litigants[44] and have argued that Harlan's attitudes toward Asians should temper the effusive praise he has received.[45] Both authors cite numerous examples of opinions that Harlan either wrote or joined in which he ruled against Asian litigants.[46] In particular, his attitude toward two seminal decisions, *Fong Yue Ting v. United States*[47] and *Wong Kim Arc v. United States*[48] illustrate that Harlan's jurisprudence was anything but prophetic in cases involving the rights of Chinese immigrants.

In *Fong Yue Ting*, which was decided in 1893, the Court denied a constitutional challenge to the Geary Act of 1892, which was the culmination of a long line of Congressional anti-Chinese laws.[49] The Act extended a moratorium on Chinese immigration to the United States which began in 1882.[50] In addition, in a provision which applied only to the Chinese, it allowed a United States judge to deport any immigrant who had not obtained a certificate of residence from the federal government. The immigrant could prevent deportation only if he established a legitimate excuse for not having the certificate and a credible white witness corroborated the immigrant's claim to being lawfully present in the United States.[51]

Despite the Geary Act's blatant discrimination, the majority ruled that the Equal Protection Clause[52] did not apply to the federal government's control over immigration.[53] As a result, Congress could exclude aliens on the basis of race or could impose conditions that a certain race of aliens had to satisfy in order to remain.[54]

Moreover, the Court held that the requirements that Chinese aliens had to fulfill in order to avoid deportation did not violate the Due Process Clause of the Fifth Amendment[55] because deportation itself did not deprive an alien of either liberty or property. Rather, it was merely a method of forcing the alien to comply "...with the conditions upon the performance of which the government of the nation... has determined that his continuing to reside here shall depend."[56] Over the passionate dissents

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44. Chin, supra note 11; Chin, supra note 14; Maltz, supra note 8, at 999-1015.

45. Maltz, *supra* note 7, at 999; On the nation's anti-Chinese bias, *See* Love, *infra* note 111, at 94.

46. Indeed, Chin concludes that Harlan was less likely to vote for Asian-American litigants than the Court as a whole. Chin, *supra* note 14, at 646.

47. 149 U.S. 698 (1893).

48. 169 U.S. 649 (1898).

49. Maltz, *supra* note 7, at 1001.

50. *Id.*

51. *Fong Yue Ting*, 149 U.S. at 726.

52. U.S. CONST. amend. XIV, § 1.

53. *Fong Yue Ting*, 149 U.S. at 725.

54. *Id.* at 724.

55. U.S. CONST. amend. V.

56. *Fong Yue Ting*, 149 U.S. at 730.

of Justices Field, Brewer and Fuller,[57] one of whom argued that "every step in the Geary Act trampled on some constitutional right,"[58] the Court ruled that Congress could deport a Chinese alien without affording him due process, or, for that matter, any process at all.

Scholars disagree as to whether Harlan concurred in the majority opinion or did not participate in the decision in *Fong Yue Ting*.[59] In either case, in later opinions he wrote, including *Lem Moon Sing v. United States*,[60] and *Yamataya v. Fisher*,[61] Harlan cited *Fong Yue Ting* with approval. Apparently Harlan, "the champion of civil liberties"[62] who had a "deep belief in the rightness of the Bill of Rights"[63] did not have problems narrowly interpreting the meaning of "liberty" in order to deprive Chinese aliens of constitutional rights before deportation. Moreover, the same justice who had expressed such eloquent sympathy for the freed slaves in *Plessy* did not share such sympathy for a Chinese person deported from the United States. Finally, Harlan was not convinced by the arguments made in Chief Justice Fuller's dissent that discrimination against one race, no matter how despised the race, nourished the seeds of unlimited and arbitrary Congressional power.[64]

Even more perplexing, and more revealing, was Harlan's vote in *Wong Kim Ark v. United States,* decided in March 1898.[65] Wong Kim Ark was born to Chinese parents in the United States. After a visit to China, he was denied reentry to the United States because Chinese aliens were excluded from the country.[66] The majority opinion ruled that he was entitled to reentry because he was a citizen. According to the Fourteenth Amendment, "all persons born... in the United States and subject to the jurisdiction thereof, are citizens of the United States..."[67] In the majority's view, everyone within United States territory, excluding diplomats and captured enemy soldiers, were "subject to the jurisdiction of the United States."[68] Hence, their children were entitled to citizenship. The majority reasoned that any ruling to the contrary would jeopardize the citizenship of thousands of persons of European dissent.[69] It held that the

57. Id. at 754, 738, 764.

58. *Id.* at 759-760 (Field, J., dissenting).

59. Maltz, *supra* note 7, at 1012 (claiming that Harlan concurred in the majority opinion); Chin, *supra* note 11, at 161 n.69 (asserting that Harlan did not participate).

60. 158 U.S. 538, 544-546 (1895).

61. 189 U.S. 86, 97, 100-101 (1902).

62. JAMES E. KERR, THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM 89 (1982).

63. LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 256 (1992).

64. Fong Yue Ting v. United States, 149 U.S. 698, 764 (1893) (Fuller, J., dissenting).

65. 169 U.S. 649 (1898).

66. Maltz, *supra* note 7, at 1012.

67. U.S. CONST. amend. XIV, § 1.

68. *Wong Kim Ark*, 169 U.S. at 682.

69. *Id.* at 694.

express command of the Fourteenth Amendment prohibited the Court from denying those born in the country citizenship on the basis of race.[70]

Harlan's dissent in *Plessy* seemed to indicate that he concurred with the majority's reasoning in *Wong Kim Ark*. "The recent amendments of the supreme law established universal civil freedom [and] gave citizenship to all born or naturalized in the United States... ."[71] Yet Harlan made a blatant exception for the Chinese. In *Wong Kim Ark*, he joined Chief Justice Fuller in dissent[72] who claimed that "... all that this amendment provides is that all persons born within the United States and not subject to some foreign power... shall be considered citizens of the United States."[73] Moreover, while the dissent primarily relied on interpretations of the intent of the framers of the Fourteenth Amendment and international law, the perceived consequences of allowing the Chinese to become citizens provided an important component of its reasoning:

> The United States was brought to the opinion that 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, might endanger good order, and be injurious to the public interests...[74]

In other passages, the *Wong Kim Ark* dissent concluded that it was inconceivable that the Framers of the Fourteenth Amendment could have intended to make the children of "Mongolian, Malay or other race(s)" eligible for the presidency while children of American citizens, born abroad, were potentially excluded from the nation's highest office.[75]

One of Harlan's biographers described his vote in *Wong Kim Ark* as "a minor mystery."[76] After all, Harlan's opinions were usually characterized by a strict adherence to the words of the Constitution[77] and Harlan, in lectures to his law school class at Columbian (later George Washington) University, seemed to admit that in this case the text of the Constitution supported the majority opinion.[78] "...[T]he argument [for the majority's position in *Wong Kim Ark*]," he conceded, "is that words of the [C]onstitution embrace [its result]."[79] Thus, when Harlan voted with Fuller in *Wong Kim Ark*, he consciously endorsed judicial activism to interpret the Fourteenth Amendment to mean that "all persons born in the United

70. Id.

71. Plessy v. Ferguson, 163 U.S. 537, 563 (1896) (Harlan, J., dissenting).

72. *Wong Kim Ark*, 169 U.S at 741.

73. *Id.* at 721; Harlan seemed to believe that the Chinese aliens in America were subject to a foreign power, *See infra* note 85.

74. *Id.* at 731.

75. *Id.* at 715.

76. BETH, *supra* note 63, at 237.

77. KERR, *supra* note 62, at 19.

78. PRZYBYSZEWSKI, *supra* note 10, at 44.

79. *Id.* at 121.

States are citizens, *except the Chinese.*"

Until the 1940s, birth in the United States was the only means by which a Chinese person could become an American citizen.[80] As Maltz pointed out, Harlan was the only member of the Court to dissent in *Wong Kim Ark* and approve of *Fong Yue Ting*.[81] Hence, Harlan was the only justice who believed that every Chinese person in America, no matter how long he or his family had been living in the United States, could be subjected to expulsion at the whim of Congress for all eternity.

Harlan's opinions, lectures and private correspondences, moreover, revealed his motivation for denying Chinese aliens constitutional rights. Harlan accepted the racist arguments prevalent at the time that the Chinese had to be denied access to citizenship because, unlike blacks, they had not proven the ability to appreciate, assimilate with or understand American institutions.[82]

For example, in his *Plessy* dissent, Harlan referred to the Chinese in order to demonstrate the irony of a statute which permitted them to sit in the same coach as a white person, while denying blacks, many of whom had fought in the Civil War, the same rights.[83] Harlan's outrage at the Louisiana statute, Chin contended, may have been the product of his belief that African Americans had earned the right to equal treatment with white citizens as a result of their race's service in the Union Army, while the Chinese had done nothing to merit similar treatment.[84]

Harlan offered further insights into his views toward the Chinese in lectures to his law school class. When one of his students asked, before *Wong Kim Ark* was decided, whether a Chinese born in this Country would be a citizen, Harlan responded that "one could argue that the Chinese had long been excluded because this is a race utterly foreign to us and never will assimilate with us. They were pagans... and when they die, no matter how long they have been here, they make arrangements to be sent back to their fatherland."[85]

These comments were consistent with attitudes Harlan expressed toward the Chinese in earlier correspondence with his son James. Harlan

80. Gabriel J. Chin et al., Beyond Self-Interest: Asian Pacific Americans Toward A Community of Justice, A Policy Analysis of Affirmative Action, 4 Ucla Asian Pac. Am. L. J. 129, 144-145 (1996).

81. Maltz, *supra* note 7, at 1014-1015.

82. *See* ERIC T. L. LOVE, RACE OVER EMPIRE: RACISM AND U.S. IMPERIALISM 1865-1900 94 (2004).

83. Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan J., dissenting).

84. Chin, *supra* note 11, at 175; In *Plessy*, though Harlan stated that the Chinese are excluded because we consider them to be so different from our own race, he did not indicate whether he actually agreed with that proposition. *Plessy*, 163 U.S. at 561. In fact, one could argue that he included the observation about the Chinese in *Plessy* merely to demonstrate the irony of a statute which discriminated against one race and not another.

85. PRZYBYSZEWSKI, *supra* note 10, at 120; When he reported back to class after the case was decided he expressed his fears that the majority opinion would require the United States to save one its Chinese citizens from beheading at the whim of the Emperor when he returned to his homeland. *Id.* at 121.

advised James to include the following arguments during an upcoming debate on the Chinese Exclusion Act in which James was participating:

> ...Now, if by introduction of Chinese labor we jeopardize our own laborers, why not restrict immigration of Chinese. The Chinese are of a different race, as distinct from ours as ours is from the negro . . . . Suppose 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.*[86]

Though Harlan did not endorse either the arguments he made to his class or the letter he sent to James, he never attempted to separate his own position from the ones he was advancing.[87] And his support for Fuller's opinion in *Wong Kim Ark* seemed to answer the question of "what stuff" he believed the Chinese were made. Unlike blacks, who had proved their worthiness during the Civil War, the Chinese were incapable of assimilating with American institutions and assuming all of the rights and responsibilities which accrued to American citizenship.[88]

Both Chin and Maltz recognize that Harlan's jurisprudential "blind spot" toward the Chinese did not encompass all of his decisions in cases involving Chinese litigants. Indeed, Harlan joined some important decisions protecting the Chinese in America. Despite the Court's holding that deportation was not punishment in *Fong Yue Ting*, Harlan agreed with a unanimous Court that a deportable Chinese person was entitled to a jury trial before he could be criminally punished for being in the United States[89] and he joined in opinions which decided that the Chinese already in America were entitled to the protections of the Bill of Rights.[90] He joined the opinion of the Court in *Yick Wo v. Hopkins*,[91] the landmark case that found unconstitutional a facially neutral state law which was clearly intended to discriminate against the Chinese[92] and showed a relatively strong commitment to protecting lawfully present Chinese from oppression by state governments and private individuals.[93] Thus, Harlan's constitutional jurisprudence toward the two races was not necessarily inconsistent. As Chin acknowledged, it is fair to conclude that Harlan

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86. YARBROUGH, *supra* note 10, at 190-191 (emphasis added).

87. *Id.* at 191.

88. Chin, *supra* note 11, at 171; PRZYBYSZEWSKI *supra* note 8, at 121.

89. Chin, *supra* note 11, at 162 (citing Wong Wing v. United States 168 U.S. 228, 237 (1896)).

90. Maltz, *supra* note 7, at 1010

91. 118 U.S. 356 (1886).

92. Maltz, *supra* note 7, at 1003.

93. *Id.* at 1002.

obeyed the commands of the Fourteenth Amendment to prevent states from discriminating on the basis of race, but did not feel any constitutional provision similarly constrained the federal government's power over aliens.[94]

Nevertheless, it seems clear that Harlan interpreted ambiguous constitutional provisions as broadly as possible to protect the freed slaves, but quite narrowly in order to avoid protecting the Chinese. Perhaps even more damning, Harlan's endorsement of federal discrimination against the Chinese diminishes his reputation for moral clarity and his ability to articulate principles of racial justice which would only be recognized by later generations.[95] As Chin argued:

> [T]he dissent [in *Plessy*] is [famous] not because it focuses on the special obligations of states, or the constitutional limitations imposed upon them. Instead, Harlan seems to be arguing a moral truth—the denial to African Americans of equal treatment is wrong. But if Harlan is entitled to credit for voting against segregation in *Plessy* because discrimination was wrong, it remains a mystery why his anti-discrimination principle was not uniformly applicable.[96]

Chin believed that Harlan could not conceive of an America which included more than two races. "When Harlan referred to 'the destinies of the two races, in this country,' he seemed to suggest that all Americans were either African American or white, and thus that non-African American non-whites could not be Americans."[97] As a result, "[b]y seeing America as only two races, Harlan failed to make the anti-racist arguments... that later commentators nevertheless attempt to ascribe to him."[98] Maltz essentially concurred with this assessment.[99]

Harlan's failure to extend the "color-blind" Constitution to races other than blacks, moreover, was of more than mere academic concern. By the time *Plessy* was decided in 1896, America already included more than two races, and would include even more in the near future. As Chin observed:

> When Harlan dissented in *Plessy*, it was already too late for a principle of equality which only solved the problem of black-white relations. Native Americans and Asian Americans were already here; Texas, Arizona, New Mexico, and California, with their many citizens of Mexican ancestry, were states or territories of the Union; and Hawaii, Puerto Rico, and the Philippines were soon to join.[100]

In sum, the research of Chin and Maltz indicates that Harlan failed to extend the "color-blind" principle he articulated so eloquently in *Plessy* to

94. Chin, *supra* note 14, at 646.

95. *Id.*

96. *Id.*

97. Chin, *supra* note 11, at 173.

98. *Id.* at 174.

99. *See* Maltz, *supra* note 7, at 1015. "This record demonstrates that modern commentators have often overstated Harlan's distaste for race based classifications... [H]is sympathy for the situation of free blacks should be characterized as no more than that-sympathy for free blacks *specifically*...In short, in Harlan's view, the Constitution was only partially 'color-blind'."

100. *Id.* at 182.

all races subject to the jurisdiction of the United States. According to Chin, we should stop looking to the *Plessy* dissent and indeed Harlan himself as a hero or a prophet or someone who could articulate values essential to our national creed. Instead, the "legal doctrine he advanced should be regarded as a museum piece, not a blueprint."[101]

## PART II

### Race and Imperialism: The Insular Cases

There is, however, a subsequent chapter in the evolution of Harlan's jurisprudence on race that Chin and Maltz did not take into account. Chin mentioned that within ten years of *Plessy*, America would expand its jurisdiction over non-white races in Hawaii and the Philippines. Chin never included an analysis of Harlan's response to the acquisition of these territories.[102] Neither did Maltz.[103] This is perhaps a little surprising since their acquisition ignited a fierce and famous debate over the constitutional rights to which the largely Asian inhabitants of those territories were entitled. If Chin and Maltz are correct and Harlan's sympathies did not extend to minority races besides the freed slaves, he should have interpreted the Constitution in a way that allowed Congress to deprive the people of the territories rights to which all Americans were entitled.

Harlan's decision in the *Insular Cases*, however, confounds Chin and Maltz's analysis of his views on race. In opposition to the views of the majority of the Court as well as the court of public opinion, Harlan argued passionately that the full protection of the Constitution must extend to all races under United States jurisdiction. Moreover, speeches he delivered during the period indicated that war and expansion abroad facilitated his recognition of a universal "color-blind" principle which eluded him in *Plessy*. In other words, the commentators who accused Harlan of having a "blind spot" to races other than the freed slaves may have themselves overlooked evidence which contradict their views.

In order to understand why Harlan's dissent in the *Insular Cases* rehabilitates his reputation as an advocate of the "color-blind" Constitution, it is necessary to briefly examine the broader legal issues which the Cases addressed. It is also helpful to examine the prevailing racial ideologies which impacted both the public and the Court's attitudes toward imperialism at the turn of the century.

The *Insular Cases* wrestled with the constitutional relationship between the United States and the "colonies" it conquered during the Spanish-American War of 1898, including the Philippines and Puerto Rico.[104] Although Hawaii was not annexed during the War, the case

101. Chin, *supra* note 14, at 647.

102. *See* Chin, *supra* note 11; Chin, *supra* note 14.

103. *See* Maltz, *supra* note 7.

104. JAMES W. ELY JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER: 1888-1910 (1995).

which grappled with its constitutional status is often included as well because it raised many of the same questions as the other *Insular Cases*.

In contrast to *Plessy*, which did not attract much attention when it was decided,[105] the *Insular Cases* received extensive publicity and incited fierce scholarly and public debate.[106] Previously, the United States' had acquired territories, California and Texas for example, with the implicit understanding that they would eventually become states and that their inhabitants would receive full constitutional rights.[107] The new territories, however, were not contiguous with the United States and were fully populated with races and cultures different from most of the people of the United States.[108] William Jennings Bryan raised opposition to imperialism as a major issue in the Presidential election of 1900, but lost to President William McKinley,[109] demonstrating that a majority of Americans supported the McKinley Administration's expansionist exploits abroad.

Broadly speaking, however, almost everyone agreed that affording the peoples of the conquered territories the full protection of the Bill of Rights and the possibility of American citizenship would inevitably lead to inept governance and anarchy.[110] After the perceived failure and corruption of the predominantly black governments under Reconstruction, most Americans deemed all non-Anglo Saxon races incapable of handling the responsibilities which citizenship in a republic entailed.[111] The supposed inability of the Chinese immigrants in America to assimilate simply confirmed these preconceptions. Not surprisingly, therefore, public opinion regarded the Chinese, Japanese and native inhabitants of Hawaii as "wholly unfit for self government."[112] In a naked allusion to the Chinese Exclusion Laws, one newspaper asked, "How can the United States admit the 20,000 Chinese residents of Hawaii to citizenship? How can we extend the invitation to these people to come into our fold while our present laws remain on the books?"[113]

Filipinos were similarly characterized as "a wholly different race of people from ours – Asiatics, Malays, negroes and mixed blood..."[114] that

105. PRZYBYSZEWSKI, *supra* note 10, at 95.

106. KERR, *supra* note 62, at 28.

107. ELY, *supra* note 104, at 174; *see also* Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY L. REV. 1, 8 (2004).

108. ELY, *supra* note 104, at 174.

109. YARBROUGH, *supra* note 10, at 96; WELCH, *supra* note 30, at 70.

110. ELY, *supra* note 104, at 174.

111. Many anti-imperialists supported granting full citizenship to the inhabitants of the Hawaiian Islands because they assumed it would motivate the United States to relinquish them. PRZYBYSZEWSKI, *supra* note 8, at 136. Southerners in particular feared that the territories would bring millions of new colored "dependents" who might even flood the borders. Indeed, racism could serve the ends of both imperialism and anti-imperialism. *See* DAVID W. BLIGHT, THE CIVIL WAR IN AMERICAN MEMORY, 353-354 (2001); *See also* LOVE, *supra note* 82.

112. Love, *supra* note 82, at 102.

113. *Id.* at 103.

114. PRZYBYSZEWSKI, *supra* note 10, at 136.

was incapable of assimilating or assuming the responsibilities of American citizenship.[115] William Howard Taft, one of Harlan's close friends, Chief Administrator for the Philippines and future President and Chief Justice, wrote to Harlan that the Filipinos "are in many respects nothing but grown up children" who could not handle the right to trial by jury because so few would be qualified to serve.[116] Instead, according to Taft, they required the colonization of up to 100 years before they would even realize the concept of Anglo-Saxon liberty.[117] These prejudices would have an unmistakable influence on the majority opinions in the *Insular Cases*.

The most important of the *Insular Cases*,[118] *Downes v. Bidwell*,[119] decided in 1901, concerned the issue of whether a duty levied on imports from Puerto Rico violated the constitutional provision that duties be "uniform throughout the United States."[120] However, everyone, including the justices themselves, realized that real issue to be determined was Congress's power to limit the civil and political rights of the territory's inhabitants.[121] If the Uniformity Clause did not apply to Puerto Rico, then it was likely that the rest of the Constitution did not apply as well.

Indeed, the Court decided that the full Constitution did not apply to the acquired territory. The decision of the Court in *Downes* was composed of three concurring opinions, two of which, Justice Brown's and Justice White's, are relevant to this discussion.[122] Justice Brown argued that Article IV, section 3 of the Constitution[123] confers upon Congress virtually unlimited power to govern the territories.[124] He emphasized that unless a constitutional provision specifically stated that it was enforceable anywhere under the jurisdiction of the United States (as the Thirteenth Amendment did) then the provision did not apply to a territory until it became a state. Justice White, meanwhile, argued that full Constitutional protections did not apply upon annexation of a territory; they only applied when the territory was "incorporated" by both houses of Congress into the United States.[125] Both White and Brown implied that certain "fundamental" protections of the Constitution may protect the inhabitants of all terri-

115. WELCH, *supra* note 30, at 103.

116. PRZYBYSZEWSKI, *supra* note 10, at 138.

117. *Id.* at 139.

118. Neuman, *supra* note 107, at 9.

119. 182 U.S. 244 (1901).

120. U.S. CONST. art. 1, § 8, cl. 1.

121. PRZYBYSZEWSKI, *supra* note 10, at 138.

122. *Downes*, 182 U.S. at 244, 287, 344.

123. U.S. CONST. art. IV, § 3, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

124. *Downes*, 182 U.S. at 285.

125. ELY, *supra* note 104, at 175-176. The specific legal doctrine of incorporation and the way in which Brown and White's opinions differed need not be elaborated here. For an in-depth examination of the difference between them, *see* Burnett, *infra* note 187.

tory annexed by the United States. Neither opinion, however, specifically limited Congress's power over the territories in any identifiable way.[126]

The underlying racist rationale behind the majority's decision was prominently articulated in both opinions. Brown, for example, believed that the inhabitants of the new territories should not receive the same constitutional treatment as inhabitants of previous territorial acquisitions because:

> It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quitted unnecessary in the annexation of contiguous territory inhabited only by people of the same race...[127]

Unless the Court allowed Congress to govern the territorial inhabitants without granting them citizenship and the full protection of the Constitution, "...it is doubtful whether Congress would ever assent to the annexation of territory... ."[128] White, like Brown, was concerned with the consequences of bestowing citizenship "on those absolutely unfit to receive it."[129] In the majority's view, American liberty and civilization could not expand across the globe unless Congress was freed from the constraints of very document that was created to protect that liberty.

In *Hawaii v. Mankichi*,[130] decided in 1903, the Court specifically distinguished between the "fundamental" and "non-fundamental" constitutional rights referred to in *Downes*. In *Mankichi*, a Japanese man was accused of murder in Hawaii shortly after American annexation of the Island.[131] The Annexation Treaty stipulated that all Hawaiian laws would remain in effect as long as they did not violate the Constitution.[132] Mankichi was tried and convicted under the Hawaiian Criminal Code that did not provide for a grand jury indictment and allowed the trial jury to convict with less than a unanimous vote.[133] The Court had to decide whether the Code satisfied the Treaty requirements.

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126. *Downes*, 182 U.S. at 286; *Downes*, 182 U.S. at 291. According to Justice Brown, constitutional natural rights included "the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government..." *Id.* at 282-283

127. *Id.* at 282.

128. *Id.* at 279-280.

129. *Id.* at 306. He also seemed particularly concerned that since the House did not have authority to make treaties, the body most directly accountable to the people (the 17th Amendment enacting direct election of senators had not been passed yet) would be deprived of the ability to decide whether or not the United States should accept "alien races" if territories were incorporated immediately upon annexation. *Id.* at 313-314.

130. 190 U.S. 197 (1903).

131. KERR, *supra* note 62, at 99.

132. *Mankichi*, 190 U.S. at 209.

133. *Id.* at 211.

Justice Brown's majority opinion[134] held that Congress had not intended to extend the full Constitution to Hawaii on annexation, only its "fundamental provisions"[135] which did not include the grand jury and unanimous verdict requirements.[136] Brown expanded on the racial theme he first developed in *Downes*;[137] the inherent character of the Anglo-Saxon race would ensure that it would always adhere to fundamental principles of justice:

> In fixing upon the proper construction to be given to this resolution, it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847 they had enjoyed the blessings of a civilized government, and a system of jurisprudence modeled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither *large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions.* Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come...[138]

Since right-thinking whites had written Hawaii's criminal laws, the grand jury and unanimous verdict requirements they decided to omit, by definition, were not "fundamental." Thus, they could be disregarded since they did not suit the "conditions of the Islands."

Finally, in *Dorr v. United States*,[139] decided in 1904, the Court denied a libel defendant accused during the American colonization of the Philippines a jury trial because it was not among the fundamental rights that accompanied United States jurisdiction around the globe. Justice Day, speaking this time for the majority, grounded his argument on his disrespect for the capacities of the Islands' inhabitants:

> ...that the President...was careful to reserve the right to trial by jury... was doubtless due to the fact that the civilized portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the Archipelago were wholly unfitted to exercise the right of trial by jury.[140]

The Court attempted to veil its racist logic behind a veneer of deference to the Spanish civil law system that had been established in the Philippines.[141] Yet, its true opinion unambiguously emerged a few paragraphs later when it declared that the nation simply could not extend the

134. Justice White again submitted a concurrence. *Id.* at 218.

135. KERR, *supra* note 62, at 99.

136. *Mankichi*, 190 U.S. at 217-218.

137. "There are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests." Downes v. Bidwell, 182 U.S. 244, 280 (1901).

138. *Id.* at 211-212 (emphasis added).

139. 195 U.S. 138 (1904).

140. *Id.* at 145.

141. Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI L. REV. 779, 795 (1992).

jury trial right to acquired territories "peopled by savages" without risking serious disturbance and injustice.[142]

In sum, the racist notions that the Anglo-Saxon race possessed an inherent capacity to understand and obey fundamental principles of justice, while the inhabitants of the territories were simply incapable of assuming the rights and responsibilities of republican government, profoundly influenced the majority opinions in the *Insular Cases*. The Bill of Rights, therefore, had to be reinterpreted and limited to reflect the racial composition of the new American empire.

## Justice Harlan's Views of Race in the Insular Cases

If Chin and Maltz's theses are correct and Harlan had a jurisprudential "blind spot" toward races other than the freed slaves, a prognosticator would confidently predict that he would have joined the majority's decisions in the *Insular Cases*. After all, his concurring opinion in *Wong Kim Ark*,[143] his approval of *Fong Yue Ting*[144] and his lectures and private correspondences seemed to indicate that he shared the view that the Chinese were unable to assimilate the values of republican government.[145] In addition, while Harlan deemed the freed slaves worthy of constitutional protections as a result of their loyal service in the Civil War, the *Insular Cases* were decided during and shortly following the conclusion of the bloody Filipino revolt against the American colonial government which killed 4200 American soldiers.[146] Finally, Harlan was a loyal member of the same political party as the imperialist President McKinley, and after an initial period of caution, wholeheartedly endorsed the Spanish-American War.[147]

Yet in both *Downes* and *Mankichi*, Harlan fully concurred in dissents written by Justice Fuller and joined by Justices Peckham and Brewer.[148] In each, Harlan wrote separately to emphasize his opposition to the majority's reasoning.[149] Moreover, in contrast to Fuller's dissents, which have been described as "dignified justification(s) for strict construction" that avoided the topic of race,[150] Harlan's dissents directly confronted the racist logic behind the majority opinions. Finally, even after Fuller, Peckham and Brewer acquiesced to the majority's opinion in *Dorr*,

142. *Dorr*, 195 U.S. at 148.

143. *See supra* notes 65-79 and accompanying text.

144. *See supra* notes 49-64 and accompanying text.

145. *See supra* notes 82-88 and accompanying text.

146. KERR, *supra* note 62, at 42. *Downes* was decided in 1901, *Dorr* was decided in 1904, the insurrection in the Philippines lasted until at least April, 1902.

147. PRZYBYSZEWSKI, *supra* note 10, at 127-128.

148. Downes v. Bidwell 182 U.S. 244, 347 (1901); Hawaii v. Mankichi, 190 U.S. 197, 221 (1903).

149. *Downes*, 182 U.S. at 375; *Mankichi*, 190 U.S. at 226-227.

150. KERR, *supra* note 62, at 42.

Harlan continued to dissent.[151] In fact, his dissent in *Dorr* may have been the Great Dissenter's most passionate.

Harlan premised his opinion in *Downes* on the idea that Congress could only exercise those powers which the people had granted to it in the written Constitution.[152] Necessarily then, that limitation extended anywhere Congress exercised its authority. "The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States..."[153] If the Court allowed Congress to exceed its powers in the territories, Harlan predicted the end of the "era of constitutional liberty guarded and protected by a written constitution" and the beginning of an era of "legislative absolutism."[154]

According to Justice Brown, the Anglo-Saxon race's inherent ability to uphold "fundamental" notions of justice curtailed the dangers that Congress would abuse its power over the inhabitants of the territories.[155] In response, Harlan argued that the framers wrote a Constitution which specifically prohibited Congress from violating fundamental principles precisely because they did not trust the Anglo-Saxon race's ability to either discern or obey such principles.[156] After, all, the English had violated those very "fundamental principles" when they subjugated the colonies prior to the Revolution:

> The [Framers] 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 had sought, by military force, to establish a government that could at will destroy the privileges that inhere in liberty. They believed that the establishment here of a government that could administer public affairs according to its will unrestrained by any fundamental law and without regard to the inherent rights of freemen, would be ruinous to the liberties of the people by exposing them to the oppressions of arbitrary power. Hence, the Constitution enumerates the powers which Congress and the other Departments may exercise.[157]

To Harlan, the written Constitution, not the Anglo-Saxon race, was the ultimate definer, provider and protector of fundamental liberty. Since its provisions applied to everyone, regardless of race and regardless of location, they applied to the inhabitants of the territories as well.

Harlan's opinion in *Mankichi* further articulated the manifest injustice which the colonial scheme perpetrated against the territorial inhabitants. In part Harlan grounded his argument in the Constitution's words—the Court could not distinguish between "fundamental and non-fundamental" constitutional rights since the framers did not distinguish between the two in the text of the Constitution or the Bill of Rights.[158]

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151. Dorr v. United States, 195 U.S. 138, 154 (1904).

152. *Downes*, 182 U.S. at 377.

153. *Id.* at 384.

154. *Id.* at 379.

155. *See supra* note 137-138 and accompanying text.

156. PRZYBYSZEWSKI, *supra* note 10, at 142.

157. *Downes*, 182 U.S. at 381.

158. Hawaii v. Mankichi, 190 U.S. 197, 243 (1903).

More significantly, Harlan also recognized that the majority's failure to guarantee Mankichi the full protection of the Constitution nourished the seeds of an even more invidious corrosion of democratic values:

> ...if the principles now announced should become firmly established, the time may not be far distant when, under the exactions of trade and commerce, and to gratify an ambition to become the dominant political power in all the earth, the United States will acquire territories in every direction, which are inhabited by human beings, over which territories, to be called "dependencies" or "outlying possessions," we will exercise absolute dominion, and whose inhabitants will be regarded as "subjects" or "dependent peoples," to be controlled as Congress may see fit, not as the Constitution requires, nor as the people governed may wish.[159]

The majority of the Court in the *Insular Cases* seemed to have no qualms about ignoring the text of the Constitution to allow the United States to create second class non-citizens of alien races without their consent. Harlan, however, recognized that a right to self-determination, to which all people were entitled, pervaded the language and spirit of the document.[160] In a republican government no race could be a "subject" of any other, no matter how compelling the justification.

In *Dorr*, Harlan, this time dissenting alone,[161] expressed his most explicit outrage at the racist logic of the majority opinions in the *Insular Cases*. He began by articulating his vision of a universal "color-blind" Constitution, whose "...guaranties for the protection of life, liberty and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the States composing the Union, or in any territory..."[162] In Harlan's view, the Constitution was the supreme law of the land. Since the Philippines were subject to the same authority as the States of the union, it was a part of that land.[163] The text of the Constitution, as he reasoned, unambiguously states that "all crimes, except impeachment" are to be tried by jury. That mandate was necessarily addressed to every one committing a crime punishable by the United States.[164] Yet the majority opinion, Harlan declared, effectively rewrote the Constitution to state that "The trial of all crimes, except in cases of impeachment, *and except where Filipinos are concerned,* shall be by jury."[165]

Harlan conceded that administration of trial by jury in the Philippines might be difficult. In his view, however, the greater danger to liberty resulted from the Court's departing from the text of the Constitution in order to facilitate current policy goals.[166] In language

159. *Id.* at 240.

160. *Id.* at 239; ("Thus will be engrafted upon our republican institutions, controlled by the supreme law of a written Constitution, a *colonial* system entirely foreign to the genius of our Government and abhorrent to the principles that underlie and pervade the Constitution.")

161. See, *supra* note 151.

162. Dorr v. United States, 195 U.S. 138, 154 (1904).

163. *Id.* at 155.

164. *Id.*

165. *Id.* at 156. (emphasis in the original)

166. *Id.* at 155.

which echoed the indignation he expressed in his dissent in *Plessy*,[167] Harlan excoriated the majority for reasoning "so obviously inconsistent with the Constitution that I cannot regard the judgment of the court otherwise than as an amendment of that instrument by judicial construction, when a different mode of amendment is expressly provided for."[168] Harlan found the majority's willingness to ignore the text of the Constitution "utterly revolting."[169]

### The Insular Cases and the "Color-Blind" Constitution

The contrast between Harlan's attitudes toward the inhabitants of the territories and his attitudes in the *Chinese Immigrant Cases* is striking.[170] In the latter, Harlan's assumptions that Asian races simply could not assimilate with American institutions justified a tortured interpretation of the text of the Constitution to deprive them of constitutional rights and equal treatment. Meanwhile, in the *Insular Cases*, Harlan argued that full constitutional protections should extend to the same race, regardless of their ability to assimilate into American institutions, regardless of their worthiness to receive them, regardless of the consequences. Moreover, in *Dorr*, he asserted that the opinion to the contrary was "utterly revolting."[171]

None of Harlan's biographers have adequately addressed this discrepancy. His two most recent biographers identify it without providing an adequate explanation.[172] This is most likely because an easy explana-

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167. As previously noted, Harlan compared the *Plessy* dissent to *Dred Scott*. Plessy v. Ferguson, 163 U.S. 537, 559 (1896). He also chastised the Court for failing to recognize that "[t]he thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done. *Id.* at 562.

168. *Dorr*, 195 U.S. at 155.

169. It should be noted that Harlan expressed the most concern with the proposition that under the majority's ruling, an American soldier, a citizen of the United States, would be denied the right to trial by jury if he were charged with a crime while stationed in the Philippines. *Id.* at 156-157.

170. It is possible to reconcile the cases on relatively technical grounds. Some have stated that Harlan's dissents in the *Insular Cases* advocated for "full citizenship for the 'alien races' of the noncontiguous territories...," YARBROUGH, *supra* note 10, at 200. It is not clear, however, that Harlan believed the people of the territories were immediately entitled to full citizenship. In none of the cases did Harlan explicitly state that the inhabitants of the territories were entitled to all the privileges of full citizens and he fully concurred in Fuller's dissent in *Downes* which specifically declined to decide the question of whether the inhabitants of the territories were entitled to citizenship. *See* Downes v. Bidwell, 182 U.S. 244, 365 (1901) (Fuller, J., dissenting). Even if Harlan did believe the inhabitants were entitled to full citizenship Congress could still withhold statehood from the territories indefinitely, thereby denying the territorial inhabitants the right to vote in federal elections indefinitely as well. Burnett, *infra* note 187, at 802. Therefore, one could argue that Harlan basically extended to the territorial inhabitants the same constitutional protections that Chinese non-citizens already in the United States possessed.

171. Dorr v. United States, 195 U.S. 138, 156 (1901).

172. Yarbrough, *supra* note 10, at 191-200. In her biography of Harlan, Przybyszewski seems to agree with Chin and Maltz's analysis that Harlan's jurisprudence and personal attitudes toward the Chinese demonstrate that he did not believe in some abstract ideal of

tion does not exist. There was a reason that one of those biographers entitled his work on Harlan *Judicial Enigma.*[173] Harlan's jurisprudence as well as his personal beliefs were not immune to contradictions, even when it came to the rights of freed slaves.[174] In fact, Harlan himself once remarked, quoting a line from Henry Clay, "Let it be said that I am right rather than consistent."[175]

The context in which Harlan made this statement, however, may reveal a clue as to why his opinions toward the Chinese immigrants and the territorial inhabitants diverged. Harlan spoke the line during a speech in 1871, in which he attempted to explain his conversion from a pro-slavery unionist before the Civil War to a supporter of black citizenship following it.[176] Harlan told the audience he was now convinced that, "the most perfect despotism that ever existed on this earth was the institution of African slavery" and he was delighted that blacks "... were now in possession of freedom and that freedom is secured by the [Thirteenth and Fourteenth Amendments]."[177] For Harlan the Civil War marked a genuine ideological transformation in which he concluded that the United States had a special mission to liberate black races subjugated by southern despotism and extend to them the equality it offered its white citizens.

It is possible that the Spanish-American War had a similar affect on Harlan's attitudes toward Asians. As Przybyszewski explained in her biography, Harlan believed that the Spanish-American War, like the Civil War before it, fulfilled America's divine prophecy to relieve "the burdens which have been imposed upon man by despotic governments"[178] throughout the hemisphere and then throughout the globe.[179] "This great Republic of ours... is likely to shape the destinies of Europe, and the far Eastern Countries and of the whole human race."[180]

Yet Harlan stressed an important component of the prophecy few other chose to–American expansion abroad entailed an expanded commit-

human equality. *See* PRZYBYSZEWSKI, *supra* note 10, at 121. Yet, she also asserts that Harlan believed that the distinguishing characteristic of Anglo-Saxons was their willingness to apply their system of rights and liberties to the non-white races, particularly those in the acquired territories. *Id.* at 124. She never explicitly explains why Harlan believed that Anglo Saxons had a responsibility to spread such values to the inhabitants of the Insular possessions while he assented to Congress's decision to subject Chinese within America's borders to expulsion and deny them access to citizenship. *Id.* at 118-146. She discusses Harlan's speeches on the Spanish-American War and notes that they stressed "... a less common theme, the importance of racial equality to the American mission" but she does not use the evidence to refute Chin's or Maltz's arguments that Harlan's sympathies did not extend to races other than the freed slaves. *Id.* at 132.

173. YARBROUGH, *supra* note 10.

174. *See supra* note 32; YARBROUGH, *supra* note 10, at viii-ix.

175. PRZYBYSZEWSKI, *supra* note 10, at 41.

176. *Id.* at 41.

177. *Id.*

178. *Id.* at 126.

179. PRZYBYSZEWSKI, supra note 10, at 133.

180. *Id.* at 127.

ment to racial equality. In a speech at the University of Pennsylvania entitled *James Wilson and the Formation of the Constitution*, Harlan attempted to explain the relationship between the Spanish-American War and his conception of the American mission. He declared that "This fair land is in a peculiar sense the home of freedom,... the freedom that takes account of man as man... and recognizes the right of all persons within its jurisdiction of whatever race, to the equal protection of the law in every matter affecting life, liberty and property."[181] He cited a 1774 pamphlet written by Wilson in which he declared that all men are by nature equal and free and emphasized that Wilson had meant precisely what he said, "*all* men, not some men, not men of any particular race or color but *all* men are by nature equal and free."[182] Later in the speech, he emphasized "for my own part, I believe that a destiny awaits America... and that in working out that destiny... humanity everywhere will be lifted up, and power and tyranny compelled to recognize the fact that 'God is no respecter of persons' and that He 'hath made of one blood all nations of men.'"[183]

Thus, the same man who had spoken so disparagingly of the Chinese before the Spanish-American War expressed a deep belief in the equality of all men during and following it. Perhaps then, for Harlan, the assertion of American power abroad clarified principles of universal racial equality which had eluded him before the War began. Indeed, for Harlan, equality for all races defined the essence of the American mission.

Harlan's willingness to articulate and extend the principle of racial equality from the freed slaves to the inhabitants of the territories is even more remarkable considering that most Anglo-Saxon Americans wanted to move in the exact opposite direction. As indicated earlier, at the time of the *Insular Cases*, white Americans lumped together all non-white races as incapable of assuming the responsibilities essential to citizens of republican government.[184] In fact, in the popular imagination, Filipinos were regarded as a combination of black, Asian and Malay races, and were often referred to as "Brown Men" or "niggers:"[185]

> It was not a coincidental misfortune of the Filipino to fall under American jurisdiction at the very time when the American black was suffering the climax of official segregation and statutory discrimination in the South and a reduction in political recognition and respect in all sections of the country. If the American-born black man was judged incapable and inferior, how much more "the Filipino nigger," for he was stunted, foreign and rebellious.[186]

In the *Origins of the New South*, C. Vann Woodward observed that "by 1898 [the North] was looking to Southern racial policy for national guidance in the new problems of imperialism resulting from the Spanish

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181. PRZYBYSZEWSKI, *supra* note 10, at 132.

182. *Id.* at 132. (emphasis in original)

183. *Id.* at 134.

184. *ee supra* note 111 and accompanying text.

185. WELCH, *supra* note 30, at 103.

186. *Id.* at 103.

[-American] war."[187] Indeed, the Anglos who wrote the criminal laws for Hawaii that Justice Brown upheld in *Hawaii v. Mankichi* were inspired by the Mississippi Constitution of 1891, which was renowned for its effectiveness in excluding blacks from the political process.[188] The *Insular Cases*, then, were a culmination of the Supreme Court's endorsement of racial subordination of all non-whites under an expanding United States territorial empire. As one scholar put it "[it was significant that *Downes* was decided] only five years after *Plessy v. Ferguson*... At the same moment that the former slaves and their descendants were stripped of full citizenship at home... [the nonwhite inhabitants of the territories]... [were] plac[ed]... outside the domain of the proper citizen..."[189] as well.

Justice Harlan was the only member of the Court who opposed the racist logic underlying both segregation and imperialism. As one of Harlan's biographers argued, "[T]o the student of Harlan's career, his opinions in the *Insular Cases* are fully consistent... with his opinions in the civil rights cases."[190] In Harlan's view, the values of the Constitution applied to all races under United States jurisdiction. "The island possessions were, to Harlan, America extended; there was no constitutional logic to a differentiation between the rights of citizens of Utah territory and those of the Philippines."[191]

Harlan's dissents in the *Insular Cases*, therefore, should reinforce his reputation as a prophetic defender of a "color-blind" Constitution. They demonstrate that he was willing to dissent alone in order to advocate for equal rights and treatment for Chinese, Japanese and Filipinos. In contrast to the arguments of Chin and Maltz, Harlan did not reserve the passion, eloquence, sympathy and sense of justice he expressed in *Plessy* to a single racial minority.

Why did Chin and Maltz fail to mention the *Insular Cases* in their analysis of Harlan's jurisprudence toward races other than African Americans? Although the *Insular Cases* languished in relative obscurity until recently[192] it is likely that both Chin and Maltz were aware of them when they wrote their articles. Indeed, Chin co-authored a brief excerpt on the *Insular Cases* for the 2003 edition of the *Dictionary of American History*.[193]

Most likely, in their desire to make as definitive a statement as possible, both authors simply ignored an important if obscure piece of contrary

187. Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 878 (2005).

188. NOEL J. KENT, HAWAII: ISLANDS UNDER THE INFLUENCE 64 (1993).

189. AMY KAPLAN, THE ANARCHY OF EMPIRE IN THE MAKING OF U.S. CULTURE 9 (2002).

190. BETH, *supra* note 63, at 256.

191. *Id.*

192. Bartholomew H. Sparrow, *The Public Response to Controversial Supreme Court Decisions: The Insular Cases*, 30 J. S. CT. HIST. 197, 209-210 (2005).

193. Gabriel Chin and Diana Yoon, *Insular Cases*, DICTIONARY OF AMERICAN HISTORY, 367 (Stanley I. Kutler ed., 3d ed. 2003).

information. Both Chin and Maltz wrote their articles in order to make a bold statement about a judicial icon. As Chin put it, "the point [of his articles] was... to suggest that Harlan's reputation has been 'whitewashed' by scholars and courts who ignored the complexities of Harlan's words and voting record."[194] Similarly, Maltz argued that "[t]his record demonstrates that modern commentators have often overstated Harlan's distaste for race based classifications."[195] The power of their argument would have been significantly diluted if they had included an analysis of Harlan's opinions in the *Insular Cases*.

Moreover, it is important to emphasize that the existence of the *Insular Cases* does not disprove Chin and Maltz's argument. Harlan's seemingly racist reference to the Chinese in *Plessy* as well as his decisions in the *Chinese Immigrant Cases* tarnishes, to some extent, his reputation as the prophetic defender of the "color-blind" Constitution. Yet their failure to mention the *Insular Cases* in their articles neglected and obscured a vital component of Harlan's views on race, as well as his jurisprudential legacy. Indeed, if we want to identify a Harlan opinion which most unambiguously articulates the concept of a universal "color-blind" Constitution and the one most relevant as a moral guide to our own time, we should look to the *Insular Cases*, not to *Plessy*.

## PART III

### Harlan's Dissents in the Insular Cases, The War on Terror and the Geographic Scope of Constitutional Rights

The purpose of the first two parts of this article is to reaffirm Harlan's position as a moral compass and prophet on race, perhaps the most important issue with which the Court grappled in the twentieth century. This section suggests that Harlan may also prove to be a moral compass and prophet on the key issues occupying the Supreme Court's agenda in the twenty-first century – the War on Terror. Just as future generations vindicated so many of Harlan's other opinions, *Rasul v Bush*,[196] may have begun the vindication of his dissents in the *Insular Cases*, which asserted that the Constitution restricts the government's authority over foreigners in foreign territory to the same extent as it limits its power over anyone within the United States.

In *Rasul v. Bush*, the Court decided that the federal courts have jurisdiction to consider the legality of the detention of foreign nationals at the naval base at Guantanamo Bay, Cuba who were captured abroad during hostilities against the Taliban.[197] According to the lease, though technically under the "ultimate sovereignty" of Cuba, the United States exercis-

194. Chin, *supra* note 14, at 629-630.

195. Maltz, *supra* note 7, at 1015.

196. Rasul v. Bush, 542 U.S. 466 (2004).

197. *Id.* at 470.

es "complete jurisdiction and control" over the naval base for as long as it wants.[198] The ambiguous terms of the agreement created what has been called a "legal black hole,"[199] in which the United States government interrogated detainees captured during the War on Terror without affording them any of the constitutional rights available to criminal suspects or enemy combatants held on the mainland.[200]

Most of the opinions in *Rasul* discussed issues relating to jurisdiction and habeus corpus[201] with Justice Stevens's majority opinion concluding, over Justice Scalia's dissent,[202] that the terms of the lease effectively subjected the base to American authority. At the end of his opinion, however, Stevens seemed to assert an even bolder claim - since the base was subject the American jurisdiction, the Constitution necessarily protected the detainees.[203] As he put it in a footnote:

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'[204]

Even more provocatively, Stevens suggested that the very fact that petitioners were being held in *federal custody* entitled them to constitutional protections.[205] In other words, it is possible that the Constitution not only applies to all *territory* under United States control, but to every *person* as well, regardless of exact geographical spot in which the United States exercises its authority over that person.

Stevens's opinion echoed the core of Harlan's opinions in the *Insular Cases* - even in times of crisis, the Constitution constrains the power of the United States government wherever it exercises jurisdiction and authority. As Harlan put it in *Downes*, "The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the Government in order to meet what some may suppose to be extraordinary emergencies."[206]

Moreover, Stevens's suggestion that the Constitution protects any person in federal custody, regardless of location or country of origin, further adopts Harlan's position in the *Insular Cases*. As Harlan argued in *Dorr*, "[The founders] took care to say that the Constitution was the

198. *Id.* at 471.

199. Neuman, *supra* note 107, at 3.

200. *Id.*

201. Rasul v. Bush 542 U.S. 466, 470-483 (2004).

202. *Id.* at 488-506 (Scalia, J., dissenting).

203. *Id.* at 481.

204. *Id.* at 483 n.15.

205. *Id.* at 483.

206. Downes v. Bidwell, 182 U.S. 244, 385 (1901).

supreme law—supreme everywhere, at all times, and over all persons who are subject to the authority of the United States."[207]

Harlan's position in the *Insular Cases*, according to one scholar, asserted that "...constitutional protections were triggered not by geography, nor even necessarily by citizenship, but rather by the simple exercise of United States power."[208] In other words, the Constitution does not protect only states or territories or citizens. Instead, it has no boundaries; it constrains the government wherever it acts and over whomever it acts. The Court in *Rasul* may have fully echoed Harlan's dissents in the *Insular Cases*.

Like many great Supreme Court decisions, *Rasul* left many questions unanswered. Though the Constitution may apply to Guantanamo, it is not clear precisely what rights the detainees are entitled to.[209] Part of the answer to this question will depend on whether they are defined as "enemy combatants," criminals or prisoners of war.[210] Before September 11th, suspects accused of acts of terrorism or attempted acts of terrorism against the United States were charged as criminals and the defendants received full constitutional rights.[211] It is unclear the extent to which that doctrine remains after September 11th.[212]

The Court will thus continue to struggle with the legal issues raised by the War on Terror. As it does, it will hopefully glean guidance from the vision Justice Harlan articulated in the *Insular Cases*. Justice Harlan had a preternatural ability to predict how future generations would interpret the values articulated in the Constitution.[213] Most prominently, the *Plessy* dissent glimpsed the moral truth that inspired the long and difficult struggle against desegregation. Similarly, Harlan's dissents in the *Insular Cases* glimpsed the moral values that should guide us as we wage the War on Terror:

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207. Dorr v. United States, 195 U.S. 138, 156 (1904).

208. Kermit Roosevelt III, *Current Debates in the Conflict of Laws: Application of the Constitution to Guantanamo Bay: Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2036 (2005).

209. *Id.* at 2018.

210. Although entitled to due process, enemy combatants probably receive fewer constitutional protections than ordinary criminals. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533-540. An enemy combatant has not been exactly classified and it is not clear whether someone accused of acts of terrorism against the United States could be so classified. For purposes of the decision in *Hamdi*, an enemy combatant was defined as an individual who, the government alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States" there. Id. at 516. It is not clear, of course, whether the Guantanamo prisoners were detained because they were thought to be complicit in acts of terrorism or because they were engaged in armed conflict against the United States in Afghanistan.

211. Kim Lane Scheppele, *Terrorism and the Constitution: Civil Liberties in a New America: Law in a Time of Emergency: States of Exceptions and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1024-1026 (2004).

212. *See Hamdi*, 542 U.S. 507.

213. *See supra* note 34 and accompanying text.

> The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued... The meaning of the Constitution cannot depend upon accidental circumstances arising out of the products of other countries or of this country. We cannot violate the Constitution in order to serve particular interests in our own or in foreign lands.[214]

Of course, a single murder defendant in Hawaii or the Philippines does not threaten the United States in the same way as a shadowy, worldwide terrorist conspiracy that has proven capable of committing mass murder on American soil. Nevertheless, in his dissents in *the Insular Cases*, delivered during and after the long, bloody, savage war to subdue the Filipino rebellion against United States colonial rule, Harlan announced that the values articulated in the Constitution do not change in order to meet the needs of emergency situations, wherever they occur.[215] Any time America violated those ideals, it threatened the very foundations of its republican government.[216] As America again asserts it power abroad to fight the War on Terror and occupy distant lands, we would do well to remember Justice Harlan's vision—the more tempting it becomes to ignore constitutional guarantees, the more important it is that we preserve them.

214. Downes v. Bidwell, 182 U.S. 244, 385.

215. *See* WELCH, *supra* note 30, at 40-42.

216. Hawaii v. Mankichi, 190 U.S. 197, 239 (1903); "Thus will be engrafted upon our republican institutions, controlled by the supreme law of a written Constitution, a *colonial* system entirely foreign to the genius of our Government and abhorrent to the principles that underlie and pervade the Constitution."