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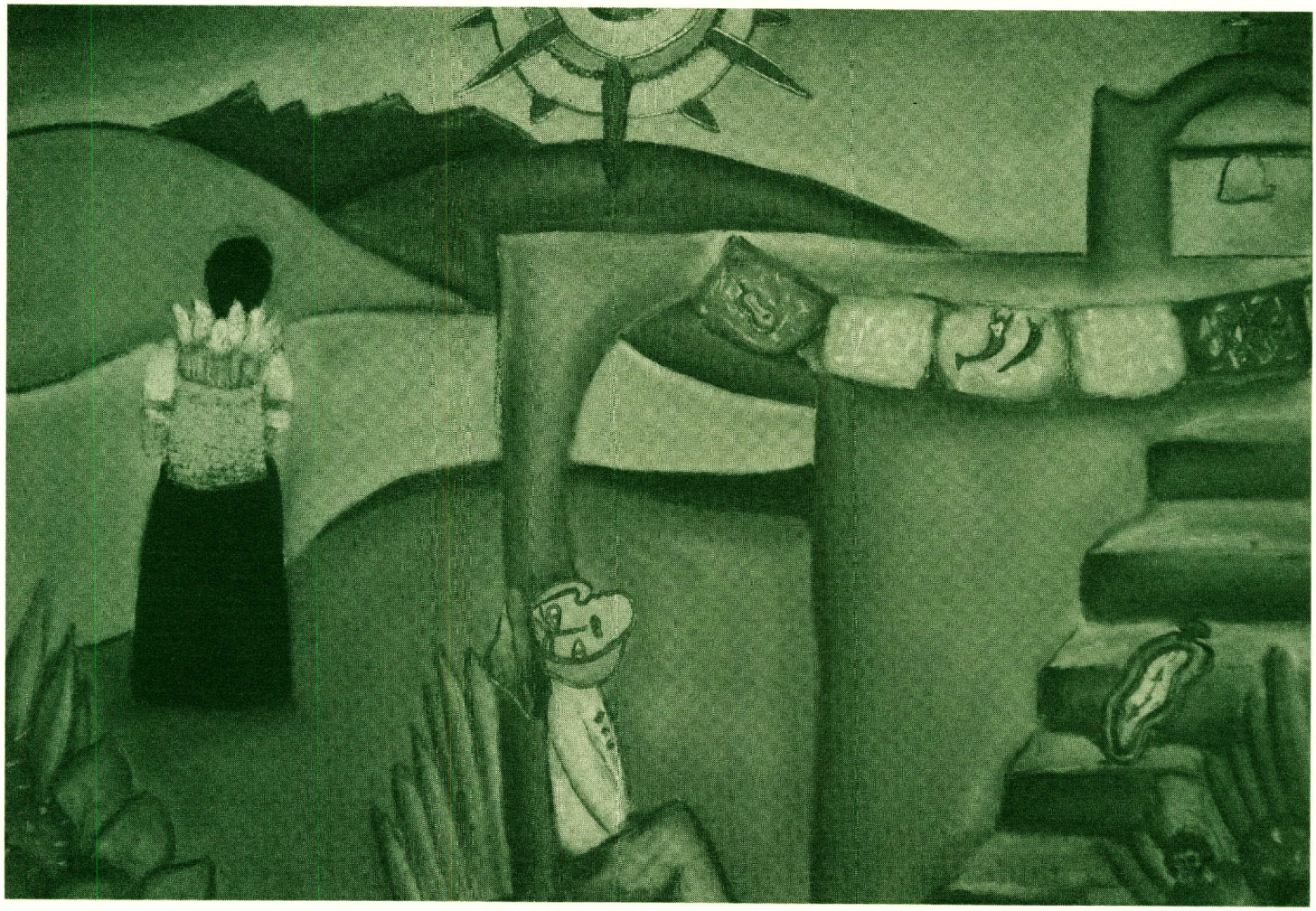

Maureen Greenan

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ARTICLE

THE LEGAL STATUS OF PUERTO RICO AND THE INSTITUTIONAL REQUIREMENTS OF REPUBLICANISM

JOEL COLÓN-RÍOS*

MARTÍN HEVIA**

SUMMARY

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The Federal Government may relinquish United States sovereignty by granting independence or ceding the territory [of Puerto Rico] to another nation; or it may, as the Constitution provides, admit the territory as a State, thus making the Territory Clause inapplicable.

Report by the U.S. President's Task Force on Puerto Rico's Status, December 2005.

I. INTRODUCTION

Puerto Rico is a colony that formally consented to colonial rule.[1] By saying that Puerto Rico *is* a colony, we mean two different and yet interrelated things. First, Puerto Rico is legally and politically subordinated to a different country. Since 1898, all U.S. laws apply with full force in the island, though Puerto Ricans do not have the right to vote in U.S. Presidential Elections and do not elect any voting representative to the U.S. Congress. Furthermore, Puerto Rico's legal system does not provide any means to terminate the aforementioned relation of subordination. The amendment clause of the Constitution of the Commonwealth of Puerto Rico prohibits any amendment incompatible with the current juridico-political relationship between the island and the U.S. Second, by saying that Puerto Rico *formally consented* to colonial rule, we mean that its electorate ratified the juridical arrangement described above in a series of referendums.[2]

It is clear that the relationship between Puerto Rico and the United States is problematic from the point of view of representative democracy. It is difficult to understand how a juridical arrangement in which a non-elected legislative assembly routinely creates civil and criminal laws (adopted, of course, in English; a language that the majority of the population does not understand) that are applied by a non-elected executive may be justified from a democratic perspective. In light of this, it is striking that Puerto Rico's juridical order receives little if any attention in contemporary U.S. constitutional theory, which has mostly treated the case of Puerto Rico as a curious but unimportant anomaly in an otherwise democratic polity; therefore undeserving serious normative academic consideration.[3] In this paper, we want to suggest that there is a deep problem with this

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1. Although some decades ago it was still a sort of sacrilege to identify Puerto Rico as a colony among some circles in the island, the epithet has become more and more common in Puerto Rican political culture (even among those that favor an 'enhanced' Commonwealth status). *See, e.g.*, PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO 106 (New York Univ. Press 2004) and JOSÉ TRÍAS-MONJE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 103 (1997).

2. The dubious democratic legitimacy of such referendums is a whole different matter, which is out of the scope of this paper. For a discussion, *see* Joel I. Colón-Ríos, *Reconstituir a Puerto Rico*, 67 REV. COL. ABOGADOS 109 (2006).

3. There are, of course, important exceptions. *See generally* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (containing articles which discuss this subject); *see also* Gary Lawson & Robert Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123 (2009).

juridical arrangement and we propose to address it from the perspective of an old tradition in political philosophy: republicanism.[4]

The republican tradition developed in Rome, where Cicero would emphasize how the Roman citizens were not subject to the will of anyone.[5] This thinking had also a great impact in the Italian cities of the Renaissance like Florence and Venice where the writings of Machiavelli were popular.[6] The republican ideals were used in the commonwealth tradition of the 17th century by the English, who thought that both the King and the people could live under the same law.[7] Finally, the "Founding Fathers" of the U.S. Constitution were republicans as well: they thought that it was not fair to be subject to the whims of a foreign assembly, that is, the British Parliament.[8] All of these republicans share the same central commitment: the greatest political evil is domination and, consequently, institutions should be organized in a way that guarantees that citizens would not be dependent on the whims of anyone else.

In this paper we will consider the juridical relationship between Puerto Rico and the United States from a republican perspective. In the first part of the essay, we provide a historical background of the juridical relationship at issue. With this historical background, we intend to show how the relationship developed and how it is currently structured, and not merely to provide an account of what courts and politicians have said about it. We will then discuss some of the main themes in contemporary republicanism, and, finally, we will analyze Puerto Rico's current relationship with the United States in light of the insights provided by republican theory.

II. A BRIEF HISTORY OF U.S. – PUERTO RICO JURIDICAL RELATIONSHIP

In April 25, 1898, the United States government issued a declaration of war against Spain. The resulting conflict was very brief, and it came officially to an end with the signing of the Treaty

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4. In the last two decades or so, groundbreaking works on republicanism have been published. Those works, in turn, have led to a revival of republicanism in political philosophy and history. *See generally* PHILLIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997); QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998); JOHN GREVILLE AGARD POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (2001). In this article, we will follow Pettit's account. His account is, perhaps, the less demanding account of republicanism, that is, it represents the minimum requirements that are to be present in a republican polity. If so, our point would be that, even under that "minimal" account of republicanism, the current legal status of Puerto Rico fails to satisfy those requirements.

5. *See* CICERO, ON DUTIES 92-97 (M.T. Griffin et al. eds., Cambridge Univ. Press 1991); *See generally* CICERO, SELECTED LETTERS (OUP Oxford 2008).

6. *See generally* NICHOLAS MACHIAVELLI, THE DISCOURSES (Bernard Crick et al. eds., 5th ed. 2003) (discussing the conditions in Rome and their effect on the creation of the Republic).

7. *See* JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS (J.G.A. Pocock ed., 1992).

8. *See* THE FEDERALIST PAPERS (Clinton Rossiter, ed., 1961).

of Paris in December of that same year.[9] The 'splendid little war,' as the Spanish American War was labeled, marked the beginnings of what can be identified as the imperial era of U.S. history.[10] On July 25th, several months before the signing of the Treaty of Paris, United States forces invaded the island of Puerto Rico. The American forces were under the leadership of General Nelson Miles, who issued the following proclamation:

> In the prosecution of war against the kingdom of Spain by the people of the United States, in the cause of liberty, justice and humanity, its military forces have come to occupy the island of Porto Rico. They come bearing the banner of freedom, inspired by noble purposes. . . .They bring you the fostering arms of a free people, whose greatest power is justice and humanity to all living within their fold. . . .They have come not to make war on the people of the country, who for centuries have been oppressed; but, on the contrary, to bring protection, not only to yourselves, but to your property, promote your prosperity and bestow the immunities and blessings of our enlightenment and liberal institutions of government. . . .[11]

Through the Treaty of Paris, the United States acquired Puerto Rico and, for all practical effects, Cuba; the last of Spain's colonies in the Caribbean. The war trumped the process that started in 1897, when Spain granted a special Autonomic Charter[12] to both islands that would have probably lead to independence. The Treaty of Paris was heavily attacked by Puerto Rican lawyers. One of the most interesting of those attacks was that of the brothers Juan and Salvador Perea. The Treaty of Paris, they argued during the 1930s, lacked a licit object and was therefore invalid.[13] For these jurists, non-sovereign but politically organized Nations were not susceptible of being legally transferred among states.[14]

The acquisition of new territories provoked an intense debate in American legal and political circles.[15] It was claimed, for example, that the new territories were different to those

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9. Treaty of Paris, U.S.-Spain, December 10, 1898, 30 Stat. 1754, T.S. No. 343.

10. *See e.g.,* Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 226 (1996).

11. Annual Report of the Major General Commanding the Army, Nelson A. Miles, Nov. 5, 1898, Messages, 1898-1899, 31-32.

12. These special charters granted 'self-government' to the islands of Cuba and Puerto Rico. For an examination of these charters, *see* EDA MILAGROS BURGOS MALAVÉ, GÉNESIS Y PRÁXIS DE LA CARTA AUTONÓMICA DE 1897 EN PUERTO RICO (1997).

13. *See generally* JUAN AUGUSTO PEREA & SALVADOR PEREA, LA CIENCIA JURÍDICA Y LA CESIÓN DE PUERTO RICO: ESQUEMA DE UNA DOCTRINA (1980).

14. Quoted in Juan Mari Bras, "Urge una Definición Jurídica del Status Internacional de Puerto Rico", *Ponencia ante la Confederación de la Federación Interamericana de Abogados,* (San Juan, Puerto Rico 1994).

15. *See, e,g.*, Charles C. Langdell, *Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); Abbot Lawrence Lowell, *Status of Our New Possessions - A Third View*, 13 HARV. L. REV. 155 (1899).

previously incorporated by the United States: they were far off, not contiguous to the continent, densely populated, and inhabited by alien peoples "untrained in the arts of representative government."[16] Because the peoples of the territories would never be assimilated into the American culture, it was argued, the new territories should be relinquished.[17] Some American jurists claimed that the United States could not constitutionally acquire territories and govern them as colonies; that the U.S. constitution would extend to these territories *ex proprio vigore*.[18] These positions did not prevail.

In 1900, the United States approved the Foraker Act[19], which replaced the military regime[20] that was installed after the invasion with a civil government, and represented 'the end' of the debate regarding the new territories. The Foraker Act was premised on the idea that the U.S. could constitutionally acquire territories and govern them permanently as dependencies.[21] This Act still contains the statutory basis for the juridical-relationship between Puerto Rico and the United States.[22] Its Section 14, which reads "[T]he statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico[23] as in the United States"[24], is still applicable to Puerto Rico and it exemplifies the undemocratic character of U.S.-Puerto Rico juridical relations. In practice, and regardless of the mysterious phrase "not locally inapplicable", that sections means that every single

16. Rivera, *supra* note 11, at 237-38.

17. *Id.* at 238.

18. See Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the Unisted States of Island Territory,* 12 HARV. L. REV. 393 (1899).

19. Foraker Act, 31 Stat. 77 (1900).

20. After occupying the island in 1898, the United States established the Provisional Court for the Department of Puerto Rico. The court was constituted by three American judges, appointed by the President of the United States. The Provisional Court for the Department of Puerto Rico served as the "judicial branch" of the military regime that the U.S. installed in 1898. This court would later become the United States Court for the District of Puerto Rico and currently operates in the island, now integrated in its entirety by Puerto Rican judges appointed by the President of the United States. Rivera, *supra* note 11, at 234.

21. *Id.* at 240.

22. Professor Rivera Ramos offers an excellent and succinct description of the legislative scope of the Foraker Act: "This law provided for a civilian Governor, an Executive Council, invested with legislative and executive functions, and a House of Delegates, which would exercise legislative powers over vaguely defined local matters ("all matters of a legislative character not locally inapplicable"), including the power to modify and repeal any laws then in existence in Puerto Rico. The United States Congress retained the power to annul the acts of the Puerto Rican legislature. The law vested the judicial power in the courts and tribunals already established by the military governors. The members of the House of Delegates would be elected by qualified voters residing in the Island; but the Governor, the members of the Executive Council and the Justices of the Supreme Court were to be appointed by the President of the United States. Only five of the eleven members of the Executive Council had to be native inhabitants of Puerto Rico." *Id.* at 234.

23. The island of Puerto Rico was officially named 'Porto Rico' by the U.S. forces shortly after occupation. In the 1930s the name was changed again to Puerto Rico. The altered spelling is significant, as it served the purpose of 'adjusting' the Spanish name of Puerto Rico to English pronunciation. *See Id.* at 249, 306.

24. Foraker Act, *supra* note 21, at Section 14.

law approved by the U.S. Congress and signed by the U.S. President apply in Puerto Rico.

A. The Insular Cases

Even after the passage of the Foraker Act, the international status of Puerto Rico was uncertain. That question was 'clarified' by the Supreme Court of the United States in a series of decisions rendered from 1901 to 1922. Those decisions are usually known as "the Insular Cases."[25] These cases have been the object of many discussions and controversies.[26] Our purpose here is not to engage in a detailed analysis but simply to provide a general account of what they decided. As Rivera Ramos explains, the issues discussed in the Insular Cases can be summarized in the following questions: (1) What was the status of the new territories?; (2) How much power did Congress enjoy in their governance?; and (3) What were the rights of their inhabitants?[27] To answer the first of those questions, the U.S. Supreme Court had to develop a new theory and a new category in American constitutional discourse: the theory of incorporation and the category of the unincorporated territory.[28] An 'unincorporated territory,' the legal category under which Puerto Rico still falls, was defined by the Court as a territory that belongs to, but is not part of the United States.[29]

According to Justice White's concurring opinion (which was later adopted by the court) those territories were 'foreign in a domestic sense'.[30] Incorporated territories, on the other hand, are those that are *part* of the United States and destined to become States of the Union.[31] The rationale behind the category of the 'unincorporated territory' provides the answer to the second and third

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25. The designation Insular Cases originally included a group of nine decisions rendered in 1901, but it has been extended to include another set of cases decided from 1903 to 1914 and one decided in 1922, all dealing with related issues. The cases are the following: *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Crossman v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York and Porto Rico Stemship Company*, 182 U.S. 392 (1901); *Dooley v. United States* (*Dooley II*), 183 U.S. 151 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Hawaii v. Manchiki*, 190 U.S. 197 (1903); *Gonzales v. Williams*, 192 U.S. 1 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Mendezona v. United States*, 195 U.S. 158 (1904); *Rassmussen v. United States*, 197 U.S. 516 (1905); *Trono v. United States*, 199 U.S. 521 (1905); *Grafton v. United States*, 206 U.S. 333 (1907); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Kopel v. Bingham*, 211 U.S. 468 (1909); *Dowdell v. United States*, 221 U.S. 325 (1911); *Ochoa v. Hernandez*, 230 U.S. 139 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

26. For an overview, *see generally* RAÚL SERRANO GEYLS, DERECHO CONSTITUCIONAL DE ESTADOS UNIDOS Y PUERTO RICO (1997).

27. Rivera, *supra* note 11, at 242.

28. Efrén Rivera Ramos, *Deconstructing Colonialism: The 'Unincorporated Territory' as a Category of Domination*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 104, 105 (Christina Duffy Burnett & Burke Marshall eds., Duke University Press 2001).

29. *See Downes*, 182 U.S. 244; *Dorr*, 195 U.S. 138 .

30. *Downes,* 182 U.S. at 341-342. Justice White's concurring opinion was unanimously adopted by the U.S. Supreme Court in *Balzac*, 258 U.S. at 305.

31. *See e.g. Balzac,* 258 U.S. at 311.

questions posed above. According to the Court, Congress holds 'plenary powers' over unincorporated territories, subject only to unspecified 'fundamental limitations in favor of personal rights' (in contrast, incorporated territories enjoyed the full protection of the U.S. Constitution).[32] This power to govern territories was seen as emanating from the country's inherent right to acquire territory, the Territorial Clause of the U.S. Constitution, the treaty-making power, and the power to conduct war.[33] With the creation of the category of the 'unincorporated territory', the U.S. Supreme Court sanctioned the colonial condition of Puerto Rico.

In 1917, the U.S. Congress adopted the Jones Act and the question of Puerto Rico's relationship with its metropolis ended again before the U.S. Supreme Court.[34] The Jones Act modified the internal structure of the government of Puerto Rico: it created a bicameral legislature that would be elected by popular vote. It also contained a bill of rights. However, it retained most provisions of the Foraker Act, including its aforementioned Section 9. The Jones Act made implicit reference to the jurisprudence of the Insular Cases. Its preamble reads as follows: "[T]he provisions of this Act shall apply to the island of Porto Rico and to the adjacent islands *belonging* to the United States. . ."[35] (emphasis added).

The most notable aspect of the Jones Act, however, was the extension of U.S. citizenship to all Puerto Ricans. The Act provided that those who desired to retain Puerto Rican citizenship could issue a sworn declaration before the district court.[36] Over two hundred Puerto Ricans issued the sworn declaration.[37] The number is surprisingly high given the procedural complications of issuing the declaration, the high percentage of illiteracy in the island, and the fact that retaining the Puerto Rican citizenship meant to put oneself in a sort of juridical limbo (to begin with, one would lose the right to vote).[38]

The extension of U.S. citizenship to Puerto Ricans posed again the question of Puerto Rico as an unincorporated territory. In the early Insular Cases it was suggested that one important

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32. *See Id.* at 312-13.

33. *See id.* at 305.

34. Jones Act, ch.145, 39 Stat. 951 (1917).

35. *Id.* at § 1.

36. "[A]ny person hereinbefore described may retain his present political status by making a declaration, under oath, of his decision to do so within six months of the taking effect of this Act before the district court in the district in which he resides, the declaration to be in form as follows: 'I, _____, being duly sworn, hereby declare my intention not to become a citizen of the United States as provided in the Act of Congress conferring United States citizenship upon citizens of Porto Rico and certain natives permanently residing in the island." *Id.* at § 5.

37. Raúl Serrano Geyls, *The Territorial Status of Puerto Rico and its Effects on the Political Future of the Island*, 39 REV. JUR. U.I.P.R. 13, 60 (2004).

38. Section 35 of the Jones Act stated: "Thereafter voters shall be citizens of the United States..." As Rivera Ramos has noted, rejecting U.S. citizenship meant being proscribed from any form of official political life in the island. *See* EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 183 (2001).

indicator of whether a territory had been incorporated would be the extension of U.S. citizenship to its 'inhabitants'. That question was definitely settled in 1922, when the U.S. Supreme Court issued its opinion in *Balzac v. People of Porto Rico*,[39] the last of the Insular Cases. Mr. Balzac was an editor of a Spanish language newspaper in Puerto Rico who had been condemned to serve a jail sentence for certain comments alluding to the American Governor of the island that were considered libelous by the government.[40] Under the applicable Puerto Rican law, Balzac did not have the right to a trial by jury because his offense (libel) was classified as a misdemeanor. Balzac argued that he was entitled to a jury under the Sixth Amendment of the U.S. Constitution.[41] The majority opinion in *Balzac* was written by Chief Justice Taft, former President of the United States.[42]

According to Taft, the question before the court was whether the U.S. Congress had enacted legislation incorporating Puerto Rico into the U.S. after the Foraker Act was adopted in 1900. Justice Taft noted that the Jones Act did not indicate by its title that its purpose was to incorporate the island and that it did not contain any clause which declared such purpose or effect: "Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by a plain declaration, and would not have left it to mere inference."[43] By that statement, Justice Taft was in fact requiring an express declaration of incorporation, contrary to what the Court had suggested in earlier decisions.[44] Justice Taft also pointed to the fact that the Jones Act included a bill of rights which contained many of the rights guaranteed by the U.S. Constitution but excluded the right to a trial by jury in civil and criminal cases. If it had been the intention of the Congress to incorporate Puerto Rico with the passage of the Jones Act, which would make applicable the U.S. Bill of Rights to Puerto Rico *ex proprio vigore*, he argued, why was it thought necessary to create for the island a bill of rights and to carefully exclude the right to trial by jury?[45]

Regarding the most important provision of the Jones Act, that is, the extension of U.S. citizenship to Puerto Ricans, and in which Balzac based its allegations, Justice Taft expressed that conferring citizenship was entirely consistent with non-incorporation. According to Taft, such extension only had the purpose of putting Puerto Ricans ". . . .on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper, and there without

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39. *Balzac*, *supra* note 27 at 298.
40. Rivera, *supra* note 11, at 265.
41. *Id.*
42. *Id.*
43. *Balzac*, 258 U.S. at 306.
44. *See e.g. Downes*, 182 U.S. at 287-344 (White, J., concurring).
45. *See Balzac*, 258 U.S. at 306.

naturalization enjoy all political and other rights."[46] And in one of those curious instances in which courts engage in interesting historical interpretations, Justice Taft added: "It became a yearning of the Porto Ricans to be American citizens, and this Act gave them the boon" (in fact, in 1914 the House of Delegates -the only elected popularly body in the island at the time- expressed to Congress its opposition to U.S. citizenship).[47]

The importance of the theory of incorporation lies in its relevance for understanding the way in which the United States juridically constructed its relationship with Puerto Rico. But the real problem, from the perspective of Puerto Rico, was the undemocratic character of such relationship. That is, even while Puerto Ricans did not have the right to vote neither for the U.S. legislators that enacted federal laws nor for the President that executed them (and appointed the judges that interpreted them) the fact is that hundreds of federal laws had direct application on their lives. In addition, their internal government was headed by non-elected American governors, appointed by the President of the United States and who spoke in a foreign language. The problem, then, was not the application (or lack of application) of the United States Constitution to Puerto Rico, but the absence of self-government and the legalization of colonialism that took place in the Insular Cases.

B. The Adoption of the Constitution and the Creation of the 'Commonwealth'

The decades that followed *Balzac* were characterized by political unrest in Puerto Rico. The Great Depression radicalized part of the then growing independence movement (which by the early 1940s' extended to the leadership of the largest party of the island, the Popular Democratic Party). On July 4th, 1946, the Puerto Rican legislature adopted a bill providing for a referendum in which Puerto Ricans would be allowed to express, for the first time in history, about their political status.[48] Driven in part by the high probability that the independence option would receive a majority of the votes, the U.S. appointed Governor Rexford G. Tugwell vetoed the bill.[49] Even though the Puerto Rican legislature adopted the bill again by the two thirds majority in order to overcome the Governor's veto, U.S. President Harry Truman, exercising the powers given to him by the Jones

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46. *Id.* at 311.

47. The Jones Act was adopted against the will of the House of Delegates -the only elected body created by the Foraker Act- and with the opposition of the Resident Commissioner –the only elected (but non-voting) representative of Puerto Rico in the U.S. Congress. *See, e.g.*, RONALD FERNÁNDEZ, THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY (Westport: Praeger Publishers, 1992). *Balzac,* 258 U.S. at 308. In fact, in 1914 the House of Delegates (the only elected body at the time) expressed to Congress its opposition to U.S. citizenship. Moreover, that same year Luis Muñoz-Rivera, resident commissioner for Puerto Rico in Washington and leader of the Union Party (who held an electoral majority and whose program proclaimed independence as its 'supreme ideal'), expressed his opposition about U.S. citizenship arguing that it could compromise the island's possibilities of becoming independent. Rivera, *supra* note 40, at 152. *See also* FERNANDO PICÓ, HISTORIA GENERAL DE PUERTO RICO 243 (1988).

48. IVONNE ACOSTA, LA MORDAZA: PUERTO RICO 1948-1957 32-33 (1989).

49. *Id.* at 32.

Act of 1917, decided to veto the bill himself.[50]

In the years that followed, an explosive political climate was putting at risk the existing juridico-political relationship between Puerto Rico and the United States. Political violence escalated to a major nationalist uprising in October of 1950 that resulted in dozens of deaths. Political repression grew to unprecedented levels (massive imprisonment of people associated with independence, political assassinations, etc.).[51] That same year, Puerto Rican nationalists failed at an attempt to assassinate President Truman. And in 1954 a group of nationalists attacked the United States Congress, severely injuring several congressmen. With World War II and the subsequent emergence of the Cold War, the importance of Puerto Rico as a strategic military outpost increased considerably, so the granting of independence was off the table. This political context surrounded the creation of the political body that is known as the Commonwealth of Puerto Rico.

The first step in this new stage of the U.S. presence in Puerto Rico was the passage of the Elective Governor Act[52] in 1947, which allowed Puerto Ricans to elect their governor for the first time in history. Luis Muñoz Marín, a long-time supporter of independence who had changed its political position regarding U.S.-Puerto Rico relations, was elected governor in 1948 by a wide popular majority. The next step was the passage of U.S. Public Law 600 (1950),[53] which provided for the organization of a constitutional government by the people of Puerto Rico.[54] In its second and third sections, the Act provided for a referendum in which the people of Puerto Rico could accept or reject its provisions.

If a majority of the Puerto Ricans participating in the referendum approved the Act, the Puerto Rican Legislature would be authorized to call a constitutional convention that would draft a constitution. The draft would then be sent to the President of the United States, and if he considered the document compatible with Public Law 600 and the U.S. Constitution, he would then transmit it to the U.S. Congress for its approval.[55] Public Law 600 repealed those sections of the Jones Act that

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50. 39 Stat. 951 at art. 34.

51. The highest legal expression of political repression in the island during the 1950's is the infamous Law 53 (popularly known in Puerto Rico as 'la ley de la mordaza' or 'the law of the muzzle'), adopted in 1948, and which resulted in hundreds of incarcerations. That law, modeled after the Smith Act of 1940 (18 U.S.C. § 2385), established as a felony promoting or advocating for the necessity of overthrowing the Insular Government. For an analysis of the origins and effects of that law. *See* ACOSTA, *supra* note 49. For a general examination of political repression in the island, see the collection of essays contained in LAS CARPETAS: PERSECUCIÓN POLÍTICA Y DERECHOS CIVILES EN PUERTO RICO (Ramon Bosque Pérez & José Javier Colón Morera eds., 1997).

52. Public Law 362, 61 Stat. 770 (August 5, 1947).

53. Public Law 600, 64 Stat. 319 (July 3, 1950).

54. In its preamble, the Act stated the following: "Whereas the Congress of the United States by a series of enactments has progressively recognized the right of self-government of the people of Puerto Rico. . . ." The Act continued by stating: "That, fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption". Public Law 600, *id.*

55. The alluded sections read as follows: "Sec. 2: This Act shall be submitted to the qualified voters of Puerto Rico for

were related to the internal structure of the Puerto Rican government, but retained all other provisions, including its Section 9, which as the reader will remember, provided that all Federal Laws of the United States would apply in Puerto Rico with the same force as in the U.S. In addition, the preamble that stated that Puerto Rico 'belonged' to the United States was not repealed by Public Law 600.

After the yes-vote prevailed, the Puerto Rican legislature convoked a 'Constituent Convention'[56] and drafted the Constitution of the Commonwealth of Puerto Rico (in Spanish, Commonwealth was 'translated' as the *Estado Libre Asociado de Puerto Rico*, which literally means Free Associated State of Puerto Rico).[57] The constitution was approved in a referendum in March 3, 1952.[58] Its approval, however, was marked by the harsh criticism of the Puerto Rican Independence Party (which was created in 1946 as a result of a division inside the Popular Democratic Party, and at the time the major opposition party in the island, receiving 19% of the popular vote in the 1952 elections),[59] which claimed that the process would result in a sort of colonialism by consent. As a result, the party boycotted the Constituent Convention and urged the followers of the party to abstain from participating in the referendum which, at least in part, explained the unusually high rate of abstentions.[60] The Puerto Rico Nationalist Party, leaded by the Harvard-educated lawyer Pedro Albizu Campos, not satisfied with the pacific boycott, resorted to violence.

Even with the limitations imposed by the Public Act 600, most members of the Constituent Convention appeared to be convinced that they were in fact exercising the right to self-

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acceptance or rejection through an island-wide referendum to be held in accordance with the laws of Puerto Rico. Upon the approval of this Act, by a majority of the voters participating in such referendum, the Legislature of Puerto Rico is authorized to call a constitutional convention to draft a constitution for the said island of Puerto Rico. The said constitution shall provide a republican form of government and shall include a bill of rights." "Sec. 3: Upon adoption of the constitution by the people of Puerto Rico, the President of the United States is authorized to transmit such constitution to the Congress of the United States if he finds that such constitution conforms with the applicable provisions of this Act and of the Constitution of the United States." Act of Jul. 3, 1950, ch. 446, 64 Stat. 319 (process to organize a Puerto Rican constitutional government)

56. According to the text of Public Law 600, U.S. Congress authorized the Puerto Rican legislature to convoke a "Constitutional Convention" that would draft a constitution. For reasons that are not clear, the term "Constitutional Convention" was translated to Spanish as "Convención Constituyente". Because the word "constituyente" ("constituent") appeals to a very particular constitutional theory (the theory of the constituent power developed by Sieyes the French constitutional theorist), we use the translation "Constituent Convention" throughout this paper. *See* EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? (S.E. Finer, ed., M. Blondel, trans., Frederick A. Praeger 1964) (1789).

57. The result of the referendum approving Public Law 600 was 76.5% in favor and 23.5 against. The referendum took place in June 4, 1951. Manuel Alvarez-Rivera, Elections in Puerto Rico, November 13, 2009, *available at* http://electionspuertorico.org/archivo/proceso.constituyente/1951/ley600.html.

58. The results of the referendum in which the 1952 Constitution was approved by the Puerto Rican electorate were the following: 81.9 voted 'yes', 18.9 voted 'no'. Manuel Alvarez-Rivera, Elections in Puerto Rico, Novemeber 13, 2009, *available at* http://electionspuertorico.org/archivo/proceso.constituyente/1952.html.

59. Comisión Estatal de Elicciones, *available at* http://www.ceepur.org/cgi-bin/municipios.pl?municipio=pr&1952=on.

60. Only 463,961 of the 783,610 electors participated in the referendum for the approval of the constitution. *See* Mari Bras, *supra* note 16.

determination of the Puerto Rican people. They understood Public Law 600 as a sort of 'treaty' between the U.S. and Puerto Rico. Their conviction rested, in an important sense, in the words of its preamble, which stated: "[T]his Act is adopted in the *nature of a compact. . .*" (Emphasis added). However, when the draft prepared by the Constituent Convention reached the U.S. Congress, the limitations imposed by Public Law 600 quickly emerged to the surface. The draft included a Section that merely repeated some of the rights included in the then recently adopted Universal Declaration of Human Rights.[61] That Section was rejected in its entirety by the U.S. Congress, which found it to be too radical. In addition, the U.S. Congress conditioned the validity of the new constitution's amendment procedure to the inclusion of a provision that stated that all future constitutional amendments had to be compatible with the U.S. Constitution and the body of American laws that regulates U.S. - Puerto Rico relations.[62] This condition was ratified by the Puerto Rican electorate in an additional referendum.[63]

These referendum results, in our view, need to be understood both in light of the political climate in which they occurred and of the fact that there were no real options put to the electorate in any of them: a 'no' vote would have meant a continuation of the 'status quo' that no one supported. Once the Constitution of the Commonwealth of Puerto Rico entered into force, the position of the new Government of the island regarding its juridical relations with the United States can be summarized as follows. Puerto Rico had ceased to belong to the United States. The grounds for U.S.-Puerto Rico relations had ceased to be the Treaty of Paris or the Territorial Clause of the U.S. Constitution; the relationship was now based on the consent of the people of Puerto Rico in the exercise of their sovereignty.[64] That position, in fact, was supported by several decisions of the United States Court for the District of Puerto Rico.[65]

Our view is that, as the essential and most problematic aspects of the relation remained intact, Puerto Rico was still juridically subordinated to the United States. That is, the colonial and undemocratic character of U.S.-Puerto Rico relations was not fundamentally affected by the adoption of the Constitution of 1952: U.S. laws still applied in the island and the Puerto Ricans still did not have the legal faculties to alter the juridical arrangement that governed them. However, there is no doubt that the adoption of a constitution and the convocation of a Constituent Convention represented an important moment in Puerto Rican history, as it was the first time that

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61. *Id.*

62. It is surprising that this provision has received practically no attention from Puerto Rican academics, lawyers, or politicians. For an exception, *see* Colón-Ríos, *supra* note 2.

63. This amendment was presented to and approved by the electorate to in the general elections of 1952, were Luis Muñoz Marín (the principal supporter of the constitutional changes) was elected governor with 64.9 of the popular vote. *See* Alvarez-Rivera, *supra* note 59.

64. *See* José Trías Monge, *El Estado Libre Asociado ante los Tribunales, 1952-1994*, 64 REV. JUR. U.P.R. 1, 3 (1995).

65. For example, in *Consentino v. International Longshoreman's Association*, 126 F. Supp. 420, 422 (D. Puerto Rico 1954), the U.S. District Court stated: "Puerto Rico is no longer a Territory in the sense that the term is used in the Constitution and the cases."

the people of Puerto Rico constituted themselves for the organization of a government. It can even be argued that, with the limitations of such exercise, the Constituent Convention was potentially sovereign, but that it failed to exercise Puerto Rico's right to self-determination.

The Commonwealth of Puerto Rico was officially established in July 25, 1952, the same day of the American invasion to the island in 1898. Shortly after the new government was in place, the U.S. Department of State initiated a series of communications directed towards getting the recognition of the UN General Assembly that Puerto Rico had ceased to be a non-self-governing territory. In November 27, 1953, after an intense debate in the UN General Assembly, Resolution 748 (VIII) was approved. The Resolution established that due to the creation of the Commonwealth of Puerto Rico, the Declaration regarding Non-Self Governing Territories could not longer be applied to the island. As a result, the U.S. was freed of its responsibilities under Article 73(e) of the Charter.[66]

Nevertheless, in 1980, the U.S. the Supreme Court reaffirmed that Puerto Rico was still under the Territorial Clause of the U.S. Constitution, and that therefore it still was considered as a territory that belonged to the United States. By doing that, the U.S. Supreme Court was in fact denying what the U.S. delegation to the UN affirmed in 1953. The case was *Harris v. Rosario*.[67] The question before the court was whether Congress had the constitutional faculty to provide Puerto Rico with less assistance than that provided to states under the Aid to Families with Dependent Children program.[68] The Supreme Court, in a one page *per curiam* opinion, stated the following: "Congress, which is empowered under the Territory Clause of the Constitution, to 'make all needful Rules and Regulations respecting the Territory. . . belonging to the United States' may treat Puerto Rico differently from States so long as there is a rational basis for its actions."[69] In *Harris*, the U.S. Supreme Court officially recognized what was already clear, that is, that the essential aspects of the U.S.-Puerto Rico juridical relationship had remained intact since 1900. According to the U.S. Supreme Court, the Insular Cases are still good law.

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66. G.A. Res. 748 (VIII), U.N. GAOR, 8th Sess., U.N. Doc. A/2556, at 25 (Nov. 27, 1953).

In an important passage, Resolution 748 (VIII) stated "...[W]hen choosing their constitutional and international status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self determination". Once this resolution was approved, it appeared as if the question of Puerto Rico had come to an end in the United Nations. However, in 1960, when the issue of decolonization was at its peak, the UN General Assembly addressed it as a priority and the question of Puerto Rico became again a topic of debate. In 1962, the General Assembly created the Special Committee on Decolonization. Since 1973 the Special Committee has adopted more than 16 resolutions in which it specifically reaffirmed the right of Puerto Rico to self-determination and independence according to resolution 1514 (XV). The last of those resolutions was approved in the year 2003. As General Assembly Resolutions, all of these resolutions are not binding, but they provide a way of understanding the juridical relations between the U.S. and Puerto Rico in a way that goes beyond the interpretation of the juridical arrangement that regulates the relationship at issue.

67. *Harris v. Rosario*, 446 U.S. 651 (1980).

68. Aid to Families with Dependent Children, 42 U.S.C.S. 601 (1976).

69. *Harris,* 446 U.S. at 651-52.

In the last few years, a consensus has been emerging in Puerto Rico regarding the colonial character of the relation of the island with the United States and of the necessity of changing such relationship. However, there is no consensus on what should be the final status of the island or the means to achieve it. At the moment, political forces are divided between annexation supporters, supporters of several versions of a 'developed' Commonwealth status (some versions of which are closer to annexation, some of which are closer to sovereignty) and supporters of independence (who now constitute a minority).[70] Not only there is no consensus regarding what should be the final status of the island, but on the method to procure it. Some (mainly annexation supporters) favor the proclamation of a series of U.S. sponsored referendums (and recently succeeded in promoting a Status Bill in the U.S. House of Representatives).[71] Others support the convocation of a Constituent Assembly that would deliberate on Puerto Rico's status and speak to the U.S. government with a unified voice. This last alternative is favored by proponents of an enhanced "Commonwealth Status" and independence supporters; but even among them, there are important differences regarding the purposes of the assembly.[72] Since 1952, U.S.-Puerto Rico relations have been in a stalemate.

III. THE REPUBLICAN TRADITION

Regardless of this stalemate, or perhaps because of it, the legitimacy of this juridical arrangement needs to be addressed from a normative point of view. We propose to examine this juridical arrangement from the perspective of republicanism. In the next section, we will briefly explain the basic tenets of republicanism, as well as its institutional requirements. Then, we will show how the current relationship between Puerto Rico and the U.S. fails to meet these requirements in fundamental ways.

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70. The Puerto Rican Legislature has approved three 'non-binding' plebiscites regarding the question of Puerto Rico's political status (despite heavy lobbying, U.S. Congress has never been willing to sponsor a 'binding' plebiscite). The first one took place in 1967, and the alternative proposing a 'more autonomous' "Commonwealth Status" resulted victorious (the other alternatives being incorporation as the 51st state of the U.S. and full independence). The second one took place in 1993, with similar results. The third one took place in 1998, with the peculiarity that it did not include a developed "Commonwealth Status." In that last plebiscite, the alternatives were: incorporation, independence, free association (as defined by the UN General Assembly Resolution 1541 (XV) of December 15, 1960), and a fourth alternative that described in a rather 'legalistic' but accurate way the current U.S.-Puerto Rico relationship. The result was interesting: a majority of the electorate voted "None of the above."

71. The U.S. House of Representatives recently approved Bill H.R. 2499 (*Puerto Rico of 2009, as amended*) which is now under the consideration of the U.S. Senate, which would provide for a series of referendums on the island's political status. The first of those referendums would ask Puerto Ricans whether they want to maintain the current Commonwealth status. If the Commonwealth alternative is defeated, then a second referendum would take place in which Puerto Ricans would choose between annexation, independence, 'national sovereignty in association with the United States', and the existent Commonwealth status (the previous version of the Bill did not contain this last option, and was successfully combated by Commonwealth supporters as a 'legal trick' to get rid of the alternative Puerto Ricans have 'historically favoured').

72. For an analysis of the nature and different versions of the proposed assembly, see Colón-Ríos, *supra* note 2.

Contemporary discussions on the idea of freedom in political philosophy have been dominated by Isaiah Berlin's famous distinction between negative and positive liberty.[73] In Berlin's view, negative liberty is the absence of interference, understood as including not only physical violence but the threat of using physical violence as well. The idea is that someone is negatively free when people leave him or her alone to do as him or her wishes. In contrast, positive liberty involves much more than the absence of interference. Positive liberty is self-mastery or, for some authors, self-realization.[74]

Republicans think of liberty in a different way.[75] They depart from the negative-positive dichotomy.[76] They start by thinking about what it means to be subject to the whims or mercy of another person or entity. Accordingly, they denounce the ills of being under the arbitrary will of somebody else. In light of this, they propose a third understanding of freedom: freedom as the absence of domination.[77] Domination is the kind of relationship that exists between the master and his slave. The problem with that relationship is that the master can arbitrarily determine what the slave should do. He can practice domination at will and with impunity.[78] For a republican, then, freedom is neither about the absence of interference nor about self-mastery: it is about non-domination.[79]

The differences between interference and domination, on the one hand, and self-mastery and non-domination, on the other, are important. For instance, the absence of domination from others does not necessarily entail the existence of self-mastery. At the same time, there can be domination without interference.[80] For instance, suppose that, legally speaking, I could be your slave. Yet, it may be that you're a benevolent master and that you do not interfere with my choices at all. In this case, there is no interference and, thus, I am negatively free. In spite of your

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73. ISAIAH BERLIN, *Two Concepts of Liberty, in* FOUR ESSAYS ON LIBERTY 118, 122-134 (1969).

74. For a discussion of Berlin's work, *see* GEORGE CROWDER, ISAIAH BERLIN: LIBERTY AND PLURALISM (2004) or CLAUDE GALIPEAU, ISAIAH BERLIN'S LIBERALISM (1994).

75. *See* PETTIT, *supra* note 5, at 22.

76. For a discussion of the ways in which different strands of republican thought approach this dichotomy, *see* ISEULT HONOHAN, CIVIC REPUBLICANISM 180-213(2002).

77. With respect to the relationship between the republican conception and the negative and positive views of liberty, Pettit writes: "This conception is negative to the extent that it requires the absence of domination by others, not necessarily the presence of self-mastery, whatever that is thought to involve. The conception is positive to the extent that, at least in one respect, it needs something more than the absence of interference; it requires security against interference, in particular against interference on an arbitrary basis." PETTIT, *supra* note 5, at 51.

78. *See id.*

79. The republican understanding of freedom resembles Immanuel Kant's understanding of autonomy. In Kant's view, autonomy is about independence. In turn, independence is a relational idea: A is independent from B if and only if A is not subject to B's choice. A person that is alone in the world is not autonomous, even if that person has a meaningful set of choices available. *See* IMMANUEL KANT, *The Doctrine of Right, in* THE METAPHYSICS OF MORALS. For an explanation of Kant's notion of autonomy, *see generally* Arthur Ripstein, *Authority and Coercion*, 32 PHIL. & PUB. AFF. 7-35 (2004).

80. *See* PETTIT, *supra* note 5, at 22-3.

benevolence, and even though I am now negatively free, you are entitled to interfere with my actions if you change your mind and you need not provide me with any explanation because you have a right to do with me what you wish. At the same time, even though I am your slave, I may have chosen to become a slave, and my preferences may be fully satisfied.[81] Or, perhaps, from a perfectionist view, it may be actually good for me to be under your domination because you know what's good for me and I don't. In these scenarios, I am under your domination but, from a certain perspective, I am positively free, I am able to exercise self-mastery.[82] To the republican, this is simply unacceptable. In fact, as Pettit writes, republicans explain their understanding of liberty by making a contrast between *liber* and *servus*, that is, between the citizen and the slave.[83] The slave is subject to the arbitrary power of another; the citizen, in contrast, is not. Machiavelli, for instance, identified subjection with tyranny and colonization.[84]

However, the republican also maintains that there could be interference without any loss of liberty. The idea is that whenever the interference is not arbitrary, and therefore does not imply domination, there is no loss in liberty.[85] This is what the law is all about under the republican ideal, a non-arbitrary form of interference. Contrast this view with the Hobbesian understanding of liberty. For Hobbes, the use of coercion through laws should be seen as an interference with liberty. Under his view, law restricts liberty but those restrictions bring about some benefits: it prevents damage by providing security to individuals.[86] In contrast, for republicans, "law is constitutive of liberty in a way that undermines any such talk of compensation; any such talk of taking one step backwards in order to take two forward."[87] In the republican view, law creates freedom but does not offend it.

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81. This is in fact what defenders of the status quo in Puerto Rico have been arguing for the last 56 years. That is, that Puerto Ricans 'consented' to the current relationship to the U.S. through the series of referendums that took place between 1950 to 1953. As a result, they say, Puerto Rico is not subordinated to the U.S., but 'freely associated' with it. As our discussion suggests, this argument is unacceptable from the republican point of view: no one can freely consent to be subject to the arbitrary will of other. Moreover, the lack of alternatives (other than saying 'no' to the possibility of adopting a constitution and therefore to remain in a clearly colonial status quo) makes the argument about the free consent of Puerto Ricans even less plausible.

82. This is precisely what worried Isaiah Berlin: he thought that the notion of positive liberty was dangerous because it could be used by tyrants to argue that people were dominated by their 'lower selves' and that, by adopting the tyrant's ideology, whatever its contents, they would be led to live their lives in accordance with what their 'higher selves' mandate. *See* BERLIN, *supra* note 74, at 132-33.

83. PETTIT, *supra* note 5, at 31.

84. See *id.* at 32.

85. *See also* SKINNER, *supra* note 5, at 82-4 (arguing that law provides the framework for freedom, but someone is not free at the specific moment of being coerced by law).

86. Hobbes understanding of liberty is made clearer in the fact that he made no difference between the republican Luca and the despotic Constantinople: "There is written in the Turrets of the city of Luca in great characters at this day, the word LIBERTAS; yet no man can thence inferred, that a particular man has more Libertie, or Immunitie from the service of the Commonwealth there, than in Constantinople. Whether a Commonwealth be Monarchical, or Popular, the Freedome is still the same." THOMAS HOBBES, LEVIATHAN, quoted at PETTIT, *supra* note 5, at 38.

87. *Id.* at 35-36.

Pettit explains that this idea comes from the republican conception of freedom as citizenship or *civitas*: "the main feature of the *civitas* is the rule of law."[88] Freedom and citizenship are one and the same thing. In the republican view, freedom only exists if there's a suitable legal regime.[89] But, of course, this view only makes sense if freedom is understood as non-domination:

> The laws only do this, of course, so long as they respect people's common interests and ideas and conform to the image of an ideal law: so long as they are not instruments of any one individual's, or any one group's, arbitrary will. When the laws become the instruments of will, according to that tradition, then we have a regime -say, the despotic regime of the absolute king- in which the citizens become slaves and are entirely deprived of their freedom. Each of them lives, in Harrington's phrase, 'at the will of his lord'; each of them is wholly dominated by the unconstrained power of the individual or group in command.[90]

Law is about interference; it involves coercion. But the use of coercion is not arbitrary since, in the republican mind, the legal authorities are allowed to use coercion only when they do so in pursuit of the common interests of citizens.[91] It's not only the individual, but also the city or state to which the individual belongs that can only be free under the law if we understand liberty as non-domination. If those within a society are not subject to arbitrary domination of domestic or external authorities, we can say that the polity at stake is free, that is, that there is a free government in that polity.[92] So, the upshot of this is that the republican ideals require not only the **actual** absence of interference, but also the *absence of capacities for arbitrary interference*.[93]

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88. Maurizio Viroli, *Machiavelli and the Republican Idea of Politics in* MACHIAVELLI AND REPUBLICANISM, 149 (Gisela Bock, Quentin Skinner, and Maurizio Viroli, eds., 1990).

89. PETTIT, *supra* note 5, at 36.

90. *Id.*

91. *Id.* at 37.

92. Some authors argue that freedom from interference would be incomplete if not accompanied by the possibility of collective action. For this kind of republican, participation is an intrinsic part of freedom. For instance, Michael Sandel maintains that: "I am free insofar as I am a member of a political community that controls its own fate, and a participant in the decisions that govern its affairs. . . .the republican sees liberty as internally connected to self-government and the civic virtues that sustain it." MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA'S SEARCH OF A PUBLIC PHILOSOPHY 25-76 (The Belknap Press of Harvard University Press 1996). *See generally* BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (University of California Press 1984) (arguing that in the United States, strong democracy must take a participatory form or else the country's representative party democracy may be replaced by new variants of neodemocracy); Hannah F. Pitkin, *Justice: On Relating Private and Public*, 9 *Political Theory* 327 (1981) (Noting that while political life is an activity through which groups of people "determine what they will collectively do, settle how they will live together, and decide their future," there is a widespread withdrawal of persons into privacy).

93. Viroli, *supra* note 89, at 276.

IV. PUERTO RICO AND THE INSTITUTIONAL REQUIREMENTS OF REPUBLICANISM

According to Pettit, a republican is concerned not only with what the state is -the *dominium*- but also with what the state does -the *imperium* of government. Because the government should not be able to act on an arbitrary basis, a republican polity would include some conditions that must be fulfilled. In other words, the republican ideals have institutional implications. If we take these conditions seriously, it will become clear why we think that the current situation of Puerto Rico fails to satisfy them. Republicanism's institutional requirements, as developed by Pettit, are the following:[94]

> (1) The existence of a constitution within which government has to operate;
>
> (2) The requirement that those in government are elected in such a way that different groups are represented;
>
> (3) The ideal of limiting the tenure of those in executive office, say, by requiring their selection to be regularly renewed, as under periodic elections;
>
> (4) The existence of the rule of law;
>
> (5) The indispensability of dividing up power, so that each authority is subject to checks and balances;
>
> (6) The requirement that whatever decisions are made by government are backed up by reasons deriving from purportedly common interests, so that the relevance and strength of those reasons can be challenged in the legislature, the courts, or other forums;
>
> (7) The requirement that citizens are able to control the exercise of government power, challenge its abuses and seek office where necessary.

These requirements, which follow from republicanism's basic tenets, are not met in Puerto Rico. Now, this should not be taken lightly. That these requirements are not met is not merely a result of Puerto Rico not being an independent country. What this means, for the republican, is that Puerto Ricans are subject to an arbitrary power. We will begin by discussing the first three requirements: the existence of a constitution, that government officials are elected in such a way that different groups are represented, and the existence of periodic elections. The remaining four requirements - the existence of the rule of law, the division of power, that governmental decisions are backed up by reasons deriving from purportedly common interests, and that citizens can exercise control over governmental power- will be discussed in a separate sub-section. Our

94. Philip Pettit, *Republicanism, available at* http://plato.stanford.edu/entries/republicanism/ (last updated May 18, 2010).

discussion will not only rely in an analysis of the juridico-political structure of the relationship at issue, but in several decisions of U.S. courts that exemplify its problematic character.

A. Of Constitutions, Representation, and Periodic Elections

A constitution, understood as a supreme law whose main function is to limit the power of government is, not surprisingly, a juridical device considered fundamental by republicans. Despite the existence of a formal document entitled 'The Constitution of the Commonwealth of Puerto Rico,' drafted by an elected 'Constituent Convention' and ratified in popular referenda, Puerto Rico has never adopted a 'constitution,' an actual supreme law. As our discussion of U.S.-Puerto Rico relations suggests, the Constitution of the Commonwealth of Puerto Rico is constantly amended by any U.S. law whenever the content of the specific U.S. law is in conflict with it. While the actions of the internal government of the island are constrained by the Constitution of the Commonwealth of Puerto Rico, the actions of the government of the U.S. are not. In others words, with relation to Puerto Rico, the U.S. federal government is free to operate according to its own laws, limited only by its *own* constitutional structure (which, in turn, can be amended without the participation of Puerto Ricans and whose meaning and scope might change according to the interpretations of the U.S. Supreme Court).

Take, for instance, the dramatic example of *U.S. v. Acosta-Martinez*.[95] In 1994, the U.S. Congress approved the Federal Death Penalty Act,[96] which established capital punishment for several offenses. The Constitution of the Commonwealth of Puerto Rico prohibits the death penalty in Section 7 of its Bill of Rights.[97] In *Acosta-Martinez,* the United States Court of Appeals decided that the prohibition contained in the Puerto Rican Constitution did not prevent U.S. Congress from adopting legislation that amounted to the reestablishment of the death penalty in the island.[98]

Of course, it could be argued that Puerto Rico is just like that of any other state of the Union in the sense that the federal constitution prevails over the 'domestic' ones, and that there is a

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95. *U.S. v. Acosta-Martinez,* 252 F.3d 13 (2001).

96. Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591-3598 (2000)

97. The relevant part of Section 7 of the Bill of Rights reads: "Se reconoce como derecho fundamental del ser humano el derecho a la vida, a la libertad y al disfrute de la propiedad. No existirá la pena de muerte." P.R. CONST. art. II, § 7 ("The right to life, liberty and the enjoyment of property is recognized as a fundamental right of man. The death penalty shall not exist.").

98. "We thus conclude that Congress intended the death penalty to apply to these federal criminal prosecutions in Puerto Rico. The death penalty is intended to apply to Puerto Rico federal criminal defendants just as it applies to such defendants in the various states. This choice by Congress does not contravene Puerto Rico's decision to bar the death penalty in prosecutions for violations of crimes under the Puerto Rican criminal laws in the Commonwealth courts. . . .This court has once before held that a provision of the Constitution of Puerto Rico does not trump a federal criminal statute, where Congress intends to apply the statute to Puerto Rico. In Quiñones, 41-43, this court held that the federal wiretapping statute, which authorizes and controls the use of wiretaps, applies to Puerto Rico despite an express provision in the Constitution of Puerto Rico prohibiting wiretaps, P.R. Const. Art. II, § 10. There, as here, the Constitution of Puerto Rico governs proceedings in the Commonwealth courts; this is true of state constitutions and proceedings in state courts..." *Acosta-Martinez*, 252 F.3d at 20.

distinction between 'federal' and 'state' jurisdictions. However, if we take that argument seriously, we can see more clearly why it does not apply to the island. Puerto Rico is not a state of the Union, and in that sense, it is not part of the U.S. federation. Thus, it simply does not make sense to apply basic principles of federalism (such as the distinction between federal and state jurisdiction) to Puerto Rico's current relationship to the U.S. Moreover, if Puerto Rico were a state, then it would receive all of the benefits that states get, perhaps in exchange for the fact that their constitutions and laws are of lower legal status than the federal constitution (and federal laws in general). To start with, Puerto Ricans, as all the citizens of states do, should be able to vote at federal elections. But that's not the case.

That brings us into the second requirement, that those in government are to be elected in such a way that different groups have their rival interests represented. For the republican, the use of coercion by legal authorities is only justified when they do so in pursuit of the common interests of citizens. By now, it should be obvious for the reader why this requirement is not met in Puerto Rico. Puerto Ricans do not have representation at the U.S. Congress. They merely choose a non-voting 'Resident Commissioner' to the U.S. House of Representatives. That means that Puerto Ricans lack the faculty of fully participating in the process that precedes the adoption of laws that they will be required to obey, and as a result, they have no guarantee that their interests will be represented. In addition, given the lack of participation of Puerto Ricans in the U.S. law-making process, when applied to them, U.S. laws are nothing but the product of the arbitrary will of that country's legislature. For the republican, this means that they deprive Puerto Ricans of their freedom.

Moreover, Puerto Ricans do not vote for the President of the U.S. In other words, they do not choose 'their' president, and that makes the third of the requirements mentioned above, the existence of periodic elections, even inapplicable. The question of Puerto Ricans not having a right to vote for the U.S. President has been considered by U.S. courts several times since the 1990s. We will briefly consider these cases as they exemplify some of the most problematic aspects of this juridical relationship. The first case that dealt with the issue was *Igartua v. United States*[99] (hereinafter *Igartua I*), decided in 1994. The case involved an action filed by residents of Puerto Rico who argued that the U.S. Constitution conferred them the right to vote for the President and Vice President of the U.S. This case was treated by the court as an "easy case" and it was dismissed in a rather succinct fashion.

The reasoning of the *Igartua I* court can be summarized in the following way. The U.S. Constitution provides that "each state shall appoint, in such manner as the Legislature thereof may direct, a number of Electors. . . ."[100] That is, it is not the voting public, but the electors appointed by the states, the ones who vote in presidential elections. Only the states (and the District of Columbia through the Twenty-Third Amendment) may constitutionally elect delegates to the electoral

99. *Igartua de la Rosa v. United States*, 32 F.3d 8 (1994).

100. U.S. CONST. art. II, § 1.

colleges. The Constitution does not grant American citizens the right to elect the President. Thus, through a very simple syllogism, the court was able to conclude that because Puerto Rico was not a state it did not have the right to cast electors to vote in presidential elections and, because of the way the U.S. presidential election works, U.S. citizens cannot vote individually for the U.S. President and Vice President. The decision was upheld by the U.S. Court of Appeals in a *per curiam* opinion and the U.S. Supreme Court denied a petition of writ of certiorari presented by the plaintiffs.[101]

In the year 2000, the same set of facts were brought to the same court (but to a different judge).[102] In the 2000 version of *Igartua v. United States*[103] (hereinafter *Igartua II*), the court was much more sympathetic to their claim. First of all, the court managed to distinguish this action from the one presented in 1994 by stating that while in *Igartua I* the court had to decide whether the plaintiffs had an individual right to vote in presidential elections, this time the case revolved around the plaintiffs' inability to elect delegates to the electoral colleges. Although the arguments presented to the court were very similar to those presented in *Igartua I*, the case was decided in a very different way. The opinion began with a rather strong statement, somewhat evocative of republicanism: "The present political status of Puerto Rico has enslaved the United States citizens residing in Puerto Rico. . ."[104] According to the court, the right to vote had to be understood as a function of citizenship and a fundamental right that is preservative of other rights. Such a right, the court continued, is not limited by Article II of the Constitution which merely sets forth the mechanism by which the right to vote will be implemented in the states.

The court concluded that because keeping the U.S. citizens that resided in Puerto Rico away from the ballot box was inconsistent with the principle of representative government, there was no need to enact a constitutional amendment to confer them the right to vote: "Requiring a constitutional amendment to grant U.S. citizens residing in Puerto Rico the right to participate in presidential elections is tantamount to entering into the democratic process to determine if democracy should prevail."[105] Finally, the court ordered the Government of Puerto Rico to organize the means by which Puerto Ricans would vote in the then upcoming presidential elections. *Igartua II* was reversed by the U.S. Court of Appeals, which in a very short opinion stated: "Since our

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101. *Igartua de la Rosa v. United States*, 32 F.3d 8 (1994), *cert. denied*, 514 U.S. 1049 (1995).

102. The case also involved the claim that the International Covenant on Civil and Political Rights guaranteed the plaintiffs' right to vote in presidential elections. The argument was rejected by the court under the reasoning that the provisions of such treaty were not self-executing and therefore their violation did not give rise to privately enforceable rights under U.S. law. In addition, the group of plaintiffs that had moved from states of the U.S. to Puerto Rico argued that the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C.S. 1973, was unconstitutional because it disallowed U.S. citizens that moved to Puerto Rico to vote, by considering them to be within the United States. This argument was also present in *Igartua I* and it was rejected in both cases.

103. *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140 (2000).

104. *Id.* at 141.

105. *Id.* at 148.

decision in *Igartua I* in 1994, Puerto Rico has not become a State, nor has the United States amended the Constitution. . .Absent such a change in the status of Puerto Rico or an amendment to the Constitution of the United States, our decision in *Igartua I* controls the case."[106]

B. The (Un)Rule of Law, the Divisions of Powers, and the Interests and Rights of Citizens

The fourth of the requirements listed above is the existence of the rule of law. The rule of law is a necessary condition for the legitimacy of a juridical order, and it is not only considered fundamental by republicans, but constitutes a basic principle of liberalism as well. Our approach to this fourth requirement will stress a problem directly related to the application of U.S. laws in Puerto Rico that is rarely brought to the surface in discussions about the island's political status. It is, however, a problem so fundamental that it puts at risk the very existence of the rule of law in Puerto Rico.

Most of the population of Puerto Rico does not speak English. U.S. laws, however, are written in English. As a consequence, of course, most people do not understand the laws that govern them. Even worse, they do not understand the language of 'their own' constitution. It could be argued that the same applies to any other jurisdiction in the following sense. In general, those who are not lawyers do not understand the laws. For instance, they're written in a technical language that only lawyers can and do understand, or they are hard to find, and so on. Because laws are like that, we need lawyers. From this perspective, the language of the law does not make a real difference. Moreover, the critic would say that, in Puerto Rico's law schools, students are required to be able to understand English.[107] Thus, even if non-lawyers do not understand the laws, those who deal with law do understand them. So, whether they're written in English or/and in Spanish does not make a real difference.[108]

There is something to this objection, however. It is still problematic from the perspective of what different commentators have taken the rule of law to mean.[109] Take, for instance, Lon L.

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106. *Igartua de la Rosa v. United States of America*, 229 F.3d 80, 84 (1st Cir. 2000). The U.S. Supreme Court denied the petition of writ of certiorari presented by the plaintiffs.

107. Applicants to Puerto Rican law schools are required to take the Law School Admission Test (LSAT), and their admission is largely dependent on their score on that test.

108. In 1993, the Puerto Rican legislature adopted a law that established English and Spanish as the official languages of the island. P.R. Laws Ann. Tit. 1, § 59 (1993). However, the majority of the population still neither speaks nor understands English. Spanish and English; Official Languages. *See supra* note 3 and accompanying text.

109. There are, of course, many accounts of the rule of law. For a "substantive" account, that is, one that emphasizes the connection between law and morality, *see generally* A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1982). For an instrumentalist account, that is, one that presents the rule of law as an instrumental good that is useful for society, *see* JOSEPH RAZ, *The Rule of Law and its Virtue, in* THE AUTHORITY OF LAW (1979). For the idea that the rule of law is an expression of the "internal morality of law", *see generally* LON L. FULLER, THE MORALITY OF LAW (1964). For further developments of this idea, *see generally* DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS (1991). For the best account, *see generally* Ratna Rueban Balasubramaniam, *The Positivist Mindset and the Rule of Law* (unpublished

Fuller's approach.[110] Fuller claims that, in order for there to be law, eight requirements should be met. Those are generality, publicity, non-retroactivity, that rules are understandable, non-contradiction, constancy, and congruity.[111] Those requirements specify ". . . necessary conditions for the activities of lawmakers to count as lawmaking."[112]

Only when the laws satisfy Fuller's requirements, they can properly influence the practical reasoning of citizens. Only then can citizens take legal requirements and prohibitions into account when deliberating about how to act. They make plans on the basis of those laws. Now, if citizens cannot understand the rules, the *legal* character of their political system is diminished because the laws can no longer figure in their practical reasoning. In other words, if people do not know what the rules require when they deliberate about how to act, they cannot take what they require into account.[113] A population that, like that of Puerto Rico, does not understand what an important part of the laws that apply to them mean is clearly living in a system in which the very idea of law must be put into question. Such a population might as a matter of fact be ruled by these laws, but it cannot be said to be living under the *rule of law*.

We could certainly stop here. A system in which the very existence of the rule of law is in question is certainly unacceptable. And, in fact, it should be clear by now that in Puerto Rico (in virtue of its relation to the U.S.), the fifth of republicanism's institutional requirements is not met. Its political order lacks a system of check and balances. Although each country's internal political system is organized according to the doctrine of the separation of powers and a system of check and balances, U.S. branches of government are not subjected to any limits emanating from Puerto Rico's political institutions. In that sense, with respect to Puerto Rican institutions, each of the U.S. branches of government is 'supreme.'

For reasons that we have already pointed out, the sixth requirement—that whatever decisions are made by government are backed up by reasons deriving from purportedly common interests— is not satisfied either. As we mentioned, Puerto Ricans do not have voting representation in the U.S. Congress. This results in the unfortunate situation that, even though U.S. laws fully apply in Puerto Rico, they do not necessarily have to be adopted with the 'common interest' of Puerto Ricans in mind. Of course, there are always conflicting interests represented within a democratic assembly. Not all of those interests will be fulfilled by each and every law that comes out of a representative body. But the point is that those who share those interests have, at least, the possibility to contest the specific law that is being proposed. Even if a specific law may, from a

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manuscript) (on file with author). Whatever account the reader may prefer, the requirement that citizens should be able to understand the laws is present.

110. *See* FULLER, *supra* note 111.

111. *Id.* at 39. The first requirement is the failure to achieve rules at all, that is, a situation in which every issue must be decided on an ad hoc basis.

112. Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 L. & PHIL. 239, 241 (2005).

113. *Id.*

certain perspective, promote the interests of the people of Puerto Rico, the lack of representation is, say, a procedural flaw that infects the system and makes it morally objectionable.[114]

Nevertheless, one could object by saying that decisions taken by most governments are rarely backed up by reasons deriving from common interests because, for example, legislatures are controlled by the interests of the wealthy. That might be true, but it does not say anything about the Puerto Rican case. Our point is that, even if the U.S. Congress were in the hands of politicians that seriously took into account the interests of every single person that could be affected by their decisions and even if, as a matter of fact, they adopted legislation that benefited Puerto Ricans, the island would still be in relationship of domination unacceptable from a republican perspective: they would still be subject to the whims of the U.S. Congress.

Finally, with regards to the seventh requirement, it follows from what we have pointed out so far that Puerto Ricans cannot hold U.S. elected officials accountable for their actions. In liberal representative democracies, perhaps the most important way in which the citizenry shows its view with respect to elected officials is through their vote. But, of course, even though they are said to be citizens, Puerto Ricans are neither allowed to vote in presidential elections nor have voting representatives in the U.S. Congress.[115] As we mentioned, the Jones Act conferred U.S. citizenship to Puerto Ricans. However, for what we have already pointed out, a citizenship that does not include the right to vote for political authorities and, thus, to participate in the democratic process is, at least, a strange kind of citizenship: a citizenship without self-government. According to Aristotle's classical definition, citizens are those with the "power to take part in the deliberative or judicial administration of any state."[116] An important part of the justification of representative democracy lies precisely in the fact that it marks the individual's transition from subject to citizen and thus ensures her role in making the laws that govern her.[117]

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114. *See supra* text p. 21. As stated above, Puerto Ricans elect a Resident Commissioner that sits in the U.S. House of Representatives and that is allowed to speak but lacks the right to vote. The Resident Commissioner, however, is allowed to sit and vote in Congressional Committees. Nonetheless, the decisions taken in Committees are not binding on the House of Representatives.

115. With the exception, of course, of Puerto Ricans that, as U.S. citizens, become residents of a U.S. State.

116. ARISTOTLE, POLITICS bk. three, pt. II, 53 (Benjamin Jowett trans., 1998).

117. *See* David Dyzenhaus, *Introduction*, *in* LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM 6 (David Dyzenhaus ed., 1998). As Dyzenhaus explains, this role is usually taken to justify obedience to the law. *See* JOSEPH CARENS, CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS (2000). Joseph Carens argues that an adequate conception of citizenship should leave space for different dimensions of citizenship. In particular, he analyzes –what he calls- the legal, the political, and the psychological dimensions of citizenship. First, the legal dimension is related to the notion of the nation state, which is a unitary model according to which individuals can have the legal status of citizenship only in one political community. Second, the psychological dimension is the sense of belonging to a particular community that people may have. The legal dimension does not necessarily coincide with the psychological one: quite often, immigrants feel a sense of loyalty to their home communities, even though, sometimes, they are required to renounce to their original citizenship for them to be able to acquire the new one. Or, even though someone may be, legally speaking, a citizen of a certain country, he or she may not feel any kind of attachment to that country. Also, a person may be psychologically attached to more than one community. Finally, the political dimension has to do with the way in which people share in collective agency.

V. CONCLUSION

In this paper, we have shown that Puerto Ricans are subject to the whims of the United States, regardless of the benefits or evils that those whims amount to. Of course, as the benevolent master, it could perfectly be the case that the U.S. leaves Puerto Rico alone in its own internal affairs.[118] But what concerns us here is the existence of *capacities for arbitrary interference*. It could be argued that the decisions taken by the U.S. with respect to Puerto Rico are not really arbitrary: while making a decision, the different branches of the U.S. government have to follow certain procedures, there has to be enough discussion at different fora, and U.S. officials are accountable to the people of the U.S. Those decisions, of course, also have to be compatible with the U.S. Constitution. All of this is true. But the problem is that Puerto Ricans are excluded from the process. The best example of the point we would like to make is the statement with which we start this paper. According to the President's Task Force on Puerto Rico's Status, the island of Puerto Rico is merely a property of the United States. And it cannot but be treated accordingly.

Carens concentrates in the issue of representational legitimacy, that is, in the issue of who may legitimately act in the name of a community. Usually, as Carens explains, this is tied to the notion of representative democracy. Of course, as he says, there are many problems with representative democracy, including the fact that the candidates for which some people vote lose. There are also other problems such as the usual complain that people do not feel represented even by those for whom they vote for. In a future article, we aim to explore how these different dimensions apply to the case of Puerto Ricans. This might be an interesting issue because most discussions about citizenship deal with the status of immigrants. The case of Puerto Rico is different because the issue is, precisely, that Puerto Ricans are not struggling for obtaining citizenship in the same sense that immigrants to a different community are. They are, indeed, U.S. citizens. The problem is, of course, that even though they're citizens, they do not have the rights with which citizenship is associated; they're, in some sense, second-hand citizens. This raises interesting questions about what "citizenship" really amounts to.

118. This could be possible but unlikely, since it would require the U.S. Congress to insert a clause in every law past and future law it adopted stating that it would not apply to Puerto Rico. Such a course of action would, for all practical purposes, change the very nature of the relationship between these two countries. *See supra* note 24 and accompanying text for a discussion of the implications of the Foraker Act.

ARTICLE

"BUT YOUR HONOR, HE'S AN ILLEGAL!" —RULED INADMISSIBLE AND PREJUDICIAL*

CAN THE UNDOCUMENTED WORKER'S ALIEN STATUS BE INTRODUCED AT TRIAL?

BENNY AGOSTO, JR.**

LUPE SALINAS***

ELOISA MORALES ARTEAGA****

SUMMARY

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* Actual quote from a recent case

** Benny Agosto, Jr. is a partner at Abraham, Watkins, Nichols, Sorrels, Agosto & Friend.

*** Lupe Salinas is a Professor of Law at Texas Southern University Thurgood Marshall School of Law.

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I. INTRODUCTION

In court battles, the desire to win at times compromises ethics, fair play and overall adherence to the rules of evidence. In that litigation frenzy, whether the battle involves a civil or a criminal case, the desire to obtain victory can contribute to deviations from the lawyer's oath to follow the rules or to a prosecutor's duty not to convict but to see that justice is done.[1] In our evolution as a nation, "blatant forms of racism have increasingly been replaced by newer, more elusive, but equally injurious forms of derision."[2] The danger that a litigant will appeal to prejudice, that "thirteenth juror,"[3] exists.

Thus, our system of justice has to be ever so vigilant to protect against efforts to tarnish a person by character attacks or by direct and subtle appeals to prejudices based on racial or ethnic background, religion, or immigration status. When the immigration issue enters the equation, the emotions of the governing majority can be provoked.[4] At times, the passions have resulted in hate crimes on the basis of perceived or actual undocumented status.

For example, in the small coal town of Shenandoah, Pennsylvania,[5] several white teenagers brutally and fatally attacked an undocumented Mexican immigrant in 2008.[6] Luis Ramirez lost his life to the hands and feet of teenagers who attacked him because he was Mexican.[7] Witnesses testified as to the use of ethnic slurs as the men attacked Ramirez, which included "Go back to Mexico" and "Tell your [expletive] Mexican friends to get the [expletive] out of Shenandoah."[8]

Even before the increased hysteria over 9/11 and immigration, Latinos received threats and beatings based on their appearance of being "Mexican." Joshua Ramirez, a fourth generation U.S. citizen of Mexican descent, complained of assumptions that he is undocumented: "I get the wetback comments . . . . I'm asked to produce proof of citizenship when I apply for a job—and I don't even speak Spanish."[9] Ramirez remembers the night he was kicked and punched by a gang of boys who

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1. *See, e.g.*, TEX. CODE CRIM. PROC. art. 2.01 (2010).

2. Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1222 (1992).

3. *See generally id.*

4. *See, e.g.*, U.S. COMM'N ON CIV. RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 10-12 (1980).

5. Shenandoah, a community of about 5,600, had a white population of 97.4 percent at the time of the 2000 census. Walter Brasch, *Twelve Angry White People: Jury Nullification in a Pennsylvania Coal Town*, ATLANTIC FREE PRESS, June 20, 2009.

6. *Pa. teens charged in fatal beating of immigrant*, (2008), http://www.npr.org/templates/story/story.php?storyId=92677116&sc=emaf.

7. Id.

8. Michael Rubinkam, *Hate-crime trial revisits '08 beating death, Shenandoah teens return to court facing federal charges in the death of an illegal immigrant from Mexico*, PATRIOT NEWS (Harrisburg, Pennsylvania), Oct. 4, 2010, at A5.

9. Julie Amparano, *Let's Rid Our State of Hatred,* ARIZ. REPUBLIC, Aug. 2, 1999, at SD5, cited in Mary Romero &

swore at him and told him they do not like "illegal aliens."[10]

Our judicial encounters have documented circumstances where resident aliens have been limited in or denied their employment opportunities.[11] Our law also protects the rights of persons who are present in the United States in an undocumented condition.[12]

Dangers of unfair prejudice generally surface where the evidence is probative of a violent or immoral character or the evidence suggests unpopular associations or beliefs and appeals to a juror's emotions or predispositions.[13]

This article addresses the treatment of the undocumented worker in the civil and criminal courts of the United States. The primary focus of the discussion, however, will address the admissibility of the undocumented status of a litigant. In order to better understand the development of the United States immigrant population, both documented and undocumented, the authors will provide some background information in Part Two as to our nation's immigration history.

Part Three addresses improper appeals in criminal cases to one's prejudices and how the rules of evidence address the admission or exclusion of relevant but unfairly prejudicial information. Part Four examines the recent increase in civil cases that discuss the right of this undocumented alien population not to be subjected to discriminatory treatment and their eligibility to receive a remedy for lost future wages or other similar benefits.

II. THE DEVELOPMENT OF THE AMERICAN IMMIGRANT POPULATION

In the early twentieth century, America entered into an economy considered by ranchers to be highly compatible with sharecroppers from Mexico who worked for low wages.[14] The history of

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Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75 n. 20 (2005).

10. *Id.*

11. *See, e.g.*, Truax v. Raich, 239 U.S. 33, 43 (1915) (An act to protect the citizens of the United States in Arizona in their employment against non-citizens held to violate the Fourteenth Amendment equal protection clause); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (City ordinance aimed at burdening Chinese residents in the laundry business is unconstitutional).

12. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982) (A State's denial of a free public education to a discrete group of innocent children is justified only if it furthers some substantial state interest which the State of Texas failed to show); United States v. Otherson, 637 F.2d 1276 (9th Cir. 1980) (Aliens who illegally entered the United States without authorization qualify as "inhabitants of any State, Territory, or District" and are protected by 18 U.S.C. § 242, the 1866 Civil Rights Act).

13. *See* D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 322 (1989).

14. *See* RODOLFO ACUÑA, OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION 142 (Canfield Press 1972) (hereinafter cited as ACUÑA) (A farmer boasted of having a docile and wonderful Mexican named Pancho whom he paid

this labor migration has been one of constant flow at least since the Mexican Revolution of 1910.[15] However, in the 1930s, with the economic crisis during the Great Depression, America sponsored Operation Repatriation to remove its Mexican population.[16]

Yet, consistent with the theory of economic dependence, when America entered World War II in 1942, Congress enacted the *Bracero* Program to import Mexican agricultural workers to pick crops.[17] However, by 1954, America's recession led to new efforts to remove undocumented Mexican aliens in what was dubbed Operation Wetback:

> Assisted by federal, state, county and municipal authorities— including railroad police officers, custom officials, the FBI, and the Army and Navy—and supported by aircraft, watercraft, automobiles, radio units, special task forces, and, perhaps most important of all, public sentiment, including that of growers, the Border Patrol launched the greatest maximum peacetime offensive against a highly exploited, unorganized and unstructured "invading force" of Mexican migrants.[18]

Operation Wetback unfortunately resulted again in the deportation of not only undocumented persons but also permanent resident aliens and citizens by birth or naturalization.[19] It has been estimated that more than one million Mexicans were deported.[20]

Efforts to enforce immigration laws have confirmed the difficulty of determining who is an undocumented alien and specifically who is a documented resident or citizen of Latino descent.[21] The Border Patrol and local police agencies have indiscriminately seized a number of resident

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sixty cents a day before World War I).

15. *See generally* J. SAMORA, LOS MOJADOS: THE WETBACK STORY (1971).

16. ACUÑA 190-91 ("The 'send-the-Mexican-back-to-Mexico' movement was inspired by President Herbert Hoover, who, after three years of depression, refused to acknowledge the failure of the U.S. economy. He made countless excuses; a favorite scapegoat was the presence of illegal workers in the United States."); *see* FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S, at 98-107 (University of New Mexico Press 1995)

17. Agreement Between The United States of America and Mexico Respecting the Temporary Migration of Mexican Agricultural Workers, U.S.-Mex., Aug. 4, 1942, 56 Stat. 1759, *amended by,* 57 Stat. 1152 (1943), (repealed 1964) (commonly known as the Bracero Program).

18. J. SAMORA, LOS MOJADOS: THE WETBACK STORY 52 (1971).

19. F. ARTURO ROSALES, DICTIONARY OF LATINO CIVIL RIGHTS HISTORY 335 (Arte Publico Press 2006).

20. Bustamante, *The Historical Context of Undocumented Mexican Immigration to the United States*, 3 AZTLAN 257, 270-71 (1972).

21. *See, e.g.*, Susan Carroll, *Wrongly deported citizen is home*, HOUS. CHRON., Sept. 13, 2010, at A1. Luis Alberto Delgado, a United States citizen, was deported to Mexico even though he showed a Texas identification card and his birth certificate. He returned to the United States in September 2010 after eighty-five days of involuntary exile. In California, the ACLU filed a lawsuit on behalf of Pedro Guzman, a disabled American citizen who was mistakenly identified as a Mexican national and transferred to an ICE detention center and later deported to Mexico because an employee of the Los Angeles County Sheriff's Office erroneously determined that Mr. Guzman was undocumented. Available at http://restorefairness.org/tag/sheriff-arpaio/, last visited on Dec. 27, 2009.

aliens and United States citizens.[22]

One of the biggest problems facing many Latinos today involves the latent prejudice evoked by simply hearing the term "illegal alien." The word "illegal" automatically sends out a negative connotation of people who entered the country without legal authority and who should therefore be labeled as criminals. While the use of the terms "undocumented" and "unauthorized" may soften the impact, the reality is that the debate is dominated by conservative talk show radio and television hosts who continuously refer to the "illegal" as if this adjective had become a noun.

"Foreignness discrimination" is problematic and difficult to assess for many reasons.[23] As a juror sits inside the courtroom, hundreds of thoughts run through her mind. In today's society, where immigration is a hot topic, there are strong views towards undocumented immigrants. When jurors hear "illegal," they think about increased taxes for schools and medical care and the increase in the unemployment rates, even if such beliefs are without factual support.

One of the major threats or concerns, at least as seen by some outspoken members of the Anglo community,[24] has been the expanded growth of Latinos, mostly Mexicans. Today, Latinos account for over 48.4 million residents of the United States.[25]

After the 1994 congressional election, GOP gains led to the passage in Congress of two harsh anti-immigrant statutes, the 1996 Immigration Acts.[26] The statutes expanded the definition of what constitutes an aggravated felony for removal (deportation) purposes and made the statute retroactive to include convictions that occurred prior to the 1996 effective date of the act.[27]

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22. ACUÑA, *supra* 14, at 190; CARLOS E. CORTES (ed.), Patricia Morgan, *Shame of a Nation: A Documented Story of Police-State Terror Against Mexican-Americans in the U.S.A.* 22-23, THE MEXICAN AMERICAN AND THE LAW (Arno Press 1974); F. ARTURO ROSALES, DICTIONARY OF LATINO CIVIL RIGHTS HISTORY 335 (Arte Publico Press 2006).

23. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 336 (1997).

24. *See, e.g.*, SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER 8 (Paperback edition, 2003 First Simon & Schuster) (Original copyright, 1996) (Harvard professor asserts that the increase of the Latino population will adversely impact American culture).

25. Mark Hugo Lopez, Associate Director, Pew Hispanic Center, and Paul Taylor, Director, Pew Hispanic Center, *The 2010 Congressional Reapportionment*, Jan. 8, 2011, available at http://hispanicohio.northcoastnow.com/2011/01/08/the-2010-congressional-reapportionment/, last visited on Jan. 23, 2011.

26. The Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104-142, § 401-443, 110 Stat. 1214, 1258-81 (1996), codified at 18 U.S.C. § 2339B (a) (7) (2006), combined with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208, Div. C, 110 Stat. at 3009-546 through 3009-724 (1996), 8 U.S.C. § 1101 *et seq.* (2006), extensively amended the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163 (1952), 8 U.S.C. § 1101 *et seq.* (2006).

27. *See* 8 U.S.C. § 1101(a)(43)(F) (2000) for the definition of an aggravated felony. For a constitutional assessment of this extremely punitive legislation, *see* Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245 (2004).

Politically, both parties engage in efforts to curtail and control undocumented entries. There are obvious exceptions. For instance, under the Obama Administration, the federal government grants a suspension from deportation to college students who came to the United States without papers when they were children.[28]

In the process of carrying out a massive enforcement effort, such as is required if the federal government desires to remove all undocumented persons from the United States, the government has resorted to collaborating with local law enforcement. The most common and notorious fashion is to enter into what is referred to as a 287 (g) Agreement with a State, or with a political subdivision of a State. The name of the program derives from the section of the Immigration and Nationality Act which authorizes the plan.[29] Congress enacted Section 287 (g) of the Immigration and Nationality Act in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[30]

The enforcement results under the 287 (g) and under Arizona-type local legislation have been shocking to the American concept of liberty and justice. One horrific example involves Chandler, Arizona and their local police cooperation with the Tucson Border Patrol Sector in July 1997. The "Chandler Roundup" operation resulted in many complaints of civil rights violations that typified the unreasonable seizures and racial insults Mexican American citizens and legal residents are subjected to during immigration raids.[31] In some cases, these enforcement efforts have even led to deportations. Another involves an East Coast accent that landed an American citizen in jail on an immigration hold.[32]

Yet these horror stories of the violations of the rights of American Latinos have not diminished the drive to make all efforts to question "suspects" of their right to be in the United States. The group State Legislators for Legal Immigration (SLLI), founded in 2007, attributes to "illegal aliens" what it describes as "[i]ncreasingly documented incidences of homicide, identity theft, property theft, serious infectious diseases, drug running, gang violence, human trafficking, terrorism and growing cost to taxpayers." Its founder, Republican Pennsylvania State Rep. Daryl Metcalfe, writes on SLLI's website that "the personal and economic safety" of all Americans is threatened by "the ongoing invasion of illegal aliens" and compares the situation to that facing the

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28. Julia Preston, *Students Spared Amid an Increase in Deportations*, NEW YORK TIMES, Aug. 8, 2010, available at http://www.nytimes.com/2010/08/09/us/09students.html?_r=1&pagewanted=2, last visited on Aug 9, 2010.

29. 8 U.S.C. § 1357(g) (2006).

30. Pub. L. 104-208, Div. C, 110 Stat. at 3009-546 through 3009-724 (1996), 8 U.S.C. § 1101 *et seq.* (2006).

31. Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75, 76 (2005).

32. Rucks Russell, *American citizen held in county jail as illegal immigrant*, 11 News (CBS Affiliate, Houston, Texas), Oct. 17, 2008 (Leonard Parrish, formerly of Brooklyn, N.Y., was identified as an undocumented immigrant on the basis of his East Coast accent.).

settlers during the American Revolution.[33] Perhaps he engages in a bit of hyperbole, but press accounts of the anti-immigrant xenophobia indicate the group is quite serious.

III. THE TREATMENT OF UNDOCUMENTED ALIENS AND OTHERS IN CRIMINAL CASES

A. Rule 403 Unfair Prejudice Standards

Rule 403 of Federal Rules of Evidence state, in part, that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."[34] Another rule allows the admission of evidence of crimes, wrongs or acts involving misconduct.[35] Generally, as the evidence becomes more essential to prove the ultimate issue in a case, the probative value increases, thus overcoming any potential unfair prejudicial impact.

By definition, all probative evidence results in *some* prejudice. The question is whether evidence of another crime has an undue or likely tendency to result in an improper decision or to appeal to negative sympathies or instincts.

Generally, a not guilty plea can open the door to the presentation of motive evidence in the Government's case in chief.[36] In *Spencer v. Texas* the Supreme Court addressed the dangers of introducing evidence of the prior crimes of a litigant, particularly when the litigant is an accused in a criminal case.[37] Because prior crime evidence generally possesses a greater potential for prejudice, it is usually excluded as prohibited character evidence.[38] However, exceptions to this general exclusion rule include circumstances when the evidence is probative in establishing intent,[39] identity,[40] malice,[41] motive,[42] or a pattern or modus operandi of criminal activity, particularly in a circumstantial evidence case where the burden on the prosecution is even more difficult.[43]

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33. Southern Poverty Law Center, *Attacking the Constitution: State Legislators for Legal Immigration & the Anti-Immigrant Movement*, March 2011, available at http://www.splcenter.org/get-informed/publications/attacking-the-constitution-slli-and-the-anti-immigrant-movement, Mar. 16, 2011.

34. FED. R. EVID. 403.

35. FED. R. EVID. 404 (b).

36. *See, e.g.*, United States v. Frank, 11 F. Supp. 2d 314, 315, 317-18 (S.D.N.Y. 1998).

37. *See* 385 U.S. 554, 560-61 (1967).

38. FED. R. EVID. 404 (b).

39. Ellisor v. State, 162 Tex. Crim. App. 117, 282 S. W. 2d 393 (1955).

40. Chavira v. State, 167 Tex. Crim. App. 197, 319 S. W. 2d 115 (1958).

41. Moss v. State, 364 S. W. 2d 389 (Tex. Crim. App. 1963).

42. Moses v. State, 168 Tex. Crim. App. 409, 328 S. W. 2d 885 (1959).

43. Haley v. State, 87 Tex. Crim. App. 519, 223 S. W. 202 (1920).

More obvious, perhaps, are situations where the accused opens the door by raising the issue of his character[44] or when the accused waives his right to remain silent, testifies and opens the door to impeachment of his credibility.[45] Regardless, the interests of an accused can to some extent be protected by the court's issuance of a limiting instruction.[46]

B. *Presentation of Unfairly Prejudicial Testimony in Criminal Cases*

1. Old Chief v. United States

In *Old Chief v. United States*, the United States Supreme Court addressed the common problem of presenting evidence of prior criminal convictions to establish jurisdictional elements in criminal cases.[47] The Court determined that a district court abuses its discretion if it declines an offer by the accused to stipulate to evidence of a prior conviction and instead accepts in evidence the full record of a prior judgment when the nature of the prior offense raises the risk of a verdict tainted by improper considerations.[48]

Old Chief faced a prosecution not only for assault with a dangerous weapon and using a firearm in relation to a crime of violence but also for being a felon in possession of a firearm.[49] His prior felony conviction, listed in full details in the indictment, involved an assault causing serious bodily injury. The federal prosecutor argued the Government should be allowed to prove each element of the case fully. The trial court agreed,[50] notwithstanding that the jury would be necessarily informed in the process that Old Chief had previously been convicted of exactly the same behavior of which he was accused in his current prosecution.[51]

Before the trial began, Old Chief moved for an order barring the prosecution from making references to the details of the prior conviction, and offered to stipulate that he had been convicted of a qualifying felony. By allowing the prosecution to provide all details, the accused feared that "unfair prejudice from that evidence would substantially outweigh its probative value."[52] The prosecutor refused to accept the offer to stipulate, and the district judge rejected the stipulation. The

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44. *See, e.g.*, Michelson v. United States, 335 U.S. 469 (1948); United States v. McRae, 593 F.2d 700 (5th Cir. 1979) (alleged grief over his wife's "accidental" death at his hands opens the door to proof of dating two months later); Perkins v. State, 152 Tex. Crim. App. 321, 213 S. W. 2d 681 (1948).

45. Giacone v. State, 124 Tex. Crim. App. 141, 62 S. W. 2d 986 (1933).

46. FED. R. EVID. 105.

47. 519 U.S. 172 (1997).

48. *Id.* at 174.

49. *Id.* at 174-75.

50. *Id.* at 177.

51. *Id.*

52. *Id.* at 175, referring to FED. R. EVID. 403.

Ninth Circuit affirmed.

Justice Souter, writing for the majority, began with the fundamental rule. i.e., that relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[53] The rules then provide: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, *by these rules*, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."[54] Finally, the critical rule in *Old Chief*, Rule 403, authorizes exclusion of relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[55]

In the analysis as to what "unfair prejudice" connotes in a criminal prosecution, Justice Souter concentrated on evidence which might "lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged."[56] Justice Souter further described the concept as including an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[57] The majority noted that these improper grounds include the situation Old Chief faced in his trial of having his earlier bad act generalized into bad character[58] and thus increasing the probabilities that the jury would conclude that he did the later bad act now charged.[59]

Stated more directly, the Government "may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime."[60] This proof is quite relevant, but the Court rejected that proof because it "is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[61]

Justice Souter clarified that the prosecution's burden of persuasion would be respected as to the need to present a continuous story. However, proving one's prior criminal status without

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53. *Id.* at 178, citing FED. R. EVID. 401.

54. FED. R. EVID. 402 (emphasis added).

55. FED. R. EVID. 403, discussed in Old Chief, 519 U.S. at 179-80.

56. Old Chief, 519 U.S. at 180, citing the Advisory Committee's Notes on FED. R. EVID. 403.

57. *Id.*

58. FED. R. EVID. 404(b) bars propensity evidence by providing that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

59. Old Chief, 519 U.S. at 180.

60. *Id.* at 181, citing Michelson v. United States, 335 U.S. 469, 475-76 (1948).

61. *Id.*

providing details of why that status was imposed does not undermine the prosecutor's desire to present "a coherent narrative of [the defendant's] thoughts and actions in perpetrating the offense for which he is being tried."[62] Since the prior conviction in *Old Chief* is for an offense likely to support conviction on an improper ground, the Court found that the only "reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available."[63]

2. The State of Texas v. Ricardo Aldape Guerra

In the summer of 1982, J. D. Harris, a Houston, Texas police officer, in response to a citizen complaint of reckless driving, approached a stalled vehicle occupied by Ricardo Aldape Guerra and Roberto Carrasco Flores. Pursuant to Officer Harris' command, the occupants exited and approached the officer's vehicle. Aldape Guerra placed his hands on the hood of the officer's vehicle, but Carrasco Flores pulled a semi-automatic pistol and shot Officer Harris three times. As the individuals fled the scene of the crime, Carrasco fired the same weapon into an approaching vehicle and killed Jose Armijo, Sr., in the presence of his two children.

It is undisputed that Carrasco wore a maroon shirt and brown pants and that Aldape Guerra wore a light green shirt and blue jeans. Carrasco was also known in the neighborhood as "Guero" or "Wero" because of his light skin.[64] As well, he was clean-shaven and had short hair; Aldape Guerra, on the other hand, had black, straight, shoulder-length hair, a mustache, and a beard.[65]

Within an hour of the shooting, Carrasco was killed in a shootout with police, but not before he shot and seriously wounded another police officer with the same weapon used to kill Officer Harris and Mr. Armijo. Authorities found Officer Harris' weapon in Carrasco's waistband when his body was examined at the morgue.

Aldape Guerra was arrested shortly after Carrasco was killed, while hiding beneath a horse trailer. He was unarmed at the time, although a .45-caliber pistol was found lying under the trailer, wrapped in a bandanna. Aldape Guerra was tried for the offense of capital murder and was convicted in October 1982.

Aldape Guerra complained that the prosecution informed four jurors during the voir dire that he was an "illegal alien." The prosecution claimed that illegal alien status constituted evidence

62. *Id.* at 192.

63. *Id.* at 192.

64. Guerra v. Collins, 916 F. Supp. 620, 623 (S.D. Tex. 1995).

65. *Id.*

that the jurors could consider when answering the punishment special issues which would assist in determining if Aldape Guerra should receive a life sentence or the death penalty. However, the court concluded that the offense of unlawful entry into the United States was irrelevant to the issue of a defendant's propensity for future violent and dangerous criminal behavior.[66] The court noted that no proof was offered that undocumented aliens are more prone than citizens to commit violent crimes, and the court stated that a capital defendant's punishment should be based on his "personal actions and intentions, not those of a group of people with whom he shared a characteristic."[67]

Aldape Guerra also contends that he was denied a fair and impartial trial since he was taken to the crime scene and location of the witnesses in handcuffs and with bags over his hands. At the lineup, he was the sole Hispanic on exhibition with long-hair; before, during, and after the lineup, the witnesses were permitted to communicate amongst themselves. One Latina witness, apparently motivated by an anti-undocumented alien bias, urged the others to identify Aldape Guerra as the shooter.

After the lineup, several of the witnesses gave a series of conflicting second statements declaring that Aldape Guerra was the shooter. One explanation may be found in the fact that witness Hilma G. Galvan spent most of her time in the hallway talking to Jose, Jr. and Flores. She pointed toward Aldape Guerra and said to Jose, Jr., and Jose and Armando Heredia, in Spanish, loud enough for all the witnesses and the officers in the room to hear, that since Carrasco had died, they could blame the man who "looked like God" or the "wetback"[68] from Mexico for the shooting of officer Harris.

Galvan continued by stating that Mexicans only come to the United States to commit crimes. She repeatedly referred to Mexican Nationals as "*Mojados*" or "wetbacks." The court attributed her actions to her bias toward Mexican Nationals who Galvan claimed "took the jobs from Americans."[69] The judge concluded that Galvan's prejudice against undocumented aliens was probably the motivation for the inconsistencies between her own statement and her testimony.

Notwithstanding the number of witnesses who contradicted the prosecution's theory that Aldape Guerra shot and killed Officer Harris, the Harris County District Attorney promoted this claim. During a pretrial meeting of the witnesses, the prosecutor told the witnesses that Carrasco was dead and that Aldape Guerra was the shooter. At the trial, two life-size mannequins were stationed in front of the jury from the beginning to the end of the trial. Carrasco's mannequin was bloody and riddled with what appeared to be wounds while that of Aldape Guerra had no such

66. *Id.* at 636.

67. *Id.*, citing Zant v. Stephens, 462 U.S. 862, 878-79 (1983) ("What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.") (emphasis in original).

68. *Id.* at 629. The word "wetback" is one of the most derogatory words that can be used against a Latino immigrant.

69. *Id.*

notorious marks. The prosecution utilized the mannequins in their strategy to help identify the survivor as the man who shot Officer Harris. Richard Bax, one of the prosecutors in the 1982 trial, conceded at the habeas hearing that "the physical evidence . . . totally pointed towards Carrasco Flores as being the shooter."[70]

Finally, Aldape Guerra claimed that the prosecution failed to disclose materially exculpatory evidence and used evidence known to be false, or half truths, to convict him. The cumulative effect of all of these actions resulted in a violation of his "due process" rights and the fundamental right to a fair trial. Several witnesses, particularly the younger ones, provided evidence that exonerated Aldape Guerra. However, officers excluded exculpatory information and never shared these facts with the defense.[71]

The Honorable Kenneth M. Hoyt, the federal district court judge who presided over the writ of habeas corpus hearing, found that intimidation by the police or prosecution to dissuade a witness from testifying or to persuade a witness to change his testimony, when combined with a showing of prejudice to the defendant, violates a defendant's "due process" rights. In addition, when this occurs, the state has a duty to disclose such conduct to the defense. The judge said the following about the police and prosecutorial effort:

> It is clear to this Court that the mood and motivation underlying the police officers' conduct arising out of this case was to convict Guerra for the death of officer Harris even if the facts did not warrant that result. The Court finds and holds that the police officers and the prosecutors intimidated witnesses in an effort to suppress evidence favorable and material to Guerra's defense. Specifically, the written statements that were taken after the line-up are in many respects in significant contrast to those taken before the line-up. The Court attributes this to the fact that Carrasco had been killed and the strong, overwhelming desire to charge both men with the same crime, even if it was impossible to do so.[72]

The judge found that the prosecutors' conduct was equally blatant. Questions to the witnesses were posed in such a manner to state or imply complicity by Aldape Guerra. When the answers were not to their liking, they resorted to ridicule. The judge found that this pretrial intimidation of the witnesses, most of whom were children, resulted in a denial of fundamental "due

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70. *Id.* at 630 n. 7.

71. Patricia Diaz, a minor in 1982, stated that she got a glimpse of Aldape Guerra after she heard the shots and that Aldape Guerra's hands looked empty. An officer insisted that Diaz had seen more and threatened to take away her infant daughter unless she cooperated. *Id.* at 624. Another youngster, fourteen- year-old Herlinda Garcia, testified that she told the police that Carrasco was the shooter. The officer told her "she just did not know what all could happen to her and her husband," a comment she viewed as a threat to jail her husband on rape charges based on her age. *Id.* at 625. Garcia further informed an officer that the man in the number four position in the lineup (Aldape Guerra) was not the shooter but, instead, was the man with empty hands near the front of the police car at the time officer Harris was shot. *Id.* at 631.

72. *Id.* at 626.

process" and a fair trial.[73]

The habeas judge also addressed the circumstances surrounding the identification of Aldape Guerra as the shooter. The court found it "confounding" that the police took statements shortly after the shooting that were essentially exculpatory of Aldape Guerra, with none pointing "unequivocally to Guerra."[74] The original statements identified the shooter generally as a light-complexioned man with blond hair who wore dark brown pants and a dark shirt. That description matched Carrasco. In contrast to Carrasco's clothing, Aldape Guerra wore a light green shirt and blue jeans. Another eyewitness identified the shooter as a man he knew by the nickname "Wero,"[75] a misspelling of the Spanish word "*Güero*," which means "light-complexioned" or a person with light-colored hair. Again, in contrast to Carrasco, Aldape Guerra had dark hair. Jose Armijo, Jr., could only identify the shooter as being left-handed. This description was critical because Carrasco was left-handed.

The judge found the various witnesses at the habeas hearing to be credible in that their testimony is consistent with the physical evidence that establishes that Aldape Guerra did not shoot officer Harris and Mr. Armijo. The court also found that the officers and prosecutors had a duty to accurately record the statements of the witnesses, to fairly investigate the case, and to disclose all exculpatory evidence. *Moreover, they had a duty to not prosecute an innocent man.*[76]

Finally, as to the trace metal detection test results, the court observed that prosecutors told the defense attorney only that the test had been positive as to Carrasco's handling of officer Harris' weapon and negative for the murder weapon. However, Carrasco also had trace metal patterns on his left hand. The evidence clearly established that Aldape Guerra had no trace metal of any sort on either hand or on his body.[77]

The judge added that the extent of the prosecutorial misconduct is legion. The numerous instances of misconduct as well as the type and degree compel the conclusion that the cumulative effect of the prosecutors' misconduct rendered the trial fundamentally unfair. The judge found no doubt that the verdict would have been different had the trial been properly conducted.

The judge concluded that the actions by the police officers and the prosecutors were intentional, were done in bad faith, and were outrageous. He added:

> These men and women, sworn to uphold the law, abandoned their charge and became merchants of chaos. It is these type flag-festooned police and

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73. *Id.* at 627.

74. *Id.*

75. *Id.* at 623.

76. *Id.* at 623 (emphasis added).

77. *Id.* at 634.

> law-and-order prosecutors who bring cases of this nature, giving the public the unwarranted notion that the justice system has failed when a conviction is not obtained or a conviction is reversed. Their misconduct was designed and calculated to obtain a conviction and another "notch in their guns" despite the overwhelming evidence that Carrasco was the killer and the lack of evidence pointing to Guerra.[78]

Having found the cumulative effect of the police officers' and prosecutors' misconduct violated Aldape Guerra's federal constitutional right to a fair and impartial process and trial, the federal district judge granted his Writ of Habeas Corpus and set aside the conviction and judgment assessing the death penalty.[79]

IV. THE TREATMENT OF UNDOCUMENTED PERSONS IN CIVIL CASES

In this section, the authors address the issue of the relevance of the admission of the status of undocumented workers in determining their eligibility to receive a remedy for lost future wages or similar remedies.

A. The Immigration Debate

According to a recent report by the U.S. Department of Homeland Security, it was estimated that 8.5 million unauthorized immigrants were living in the United States in 2000.[80] This figure grew by approximately 250,000 persons each year.[81] As of 2009, the number of unauthorized immigrants living in the United States was approximately 10.8 million.[82] Immigrants from Mexico account for about 6.7 million of the total unauthorized immigrants living in the United States.[83] It is estimated that between 2000 and 2009, approximately two million people illegally entered the United States from Mexico.[84] There are an additional 170,000 people legally entering this country from Mexico each year.[85] These numbers are the spark that has produced a firestorm of controversy.

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78. *Id.* at 637.

79. The district attorney declined to prosecute Aldape Guerra so he was released to Mexican authorities at the Brownsville-Matamoros bridge in South Texas in 1997. Available at http://www.deathpenaltyinfo.org/innocence-cases-1994-2003. He became a cause célebre in his native Mexico and died shortly after his return in a car crash. Available at http://www.nytimes.com/1997/04/17/us/mexican-long-held-in-texas-murder-wins-his-freedom.html.

80. MICHAEL HOEFFER, NANCY RYTINA & BRYAN C. BAKER, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 2 (U.S. Dep't of Homeland Sec., Office of Immigration Statistics 2010) *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

81. *Id.*

82. *Id.*

83. *Id.* at 4.

84. *Id.*

85. Benny Agosto, Jr. & Jason B. Ostrom, *Can the Injured Migrant Worker's Alien Status be Introduced at Trial?*, 30 T.

As the United States Supreme Court recently stated in the March 2010 decision of *Padilla v. Kentucky*, "[t]he landscape of federal immigration law has changed dramatically over the last 90 years.... The Nation's first 100 years was 'a period of unimpeded immigration.'"[86] The 2010 Census, which is currently underway, may indicate that the number of undocumented workers living in the United States will reach between 12 to 13 million.

Migrant workers, whether legal or illegal, play an important role in the United States' economy. The average undocumented family pays more than $4,200 in annual federal taxes while earning less than the average annual salary of $36,700.[87] Fifty to eighty-five percent of the country's 1.6 million farm workers are undocumented.[88] Immigrant workers play a critical service in keeping hotels operating affordably by taking jobs American-born workers do not want. Of the 12 million food service workers in the United States, 1.4 million are believed to be immigrants, with 500,000 of them from Mexico.[89] Forty percent of the workers in the New York restaurant industry are undocumented.[90] Undocumented workers from Mexico tend to be young, predominately male, struggling with the English language, and employed in the construction, manufacturing and hospitality industries.[91] The reality of undocumented workers in America stands in stark contrast to the fears engendered by their presence.

The fear associated with undocumented workers is not new. Courts throughout the nation have examined, and attempted to insulate against, the prejudices that a plaintiff, who is an injured undocumented worker, encounters in trying to obtain a fair trial. The debate over illegal immigration, however, is currently at the forefront of the policy in the United States, and attorneys who represent injured undocumented workers must be acutely cognizant of the prejudices that the American people are exposed to during this debate.[92]

B. Evidence of an Individual's Alien Status in the Courts

In the course of a hotly contested trial, lawyers often "pull off the gloves." Professional and ethical conduct, however, requires that there be limitations on the extent to which counsel may go into prejudicial and inadmissible matters. Rule 403 of the Texas Rules of Evidence, as well as the Federal Rules of Evidence, require that the trial court balance the risk of unfair prejudice against the

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MARSHALL L. REV. 383, 384 (2005).

86. Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).

87. Agosto & Ostrom, *supra* note 9, at 385.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *See generally* Lise Johnson, *"You Can Violate the Rights of Undocumented Persons with Impunity": The Shocking Message Arizona's Constitution Sends and Its Inconsistency with International Law*, 13 J. GENDER RACE & JUST. 491 (2010).

probative value of the evidence seeking to be admitted.[93] Most courts across the country following Rule 403 have determined that the trial court is to admit relevant evidence unless the probative value of that extraneous evidence is substantially outweighed by the danger of unfair prejudice.

C. *Evidence Used to Inflame the Jury*

During the last 100 years, the Texas Appellate Courts have uniformly condemned arguments that invoke prejudice based on race, ethnicity, religion, or national origin: "Cases ought to be tried in a court of justice upon the facts provided; and whether a party be a Jew or gentile, white or black, is a matter of indifference."[94] This condemnation extends to arguments that seek to highlight or give weight to a person's alien status. Although the manner in which the prejudicial appeal is presented has varied through the years and from case to case, the response thereto has remained relatively unchanged.

D. *Recent Texas Supreme Court case–TXI Transp. Co. v. Hughes*

In the historic case of *TXI Transp. Co. v. Hughes*, decided in March 2010, Justice David Medina, writing for a unanimous Texas Supreme Court, held that the trial court erred in admitting evidence impugning defendant Ricardo Rodriguez's character on the basis of his immigration status.[95] According to the Court, "[s]uch error was harmful, not only because its prejudice far outweighed any probative value, but also because it fostered the impression that Rodriguez's employer [TXI] should be held liable because it hired an illegal immigrant."[96]

In *TXI*, Kimberly Hughes was driving with several members of her family when her vehicle collided with a TXI gravel truck driven by Ricardo Rodriguez. The collision killed everyone in Hughes' vehicle except for one passenger. Hughes' husband sued TXI and Rodriguez.

At trial, evidence of Rodriguez's immigration status was admitted over TXI's objections.[97] Evidence was introduced regarding Rodriguez's prior deportation, his use of a false Social Security number, and the fact that he lied to obtain a commercial driver's license by using a false Social Security number, among other evidence.[98] TXI complained that Rodriguez's immigration status was not relevant to any issue in the case, and that evidence of his status was highly prejudicial.[99] Hughes argued that evidence of Rodriguez's immigration status was relevant to the issues of negligent

93. TEX. R. EVID. 403; FED. R. EVID. 403.
94. Moss v. Sanger, 75 Tex. 321, 12 S.W. 619, 620 (Tex. 1889).
95. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 245 (Tex. 2010).
96. *Id.*
97. *Id.* at 234.
98. *Id.*
99. *Id.* at 240.

hiring and negligent entrustment, and also as impeachment evidence.[100]

Justice Medina analyzed whether evidence of Rodriguez's immigration status was relevant to the issues of negligent hiring and negligent entrustment.[101] The Court concluded that neither Rodriguez's immigration status nor his use of a fake Social Security number to obtain a commercial driver's license caused the collision.[102] Thus, his immigration status was not relevant to either issue.[103]

The Court then went on to analyze whether evidence of Rodriguez's immigration status, offered for impeachment purposes as prior inconsistent statements, was admissible.[104] Justice Medina concluded it was not, for at least two different reasons.[105] The Court first pointed out that Rodriguez's immigration status was a collateral matter—that is, it did not relate to any of the claims–thus, it was inadmissible impeachment evidence.[106]

Second, the immigration-related evidence was also inadmissible under Texas Rule of Evidence 608(b).[107] This rule provides that specific instances of conduct of a witness for the purpose of attacking his or her credibility may not be proved by extrinsic evidence. As the Court noted, "[f]or over 150 years, 'Texas Civil Courts have consistently rejected evidence of specific instances of conduct for impeachment purposes, no matter how probative of truthfulness.'"[108] Thus, evidence of Rodriguez's immigration status and deportation were inadmissible.[109]

The Court held that even if evidence of Rodriguez's immigration status had some relevance, its probative value was outweighed by the risk of unfair prejudice.[110] Therefore, the trial court erred in admitting evidence of Rodriguez's immigration status and the error was harmful.[111]

As Justice Medina so eloquently wrote, "[s]uch appeals to racial and ethnic prejudices, whether 'explicit and brazen' or 'veiled and subtle,' cannot be tolerated because they undermine the very basis of our judicial process."[112]

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100. *Id.*
101. *Id.* at 240-41.
102. *See id.*
103. *See id.*
104. *Id.* at 241.
105. *Id.* at 241-42.
106. *Id.*
107. *Id.* at 242.
108. *Id.* (citing CATHY COCHRAN, TEXAS RULES OF EVIDENCE HANDBOOK 597 (7th ed. 2007-08).
109. *Id.*
110. *Id.* at 245.
111. *Id.*
112. *Id.*

E. Republic Waste Services, Ltd. v. Martinez – Texas Court of Appeals for the First District

Following the Texas Supreme Court's decision in *TXI*, the Court of Appeals for the First District of Texas, in a landmark case, affirmed a trial court's ruling to exclude evidence of a decedent's immigration status. In *Republic Waste Services, Ltd. v. Martinez*, Elida Martinez sued Republic, a non-subscriber to the Texas Workers' Compensation Act, for the wrongful death of her common law husband, Oscar Gomez.[113] Gomez was an immigrant from El Salvador and was working for Republic Waste in Houston, Texas, when a co-worker ran over him with a garbage truck, killing him.

Before trial, Martinez filed a motion in limine, which the trial court granted, to exclude evidence of Gomez's illegal immigrant status, asserting that it was irrelevant and highly prejudicial. Republic relied on evidence of a federal immigration raid at its facilities just two weeks after Gomez's death, which resulted in fifty to fifty-five workers being detained. Republic asserted that Gomez likely would have been deported after the raid and argued that this evidence was probative of whether Gomez's future income would be earned in the United States, where he earned $33,000 per year, or in El Salvador, where he had earned $1,000 per year. The jury found for Martinez and awarded $1,408,491, including $1,275,000 in future pecuniary losses.

Republic appealed, arguing that the trial court erred in excluding evidence of Gomez's illegal immigrant status. The court of appeals noted that "the issue of immigration is a highly charged area of political debate" and then went on to state that "[t]he probative value of evidence showing only that the plaintiff is an illegal immigrant, who could possibly be deported, is slight because of the highly speculative nature of such evidence."[114] The only evidence presented by Republic of Gomez's possible deportation was the federal immigration raid at its facilities, which did not, "without engaging in speculation and conjecture, rise to the conclusion that Gomez would have been deported, even if he had been detained."[115] The court concluded that the probative value of Gomez's immigration status was slight and was outweighed by its prejudicial effect. Thus, the trial court did not abuse its discretion in excluding evidence of Gomez's immigration status and the judgment was affirmed.

F. Other States' Decisions on the Admissibility of Immigration Status

Courts outside of Texas have rendered opinions espousing the same concerns as Texas courts on the issues of introducing evidence of a person's status as an undocumented worker.

For example, one Florida Court of Appeals held that any probative value of immigration

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113. Republic Waste Services, Ltd. v. Martinez, ____ S.W.3d ____ (Tex. App.—Houston [1st Dist.] 2011).

114. *Id.*

115. *Id.*

status was "thoroughly outweighed by unfair prejudice, confusion of the issues, and misleading of the jury."[116] The California Supreme Court held in a 1985 decision that immigration status, "even if marginally relevant, was highly prejudicial."[117]

Similarly, the Delaware Supreme Court held in 1999, that even if immigration status is relevant to impeach a witness, the court must still determine if the probative value is outweighed by unfair prejudice.[118] A New York court excluded evidence of immigration status because any probative value of the evidence was far outweighed by its prejudicial impact.[119] The Wisconsin Supreme Court, in a 1987 decision, affirmed the exclusion of undocumented status based on its prejudicial effect.[120]

A California Court of Appeals held that prejudice from evidence of undocumented status is "manifest and substantial" and noted "there is unequivocally an inherent bias among certain segments of society against illegal immigrants."[121] One Virginia court stated that "[t]he danger of a jury unfairly denying [Plaintiff] relief based on his status alone outweighed the probative value of the evidence that he acted dishonestly in the past."[122]

Courts in other jurisdictions have similarly held that the use of a witness's immigration status to attack the witness's character is not admissible.

A New York court found that there was no authority to support the conclusion that evidence of undocumented status "impugns one's credibility."[123] Thus the evidence was not admissible for impeachment purposes. One Illinois court did not allow evidence of undocumented status to impeach a witness.[124]

Likewise, a California Court of Appeals found immigration status inadmissible to attack a party's credibility.[125] The Fourth Circuit held that "[a]n individual's status as an alien, legal or otherwise," did not brand the individual a liar.[126]

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116. Maldonado v. Allstate Ins. Co., 789 So.2d 464, 470 (Fla. Dist. Ct. App. 2d 2001).
117. Clemente v. State, 707 P.2d 818, 829 (Cal. 1985).
118. Diaz v. State, 743 A.2d 1166, 1184 (Del. 1999).
119. Klapa v. O & Y Liberty Plaza Co., 645 N.Y.S.2d 281, 282 (Sup. Ct. N.Y. Cty., 1996).
120. Gonzalez v. City of Franklin, 403 N.W.2d 747, 759-60 (Wis. 1987).
121. People v. Martin, No. B164978, 2004 WL 859187, at *6 (Cal. Ct. App. Apr. 22, 2004).
122. Romero v. Boyd Bros. Transp. Co., No. 93-0085-H, 1994 WL 287434, at *2 (W.D. Va. June 14, 1994).
123. Mischalski v. Ford Motor Co., 935 F.Supp. 203, 207-208 (E.D.N.Y. 1996).
124. First Am. Bank v. W. Dupage Landscaping, Inc., No. 00-C-4026, 2005 WL 2284265, at *1 (N.D. Ill. Sept. 19, 2005).
125. Hernandez v. Paicius, 134 Cal.Rptr.2d 756, 760–61 (2003).
126. Figeroa v. I.N.S., 886 F.2d 76, 79 (4th Cir. 1989).

G. *Recent Supreme Court of the State of Washington case–Salas v. Hi-Tech Erectors*

In *Salas v. Hi-Tech Erectors*, decided in April 2010 by the Supreme Court of the State of Washington, Alex Salas was working at a construction site when he slipped from a ladder erected by Hi-Tech.[127] He fell more than 20 feet to the ground and was severely injured.[128] He sued Hi-Tech for negligence.[129] Salas sought to exclude evidence of his immigration status at the trial court.[130] The trial court admitted evidence of his immigration status because Salas was seeking lost future income.[131] The court determined that the evidence was probative of whether Salas's future income would be in U.S. dollars or in his home country's currency.[132] The jury found that Hi-Tech was negligent but was not the proximate cause of Salas' injuries.[133] The Court of Appeals affirmed.[134]

Justice Fairhurst, writing for the majority of the Supreme Court of the State of Washington, noted that there was no evidence of pending deportation proceedings.[135] In addition, Salas had been in the country since 1989, had lived without a visa since 1994, had purchased a home, and had children living in the United States.[136] The only risk of Salas being deported was his immigration status.[137] As the Court pointed out, "immigration status alone is not a reliable indicator of whether someone will be deported," considering that even when an undocumented alien is apprehended, he or she must still go through removal proceedings, which may or may not result in deportation.[138] Based only on Salas' immigration status, Salas' risk of being deported was very low.[139] Nonetheless, the Court concluded that, although Salas' immigration status only minimally increased the likelihood that his labor market would be outside the United States, that was enough to make his immigration status relevant to the issue of lost wages.[140]

However, the Court then went on to analyze whether the low probative value of Salas' immigration status was substantially outweighed by the risk of unfair prejudice.[141] They pointed to California and Wisconsin cases where the courts found that evidence of immigration status was

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127. Salas v. Hi-Tech Erectors, 230 P.3d 583, 584 (Wash. 2010).
128. *Id.* at 584.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 585.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 585-86.
141. *Id.*

prejudicial.[142] The Court held that with regard to lost future earnings, the low probative value of immigration status was greatly outweighed by the danger of unfair prejudice.[143] The Washington Supreme Court then reversed and remanded, and held that the trial court abused its discretion in admitting evidence of Salas' immigration status.[144]

Justice Fairhurst best articulated the argument in favor of excluding evidence of immigration status, writing for the majority in *Salas*:

> We recognize that immigration is a politically sensitive issue. Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation. In light of the low probative value of immigration status with regard to lost future earnings, the risk of unfair prejudice brought about by the admission of a plaintiff's immigration status is too great. Consequently, we are convinced that the probative value of a plaintiff's undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice.[145]

H. Recent Fifth Circuit case—Bollinger Shipyards, Inc. v. Rodriguez

In *Bollinger Shipyards, Inc. v. Rodriguez*, the Fifth Circuit held that undocumented immigrants are eligible for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA").[146] Jorge Rodriguez was working for Bollinger as a pipefitter when he fell while welding the wall of a ship.[147] Due to the injury, he was only able to perform light duty work for about a month, and eventually he had to stop working.[148] He sought benefits under the LHWCA.[149]

At the administrative trial, Bollinger's vocational rehabilitation expert testified that because of Rodriguez's status as "an undocumented immigrant," he "had suffered no loss of *legal* earning capacity, as he had no *legal* earning capacity prior to being injured."[150]

The administrative law judge ("ALJ") held that undocumented immigrants are eligible for LHWCA benefits and ordered that Bollinger pay benefits from the date of the accident to the

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142. *Id.* at 586.
143. *Id.* at 587.
144. *Id.*
145. *Id.* at 586-87.
146. *Id.*
147. *Id.* at 867.
148. *Id.* at 868.
149. *Id.* at 867.
150. *Id.* at 868-69.

present, among other things.[151] The Benefits Review Board ("BRB") affirmed the ALJ's order and also held that undocumented immigrants are entitled to benefits under the LHWCA.[152] Bollinger petitioned for review of the BRB's decision.[153]

Bollinger argued that undocumented immigrants are "per se ineligible to receive indemnity benefits under the LHWCA, as any such benefits 'would be based on illegally obtained wages.'"[154] Bollinger went so far as to compare Rodriguez to a drug dealer, a pirate, and a Mafioso in regards to "ill-gotten wages."[155]

The LHWCA provides workers' compensation benefits to an "employee" if disability or death "results from an injury occurring upon the navigable waters of the United States."[156] "Employee" is defined in the Act as "any person engaged in maritime employment."[157] Further, the Act also states "compensation under [the LHWCA] to aliens not residents (or about to become not residents) of the United States or Canada shall be the same in amount as provided for residents."[158] As the Fifth Circuit pointed out, the Act makes no reference to "illegal" or "undocumented," nor does it exclude undocumented immigrants from the definition of "employee."[159]

The Court reviewed its 1988 decision in *Hernandez v. M/V Rajaan*, where the Court affirmed a district court's award of lost future wages despite the Plaintiff's status as an undocumented immigrant.[160] According to the Court, *Hernandez* "stands for the proposition that undocumented immigrants are eligible to recover workers' compensation benefits under the LHWCA."[161]

Bollinger further argued that the BRB's ruling undermines the Immigration Reform and Control Act of 1986 ("the IRCA").[162] The Court then reviewed the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.[163] In *Hoffman*, the Court held that the IRCA precluded the National Labor Relations Board from awarding back pay to an undocumented immigrant under

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151. *Id.* at 869.
152. *Id.* at 869-70.
153. *Id.* at 870.
154. *Id.* at 871.
155. *Id.*
156. 33 U.S.C. §903 (2006).
157. 33 U.S.C. §902 (2006).
158. 33 U.S.C. §909 (2006).
159. *Bollinger*, 604 F.3d at 872.
160. *Id.* at 873 (citing Hernandez v. M/V Rajaan, 841 F.2d 582, *amended after rehearing*, 848 F.2d 498 (5th Cir. 1988)).
161. *Id.* at 874.
162. *Id.*
163. *Id.* at 875 (citing Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002)).

the National Labor Relations Act ("the NLRA").[164] The Court noted that 1) the employee qualified for the back pay award only by remaining in the United States illegally and 2) the employee could not mitigate damages, as required, without violating the IRCA.[165]

The Fifth Circuit disagreed with Bollinger for three reasons.[166] First, the LHWCA is a non-discretionary, statutory remedy, unlike discretionary back pay under the NLRA.[167] Second, the LHWCA is an injured longshoreman's exclusive remedy and thus, is a substitute for tort claims.[168] An undocumented immigrant would have the right to sue in tort.[169] Therefore, "the remedy provided by the LHWCA is merely a substitute for the negligence claim that an employee could otherwise bring against his employer in tort."[170] Third, the plain language of the LHWCA provides for compensation to nonresident aliens and aliens who are about to become nonresidents.[171] Also, unlike NLRA cases, an injured longshoreman does not have to mitigate damages under the LHWCA nor does the employee have to remain in the United States to qualify for benefits.[172] Therefore, awarding benefits to an undocumented immigrant under the LHWCA does not undermine the IRCA.[173]

After reviewing the statutory text of the LHWCA, previous Fifth Circuit decisions, and the Supreme Court's decision in *Hoffman*, the Fifth Circuit was "convinced that Rodriguez [was] eligible to receive benefits under the LHWCA," and therefore denied Bollinger's petition for review in all respects.[174]

V. CONCLUSION

The terms "illegal alien," "illegal immigrant," and "undocumented worker" now more than ever create a great deal of fear and distress in our society. This fear will, undoubtedly, find its way into a courtroom and prejudice an injured undocumented worker's right to a fair trial. As illustrated by the recent decisions of the Texas Supreme Court, the Supreme Court of the State of Washington, and other cases cited herein, courts throughout this nation recognize the prejudice that is engendered

164. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002).
165. *Id.* at 150.
166. *Bollinger*, 604 F.3d at 877.
167. *Id.*
168. *Id.* at 878.
169. *Id.*
170. *Id.*
171. *Id.* at 879.
172. *Id.*
173. *Id.*
174. *Id.*

with terms like "illegal alien," "illegal immigrant," and "undocumented worker," and have tried to strike a balance between this prejudice and its possible relevance. Texas and Washington, however, have made their position clear—any relevance that the alien status of an injured worker may have in a particular case is likely outweighed by its prejudicial effect.

ARTICLE

WHEN THE WISE LATINA JUDGE MEETS A LIVING CONSTITUTION—WHY IT IS A MATTER OF PERSPECTIVE

LAURA A. HERNANDEZ

SUMMARY

I. INTRODUCTION

It was impossible to ignore. Before becoming president, Barack Obama had enunciated that one of the qualities he would look for in his first United States Supreme Court nominee was "empathy," especially towards the disadvantaged.[1] When the opportunity came, President Obama chose a sitting federal court appellate judge from New York, Sonia Sotomayor.

Initially hailed as a historical choice, Sotomayor would become the first Hispanic justice to sit on the highest court, but opposition arose to Sotomayor's nomination because of a statement she made in a 2001 lecture at the University of California, Berkeley, School of Law.

> That same point can be made with respect to people of color. No one person, judge or nominee will speak in a female or people of color voice. I need not remind you that Justice Clarence Thomas represents a part but not the whole of African-American thought on many subjects. Yet, because I accept the proposition that, as Judge Resnik describes it, "to judge is an exercise of power" and because as, another former law school classmate, Professor Martha Minnow of Harvard Law School, states "there is no objective stance but only a series of perspectives - no neutrality, no escape from choice in judging," I further accept that our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that—it's an aspiration because it denies the fact that we are by our experiences making different choices than others. Not all women or people of color, in all or some circumstances or indeed in any particular case or circumstance but enough people of color in enough cases, will make a difference in the process of judging. . . .
>
> Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.
>
> Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a

1. Dahlia Lithwick, *Once More Without Feeling*, SLATE (May 11, 2009, 7:15 PM), http://www.slate.com/id/2218103/.

> woman in a gender discrimination case. I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. . . . My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.[2]

Of course, the only sentence that registered with the national consciousness was, ". . . . I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."

The resulting backlash and condemnation caused President Obama to back away from the terminology of "empathy" and Justice Sotomayor to apologize for her endorsement of the idea that a wise Latina would, and should, bring a different perspective to the bench.[3] While no legitimate legal commentator would suggest that impermissible bias either in favor of, or against, a specific group of people be used in current case law, it does seem disingenuous to assert that the justices who serve on the United States Supreme Court do not already bring their individual life experiences to their legal opinions.

Indeed, a review of United States Supreme Court case law demonstrates that when the judiciary fails to apply, or simply lacks, the same life experience presented to them in a dispute, the resulting judicial decision is weak. The judiciary cannot use a methodology to interpret the Constitution that requires decisions to be made in a vacuum. Case law demonstrates this type of legal deliberation will usually deprive unrepresented groups of Americans of their fundamental rights. For better or for worse, the American judiciary, and especially the Supreme Court, is the guardian of our constitutional rights. Those rights are compromised when there is no perspective. As the future for heightened constitutional protection over gender discrimination claims is shaped, with Justice Antonin Scalia asserting there is no equal protection right for gender claims at all, the

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2. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002) (emphasis added).

3. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States*, 111th Cong. 62 (2009) (Statement of Sonia Sotomayor, nominee to the United States Supreme Court) (" Senator Leahy, yesterday, many of the senators emphasized that their -- the values they thought were important for judging, and central to many of their comments was the fact that a judge had to come to the process understanding the importance and respect the Constitution must receive in the judging process and an understanding that that respect is guided by, and should be guided by, a full appreciation of the limited jurisdiction of the court in our system of government, but understanding its importance as well. That is the central part of judging. What my experiences on the trial court and the appellate court have reinforced for me is that the process of judging is a process of keeping an open mind. It's the process of not coming to a decision with a pre-judgment ever of an outcome and that reaching a conclusion has to start with understanding what the parties are arguing, but examining in all situations carefully the facts as they prove them or not prove them, the record as they create it, and then making a decision that is limited to what the law says on the facts before the judge."), *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html.

perception of the other Supreme Court justices is even more critical.

This article discusses the use of perception by past and present United States Supreme Court justices in reaching their judicial decisions.

Part II of this article will analyze past Supreme Court decisions in the area of racial discrimination with a special emphasis on the background of the majority author.

Part III of this article will analyze modern day Supreme Court cases in the area of gender discrimination with a special emphasis on the background of the majority author.

Part IV of this article will discuss case law where a Supreme Court justice's life experiences form the core of his judicial reasoning.

Part V of this article will discuss the costs of constitutional interpretation where a justice lacks or does not apply his or her life experiences, otherwise known as perspective.

II. THE SUPREME COURT'S HISTORICAL USE OF PERCEPTION AND JUDICIAL INTERPRETATION OF THE CONSTITUTION AS REFLECTED IN THE RACIAL DISCRIMINATION CASES.

Former Supreme Court Justice David Souter noted in his May 2010 commencement speech at Harvard University that while the text of the Constitution has not changed, the way judges and attorneys interpret it certainly has.[4] We must begin with the racial discrimination cases.

A. *The Evolution of Impermissible Racial Discrimination and the Perspective that Shaped It Beginning with Dred Scott.*

In 1856, five years before the start of the Civil War, the United States Supreme Court decided *Dred Scott v. John Sanford.*[5] The issue was simple: was a freed slave considered a citizen

4. Justice David Souter, Harvard Commencement Remarks (May 27, 2010), *in* HARVARD GAZETTE, http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/ ("The reasons that constitutional judging is not a mere combination of fair reading and simple facts extend way beyond the recognition that constitutions have to have a lot of general language in order to be useful over long stretches of time. Another reason is that the Constitution contains values that may well exist in tension with each other, not in harmony. Yet another reason is that the facts that determine whether a constitutional provision applies may be very different from facts like a person's age or the amount of a grocery bill; constitutional facts may require judges to understand the meaning that the facts may bear before the judges can figure out what to make of them.").

5. *Scott v. Sandford*, 60 U.S. 393 (1856).

by the United States Constitution?[6] The answer was not obvious. After all, the Constitution was originally drafted with the following clause: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, ***three fifths of all other Persons***."[7] The infamous *Dred Scott* ruling held that Mr. Scott was not a citizen and therefore, could be legally deprived of all constitutional rights and privileges.[8]

1. The *Dred Scott* Analysis

According to the 1856 Court, the Constitution imposed firm boundaries on state autonomy; thus, its interpretation must strictly adhere to what the drafters intended.

> It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it. . . . It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms. In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who

6. *Id.* at 404-405 ("The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.").

7. U.S. Const. art.1, §2 (emphasis added) (African American slaves were deemed three fifths of a white man.).

8. *Scott*, 60 U.S. at 404-405 ("The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.").

> had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.[9]

The Court painstakingly laid out its justification for the reduced status of African Americans based on their past historical treatment: (1) they were inferior; (2) they were unfit to associate with the white race; (3) they had no rights which the white man was bound to respect; and, (4) they were "justly and lawfully. . . .reduced to slavery for [their own benefit."[10] What is most jarring to the modern reader is the underlying implication that the Supreme Court did not question this treatment as either constitutionally improper or ethically questionable.

To advance this view, the Court felt the need to clarify plain and unambiguous language in the Constitution by inserting its interpretation, or perspective, of what the framers' intended:

> The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the *people* of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the *people* of the United States, and of *citizens* of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood, that no further description or definition was necessary.[11]

Thus, instead of a living document, the Court imagined a Constitution frozen in time.[12]

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9. *Id.* at 406-07.

10. *Id.* at 407. The Court further elaborated: "He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion." *Id.* at 408. "And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States." *Id.*

11. *Id.* at 410-11.

12. In further support of their legal conclusions, the Court reinforced its idea of black servitude by demonstrating that no governmental authority or document treated them as more than property. *Id.* at 415. The Court first considered the laws of states deemed hostile to the slave trade at the time of the founding. "We have made this particular examination into the legislative and judicial action of Connecticut, because, from the early hostility it displayed to the slave trade on the coast of Africa, we may expect to find the laws of that State as lenient and favorable to the subject race as those of any other State in the Union; and if we

And the time chosen, September 17, 1787, was unkind to black freedman like Dred Scott.[13]

Unsurprisingly, the Court held that Mr. Scott did not have the ability to sue in American courts because he was not an American citizen.[14] In an extraordinary extension of this decision, the Supreme Court then stated in dicta that it would not recognize Mr. Scott's freedman status because he was born a slave and gained freedom by merely moving to a state that prohibited slavery.[15]

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find that at the time the Constitution was adopted, they were not even there raised to the rank of citizens, but were still held and treated as property, and the laws relating to them passed with reference altogether to the interest and convenience of the white race, we shall hardly find them elevated to a higher rank anywhere else." *Id.* Then, the Court analyzed the Articles of Confederation. "Words could hardly have been used which more strongly mark the line of distinction between the citizen and the subject; the free and the subjugated races. *Id.* at 418-19. The latter were not even counted when the inhabitants of a State were to be embodied in proportion to its numbers for the general defence. And it cannot for a moment be supposed, that a class of persons thus separated and rejected from those who formed the sovereignty of the States, were yet intended to be included under the words 'free inhabitants,' in the preceding article, to whom privileges and immunities were so carefully secured in every State." *Id.* "Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons, and authorized to be employed, if born in the United States." *Id.* at 421.

13. September 17, 1787 was the date the Constitution was signed in Philadelphia, Pennsylvania. African Americans were not the only group given short shrift by the beliefs and perspectives of that date. The framers were white, male landowners and as result, conferred all authority, such as the right to vote, to their brethren. The group was so narrow that even white females did not enjoy full constitutional privileges. The minority groups of the time were black freedmen, like Mr. Scott, black slaves or Native Americans. *Id.* at 403-407. As *Dred Scott* reminds us, they had no traces of citizenship or constitutional protection. *Id.* at 410-411. Further, there was not a real diversity of religion in the United States. The dominant faith was Protestant, or at least, non-Catholic. Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 368 n.58 (1995) (discussing the political power of non-Christians and non-Protestants at the time of the 1787 convention).

14. *Scott*, 60 U.S. at 426-27. ("What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since, the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word 'citizen' and the word 'people.' And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.")

15. The Court relied on the Bill of Rights and protections afforded to citizens to hypothetically invalidate Mr. Scott's freedman status. "And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law. . . The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States. *Id.* at 450-451. Therefore, the Court stated, "[I]t is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident." *Id.* at 452.

2. Chief Justice Roger Taney's Perspective

The *Dred Scott* opinion is categoric and inflexible. African Americans bound in slavery were nothing more than property in the United States, as supposedly intended by our country's founding documents. What would lead the Supreme Court and its majority opinion writer, Chief Justice Roger Brooke Taney, to such a terribly wrong conclusion?

Chief Justice Taney was the fifth Chief Justice of the United States and the first Roman Catholic on the Court.[16] While the infamy of the *Dred Scott* opinion has marred his historical legacy,[17] an analysis of his life experiences may explain what led Chief Justice Taney to interpret broad and inclusive constitutional language as an explicit exclusion of African Americans, and every other unrepresented American minority group, from the privileges of American liberty.

Chief Justice Taney was closely allied with President Andrew Jackson, holding the offices of the United States Attorney General, from 1831 to 1833, and the Secretary of the Treasury, from 1833 to 1834.[18]

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16. Chief Justice Taney sat on the Supreme Court from 1836 until his death in 1864. Roger B. Taney Biography, BIOGRAPHYBASE, http://www.biographybase.com/biography/Taney_ Roger_B.html (last visited on Jan. 21, 2011).

17. Current Justice Antonin G. Scalia recently remarked on the lingering effect that *Dred Scott* had on Taney's historical legacy. Justice Scalia, like Chief Justice Taney, is Roman Catholic. "There is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. 'It is the dimension' of authority, they say, to 'cal[l] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution.' There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in Dred Scott. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer, and staring straight out. There seems to be on his face, and in his deep set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by Dred Scott cannot help believing that he had that case—its already apparent consequences for the Court, and its soon-to-be-played-out consequences for the Nation—burning on his mind. ***I expect that two years earlier he, too, had thought himself call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution.*** It is no more realistic for us in this case, than it was for him in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be "speedily and finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish. We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining." *Planned Parenthood v. Casey*, 505 U.S. 833, 1001-02 (1992) (Scalia, J., concurring in part, dissenting in part) (emphasis added) (alteration in original) (citations omitted).

18. His appointment as Chief Justice of the Supreme Court, replacing Chief Justice John Marshall, came at some controversy as Taney was unpopular with the United States Senate for actions he took as Treasury Secretary. Roger B. Taney Biography, *supra* note 16. His nomination for Secretary was rejected by the Senate, marking the first time "the Senate exercised

History suggests that Taney's attitude towards slavery hardened over time as the issue became politicized.[19] Born to a wealthy slave owning family who grew tobacco in Maryland, Taney emancipated his own slaves, and bestowed pensions on those who were too old to work.[20] In 1819, Taney denounced slavery as "a blot on our national character" while defending a Methodist minister against charges of inciting slave insurrections.[21]

By the time the Court decided *Dred Scott*, however, Chief Justice Taney was openly labeling opposition to slavery as "northern aggression," a popular phrase among Southerners.[22] Taney hoped the *Dred Scott* decision would remove the issue of abolition from the political debate where it was dividing the country.[23] Instead, *Dred Scott* had the opposite effect - galvanizing Northern opposition to slavery, perhaps because of its dismissal of state authority on this issue, and causing a split in the Democratic Party on sectional lines.[24]

Abolitionists and some supporters of slavery read the dicta contained in *Dred Scott*, that slaves and freedmen were nothing more than property under the federal Constitution, as Chief Justice Taney's advance opinion on the issue of whether states lacked the power to bar slaveholders from bringing their property into free states and whether state laws providing for the emancipation of slaves brought into their territory were constitutional.[25] In anticipation of a ruling that both uses of state power were unconstitutional, a case framing those issues was slowly making its way to the Supreme Court.[26] The American Civil War erupted in 1861 before the case could be heard.[27]

Chief Justice Taney's background as a slave owner and career politician provide the missing pieces that explain *Dred Scott's* absolutism. While a superficial reading of Taney's background might suggest a Supreme Court justice who was far too involved with, and beholden to, political ideology, it would be a mistake to dismiss Taney's history as a slave owner. *Dred Scott* is the product of a justice who was comfortable with the idea of slavery.[28] He was so comfortable with the institution that the idea of fundamental civil liberties never entered his legal analysis. Justice Scalia used Taney's mistake in judgment to decry the Court's role in any issue more

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its power to reject a cabinet officer." *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. The case was entitled *Lemmon v. New York. Id.*

27. *Id.* In a striking coincidence, Chief Justice Taney died at the end of the Civil War and on the same day that his home state of Maryland abolished slavery. *Id.*

28. Chief Justice Taney's earlier denunciations of slavery are not seen at all in the opinion of *Dred Scott. See id.*

properly reserved to the legislative branch;[29] but if it had not been for Taney's individual perspective that slaves were entitled to nothing more than a property designation within the United States, then *Dred Scott* might have ended with a simple dismissal on jurisdictional grounds: Scott is not a citizen because the drafters of the Constitution did not intend to confer citizenship to any group who were not citizens on September 17, 1787.[30] Instead, Chief Justice Taney used the opinion to deliver a complex explanation regarding the inferiority of African Americans, and why they did not deserve any civil liberties at all. Even in 1856, this opinion was controversial, probably because of the presence of freedmen in the northern states who demonstrated that they could handle the duties associated with citizenship. Accordingly, Taney supported the opinion with questionable interpretations of the Constitution and damning recitations of the country's historical treatment of African Americans.[31] The perspective of the Chief Justice was on full display throughout the *Dred Scott* opinion.

B. *Separate but Equal is NOT a Badge of Inferiority according to the Court in Plessy.*

Forty years later, in 1896, the United States Supreme Court had the opportunity to re-visit the issue of race and the Constitution in *Plessy v. Ferguson*.[32] At issue was a Louisiana statute providing for separate railway carriage for "the white and colored races."[33] The state law required passenger trains to have separate compartments for each race or a partition in the rail car so that each race would have separate accommodations.[34] The statute further required each race to occupy the compartment to where they "belonged."[35] Failure to comply resulted in a fine or imprisonment of not more than 20 days in prison.[36] The statute also gave railway companies the power to refuse

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29. *See Planned Parenthood v. Casey*, 505 U.S. 833, 1001-02 (1992) (Scalia, J., concurring in part, dissenting in part) .

30. While it can certainly be inferred that Chief Justice Taney meant to abridge state and territorial power on the creation of freedmen, thus removing the incentive for slaves to escape to these safe havens, more than federal court supremacy is at issue in *Dred Scott*.

31. *See Scott*, 60 U.S. at 406-15.

32. 163 U.S. 537 (1896).

33. *Id.* at 540.

34. *Id.* at 540-541 ("The first section of the statute enacts 'that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to.'").

35. *Id.* at 541.

36. *Id.* ("By the second section it was enacted 'that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than

service to passengers that would not sit in the compartment where they "belonged."[37] Separate penalties were assessed against those railway companies that did not comply.[38]

1. The *Plessy* Analysis

Homer Plessy was riding the East Louisiana Railway when he attempted to sit in the white section of the train.[39] Because he was seven-eighths white and one-eighth black, Mr. Plessy maintained that he had the right to sit in the white section.[40] Seeking a writ of prohibition against the state from the statute's fines and imprisonment,[41] Mr. Plessy argued that the Louisiana statute was unconstitutional under the 13th and 14th Amendments of the Constitution.[42]

Writing for the court, Justice Henry Billings Brown quickly held that it was "too clear for argument" that the statute did not conflict with the 13th amendment.[43] "Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services."[44] The court found that refusing accommodations to persons of color does not impose a badge of slavery; therefore, the Louisiana statute was not in conflict with the 13th Amendment.[45]

Turning to the 14th Amendment, the Supreme Court relied upon the *Slaughter-House cases* for proper construction.[46] After rejecting the role of race in the passage of the 14th Amendment, the Court held that segregation did not facially imply the inferiority of either race to the other.[47] To

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twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state.'")

37. *Id.*

38. *Id.* ("The third section provides penalties for the refusal or neglect of the officers, directors, conductors, and employés [sic] of railway companies to comply with the act, with a proviso that 'nothing in this act shall be construed as applying to nurses attending children of the other race.'")

39. *Id.* at 538. Mr. Plessy was subsequently jailed. *Id.*

40. *Id.*

41. *Id.* at 539.

42. *Id.* at 542.

43. *Id.*

44. *Id.*

45. *See id.* at 542-543.

46. *Id.* at 543-44 (citing *Slaughter-House Cases*, 83 U.S. 36 (1873)) ("The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.").

47. *Id.* at 543 (stating that the 14th amendment did not pertain to race, but instead to "exclusive privileges"); *but see*

support this construction, the Supreme Court turned to existing precedent regarding education and the 14th Amendment. It found that the judicial system "generally, if not uniformly," upheld state legislation segregating schools as a valid exercise of a state's police powers.[48] The Court also recognized the constitutionality of laws against miscegenation.[49]

The Court was not persuaded by previous cases striking down laws imposing segregation. Relying on a distinction of political equality versus social equality, the Court explained that *Strauder v. West Virginia*, holding the exclusion of colored men over the age of 21 from sitting on juries was unconstitutional,[50] involved the former category, while the case before it involved the latter.[51] Similarly, the *Civil Rights Cases* were inapplicable because the basis for that decision was an impermissible federal encroachment into state rights.[52]

Instead, the Court endorsed its previous decision in *Louisville, N.O. & T.Ry. Co. v. State,* which was factually almost identical.[53] There, the Supreme Court upheld a Mississippi statute mandating "equal, but separate" accommodations for white and colored races.[54] Finding it a matter of intrastate commerce alone, the Supreme Court quoted itself with approval:

> All that we can consider is whether the state has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the state is no invasion of the power given to Congress by the commerce clause.[55]

The Supreme Court was not persuaded by Mr. Plessy's claim that his reputation of belonging to the "dominant race" was his "property" and the statute deprived him of his right to such property.[56] Engaging in circular logic, the Court found that Plessy was not deprived of any

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Slaughter-House Cases, 83 U.S. at 73-74 (explaining that the 14th Amendment's primary purpose was to establish "the citizenship of the negro," to distinguish between citizenship of the United States and of the states, and to protect the privileges and immunities of citizens of the United States from the hostile legislation of the states).

48. *Plessy*, 163 U.S. at 544-545 (citing *Roberts v. City of Boston*, 5 Cush. 198 (1848-1849)) (highlighting examples from Massachusetts and the District of Columbia).

49. *Id.*

50. *Strauder* v. *West Virginia*, 100 U.S. 303 (1880).

51. *Plessy*, 163 U.S. at 544-45.

52. The act of Congress provided that "all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, on land or water, theaters, and other places of public amusement, and made applicable to citizens of every race and color." *Id.* at 546 (citing *The Civil Rights Cases*, 109 U.S. 3 (1883)). The Supreme Court held Congress was invading the domain of state legislation provided for by the federal Constitution. *Id.* at 547.

53. *Id.* at 547 (citing 133 U.S. 587 (1890)).

54. *Id.*

55. *Id.* at 548.

56. *Id.* at 549 (definition of race and who could be considered white or "colored" was controlled by state law).

such property right because as a matter of state law, if he is not a member of the "dominant race," then there can be no deprivation.[57]

Holding that the Louisiana statute does not conflict with the 14th Amendment,[58] the Court stated:

> The enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment.[59]

Moreover, the majority of the Court was not persuaded that the forced separation of the races necessarily stamps the colored race with inferiority.[60]

> Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the represent situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.[61]

In an impassioned dissent, Justice John Marshall Harlan admonished the majority:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The destinies of the two races, in this country, are indissolubly linked together and the interests of both require that the common government of all shall not permit the seeds of race hate to be

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57. *Id.* at 549-50. If he is a member of the dominant race, however, and was deprived of his reputational property interest, then he may sue for damages. *Id.* As long as the state's exercise of its police power is reasonable, then the state may make racial distinctions and require that the races be separated. *Id.* The Supreme Court had already affirmed the use of a municipality's state power to make "an arbitrary and unjust discrimination against the Chinese race." *Id.* at 550 (citing *Yick Woo v. Hopkins,* 118 U.S. 356 (1886)).

58. *Id.* at 548.

59. *Id.* The Supreme Court found that this analysis only required an inquiry of reasonableness. *Id.* at 550-51 (". . . .the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. . . . [Lousiana is free to act] with reference to the established usages, customs, and traditions of the people, and with a view of the promotion of their comfort, and the preservation of the public peace and good order." "[Louisiana's law is no more] unreasonable or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia.").

60. *Id.* at 551.

61. *Id.*

planted under the sanction of law.[62]

62. *Id.* at 559-60. Harlan further predicted that *Plessy* would only stimulate more transgression on the rights of colored citizens. *Id.*

2. Justice Henry Billings Brown and Social Darwinism

Unlike the opinion in *Dred Scott*, *Plessy* did not attempt to reduce African Americans to mere articles of commerce. Yet, the Court implicitly recognized that the white race could constitutionally segregate itself against all "colored" races. The majority author, Justice Henry Billings Brown, was considered a "social elite."[63] Born in Massachusetts to a New England merchant's family, Brown graduated from Yale in 1856.[64] He trained in the legal profession at both Yale and Harvard, although he did not earn a law degree.[65] Brown practiced law in Michigan and was a United States attorney there until his appointment as a district court judge for the Eastern District of Michigan.[66] Brown joined the Supreme Court in 1890 upon the nomination by President Benjamin Harrison.[67] Primarily known for his expertise in admiralty law, Brown's opinions on the Court reflected an aversion to government intervention in matters of commerce.[68]

Like most social elites in the late 1800s, Brown was considered a social Darwinist.[69] This philosophy applied Charles Darwin's theories of evolution - survival of the fittest - to the social, political and economic realms.[70] "Social Darwinists insisted that biology was destiny."[71] So every trait considered undesirable by society could be attributed to heredity and nature's attempt to weed out the weak of the species.[72] Social Darwinism was the foundation for the science eugenics, the idea that the human race could potentially be "improved" by the artificial selection in the same manner as plants and animals.[73]

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63. *See Henry Billings Brown*, HISTORY OF THE SIXTH CIRCUIT, http://www.ca6.uscourts.gov/lib_hist/Courts/supreme/judges/brown/hbb-bio.html (last visited February 12, 2011).

64. *Id.*

65. *Id.* Brown did, however, obtain honorary law degrees from both Michigan and Yale. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* Brown concurred with the majority opinion in *Lochner v. New York*, which struck down a limitation on the maximum number of working hours. *Id.* He did, however, support the assessment of a federal income tax in *Pollock v. Farmers' Loan & Trust Co. Id.*

69. See *Id.* Social Darwinism is a belief that the strongest or fittest should survive and flourish in society, while the weak and unfit should be allowed to die. *Social Darwinism*, REPLICATORS: EVOLUTIONARY POWER HOUSES, http://library.thinkquest.org/C004367/eh4.shtml (last visited Feb. 12, 2011). The father of Social Darwinism, Herbert Spencer, used his theory to promulgate the idea that the rich and powerful were better adapted to the social and economic climate, and that it was natural and normal for the strong to thrive at the expense of the weak. *Id.* The major flaw in Social Darwinism is that it assumes that what is natural is also morally correct, which history has proven false. *Id.*

70. *But See* Daniel Kevles, *In the Name of Darwin*, http://www.pbs.org/wgbh/evolution/darwin/nameof/ ("Some supporters of Darwin's theory of evolution have misapplied the biological principles of natural selection -- "survival of the fittest" -- to the social, political, and economic realms.").

71. *See Id.*

72. *Id.*

73. *See id.* at 3-4. This theory was notoriously applied by the Nazi regime during World War II. Unfortunately, some aspect of eugenics is still present today, most recently in the well publicized book, The Bell Curve by Charles Murray and

During Justice Brown's tenure on the Supreme Court, being a member of the "colored" race was a socially undesirable trait. Brown would have little sympathy for a race deemed to be inferior. The basis for such a conclusion of course stems from the philosophy guiding *Dred Scott*; African Americans were inferior to the white race, with no chance for constitutional protection, much less equality. Social Darwinists would not think it a matter for the legal system to confer civil liberties to members of society who were powerless, because they were not the fittest, as decided by nature. Of course, this reasoning is obviously circular, much like Brown's dismissal of Plessy's claim to a property right as a member of the white race.[74] The Court stated that Plessy could not have a property right unless the state of Louisiana decided he was a member of the dominant race.[75] Of course, if Mr. Plessy was deemed white by Louisiana, then he would not be subjected to its segregation statute at all. Similarly, social Darwinism would not confer judicial protection on a member of the weaker race because if nature deemed Mr. Plessy a species worth preserving, he would be a member of the dominant race and as such, would not require constitutional protection. Justice Brown's personal philosophy seems to have made him comfortable with the idea of superior and inferior races. Therefore, "separate but equal" would not only be a constitutionally acceptable accommodation for the white race, but might also be a necessity.

C. *Brown I Reverses the Court's Perception: Separate but Equal is Now a Badge of Inferiority.*

Fifty-eight years after *Plessy*, in 1954, the Supreme Court made an abrupt about face on the issue of constitutional rights as they relate to race. *Brown v. Board of Education of Topeka* addressed a class action lawsuit involving four states: Kansas, South Carolina, Virginia and Delaware.[76] The only question before the Court was whether the "separate but equal" accommodation, *i.e.* segregation, was constitutional in the context of public education.[77] The

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Richard J. Hernstien, which maintained that blacks as a group were less intelligent than whites because of dysgenics, an increase in inadequate genes in the population. *Id.*

74. *See Plessy v. Ferguson,* 163 U.S. 537, 549 (1896).

75. *Id.*

76. 347 U.S. 483 (1954).

77. *Id.* at 493 (The Court framed the question: "Does the segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"). The state of Kansas had passed a statute that permitted but did not require separate school facilities for black and white children. *Id.* at 486 n1. The Topeka Board of Education chose to create segregated facilities. *Id.* The Kansas district court recognized that segregation had a negative effect upon the black children, but nonetheless found the school facilities were substantially equal. *Id.* In South Carolina, the relevant statute required segregation in public schools. *Id.* Unlike Kansas, the South Carolina district court found that the black schools were inferior to white schools; and ordered that the black schools be equalized immediately. *Id.* The state of Virginia also required the segregation of black and white school children. *Id.* Like South Carolina, the district court in Virginia upheld the validity of segregation but ordered the equalization of the black and white schools. *Id.* The Delaware state statute also required segregation of black and white students. The court of Chancery ordered that the admission of black children into white schools immediately, because the facilities for the black

challenge to segregation was based on the deprivation of equal protection under the law as required under the Fourteenth Amendment.[78]

1. The *Brown I* Analysis

To strike down the segregation statutes, the *Brown* court had to depart from the reasoning in *Plessy*, which enunciated the 'separate but equal' doctrine.[79] That doctrine provided that "equality of treatment is accorded when the races are provided substantially equal facilities, even though those facilities are separate."[80] *Brown* challenged the constitutionality of this premise, holding that segregated public schools could never be made equal.[81]

The Supreme Court found that the legislative history of the Fourteenth Amendment did not provide any illumination on the issue of segregation because public education had changed dramatically in the years since its adoption.[82] In 1868, the United States did not have a developed system of public education in the south. "Education of white children was largely in the hands of private groups. Education of negroes was almost nonexistent and practically all of the race were illiterate."[83] In the North, there was some progress in public education, but "the conditions of public education did not approximate those existing [in 1954]."[84] The Supreme Court began to acknowledge that that education was perhaps the most important function of state and local governments. "It is doubtful that any child can reasonably be expected to succeed in life if he is denied the opportunity of an education."[85]

The doctrine of 'separate but equal' had no place in the field of public education.[86]

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children were inferior. *Id.*

78. *Id.*

79. *Id.* (citing *Plessy*, 163 U.S. 537). With the exception of Delaware, all courts relied upon *Plessy,* even though that case did not address secondary education.

80. *Id.*

81. *Id.*

82. *Id.* at 489.

83. *Id.* at 490.

84. *Id.* The *Brown* court recognized that school districts were in the process of equalizing their facilities. *Id.* One state court found equalization had occurred. *Id.* Therefore, the Court found it incumbent to look beyond just the tangible facilities and instead "to the effect of segregation itself on public education." *Id.* at 491.

85. *Id.* at 493.

86. *Id.* at 495. The Court began its analysis by reviewing existing precedent. There were six previous Supreme Court cases addressing the "separate but equal" doctrine, none of which addressed its validity under the federal Constitution. *Id.* at 491-92 (citing *Cummings v. Board of Education of Richmond County*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927)). In *Sweatt v. Painter*, the court found that a segregated law school could not provide an equal educational opportunity because of "those qualities which are incapable of objective measurement but which make for greatness in a law school." *Id.* Another case required that a minority student admitted to a white graduate school be treated like all the other students. *Id.* at 495

Rejecting *Plessy*, the Court declared that "separate educational facilities are inherently unequal,"[87] and that segregation itself communicates a message of inferiority to minority students, or a badge of inferiority.[88]

> To separate [the minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[89]

The Supreme Court struck down the segregation statutes because they deprived the plaintiffs from the equal protection of the laws guaranteed by the Fourteenth Amendment.[90]

2. Chief Justice Earl Warren and Social Change

Chief Justice Earl Warren was a polarizing figure during his years on the United States Supreme Court.[91] Born to Swedish immigrants in Los Angeles, California, Warren was raised in

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(citing *McLaurin v. Oklahoma State Regents*, 339 US 637 (1950)) (The Court relied again upon the intangible considerations of a student's ability to engage in discussions and exchange views with other students."). The Supreme Court held that such considerations apply with just as much force to children in grade and high school. *Id.* at 494.

87. *Id.* (finding that separate facilities usually led to less educational resources at the non-white school).

88. *Id.* at 494.

89. *Id.*

90. *Id.* at 495. The Court did not address whether segregation also violated the Due Process Clause. *Id.* Also, due to the wide scope of the *Brown I* opinion, the Supreme Court did not immediately address a remedy. Rather, it requested further argument on two distinct questions. *Id.* at 495. The first question was whether "Negro children should forthwith be admitted to schools of their choice" or whether the Court could permit a gradual adjustment from a segregated system to a system not based on color distinctions. *Id.* at 496 n13. The second question essentially asked what role the Court should play in the process and how detailed the decrees should be. *Id.* A year later, the Court issued its opinion in *Brown v. Board of Education of Topeka II*, 349 U.S. 294 (1955). In *Brown II*, the Court found that "school authorities have the primary responsibility for elucidating, assessing, and solving these problems." *Id.* at 299. The courts had the job of considering "whether the actions of the school authorities constitute good faith implementation of the governing constitutional principles." *Id.* In recognition of the need for local solutions, the Supreme Court held that "the courts which originally heard these cases can best perform this judicial appraisal." *Id.* Therefore, the cases could be most appropriately monitored by the district courts. This responsibility came with some ground rules. Because the district courts were acting in equity, they enjoyed a great deal of flexibility and could consider both public and private considerations. *Id.* at 300. "[C]ourts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulation which may be necessary in solving the foregoing problems." *Id.* at 300-01. The school districts needed to show they were making "prompt and reasonable" compliance to desegregate schools "with all deliberate speed." *Id.* at 301. Therefore, the judgments below were reversed and remanded. *Id.*

91. After Warren led the Supreme Court in handing down decisions generally described as "liberal," President Dwight D. Eisenhower remarked that his appointment of Warren was "the biggest damned-fool mistake I ever made." John Fox, *Biographies of the Robes: Earl Warren*, EDUCATIONAL BROADCASTING CORPORATION (December 2006), http://www.pbs.org/wnet/supremecourt/democracy/print/robes_warren.html.

Bakersfield.[92] Chief Justice Warren began his public service career as a City Attorney for Oakland and then served as District Attorney for the County Of Alameda before eventually becoming the Governor of California.[93] During this time period, in the late 1920s to 1930s, Warren was a member of whites-only ritual organizations such as the Order of the Elks.[94] After rising to Governor, Warren heartily supported the wartime Federal order removing all persons of Japanese ancestry from the West Coast to holding camps inland.[95] He also opposed the return of Japanese residents.[96] Warren declared at a Governor's Conference speech, "if the Japs are released, no one will be able to tell a saboteur from any other Jap."[97]

Chief Justice Warren was never considered a brilliant lawyer, just a thorough one.[98] While his record portrays him as a Republican political official mirroring the realities of his time on the issue of race on social issues, Warren was displaying some forward thinking especially on the issue of health care where he supported compulsory health insurance for all citizens of California to be paid by a 3 percent payroll tax.[99] Perhaps, as a result, President Eisenhower appointed Warren to the Supreme Court in a recess appointment.[100]

The cases Warren presided over as Chief Justice had a cumulative effect of expanding American's civil liberties in a broad manner.[101] A non-comprehensive list of the Warren Court decisions includes: striking down school segregation; establishing the one-man, one-vote doctrine; binding states to most of the Bill of Rights; curbing wiretapping; enforcing the right against unreasonable searches and seizures; expanding the right to counsel for those who were indigent; barring racial discrimination in voting, marriage laws, the use of public parks, airports, bus terminals and in housing sales and rentals; barring compulsory religious exercises in public schools; sustaining the right to disseminate and receive birth control information.[102]

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92. Alden Whitman, *Earl Warren, 83, Who Led High Court In Time of Vast Social Change, Is Dead,* N.Y. TIMES, July 10, 1974, *available at* http://www.nytimes.com/learning/general/onthisday/bday/0319.html.

93. *Id.*

94. *Id.* ("In those days, he said later, he accepted without thought the prevailing racial attitudes.")

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*; *see also The Supreme Court: Earl Warren,* PBS, http://www.pbs.org/wnet/supremecourt/democracy/print/robes_warren.html (last visited Apr. 14, 2011).

99. Whitman, *supra* note 93.

100. *Id.* Warren declined to attend the Senate hearings confirming his nomination despite over 200 objections. *Id.*

101. *Id.*

102. *Id.*; *Brown v. Board of Education*, 347 U.S. 483 (1954) (Examining segregation, found "separate is inherently unequal"); *Gray v. Sanders*, 372 U.S. 368 (1963) (Holding "one man, one vote"); *Katz v. United States*, 389 U.S. 347 (1967) (Holding wiretapping is a search and seizure); *Ker v. California*, 374 U.S. 23 (1963) (Incorporating the Fourth Amendment); *Massiah v. United States*, 377 U.S. 201 (1964) (Expanding the right to counsel); *Katzenback v. Morgan*, 384 U.S. 641 (1966) (Barring racial discrimination in voting); *Heart of Atlanta Motel v. United States*, 379 U.S. 294 (1964) (Upholding civil rights in

Chief Justice Warren was not an obvious candidate to be the majority author of *Brown I*. In later years, he did not consider the desegregation rulings to be the most significant of his Court.[103] Instead, Warren cited the redistricting cases.

> If everyone in this country has an opportunity to participate in his government on equal terms with everyone else, and can share in electing representatives who will be truly representative of the entire community and not some special interest, then most of the problems that we are confronted with would be solved through the political process rather than through the Courts.[104]

But yet, it cannot be overlooked that Warren, who was himself a first generation American citizen, had as a government official, presided over one of the nation's greatest wrongs, the internment of resident Japanese and Japanese Americans on United States soil.[105] Perhaps this was his motivating factor in the Warren Court cases—fairness and the opportunity to be heard even if your identity was a racial minority, an alleged criminal or pregnant female.[106] In any event, *Brown I* and the other Warren court cases caused a major judicial shift in the interpretation of the Constitution. Now unfrozen from September 17, 1787, the Constitution became a living document.

III. THE SUPREME COURT'S MODERN APPLICATION OF PERSPECTIVE IN THE GENDER DISCRIMINATION CASES.

Justice Antonin Scalia recently declared:

> You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don't need a constitution to keep things up-to-date.[107]

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places of interstate commerce); *Engel v. Vitale*, 370 U.S. 421 (1962) (Barring compulsory religious exercises in public schools); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Right to disseminate and receive birth control).

103. Whitman, *supra* note 93. Most commentators agree that the desegregation rulings tested the moral authority of the Court, but it did survive. *Id.*

104. *Id.*

105. See *Id.* (As governor, Warren supported the Japanese internment.).

106. Warren later explained "I would like the Court to be remembered as the people's court." *Id.*

107. Calvin Massey, *The Originalist*, CALIFORNIA LAWYER, Jan. 2011, *available at* http://www.callawyer.com/story.cfm?eid=913358&evid=1.

In a nutshell, Justice Scalia framed what is an ongoing debate within the current Supreme Court: what is the appropriate constitutional protection for gender discrimination claims? While discrimination on the basis of gender has never received as much protection as racial discrimination, the decisions the Court has rendered show the same correlation between the personal experiences of the justices and their resulting opinions.

A. *The Supreme Court Recognizes that Government Enforced Separate But Equal on the Basis of Gender Is Not Constitutional.*

The Supreme Court articulated a standard of heightened protection against gender discrimination in *United States v. Virginia* in 1996.[108] There were two issues before the Court: (1) whether Virginia's policy of limiting enrollment at the Virginia Military Institute to men was a violation of the 14th amendment's Equal Protection Clause;[109] and (2) if the admission policy was found unconstitutional, whether the court needed to fashion a proper remedy.[110] Justice Ruth Bader Ginsburg wrote the majority opinion holding that Virginia's policy of limiting enrollment at Virginia Military Institute only to men violated the Equal Protection Clause.[111]

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108. *United States v. Virginia,* 518 U.S. 515 (1996). Six justices joined fully in the majority opinion. Chief Justice William Rehnquist concurred in the judgment but not the analysis of the majority. Justice Antonin Scalia filed a lone dissent. Justice Clarence Thomas took no part in the consideration because his son was enrolled in VMI.

109. *Id* at 530.

110. *Id.* at 531.

111. 518 U.S. 515. *VMI* began in 1990 when a female high school student filed a complaint with the Attorney General complaining of the school's exclusionary admission policy. The United States filed suit against the state of Virginia and VMI alleging a violation of the 14th amendment's Equal Protection Clause. *Id.* at 523. The district court ultimately rejected the equal protection challenge. *Id.* In its opinion, however, the district court, did recognize that some women would want to attend VMI who would be capable of the activities required of VMI cadets. *Id.* Nonetheless, the district court held that Virginia provided an "exceedingly persuasive justification" for the classification in upholding VMI's admission policy. *Id.* at 524. The court stated that "VMI's school for men brought diversity to an otherwise coeducational Virginia system, and that diversity was 'enhanced by VMI's unique method of instruction." *Id.* Upon appeal, the Fourth Circuit vacated the lower court's judgment, stating "the Commonwealth of Virginia has not...advanced any state policy by which it can justify its determination." *Id.* A "policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender." *Id.* at 525 (quoting *United States v. Virginia*, 976 F.2d 890 at 899 (4th Cir.1992)). On remand, the Fourth Circuit tasked the state of Virginia with selecting a remedial course of action. *Id,* at 525. It suggested that Virginia could establish a parallel program, transform VMI into a private institution or admit women into VMI. *Id.* at 525-26. Virginia fashioned a remedy that would create a parallel program for women called the Virginia Women's Institute for Leadership (VWIL). *Id.* at 526 Virginia would locate the program at Mary Baldwin College, a private liberal arts school for women. Id. The Supreme Court recognized the considerable differences between the male and female programs in size, prestige and in resources. *Id.* at 526-27. The Supreme Court later noted that a military model of training would be "wholly inappropriate" at VWIL. *Id.* at 526-27. The district court approved the program despite its recognition that VWIL was not a mirror image of VMI. *Id.* at 528. "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination." *Id.* The Fourth Circuit affirmed the remedy on appeal and held that Virginia had a legitimate purpose in seeking to provide single-sex education for its residents. Id. "Exclusion of 'men at Mary Baldwin College and women at VMI'. . . .was essential to Virginia's purpose, for without such exclusion, the Commonwealth

1. The *VMI* Analysis

The Virginia Military Institute (VMI) was founded in 1839 with the goal of producing "citizen-soldiers."[112] The school provided a distinctive educational environment because it endeavored to "instill physical and mental discipline in its cadets and impart [to] them a strong moral code." [113] VMI is not a federal service academy but a state military school that is subject to the control of the Virginia State Assembly.[114] At the time of the Supreme Court's decision, VMI was the sole single-sex military school in Virginia, as well as in the nation.[115] As such, the Supreme Court took special note of the "Spartan barracks" housing the cadets, the lack of privacy, the adversarial teaching method, as well as the tight knit alumni network.[116]

The critical issue in *VMI* was the appropriate standard of review for a case alleging gender discrimination in violation of the Constitution: "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.'"[117] The Supreme Court held that allegations of gender discrimination must be scrutinized in light of the long history in the United States of sexual discrimination.[118] While gender classifications were subject to a higher level of scrutiny, the opinion was careful to establish that gender classifications were *not* equal to classifications based on race or national origin.[119]

Nonetheless, gender discrimination claims were subject to a new heightened review standard: "inherent differences" between men and woman were no longer acceptable as a justification for classifications, just as "inherent differences" were not acceptable as a basis for race or national origin classifications.[120]

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could not "accomplish [its] objective of providing single-gender education." *Id.* at 529 The United States Supreme Court granted certiorari. *Id.* at 530.

112. *Id.* at 520.

113. *Id.*

114. *Id.*

115. *Id.* at 520-521.

116. *Id.*

117. *Id.* at 531. (citing *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127 (1994); *Mississippi Univ. for Women*, 458 U.S. 718 (1982)).

118. *Id.* at 531. In 1971, the Supreme Court ruled in favor of a woman who had complained that her State had denied her the equal protection of its laws. *Id.* at 532; *see* Reed v. Reed, 404 U.S 71 (1971). It was the first case to recognize a constitutional claim based on gender discrimination. *Id.*

119. *Id.* at 532. Virginia had to show that any classifications based upon gender had an "exceedingly persuasive" justification, not a compelling one. *Id.* at 533. In other words, the challenged classification must serve an important governmental purpose and the discriminatory means used must be substantially related to the achievement of the government's objectives. *Id.*

120. *Id.*

> Sex classifications may be used to compensate women for 'particular economic disabilities [they have] suffered. . . .But such classifications may not be used, as they once were. . . .to create or perpetuate the legal, social, and economic inferiority of women.[121]

Thus, benefits could be conferred on the basis of gender to rectify past inequality, but exclusionary discrimination would no longer be permitted.

Virginia offered two justifications for its exclusion of women at VMI, both of which failed to meet the new standard.[122] First, while the Court recognized that single-sex education could afford benefits to some students, it was not enough to overcome the intent of the state in perpetuating those gender classifications: "Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth."[123] Second, Virginia's assertion that the unique character of the training at VMI would be lost if it had to admit women or modify its program was not justification enough because Virginia based its argument on the average capacities and preferences of men and women.[124] Virginia's argument also suffered from the fact that women had already successfully integrated in federal military academies and the armed forces.[125]

The *VMI* Court then turned its attention to fashioning an appropriate remedy to cure the constitutional violation.[126] Because Virginia chose to create a parallel military academy for women, a solution that is uncomfortably close to the "separate but equal" methodology sanctioned in *Plessy*; the female program's resources, teaching and facilities had to be equal in every respect.[127] Drawing

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121. *Id.* at 533-34.

122. *Id.* at 534-35.

123. *Id.* Instead, the Court found that Virginia's historical record showed a demonstrable lack of providing educational opportunities for women. *Id.* at 538. In sum, the Court found no persuasive evidence that VMI's male-only admission policy is in furtherance of a state policy of diversity. *Id.* at 539.

124. *Id.* at 540-41. Rejecting these broad assertions, the Supreme Court stated that reviewing courts must "take a 'hard look' at generalizations or 'tendencies' of the kind pressed by Virginia." *Id.* These types of justifications were often used in the past to deny women rights and opportunities such as the right to vote, admission to the state bar or access to educational opportunities. *Id.* at 524-544. *See Mississippi Univ. for Women*, 458 U.S. 718 (1982).

125. *Id.* at 544-45.

126. *Id.* at 546. The remedy "must be shaped to place persons unconstitutionally denied an opportunity. . . .in the position they would have occupied in the absence of discrimination." *Id.* at 547 (citing *Milliken v. Bradley*, 433 U.S 267, 280 (1977)). A proper remedy should not only eliminate the discriminatory effects of the past, but it should also bar similar discrimination in the future. *Id.* (citing *Louisiana v. United States*, 380 U.S. 145 (1965)).

127. *Id.* at 547-50. When the Court compared the male and female programs in depth, it ultimately found that the programs were not truly parallel. *Id.* at 548. Where VMI is known for its rigorous military training, VWIL, the female program, "deemphasizes" military education and focuses on a "cooperative method" of education. *Id.* "In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network." *Id.* at 551. Rather VWIL represents a "'pale shadow' of VMI in terms of the range of

a comparison to the racial discrimination cases, the Supreme Court compared the female program to the law school that Texas opened for black students in 1950.[128] In *Sweatt*, there was great contrast in the resources between the new school and the University of Texas Law School.[129] In ruling that the black law school violated the Equal Protection Clause, the *Sweatt* court highlighted the importance of "those qualities which are incapable of objective measurement but which make for greatness . . . ."[130] Similarly, the Court found that "Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supported at VWIL and VMI."[131] Because Virginia's attempt at a proposed remedy did not cure the constitutional violation, the only relief available was the admission of women to VMI: "Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection."[132]

Unsurprisingly, the sole dissenting opinion in *VMI* came from Justice Antonin Scalia.[133]

> Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. . . . Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education.[134]

Scalia maintained that there was no established criterion for "intermediate scrutiny," but the majority applied it "when it seems like a good idea to load the dice."[135] While on the surface, his words seem to be critical of heightened scrutiny in gender discrimination, Justice Scalia asserted that he was not actually opposed to the inquiry but instead, to the Court's role in the process.[136] Of special note, Scalia believes the majority misrepresented well-established precedent.[137]

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curricular choices and faculty stature, funding prestige, alumni support and influence." *Id.* at 553; *see United States v. Com. of Va.*, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J. dissenting) rev'd sub nom. *United States v. Virginia*, 518 U.S. 515 (1996).

128. 518 U.S. at 517-18; *see Sweatt v. Painter*, 339 U.S. 629 (1950).

129. 518 U.S. at 553-54.

130. *Sweatt*, 339 U.S. at 634.

131. 518 U.S. at 554.

132. *Id.* at 557.

133. *Id.* at 566 (Scalia, J., dissenting).

134. *Id.* Justice Scalia appears to argue that change in areas of gender discrimination is not to be accomplished by the courts. *See id.* at 567. His interpretation of the founding documents is the creation of system that was capable of change by future generations. *Id.*

135. *Id.* at 568.

136. *Id.* ("[In] my view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our authority, progressively higher degrees.").

137. *Id* at 574.

> "The Court has thus far reserved the most stringent judicial scrutiny for classifications based on race or national origin. . . ." The statements are misleading, insofar as they suggest that we have not already categorically held strict scrutiny to be inapplicable to sex-based classifications.[138]

On this basis, Scalia maintained that he did not believe personally that gender classifications required the heightened scrutiny. "And of course normal, rational-basis review of sex-based classifications would be much more in accord with the genesis of heightened standards of judicial review."[139] Scalia scoffed, "[i]t is hard to consider women a 'discrete and insular minority' unable to employ the 'political processes ordinarily to be relied upon,' when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns."[140]

Justice Scalia also asserted that providing an all-male single sex educational environment was clearly and substantially related to an important government objective; thus, Virginia had passed constitutional muster.[141] Scalia accepted the ultimate findings of a commission formed by VMI, which purported to refute "the claim that VMI has elected to maintain its all-male student body composition for some misogynistic reason."[142] According to Scalia, the majority essentially ignored all the evidence in the record. "It instead makes evident that the parties to this litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial. The Court simply dispenses with the evidence submitted at trial - it never says that a single finding of the District is clearly erroneous."[143]

The core of Scalia's objection was his perspective that the majority opinion would destroy VMI as an institution because its educational philosophy was not easily adaptable to the admission of women.[144]

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138. *Id.* (citing the majority opinion at 518 U.S. at 533 n.6.).

139. *Id.* at 575.

140. *Id.*

141. *Id.* at 576-79. "It is thus significant that, whereas there are 'four all-female private [colleges] in Virginia,' there is only 'one private all-male college,' which 'indicates that the private sector is providing for th[e] [former] form of education to a much greater extent that it provides for all male education." *Id.*

142. *Id.* at 580. Moreover, it is clear that Scalia believes in the merits of single-sex education. Citing the court below, Scalia repeats that experts testified in support of the claim that single sex education is advantageous. *Id.* at 586 (citing *United States v. Com. of Va.*, 766 F. Supp. 1407, 1411-12 (W.D. Va. 1991) *vacated*, 976 F.2d 890 (4th Cir. 1992) aff'd sub nom. *United States v. Virginia*, 518 U.S. 515 (1996)). "Not a single witness contested, for example, Virginia's 'substantial body of exceedingly persuasive' evidence. . . .that some students, both male and female, benefit from attending a single-sex college' and '[that] [f]or those students, the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement." *Id.*

143. *Id.* at 585.

144. *Id* at 587-88.

> The record supports the district court's findings that at least these three aspects of VMI's program-physical training, the absence of privacy, and the adversative approach-would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training. . . . It sufficed to establish, as the District Court stated, that VMI would be 'significantly different' upon the admission of women, and 'would eventually find it necessary to drop the adversative system altogether.'[145]

Justice Scalia lambasted the majority for "lawmaking by indirection."[146] Scalia intoned that the Court's actions were not the interpretation of a Constitution, but the creation of one."[147] Echoing the idea of a Constitution as a frozen document, Scalia argued:

> In order words, the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.[148]

Notably, Justice Scalia gave no consideration to the opportunities lost by women who could not attend VMI. As such, Scalia appears to be more persuaded by the history of excluding women, much like the Supreme Court's opinions in the pre-*Brown* racial discrimination cases, rather than the constitutional rights of women. Bemoaning the functional death of public single-sex education, Justice Scalia asserted that the majority inappropriately targeted VMI because of its old-fashioned concepts, such as manly honor.[149] Scalia was particularly moved by VMI's "The Code of the Gentleman," quoting it in its entirety.

I don't know whether the men of VMI lived by this code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction.[150]

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145. *Id.* at 588-89 (citing *United States v. Va.*, 976 F.2d at 896-87; *United States v. Va.*, 766 F. Supp. at 1412-13).

146. *Id.* at 587.

147. *Id.* at 570.

148. *Id.*at 569.

149. *Id.* at 601. 596-97 ("The enemies of single-sex education have won; persuading only seven Justices (five would have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.").

150. *Id.* at 603. See full text below:

A Gentleman.....

Does not discuss his family affairs in public or with acquaintances.

2. Justice Ruth Bader Ginsburg's Commitment to Equality Between the Sexes

The current Supreme Court is divided on the idea that gender discrimination deserves heightened protection.[151] The divide exists largely because of the efforts of *VMI*'s majority writer, Justice Ruth Bader Ginsburg, to expand constitutional protection of women's rights.

Ginsburg was born and raised in a working class neighborhood in Brooklyn, New York in 1933.[152] After graduating first in her class from Cornell University and Columbia Law School,[153] Ginsburg entered academia, teaching law at Rutgers and Columbia,[154] and also served as a director for the American Civil Liberties Union ("ACLU").[155] In 1973, she became the ACLU's general counsel where she served until her nomination to the United States Court of Appeals for the Second

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Does not speak more than casually about his girl friend.

Does not go to a lady's house if he is affected by alcohol. He is temperate in the use of alcohol.

Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public.

Does not hail a lady from a club window.

A Gentleman never discusses the merits or demerits of a lady.

Does not mention names exactly as he avoids the mention of what things cost.

Does not borrow money from a friend, except in dire need. Money borrowed is a debt of honor, and must be repaid as promptly as possible. Debts incurred by a deceased parent, brother, sister or grown child are assumed by honorable men as a debt of honor.

Does not display his wealth, money or possessions.

Does not put his manners on and off, whether in the club or in the ballroom. He treats people with courtesy, no matter what their social position may be.

Does not slap strangers on the back nor so much as lay a finger on a lady.

Does not 'lick the boots of those above' nor 'kick the face of those below him on the social ladder.'

Does not take advantage of another's helplessness or ignorance and assumes that no gentleman will take advantage of him.

A gentleman respects the reserves of others, but demands that others respect those which are his.

A gentleman can become what he wills to be.

Without a strict observance of the fundamental Code of Honor, no man, no matter how 'polished,' can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptability of his principles. He is the descendant of the knight, the crusader; he is the defender of the defenseless and the champion of justice...or he is not a Gentleman. *Id.* at 602.

151. *See* Editorial, *There He Goes Again*, NEW YORK TIMES, Jan. 4, 2011 (Discussing an interview with Justice Scalia where he stated that the Equal Protection Clause contained in the 14th Amendment did not extend to gender discrimination).

152. *Ruth Bader Ginsburg Biography*, BIO. TRUE STORY, http://www.biography.com/articles/Ruth-Bader-Ginsburg-9312041 (last visited Apr. 13, 2011).

153. *Id.* Ginsburg initially matriculated at Harvard Law School, but transferred to Columbia when her husband accepted employment at a New York City law firm. *Id.* Ginsburg clerked for a federal judge before beginning her teaching career. *Id.*

154. *Id.* Ginsburg was the first female to achieve tenure at Columbia University. *Id.*

155. *Id.*

Circuit in 1980.[156] During her tenure at the ACLU, Ginsburg was best known for cases involving gender equality, including the decision in *Weinberger v. Wiesenfeld* where the ACLU successfully invalidated a statute providing lower survivor benefits to widowers than widows.[157]

Ginsburg has never hidden her commitment to equal protection based on gender under the federal Constitution. Prior to her appointment to the Court, she co-authored a report for the United States Commission on Civil Rights entitled "Sex Bias in the U.S. Code," identifying federal statutes that allegedly discriminated on the basis of gender.[158] While on the Court, Justice Ginsburg authored a book entitled "Supreme Court Decisions and Women's Rights, Milestones to Equality."[159]

Ginsburg, like Justice Sotomayor, has freely admitted she is a product of affirmative action.[160] It comes as no surprise to learn that upon her graduation from law school, Ginsburg, like Justice Sandra Day O'Connor, faced obstacles to employment because she was a woman.[161] She likened the experience of being the sole female justice on the court, prior to the appointment of Justices Sotomayor and Elena Kagan, to her days in law school:

> It's almost like being back in law school in 1956, when there were 9 of us in a class of over 500, so that meant most sections had just 2 women, and you felt that every eye was on you. Every time you went to answer a question, you were answering for your entire sex. It may not have been true, but certainly you felt that way. You were different and the object of curiosity.[162]

And because of her life experience, Justice Ginsburg is particularly aware of the obstacles females encounter in historically male institutions – an insight her male colleagues on the Court

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156. *Id.*

157. *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975). Ginsburg argued a total of six cases before the Supreme Court. *Ruth Bader Ginsburg Biography*, *supra* note 155. She won five. *Id.*

158. *Id.*

159. *Id.*

160. Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES, July 12, 2009, *available at* http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html ("I was the first tenured woman at Columbia. That was 1972, every law school was looking for its woman. Why? Because Stan Pottinger, who was then head of the office for civil rights of the Department of Health, Education and welfare, was enforcing the Nixon government contract program. Every university had a contract, and Stan Pottinger would go around and ask, How are you doing on your affirmative action plan? . . . . I never would have gotten that invitation from Columbia without the push from the Nixon administration. I understand that there is a thought that people will point to the affirmative-action baby and say she couldn't have made it if she were judged solely on the merits. But when I got to Columbia I was well regarded by my colleagues even though they certainly disagreed with many of the positions that I was taking. They backed me up: if that's what I thought, I should be able to speak my mind.").

161. *Ruth Bader Ginsburg Biography*, *supra* note 155.

162. Bazelon, *supra* note 163.

could never bring. It is not surprising that the majority decision in *VMI* resulted in integration, as opposed to the creation of a separate but equal female institution, given the presence of Ginsburg and Justice Sandra Day O'Connor on the Court.

3. Justice Antonin Scalia's Use of Perspective

Justices Ginsburg and Scalia present two strong opposing viewpoints in *VMI*, as the majority and dissenting writers. Justice Antonin Scalia' s background, however, may not appear to be too different from that of Ginsburg. Born in Trenton, New Jersey, in 1936, Justice Scalia was the only child of Italian immigrants.[163] After graduating from Georgetown University, Scalia studied abroad in Switzerland and then obtained a degree from Harvard Law School. Scalia entered private practice with a large law firm in Cleveland, Ohio, before becoming a law school professor.[164] Justice Scalia also held federal government positions as General Counsel of the Office of Telecommunications Policy, Chairman of the Administrative Conference of the United States and Assistant Attorney General for the Office of Legal Counsel.[165] Scalia is also a devout Roman Catholic who is married with nine children.[166]

Known for his combative personality and strong opinions, Justice Scalia does not suffer fools lightly. At a Florida event to promote a book he wrote on advocacy, a young college woman asked why the Supreme Court would not permit cameras in the courtroom even though some justices are engaged in promotional activities to sell books.[167] Scalia responded: "That's a nasty, impolite question."[168] Later, he explained "I'm doing her a favor to answer her question. I shouldn't have to put up with her abuse."[169] Justice Scalia also discussed his approach to social issues as follows: "It takes courage not to be politically correct. If you're a coward, that's your fault."[170]

The labels given to Scalia's interpretation of the Constitution range from "strict constructionism" to "originalism."[171]Both approaches favor interpretation from the viewpoint of the

163. Mark Sherman, *Justice Antonin Scalia, by the Book,* ASSOC. PRESS, Nov. 29, 2009, *available at* http://www.sun-sentinel.com/features/fl-scalia-bio-112909-20091125,0,595366.story (quoting *American Original: the Life and Constitution of Supreme Court Justice Antonin Scalia* by Joan Biskupic).

164. Justin Quinn, *Biography of Antonin Scalia,* ABOUT.COM, http://usconservatives.about.com/od/champions/p/ScaliaBio.htm.

165. *Id.*

166. *Id.*

167. Mark Sherman, *supra* note 166.

168. *Id.*

169. *Id.*

170. *Id.*

171. See *id.*; Justin Quinn, *supra* note 167.

original drafters in September 17, 1787. *VMI* was premised, however, on the Equal Protection Clause, which was drafted in 1866 to confer constitutional protection to the newly freed slaves.[172] Scalia is therefore technically correct, when he asserts that there the 1866 drafters did not have the rights of women in mind at the time of drafting.[173] But this is a version of the same argument that Chief Justice Taney used to justify the Court's opinion in *Dred Scott*, an opinion that is now universally disfavored. What is apparent from his strong dissent in *VMI* is that Justice Scalia does not approve of the enlargement of rights that are not specifically articulated in the Constitution, a return to the idea of a frozen Constitution.[174] Because he did not face the same professional obstacles as Justices Ginsburg and O'Connor as new lawyers who were also female, Scalia simply does not have the same perspective.

B. *The Supreme Court Reconsiders Heightened Scrutiny in Gender Discrimination or How Title VII Should Be Interpreted Strictly.*

The Court's attitude towards heightened scrutiny in gender discrimination cases changed in 2007 with the decision in *Ledbetter v. Goodyear Tire.*[175] Authored by Justice Samuel Alito, *Ledbetter* addressed the proper statute of limitations period for Title VII disparate-treatment pay cases.[176] The plaintiff alleged pay discrepancies stemming from gender discrimination.[177]

1. The *Ledbetter* Analysis

Ms. Ledbetter was an area manager for Goodyear from 1979 until 1998.[178] After her retirement in 1998, Ms. Ledbetter became aware of a pay discrepancy between herself and other male employees with the same title.[179] After filing a claim through the EEOC, Ledbetter then sued

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172. CONG. GLOBE, 39th CONG., 2nd Sess. 1376 (1867) (Table showing murders of Freedman in Texas in 1866); CONG. GLOBE, 39th CONG., 1st Sess. 474 (1866). The legislative history of the Fourteenth Amendment demonstrated that among other things, that discriminatory enforcement of States' criminal laws was a matter of great concern for the drafters. CONG. GLOBE, 39th CONG. 1st Sess. 129, 184, 211, 212, 421, 471, 497, 522, 569, 594, 1365, 1376, 1413, 1438, 1679, 1755, 1809, 1863 (1865-66) (Civil Rights Bill of 1866, a Bill to protect all persons in the United States in their civil rights and furnish the means of their vindication).

173. Despite the passage of many years, it should be noted that women were still politically powerless, with no right to vote.

174. Justin Quinn, *supra* note 167 (quoting Scalia, "I do not think the Constitution or any text should be interpreted either strictly or sloppily; it should be interpreted reasonably.").

175. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007).

176. *Id.* at 633-43.

177. *Id.* at 621-22.

178. *Id.* at 643.

179. *Id.* at 621-22.

Goodyear, taking the case to trial under Title VII.[180] Ms. Ledbetter prevailed at the trial court level but the Court of Appeals for the Eleventh Circuit reversed, holding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the charging period.[181]

After accepting certiorari, the Supreme Court explained that under Title VII of the Civil Rights Act of 1964, it is an "unlawful employment practice" to discriminate against "any individual with respect to his compensation. . . .because of an individual's sex."[182]

Ms. Ledbetter's claim was premised on two allegedly discriminatory employment practices within the 180-day charging period.[183] First, Ledbetter asserted that each paycheck she received during the charging period was a different and separate act of discrimination.[184] Second, the wrongful denial of a raise in 1998 carried forward intentionally discriminatory disparities from prior years.[185] All of Ms. Ledbetter's claims asserted disparate treatment, which required the showing of discriminatory intent on the part of the employer. The Supreme Court held that Ms. Ledbetter's claim failed because she could not show an actual discriminatory intent during the charging period.[186]

In its analysis, the Court reviewed prior case law. In *United Air Lines v. Evans*, a flight attendant was forced to resign because the airline did not wish to employ married flight attendants.[187] Several years later, she was rehired, but was treated as a new employee for seniority purposes, which affected her pay and benefits.[188] Unfortunately for that plaintiff, she failed to file an EEOC charge after she was initially forced to resign. The Court held that the continuing effect of the pre-charging period did not comprise a present violation: "'A discriminatory act which is not made the basis for a timely charge . . . .is merely an unfortunate event in history which has no present legal consequences.'"[189]

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180. *Id.* The district court dismissed Ms. Ledbetter's claim under the Equal Pay Act. *Id.* at 622.

181. *Id.* at 622-23.

182. *Id.*

183. *Id.* at 623.

184. *Id.*

185. *Id.* at 623-24.

186. *Id.* "Ledbetter does not assert that the relevant Goodyear decision makers acted with actual discriminatory intent during the EEOC charging period or when they denied her a raise in 1998. Rather, she argues that the paychecks were unlawful because they would have been larger had she been evaluated in a non-discriminatory manner prior to the EEOC charging period." *Id.*

187. *Id.* (citing *United Air Lines v. Evans*, 431 U.S. 553 (1977)).

188. *Id.*

189. *Id* at 625-26 (citing *United Air Lines*, 431 U.S. at 558).

Next, the Court addressed *Delaware State College v. Ricks*, in which a college professor was denied tenure allegedly because of his national origin.[190] Following the denial of tenure, the professor was a given a non-renewable one year contract.[191] At the conclusion of the contract, the professor filed suit alleging the EEOC charging period ran from the date of his final termination.[192] In *Ricks*, the Court found that "the EEOC charging period ran from 'the time the tenure decision was made and communicated to Ricks.'"[193] The Court's reasoning was the discriminatory practice was the denial of tenure. The plaintiff's ultimate termination was only an effect of the discriminatory practice. Therefore, the charging period, and the running of the statute of limitations, began much earlier than the plaintiff asserted.

The Court then discussed *Lorance v. AT&T Technologies, Inc.*, whose facts were analogous to *Ledbetter*.[194] In *Lorance*, a collective bargaining agreement changed the way seniority status was calculated for workers at a certain plant.[195] Female employees sued several years later claiming that the new rule for calculating seniority intentionally discriminated against female employees, because it protected the male workers in a traditionally male position from being laid off.[196] The Court again found that the discriminatory practice occurred outside the charging period.[197] The act of laying off the female workers was merely an effect of the discriminatory practice rather than an actual act of intentional discrimination.[198] The Supreme Court found the precedent to be clear:

> The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.[199]

Therefore, the Court was not persuaded by Ms. Ledbetter's arguments that each paycheck during the charging period, and the denial of the 1998 raise, triggered a new charging period.[200] The paychecks and the denial of a raise were simply the effects of the discriminatory employment

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190. *Id.* at 626 (citing *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980)).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* (citing *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989)).

195. *Lorance*, 490 U.S. at 902-03.

196. *Id.*

197. *Lorance*, 490 U.S. at 905.

198. *See Ledbetter*, 550 U.S. 618 at 627 ("We noted that the plaintiffs had not alleged that the new seniority rule treated men and women differently or that the rule had been applied in a discriminatory manner. Rather, their complaint was that the rule was adopted originally with discriminatory intent.").

199. *Id.* at 628.

200. *Id.*

practice that occurred outside the charging period.[201] According to the Court, Ledbetter should have filed an EEOC charge after the discriminatory pay decisions were made, even if she was not aware of them.[202]

The Court chastised Ms. Ledbetter for attempting to shift the intent associated with the prior pay decisions to her 1998 pay decision claim.[203] Not only did the Court hold that previous case law prevented Ledbetter from accomplishing such a shift, but also that it would directly undermine the process and procedure that Congress intended for Title VII claims.[204] The Court further stated that statutes of limitation served a policy purpose in preventing parties from the need to litigate stale claims.[205] The Court held that short deadlines, or a short statute of limitations, reflected a Congressional preference for the prompt resolution of employment discrimination claims.[206] "The EEOC filing deadline 'protect[s] employers from the burden of defending claims arising from employment decisions that are long past.'"[207]

Ms. Ledbetter, however, premised her claim on the Court's holding in *Bazemore v. Friday,*[208] in which the Supreme Court arguably adopted a "paycheck accrual rule" in holding that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."[209] *Bazemore* addressed a disparate-treatment pay claim brought against the North Carolina Agricultural Extension Services, which paid black employees on a separate and lower pay scale.[210] The practice dated back to the 1960s when the employer had segregated service branches.[211] The *Bazemore* court found the employer was clearly violating Title VII because it had adopted and retained a pay structure that intentionally discriminated on the basis of race.[212]

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201. *Id.*

202. *See Id.* ("Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so.")

203. *Id.* at 629.

204. *Id.* The Court then reiterated that courts must be respectful of the legislature and give effect to the statute as enacted. *Id.* at 630 (citing *Mohasco Corp v. Silver*, 447 U.S. 807, 819 (1980)).

205. *Id.* at 630.

206. *Id.* at 630-631.

207. *Id.* at 630 (citing *Delaware State Coll. v. Ricks*, 449 U.S, 449 U.S.at 256-57). The Court stressed that filing deadlines were particularly important in discriminatory intent claims because the element of discrimination was always at issue. *Id.* at 631. "The passage of time may seriously diminish the ability of the parties and the fact-finder to reconstruct what actually happened." *Id.* at 632. As an example, the Court remarked that the supervisor principally responsible for discriminating against Ms. Ledbetter had passed away by the time of trial. *Id.* at 623 n.4.

208. 478 U.S. 385 (1986).

209. *Ledbetter*, 550 U.S. at 633 .

210. *Id.* (citing *Bazemore*, 478 U.S. at 389-91).

211. *Id.*

212. *Id.* at 634.

The Court rejected this reading of *Bazemore* as too broad.[213] *Bazemore* focused on a current violation of Title VII, not the carrying forward of a past act of discrimination.[214]

> For this reason it is generally true that, as the catch-phrase has it, Title VII imposed 'no obligation to catch-up,' *i.e.*, affirmatively to remedy present effects of pre-Act discrimination . . . . But those cases cannot be thought to insulate employment decisions that presently are illegal on the basis that at one time comparable decisions were legal when made by the particular employer.[215]

The Court elaborated that *Bazemore* "stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure."[216] In contrast, Ms. Ledbetter produced no evidence that her employer's pay structure was adopted for the purpose of discrimination on the basis of sex.[217] As a result, the pay system is considered to be "facially nondiscriminatory and neutrally applied."[218]

Ms.Ledbetter also argued that analogous statues supported the "paycheck accrual rule." [219] Acknowledging that the Equal Pay Act ("EPA") was enacted contemporaneously with Title VII, the Supreme Court found the comparison unpersuasive.[220] The EPA did not require the filing of a charge nor did it require proof of intentional discrimination.[221] Similarly, the Fair Labor Standards Act ("FLSA") would not be applicable because the FLSA did not require proof of a specific intent to discriminate.[222] As for the National Labor Relations Act ("NLRA"), a statutory scheme that

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213. *Id.*

214. *Id.* at 635, n.5.

215. *Id.* (quoting *Bazemore v. Friday*, 751 F.2d 662, 696 (C.A.4 1984)(Phillips, J., concurring in part and dissenting in part)).

216. *Id.* at 637.

217. *Id.*

218. *Id.* (citing *Lorance*, 490 U.S. at 911) ("A new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a facially neutral system.") The dissent in *Ledbetter* argued that pay claims are different from other types of Title VII claims in that they are "based on the cumulative effect of individual acts." *Id.* at 638. In rebuttal, the majority stated that the dissent fundamentally misinterpreted precedent. *Id.* at 639. Ledbetter had not alleged a "single wrong consisting of a succession of acts," instead her claim alleged a series of discrete discriminatory acts. *Id.* at 638. Moreover, the majority asserted that the dissent focused on particular aspects of the case "that is certainly not representative of all pay cases and may not even be typical." *Id.* Instead, the majority adopted a rule it believed to be more universally applicable to pay discrimination cases. *Id.*

219. *Id.* at 640.

220. *Id.*

221. *Id.* The opinion also noted that Ledbetter had originally asserted an EPA claim, which she failed to pursue after that claim was dismissed by the District Court. *Id.*

222. *Id.* at 641.

provided the model for Title VII's remedial provisions,[223] the Supreme Court found that NRLA case law on the statue of limitations "corresponds closely" with Title VII precedent including *Evans* and *Ricks*.[224]

The Supreme Court held it would not change its opinion based on public policy considerations.

> We are not in a position to evaluate Ledbetter's policy arguments, and it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the "prompt processing of all charges of employment discrimination. . . ."[225]

Applying the statute as written, the Supreme Court held that to be actionable under Title VII, the specific act of discrimination must have occurred within the charging period provided.[226] Ms. Ledbetter had run out of time.

In an impassioned dissent, Justice Ginsburg took issue with the majority's summary dismissal of Ms. Ledbetter's claims:

> The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.[227]

Justice Ginsburg disagreed with the majority's interpretation of existing precedent.[228] She found that the proper precedent, *i.e. Bazemore*, as well as the lower courts, had overwhelmingly held that the statute of limitations runs when the "unlawful practice result[ed] in the *current payment* of salaries infected by gender-based (or race-based) discrimination-a practice that occur[ed] whenever a paycheck deliver[ed] less to a woman than to a similarly situated man."[229]

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223. *Id.*
224. *Id.* at 641-42.
225. *Id.* at 642.
226. *Id.*
227. *Id.* at 645 (Ginsburg, J., dissenting).
228. *Id.*
229. *Id.*

Ginsburg also noted the facts of the case that did not sway the majority: salary information was confidential; Goodyear's consistent underpayment to Ms. Ledbetter, even falling below minimum salary levels for someone at her position; blatant statements of gender discrimination by supervisors; and evidence of underpayment by Goodyear to other female supervisors.[230]

At the end of her dissent, Justice Ginsburg reminded the Supreme Court that its onerous interpretation of Title VII had already led to Congressional action in the form of the 1991 Civil Rights Act.[231] The implication was fairly clear – congressional action would be necessary again. Two years after the decision in *Ledbetter*, Congress passed the Lilly Ledbetter Fair Pay Act of 2009 overruling the decision in *Ledbetter*.[232]

2. Justice Samuel Alito's Use of Perceptive

Justice Samuel Alito is unique among modern day justices with respect to perspective because he openly acknowledged that his Italian American heritage would play a role in his judicial decision-making at his Supreme Court confirmation hearings.[233] No Senator raised an objection.[234]

> But when I look at those cases, I have to say to myself, and I do say to myself, "You know, this could be your grandfather, this could be your grandmother. They were not citizens at one time, and they were people who came to this country . . . . When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender. And I do take that into account.[235]

Justice Samuel Alito was born in Trenton, New Jersey in 1950.[236] His father was an immigrant who, through a stroke of kindness, received a scholarship to college, which enabled him to become a teacher.[237] His mother was also a first generation American who was the first in her family to obtain an undergraduate degree, as well as a master's degree.[238] Justice Alito graduated

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230. *Id.* at 659-60.

231. *See Id.*

232. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

233. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 54-57, at 475 (Jan. 9-13, 2006) (statement of Nominee Samuel A. Alito, Jr.), *available at* http://www.gpoaccess.gov/congress/senate/judiciary/sh109-277/browse.html.

234. *Id.*

235. *Id.*

236. Alito has the same birthplace as Justice Antonin Scalia.

237. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary*, *supra* note 236, at 54.

238. *Id.*

from Princeton University and Yale Law School.[239] Alito acknowledged that attitudes toward Italian Americans had changed by the time he matriculated to college, "A generation earlier, I think that somebody from my background probably would not have felt fully comfortable at a college like Princeton. But, by the time I graduated from high school, things had changed."[240] Prior to his nomination to the United States Court of Appeals for the Third Circuit, Alito was a United States Attorney and an assistant to the Solicitor General.[241]

Perhaps because Justice Alito did not experience adversity firsthand, he has little judicial regard for situations, like the *Ledbetter* discrimination case, where systemic discrimination results in a potential plaintiff being unaware of her claim until it is too late. Alito has described his approach to judicial decision-making as follows:

> The judge's only obligation – and it's a solemn obligation – is to the rule of law. And what that means is that in every single case, the judge has to do what the law requires. Good judges develop certain habits of mind. One of those habits of mind is the habit of delaying reaching conclusions until everything has been considered. Good judges are always open to the possibility of changing their minds based on the next brief they read, or the next argument that's made by an attorney who's appearing before them, or a comment that is made by a colleague during the conference on the case when the judges privately discuss the case.[242]

It is plain in the *Ledbetter* decision that Alito's allegiance to the rule of law does not envision circumstances when the law must be interpreted in alternate ways because it is too exclusionary or leads to unfair results in the area of gender discrimination. Unlike Justice Ginsburg, Alito never had to endure the loss of an opportunity for an immutable characteristic like race or gender.

But Justice Alito has expressed judicial concern in other areas of the law, specifically in a case involving animal cruelty.[243] Alito is an owner of a Springer spaniel that he reportedly brings to court at times.[244] He was the lone dissenting vote in a Supreme Court holding that animal protection laws conflicted with the First Amendment's right of freedom of speech.

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239. *Id.* Alito has the same birthplace as Justice Antonin Scalia.

240. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary*, *supra* note 236, at 55.

241. *See Id.* at 322.

242. *Id.* at 56.

243. *See U.S. v. Stevens*, 130 S. Ct. 1577 (2010) (Alito, J., dissenting).

244. Patt Morrison, *The Supremes' film review: 8-1, animal cruelty films are free speech (Justice Alito gives them a thumbs-down)*, LOS ANGELES TIMES (Apr. 20, 2010, 5:23 PM) http://opinion.latimes.com/opinionla/2010/04/the-supremes-film-review-81-animal-cruelty-films-are-free-speech-justice-alito-gives-them-a-thumbsdo.html.

> The Court strikes down in its entirety a valuable statute, 18 U. S. C. section 48 that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of "crush videos," a form of depraved entertainment that has no social value. The Court's approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted.[245]

True to his word, Justice Alito does not wholly separate himself from his life experiences when he is on the bench.

IV. MODERN CASE LAW ABOUNDS WITH EXAMPLES OF SUPREME COURT JUSTICES DEEMED TO BE STRICT CONSTRUCTIONISTS, RELYING ON THEIR LIFE EXPERIENCE WHEN REACHING JUDICIAL DECISIONS.

The gender discrimination cases are not the only examples of modern day case law where Supreme Court justices have drawn upon their life experiences in rendering a decision on the case before them. Indeed, some of the justices who are the most frank about drawing from their life experiences, are those deemed to be strict constructionists.

A. *The Evolution of Chief Justice William Rehnquist's Perspective.*

For example, Chief Justice Rehnquist often articulated his disagreement with what he saw as an over-expansion of civil liberties accorded by the Supreme Court under Chief Justice Earl Warren. In his dissent in *J.E.B. v. Alabama*, Rehnquist downplayed the severity of discrimination based on gender.

> That race and sex discrimination are different is acknowledged by our equal protection jurisprudence, which accords different levels of protection to the two groups. Classifications based on race are inherently suspect, triggering "strict scrutiny," while gender based classifications are judged under a heightened, but less searching standard of review. [citation omitted.] Racial groups comprise numerical minorities in our society, warranting in some situations a greater need for protection, whereas the population is divided almost equally between men and women. Furthermore, while substantial discrimination against both groups still lingers in our society, racial equality has proved a more challenging goal to achieve on many fronts than gender equality. [citation omitted].[246]

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245. *Stevens*, 130 S. Ct. at 1592 (Alito, J., dissenting).

246. *J.E.B. v. Alabama*, 511 U.S. 127, 154 (1994) (Rehnquist, C.J., dissenting).

Yet, nine years later, Rehnquist appeared to back off from sounding the death knell of gender discrimination in *Nevada v. Hibbs*.

> The history of the many state laws limiting women's employment opportunities is chronicled in-***and, until relatively recently, was sanctioned by-this Court's own opinions***. For example, in *Bradwell v. State*, [citation omitted], and *Goesaert v. Cleary*, [citation omitted], the Court upheld state laws prohibiting women from practicing law and tending bar, respectively. State laws frequently subjected women to distinctive restrictions, terms, conditions, and benefits for those jobs they could take. . . . Such laws were based on the related beliefs that (1) a woman is, and should remain, "the center of home and family life," [citation omitted], and (2) "a proper discharge of [a woman's] maternal functions-having in view not merely her own health, but the well-being of the race-justif[ies] legislation to protect her from the greed as well as the passion of man." [citation omitted]. Until our decision in Reed v. Reed. . . ."it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' "-such as the above beliefs-"could be conceived for the discrimination." [citation omitted]. . . . Reliance on such stereotypes cannot justify the States' gender discrimination in this area. [citation omitted.] ***The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here, as in Fitzpatrick, the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic §5 legislation***.[247]

In an interview with Justice Ginsburg after Rehnquist's death, she hypothesized on the reason for the turnabout in his judicial approach to gender claims.

> That opinion was such a delightful surprise. When my husband read it, he asked, did I write that opinion? I was very fond of my old chief. I have a sense that it was in part his life experience. When his daughter Janet was divorced, I think the chief felt some kind of responsibility to be kind of a father figure to those girls. So he became more sensitive to things that he might not have noticed.[248]

Thus, Rehnquist is a perfect example of a justice who did not fully consider the obstacles faced by Americans who are not male. Once he was exposed to the inequity, Chief Justice Rehnquist used his position on the Supreme Court to rectify it. This is not judicial activism, it is the flexibility we expect from our judiciary.

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247. *Nevada v. Hibbs*, 538 U.S. 721, 729-30 (2003) (emphasis added).

248. Bazelon, *supra* note 163.

B. *The Perspective of Current Chief Justice John Roberts*

As a longtime participant in the Washington D.C. power spectrum, as White House lawyer, as partner in a major law firm, as a federal appellate court judge, then on the United States Supreme Court; Roberts' opinions generally favor the protection of corporate rights.[249] This viewpoint is a perfect reflection of his life experiences before joining the Supreme Court.

In *Caperton v. A.T. Massey Coal Company*, Chief Justice Roberts authored a strong dissent from the majority opinion finding it was error for a judge not to recuse himself from hearing a case where one of his major campaign contributors, a large corporation, was a defendant.[250]

> And why is the Court so convinced that this is an extreme case? It is true that Don Blankenship spent a large amount of money in connection with this election. But this point cannot be emphasized strongly enough: Other than a $1,000 direct contribution from Blankenship, *Justice Benjamin and his campaign had no control over how this money was spent*. Campaigns go to great lengths to develop precise messages and strategies. An insensitive or ham-handed ad campaign by an independent third party might distort the campaign's message or cause a backlash against the candidate, even though the candidate was not responsible for the ads.[251] The majority repeatedly characterizes Blankenship's spending as "contributions" or "campaign contributions," [citation omitted] but it is more accurate to refer to them as "independent expenditures." Blankenship only "contributed" $1,000 to the Benjamin campaign.[252]

Roberts's personal background may also explain his dismissive attitude toward constitutional protection against racial discrimination.

> Before Brown, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools

249. *See e.g.*, *Caperton v. A. T. Massey Coal Co.*, 129 S.Ct. 2252, 3367 (2009) (Roberts, C.J., dissenting); *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/biographies.aspx (last visited February 12, 2011).

250. *Caperton*, 129 S.Ct. at 3367.

251. *Id.* (citing *Buckley* v. *Valeo*, 424 U.S. 1, 47 (1976) (*per curiam*) ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive"); see also Brief for Conference of Chief Justices as Amicus Curiae 27, n.50 (citing examples of judicial elections in which independent expenditures backfired and hurt the candidate's campaign)).

252. *Id.* at 2273 (emphasis in original).

> on a nonracial basis," [*citation omitted*], is to stop assigning students on a racial basis. ***The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.***[253]

It almost seems like Roberts believes racial discrimination is no longer such a problem in the United States that it is worthy of constitutional protection. Unlike Justices Ginsburg and Sotomayor, his perspective is one free of impermissible discrimination. Therefore, it is quite clear that the way to end racial discrimination is to merely "stop discriminating on the basis of race."[254]

V. THE TRUE COSTS ARISING FROM THE ABSENCE OF JUDICIAL PERSPECTIVE

Much of the commentary heard today labels human perspective as the direct equivalent of judicial activism. What Sotomayor meant to convey by her "wise Latina judge" analogy was that without a diversity of experience in the judicial system, some groups in our society will most likely be excluded from protections that should exist in the United States Constitution.

And history bears her out. This lack of perspective was the fundamental flaw in Chief Justice Taney's opinion in *Dred Scott*.[255] Taney was willing to judicially insulate the institution of slavery simply because it existed on September 17, 1787.[256] Similarly, Justice Brown's opinion in *Plessy* was painfully obtuse as to how racial segregation automatically conferred a badge of inferiority because he did not acknowledge that separate accommodations were *never* equal accommodations.[257] With the decision in *Brown I*, Chief Justice Warren prompted society to address the inherent inequality that it could not bring itself to do legislatively.[258] Many criticized and continue to criticize Warren's judicial decision-making. But the purpose of the Constitution, and the judiciary as its interpreter, is to guarantee to all Americans the fundamental freedoms and civil liberties which it enshrines. If any group in our society is absent from the judiciary, then that group is rendered powerless, as demonstrated by *Dred Scott* and *Plessy*. For the omitted societal group, judicial recognition is their best chance at justice. When the judiciary fails to act, injustice thrives, sometimes for decades, as the racial discrimination cases demonstrate.

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253. *Parents Involved in Comty. Schools v. Seattle School Dist.*, 551 U.S. 701, 747–48 (2007) (emphasis added). Indeed, Roberts has expressed that the time for judicial-systemic overhauls to prevent racial discrimination has passed. *See Northwest Austin Mu.l Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2524 (2009); Jeffrey Toobin, *No More Mr. Nice Guy*, THE NEW YORKER, May 25, 2009, *available at* http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin.

254. *Seattle School Dist.*, 551 U.S. at 747–48.

255. *See Scott v. Sandford*, 60 U.S. 393 (1856).

256. *Id.*

257. *See Plessy v. Ferguson*, 163 U.S. 537 (1896).

258. *See Brown v. Board of Edu.*, 347 U.S. 483 (1954).

As the Supreme Court currently wrestles with constitutional protections regarding gender discrimination, case law decisions reflect the experiences of the justices of the Court in an almost startling way. In *VMI*, the Supreme Court enjoyed the presence of two female justices who experienced gender discrimination firsthand.[259] By the time of the decision in *Ledbetter*, however, only Justice Ginsburg remained on the Court. The Court had also undergone a small makeover itself with the additions of Chief Justice Roberts and Justice Alito, replacing Chief Justice Rehnquist and Justice O'Connor respectively. The perspective of two justices who acknowledged the gravity of gender discrimination was gone.[260]

With *Ledbetter*, however, there was a Congressional will to rectify the harshness of the decision.[261] While the Supreme Court was interpreting a federal statutory scheme in *Ledbetter*, it cannot be forgotten that the purpose of the statute was to protect against discrimination.[262] Justice Alito strictly construed statutory language in a case where there was room for judicial discretion to

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259. Despite finishing at the top of their classes at Stanford and Columbia Law Schools, respectively, both Justices O'Connor and Ginsburg experienced trouble finding legal employment upon graduation. *See Justice Sandra Day O'Connor*, THE OYEZ PROJECT, http://oyez.org/justices/sandra_day_oconnor

(last visited Tuesday, April 19, 2011) (Although Justice O'Connor finished third in her class, no California firm offered her a job). *See Justice Ruth Bader Ginsburg,* THE OYEZ PROJECT, http://oyez.org/justices/ruth_bader_ginsburg (last visited Tuesday, April 19, 2011) (Justice Ginsburg finished first in her class. Still, "[a]t one point, Dean Erwin Griswold asked the women of the class what it felt like to occupy places that could have gone to deserving men.").

260. Bazelon, *supra* note 163 (Justice Ginsburg stated that gender discrimination cases would have different outcomes if more of the judges were female: "Yes, I think the presence of women on the bench made it possible for the courts to appreciate earlier than they might otherwise that sexual harassment belongs under Title VII [as a violation of civil rights law.]"); *But see The Interviews, Sandra Day O'Connor and John Paul Stevens*, NEWSWEEK, Jan. 3, 2011, at 38-39, *available at* http://www.newsweek.com/2010/12/17/former-supreme-court-justice-sandra-day-o-connor-interviews-john-paul-stevens.html (Justice O'Connor articulated the need for women on the Court in another way: "I've always said that at the end of the day, on a legal issue, I think a wise old woman and a wise old man are going to reach the conclusion. So I agree with [Justice John Paul Stevens] that probably in outcomes it's not critical. But in terms of having the American people look at the court and think of it as being fair and appropriate for our nation, it helps to have women, plural, on the court."). Of course, as Justices Sotomayor and Ginsburg intimate, different perspectives are what lead to sound judicial decisions and a diversity of race and gender usually leads to many perspectives.

261. *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub.L. 111-2, § 2, Jan. 29, 2009, 123 Stat. 5. Under the "Findings" section, the text of the statute reads as follows:

Congress finds the following:

(1) The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended. . . .

Id.

262. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621-22 (Ledbetter brought her claim under Title VII).

prevent an unfair result.[263] The result in *Ledbetter* serves as a good example of the perils of strict constructionism at the expense of perspective, or even fairness. Just like the frozen Constitution imagined by Chief Justice Taney, the perspective of the drafters can be of little guidance as to whether gender rights should be protected by a heightened state of judicial scrutiny because women did not enjoy the same place in society that they do now. Instead, the perspective of the drafters is meaningful on these issues only as to whether the Constitution confers the right at all. To restrict judicial scrutiny to 1787 perspectives is unwise, as well as unjust.

Absolutism on either end of the so-called "conservative-liberal" spectrum is never ideal. Yet, it is wrong to label a justice's use of perspective as judicial activism. The power of the United States Constitution is as a living document. As Justice Souter explained, there are some constitutional rights that are easy to enunciate, legislate and judicially protect.[264] But other rights are drafted broadly and in some cases, exist in tension with one another.[265] In these areas of constitutional rights, the Supreme Court as well as the rest of the judiciary must apply their modern perspective, and the current realities of life in the United States to reach a sound legal decision. What hurts the United States, and all of its citizenry, is when a justice reaches a legal conclusion on the premise that "it has always been done this way."[266] The United States Constitution should not be susceptible to this form of tunnel vision.

VI. CONCLUSION

Wise judges do use their life experiences in reaching judicial decisions. This fact is neither troubling nor problematic. Indeed, when a judge lacks perspective, the soundness of the legal decision invariably suffers – either through the backwards looking lens of history or in the guise of immediate Congressional action. Strict constructionism and originalism are inappropriate methodologies of constitutional interpretation when the right at issue is broadly drawn and should evolve with the arrival or formation of new societal groups in the United States. To systematically deprive entire swaths of society of constitutional protections, simply because they were not American citizens in 1787, or could not be envisioned by the drafters, is too restrictive for the

263. *See id.* at 643 (Ginsburg, J. dissenting).

264. "There are, of course, constitutional claims that would be decided just about the way this fair reading model would have it. If one of today's 21-year-old college graduates claimed a place on the ballot for one of the United states Senate seats open this year, the claim could be disposed of by simply showing the persons' age, quoting the constitutional provision that a senator must be at least 30 years old, and interpreting that requirement to forbid access to the ballot to anyone who could not qualify to serve if elected. No one would be apt to respond that lawmaking was going on, or object that the age requirement did not say anything about ballot access." Souter, *supra* note 4.

265. *See* U.S. Const. amend. I. (The Religion Clauses are examples of two constitutional rights that tend to contradict one another. The boundaries of the prohibition between church and state are also highly controversial today.).

266. *See Scott v. Sandford*, 60 U.S. 393 (1856).

weighty rights of equal protection and due process. Today's multi-cultural American citizen deserves more.

NOTE

REASONABLY SUSPICIOUS OF BEING *MOJADO*: THE LEGAL DEROGATION OF LATINOS IN IMMIGRATION ENFORCEMENT

Javier Perez*

SUMMARY

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I. INTRODUCTION

One of the greatest joys of attending the University of Texas is the opportunity to attend the annual Red River Rivalry in Dallas Texas where the Longhorns engage in a spirited football game against the Oklahoma Sooners. In October of 2005, with a group of Mexican-American friends, I trekked up to Dallas to watch this game from a popular sports bar near the Cotton Bowl.

Throughout the first quarter, Texas Quarterback Vince Young made astounding plays, one after another. But, OU runningback Adrian Peterson was not to be outdone. After he countered with a spectacular touchdown run, even us Texas fans had to acknowledge the formidability of the Sooners. The crowd was lively and loud, with Longhorn and Sooner fans chanting fight songs back and forth.

At some point, the Sooners were going for it on 4th down, and the noise from the crowd hit a fever pitch. The ball was snapped and Peterson took the handoff to the left side of the field. The Texas Defense stuffed him for no gain and a turnover on downs. As one might expect, the Texas contingent in the bar erupted into a hurricane of *Texas Fight*—much to the chagrin of the Sooner fans. It was all in good fun, though. . .or so I thought.

We exchanged chants once again, but my friends and I could tell that one Sooner fan was more irked than the rest. Finally fed up with how their chants of "Boomer Sooner" seemed to roll off our backs, he started a chant at his table that spread to a majority of the bar:

> WHERE'S YOUR GREEN CARD?!?! WHERE'S YOUR GREEN CARD!?!?! WHERE'S YOUR GREEN CARD?!?!

Fists pounded tables with the beat, which made plates and pint glasses clang together with crusty bits of silverware. Louder, though, was the heartbeat throbbing at my temples. The sheer insult of the notion questioning my citizenship was disemboweling. I became queasy with rage and overcome by an indignant pain unlike any I'd felt before.

There really is no legitimate question about my citizenship status: I was born in the United States and the 14th Amendment makes me a citizen by birthright.[1] But moreover my parents were both born here as well. Despite the overabundance of proof, the question persists: why does an implication to the contrary strike me as strongly as it did?

I am not at all unsure about whether I am a citizen but the comment suggesting that I am

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1. U.S. Const. amend. XIV, § 1.Some congressional factions call for the repeal of the birthright provision of the Fourteenth Amendment. *See, e.g., House Republicans Introduce Bill to Repeal Birthright Citizenship Amendment,* FOXNEWS.COM, Jan. 6, 2011, http://www.foxnews.com/politics/2011/01/06/house-republicans-introduce-repeal-birthright-citizenship-amendment.

not, that my status as an American is suspect, invokes the time-honored motif of Latinos' illegitimate presence in the United States. Moreover, the fact of my birthright does nothing to dislodge the force of the Sooner's comment—and, I don't really think even he cared whether I was a citizen at the time. Indeed, it was much more simple than that. The Sooner saw my friends and I and, by our looks, knew just the subject matter to invoke. In the mind of the Sooner, the way we looked made us targets for the denigration of our status as Americans. We are well served to consider the motif the Sooner invoked and our respective familiarities with it.

Long have Latinos and the citizenship status of Latinos been fodder for race-based jokes and insults.[2] The origins stretch back to US policies that sought to employ cheap labor from Mexico and then deal with the resulting influx of people via force.[3] The politics of this relationship has festered into the widespread image of Latinos as a suspect group of people with questionable citizenship status.

Contemporary manifestations of this motif indicate both its ubiquity and significance to race relations today. One need not look beyond their morning radio in Austin, Texas to experience this phenomenon first hand. During the summer of 2009, two morning show hosts were suspended and eventually had their show cancelled following an episode where Disc Jokey Don Pryor used the word "wetback" over 30 times in an hour-long show, despite the urges and pleas of his co-host Todd Jeffries.[4] Pryor argued for the return of the term's common usage, citing both efficiency in referring to undocumented individuals and a nostalgia for classic "Americana."[5] He taunted his co-host Jeffries for asking him to refrain from using the term by issuing it in rapid succession and in combination with other insensitive jargon.[6]

Those who called in presented a variety of viewpoints; those siding with Pryor demonstrated a marked racial anxiety about the increasing Latino presence. One caller lamented about constantly hearing families speaking Spanish to one another and coupled it with her assumption of their undocumented status.[7] When asked by Jeffries how she knew they were undocumented, she paused and reasoned that she ". . . .could just usually tell." She followed it up

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2. *See generally* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL. L. REV. 1258, 1273-75 (1992); Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1262-3 (1997) (describing a emblematic example of a "Mexican joke" in anecdotal form); Otto Santa Anna, *Did You Call in Mexican? The Racial Politics of Jay Leno Immigrant Jokes*, *in* 38 LANGUAGE IN SOCIETY 38 (2009); CHARLES RAMÍREZ-BERG, LATINO IMAGES IN FILM: STEREOTYPES, SUBERVERSION, AND RESISTANCE (University of Texas Press 2002).

3. *See generally* Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503 (1998).

4. Blair Schiff and Paul Matadeen, *KLBJ Cancels "Todd and Don Show,"* KXAN NEWS, July 20, 2009, http://www.kxan.com/dpp/news/local/KLBJ_cancels_Todd_and_Don_Show.

5. *Todd and Don Show* (KLBJ radio broadcast July 14, 2009), *available at* http://home.kxan.com/mp3/KLBJ_07_14_09_Broadcast.mp3.

6. *Id.*

7. *Id.*

by attaching anxiety about a "tak[e] over," which included other rapes, murders, and of all things, increasing the cost of rent.[8]

Though semi-anonymous rants on morning radio can hardly form a fair and accurate impression of public sentiment, they are indicative of the anxiety a provocateur like Pryor can invoke. It's a bridge too far to extend the anxiety generally; the more helpful lesson is an understanding that immigration status piques emotions and evokes a pejorative status for those referenced.

Jose Limón, Director of the Center for Mexican American Studies at the University of Texas, explained: "In saying 'wetback,' you're saying Mexican of a lower and marginalized and illegal class. I think that's why a lot of Mexican Americans would take offense. Some of them were born here."[9]

Though Immigration regulations no longer employ the term "wetback," it is instructive to note that its history can be traced back to an official US policy: Operation Wetback. In 1954, following a developing consensus that immigrants from Mexico were depressing wages and displacing potential native workers, the federal government initiated "Operation Wetback."[10] *Wetback* created a special task force that employed paramilitary equipment and the complicity of employers to solve the "wetback problem" by rounding up and deporting over one million undocumented Mexicans.[11]

The "Wetback Problem," however, was largely created by the US Government's promulgation of The Bracero Program and Public Law 45 in the 1940's.[12] The former permitted male Mexican citizens to perform agricultural work temporarily in the US while the latter authorized and financed the recruitment, transportation and placement of this new labor force.[13] The exploitation of this labor force encouraged a perception of Latinos as a proper source for cheap work, but only deserving of temporary national inclusion.[14] In more contemporary times, we are faced with a controversial debate over how to solve the "Immigration Problem" with a legal framework that disenfranchises a status and culture.

With so much of this cultural tension tied to a *legal* designation, the relevant law is essential to our analysis. In addition, many scholars have written on the expressive function of law; that is,

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8. *Id.*
9. Juan Castillo, *Slur Has Long History of Hurt in Texas*, AUSTIN AM.-STATESMAN, Mar. 24, 2008, at A01.
10. Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503, 521 (1998).
11. *Id.*
12. *Id.* at 520.
13. *See Id.* at 520-21.
14. *Id.*

the way in which the law ". . . .[makes] statements as opposed to controlling behavior directly."[15] Although the primary aim of most laws is to directly control behavior, they can nevertheless function as statements about social norms—describing them or prescribing how they ought to be. In this paper, I argue that the already doctrinally deficient practice of employing Mexican-origin as a probative factor in immigration enforcement avers harmful statements about Latinos in both a descriptive and prescriptive fashion. Specifically, Latinos are limned as suspicious individuals whose very presence in the United States is legitimately suspect. More recently, we've seen the public outcry surrounding Arizona's Senate Bill 1070, which, *inter alia*, mandated racial profiling by state authorities.[16] But Federalism issues aside, it is more valuable to examine the predicate legal framework for the federal enforcement of immigration law.

The governing statute, the Immigration Nationalization Act, provides that any officer of the then INS shall have the power without warrant to interrogate ". . . .any alien or person believed to be an alien as to his right to be or to remain in the United States. . . ."[17] The right created in an officer by the INA facially appears to rely on a subjective belief. The case law, however, has enforced *some* Fourth Amendment protections against unreasonable searches and seizures on this issue.[18] In applying *Terry* to the statute, the Court required that in order for such an interrogation to be legitimate, an officer must be aware of "specific articulable facts, which, together with rational inferences from those facts, reasonably warrant suspicion that vehicles contain aliens who may be illegally in the country."[19]

U.S. v. Brignoni-Ponce is the seminal Supreme Court authority for this issue. The Court reasoned that any number of factors may serve to establish reasonable suspicion to stop a vehicle in the border area, including traffic patterns, proximity to the border, and the trained officer's ability to recognize "the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut."[20] The Court also upheld the use of Mexican appearance as a relevant but insufficient factor because ". . . .[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make [it] a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."[21] However, the case law demonstrates that the requisite *other* factors can often function as nominal tokens.[22] The *Brignoni-*

15. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996).

16. *See* Thomas A. Saenz, Presentation on Issues Affecting Immigration Reform at University of Texas School of Law American Constitution Society Panel (Oct. 6, 2010). Saenz is currently the President and General Counsel of the Mexican American Legal Defense and Educational Fund. Thomas A. Saenz – Profile, http://www.maldef.org/about/offices/national_headquarters/index.html.

17. The Immigration and Nationality Act § 287(a)(1), 8 U.S.C.A. § 1357(a)(1) (2006).

18. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975).

19. *Brignoni-Ponce*, 422 U.S. at 884; *See* Terry v. Ohio, 392 U.S. 1 (1968).

20. *Id.* at 884-85 (emphasis added).

21. *Id.* at 886-87.

22. *See e.g* State v. Castillo, 2001-0570 (La. App. 1 Cir. 12/28/01); 805 So. 2d 393 (La. Ct. App. 2001)

Ponce Court evaluated the probative value of race, based on statistics that were not likely accurate at the time and which are absolutely dwarfed by current demographics.[23] Moreover, this practice would not withstand a challenge on the basis of the Equal Protection doctrine.

In this paper, I contend that the *Brignoni-Ponce* practice, where Mexican-origin is used as a relevant factor in justifying a stop, is legally deficient—it insults the protections of the Fourth Amendment and flat out bucks those provided for by the Equal Protection Clause of the Fourteenth Amendment.

By its expressive function, this practice also imposes a cultural impact. Many scholars, like Cass Sunstein, have written on the way in which the law evokes statements and imparts values.[24] The expressive function of this practice indicts Latino identity and levies a cultural impact on the community writ large. The endorsed association, then, of a Hispanic phenotype and a questionably lawful presence estranges Latinos both from without and within their community.

Specifically, this practice contributes to the negative way in which others view and treat Latinos and Latino immigrants, in addition to wreaking havoc on dynamics within the Latino community.

II. THE LEGAL FRAMEWORK & DOCTRINAL PREJUDICE

A. [Un]Reasonableness of an Exception to the Fourth Amendment

As mentioned above, the seminal case of *U.S. v. Brignoni-Ponce* provides the basis for Fourth Amendment protections from the investigation of potential violations of the INA. The defendant, charged with two counts of knowingly transporting illegal immigrants, moved to suppress their testimony, claiming that it was the fruit of an illegal seizure.[25] Because a highway checkpoint was closed, two officers were observing the same road and pursued the defendant's car, saying later that their only reason for doing so was that its three occupants appeared to be of

(upholding as lawful a bus search based entirely on factors external to that particular bus); Marquez v. Kiley, 436 F. Supp. 100 (S.D.N.Y. 1977) (upholding the employ of physical appearance and the alleged nature of the area as being highly concentrated with illegal aliens); U.S. v. Montez-Hernandez, 291 F. Supp. 712 (E.D. Cal. 1968) (upholding the factors of Mexican appearance and apparent "nervousness").

23. *See* Robert A. Culp, *The Immigration and Naturalization Service and Racially Motivated Questioning: Does Equal Protection Pick up Where the Fourth Amendment Left Off?*, 86 COLUM. L. REV. 800, 816-17 (1986) (discussing the differing immigration figures the Court considered and how they questionably relied on a dubious set from the INS).

24. *See generally* Sunstein, *supra* note 15, at 2024 (exploring the expressive function of how law may be designed to control behavior indirectly and change social norms).

25. *Brignoni-Ponce*, 422 U.S. at 875.

"Mexican descent."[26]

The Government claimed statutory authority from the INA to stop cars without warrants in the border areas.[27] The Court noted that "[w]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person,' and the Fourth Amendment requires that the search be 'reasonable.'"[28] The reasonableness of a seizure, the Court went on to say, ". . . .depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."[29]

In its reasonableness analysis, the Supreme Court in *Brignoni-Ponce* relied on empirical data submitted by the parties to evaluate the public interest of enforcing the INA. The Court points to widely varying estimates of the number of illegal immigrants in the United States, that, by its account, range from one to twelve million. However, there is no description of the national origin of these illegal immigrants. Moreover, the Court adopts a rather cursory and seemingly oversimplified posture regarding "these aliens":

> Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation.[30]

Though the Court generally references a subcommittee hearing, the tenor and thrust of this characterization nevertheless indicates a denigrated status for ". . . .these aliens."[31]

Ultimately, the Court reasoned using *Terry* that "[e]xcept at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."[32] Reasoning from its imprecise and impermanent empirical data, the Court concluded that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but

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26. *Id.* at 874-75.

27. *Id.* at 876-77.

28. *Id.* at 878 (quoting Terry v. Ohio, 392 U.S. 1, 16-19 (1968)).

29. *Id.*

30. *Id.* at 878-89.

31. *Id.* The Court also notes a Government estimate that 85% of illegal aliens are from Mexico based on the ". . . .consistently high proportion of Mexican nationals in the number of deportable aliens arrested each year." *Id.* at 879 n.5. One might wonder whether those officers making arrests using a racially-dependent mechanism would even be alerted to the reasonably suspicious white or black illegal alien.

32. *Id.* at 884.

standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."[33] Citing *Terry* again, the Court acknowledges the Government's assertion that ". . . .trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling."[34] In its reasonableness analysis, the Court also noted the "modest" intrusion of a stop to demand proof of lawful presence or citizenship.[35]

First, one ought to evaluate both the substance and propriety of Justice Rehnquist's reasonableness analysis for compliance with the Fourth Amendment. The Court flippantly accepts the "racial factor" as long as its probative value is facially sufficient and it is accompanied by any other factor to arouse reasonable suspicion—a troubling enough proposition on its own. By allowing its use, the Court endorses the *racialization* of an offense so long as race is correlated with the commission of an offense in the record. However, there are many other traits to use as proxies for this specific criminality that would be more narrowly tailored to the end sought.[36]

The "likelihood" discussed by the Court is problematic based on the data at the time, and even the more accurate data is terribly outdated. Justice Rehnquist noted the disparity between a "conservative" 1 million undocumented aliens to the INS's estimate of 12 million.[37] Today, almost 40 years later, there are an estimated 47 million Latinos in the United States.[38] There are only about 11.9 million undocumented immigrants in the US today, and not all of them are even Latinos.[39]

Furthermore, The Ninth Circuit has not upheld the probative value of Hispanic appearance based on the fact that the majority of people passing through a checkpoint were Hispanic.[40] In addressing *Brignoni-Ponce*, the Circuit Court ruled the proposition as dictum and reasons that ". . . .the statistical premises on which [it] relies are no longer applicable" and that such demographic changes have ". . . .been accompanied by significant changes in the law restricting the use of race as a criterion in government decision-making."[41] Other circuits have yet to promulgate similar rulings and characterize the *Brignoni-Ponce* endorsement as mere dicta.[42] Almost 40 years after the *Brignoni-Ponce* Court relied on the questionable empirical data to justify the probative

33. *Id.* at 886-87.

34. *Id.* at 885.

35. *Id.* at 883.

36. *See infra* p. 13 (discussion of potential Equal Protection claim).

37. *Brignoni-Ponce*, 422 U.S. at 878.

38. Pew Hispanic Center, *Illegal Immigration Backlash Worries, Divides Latinos*, at ii, (Oct. 28, 2010), http://pewhispanic.org/files/reports/128.pdf.

39. Pew Hispanic Center, *Unauthorized Immigration Flows are Down Sharply Since Mid-Decade*, (Sep. 1, 2010), http://pewhispanic.org/reports/report.php?ReportID=126.

40. U.S. v. Montero-Camargo, 208 F.3d 1122, 1131-32 (2000).

41. *Id.* at 1133-34.

42. Based on a Westlaw Keycite search current as of Dec. 15, 2010.

value of Mexican decent, the statistics indicating an extremely imposing presence of illegal immigrants have yet to manifest themselves. It is unwise to base a doctrinal intrusion of rights, based on a suspect classification, on ephemeral demographics from a period so far removed.

Second, the actual *modesty* of such an intrusion undermines the inclusiveness of citizenship, widely regarded to be essential to inclusion in the social fabric. Some scholars have written that equal citizenship centers on inclusion, membership, belonging, equal participation, and respectful dialogue; others write that citizenship validates the law's authority over the individual.[43] Citizenship, they write, encourages a sense of security and belonging.[44] Indeed, citizenship, law, and race have been described as mutually constitutive of a group's place in the circle of national civic life.[45] The putative *modesty* is thus undermined by the support one's immutable characteristics to provide a suspicion of unlawful presence. About 19% of Latinos are unauthorized immigrants, leaving less than 20% of all Latinos whose citizenship status might be suspect for investigation by officers.[46] Further attenuating the purported correlation is the fact that Latinos have been the largest minority group in the United States since 2001.[47]

If Justice Rehnquist was shown these numbers and was being intellectually honest, one would expect both the reasonableness and his determination of the probative value of the appearance of Mexican descent not to stand up to Fourth Amendment restrictions. The likelihood that a Mexican phenotype, when combined with another factor, would indicate a questionable presence is remarkably low. Indeed, most Latinos are not just citizens but are native-born. It therefore marginalizes native-born citizens to include parts of their immutable characteristics on a veritable checklist of factors supporting a suspicious presence in the United States. Because citizenship is such an integral part of a member's inclusion, a presumption of suspiciousness for Latinos is anything but "modest."

The use of Mexican descent as a reasonable factor in establishing Reasonable Suspicion of unlawful presence flows from traditional Racial Profiling. Conventionally, Racial Profiling is described as ". . . .permitting race to be used on a routine basis as a negative signal of increased risk of criminality."[48] Randall Kennedy argues that cases like *Brignoni-Ponce* and *U.S. v. Martinez-Fuerte* ". . . .represent an influential, indeed dominant, view within the judiciary."[49] In *Martinez-Fuerte*, U.S. Border Patrol agents subjected a driver to questioning and search at a highway

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43. *See* Murray, *supra note* 10, at 505.

44. *See Id.*

45. MARK WEINER, AMERICANS WITHOUT LAW: THE RACIAL BOUNDARIES OF CITIZENSHIP 6 (NYU Press, 2006).

46. *See* Pew Hispanic Center, *supra* note 39, at ii.

47. Lynette Clemetson, *Hispanics Now Largest Minority, Census Shows*, N.Y. TIMES, Jan. 22, 2003, *available at* http://www.nytimes.com/2003/01/22/us/hispanics-now-largest-minority-census-shows.html.

48. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 143 (Pantheon Books 1997).

49. *Id.*

checkpoint because suspicion was partially prompted by his Mexican appearance.[50]

The direct subjugation of Latinos in the U.S. during the militarization of the border also contributes to their disenfranchisement from the system that impeaches their identity. At the time of Operation Wetback, Mexican-Americans were forced to at all times be prepared to prove their U.S. Citizenship or face arrest and deportation.[51] "Also, at the very least, Operation Wetback was an assault on the dignity of Mexican immigrants and of Mexican-origin people more generally."[52] Further, there is substantial evidence that from the late 1980s onwards there has been extensive and systemic abusive behavior and violations of human and civil rights—the victims of which were both Mexican-Americans as well as Latino immigrants.[53] Border region and drug enforcement efforts have been largely directed against Mexican immigrants and smugglers, including those suspected of being either—like Mexican-Americans.[54]

The distinct use of Mexican descent as a relevant factor of an immigration offense takes this practice a step further. Not only is color used as a proxy for general criminality, but used specifically for the commission of immigration offenses like illegal entry, illegal presence, et cetera. This wrinkle in such an ugly and unfair *modus operandi* undermines the presumption of both one's lawful conduct and presence in the United States.

Kennedy writes of Mexican-American motorists paying a "race tax" for the campaign against illegal immigration from which other races are exempt.[55] *Inter alia*, he advocates for an increase in so-called taxes "across the board":

> Instead of placing a racial tax on blacks, Mexican-Americans, and other colored people, governments should, if necessary, increase taxes across the board. More specifically, rather than authorizing police to count apparent Mexican ancestry or apparent blackness as negative proxies, states and the federal government should be forced either to hire more officers or to inconvenience everyone at checkpoints by subjecting all motorists and passengers to questioning (or to the same chance at random questioning). The reform I support, in other words, does not entail less policing. It only insists that the costs of policing be allocated on a nonracial basis.[56]

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50. *See* U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976).

51. TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME 17 (1996).

52. *Id.*

53. *Id.* at 156.

54. *Id.* at 158

55. KENNEDY, *supra* note 49, at 159.

56. *Id.* at 161.

If Kennedy were to be understood in the context of Reasonable Suspicion, we would conceivably see border enforcement akin to the notorious airport security checks. That is, everyone would be considered equally suspicious and apt for further investigation in a complete and indiscriminate crackdown on illegal immigration. Reasonable Suspicion could be established via multiple factors, but of those, race would be prohibited. A nervous Anglo or African-American or Asian-American would be just as suspicious and the burden is thus fairly allocated.

B. Equal Protection as a Guardian for Fairness

As a law student in 1986, Robert A. Culp published a note in the Columbia Law Review that won the prestigious Edward L. Dubroff Memorial Award sponsored by the American Immigration Lawyers Association. The note was also published in Immigration and Nationality Law: Fortieth Anniversary Symposium of the American Immigration Lawyers Association.[57] In his note, Culp argues for the prohibition of racially motivated questioning by the INS on the basis of it being violative of the Equal Protection doctrine.[58] In particular, Culp asserts that:

> . . . .[E]ven in the absence of a physical detention sufficient to trigger fourth amendment guarantees, the equal protection clause demands that officers who rely on racial appearance when questioning individuals have a reasonable, individualized suspicion of undocumented alienage. . . .[T]he INS invidiously relies on race when it lacks reasonable, individualized suspicion of undocumented alienage. . . .[which] cannot withstand the strict scrutiny mandated by guarantees of equal protection.[59]

As noted by Culp, Government actions subject to the Equal Protection clause can be strictly scrutinized if they make any "suspect" classifications, including those based on race. The government agency must then prove that its action is (1) narrowly tailored to serve (2) a compelling state interest.[60]

As it describes national origin, Mexican descent qualifies as a suspect classification.[61] Such a claim may be problematic because Immigration officials often ". . . .recite nonracial reasons for [their] question[ing]," which then undercuts the legal discernment of the Suspect Classification.[62] However, the common law doctrine, starting with *Brignoni-Ponce* and continuing forward, has definitively fleshed out the legitimate use of race as a but-for causal factor in establishing Reasonable Suspicion. Moreover, the systemic use of race is codified in the standard procedures

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57. Culp, *supra* note 24.
58. *See generally id.*
59. *Id.* at 801
60. *Id.* at 807.
61. *See* Hernandez v. Texas, 347 U.S. 475, 479-80 (1954).
62. Culp, *supra* note 24, at 807.

employed by the INS.

Though demonstrably attenuated, race does present some probative value for the enforcement of immigration policies. But, after 40 years of the legitimized exploitation of race as a relevant factor, the basis for its use is even less helpful than it was in 1975. The Latino citizenry continues to grow, both from the traditional progression of generations and by virtue of the birthright citizenship of the children of immigrants born "right wise." Going forward, this use of race will become ever more obsolete and increasingly hostile to lawfully present Latinos as they form a larger part of the body politic. Even though the use of race is optional, it would be overwhelmingly persuasive if there were some way to track how often race is used in stops—both those resulting in adjudication and otherwise.

In order to pass the Court's application of Strict Scrutiny, a Suspect Classification must be narrowly tailored to the compelling state interest it seeks to advance.[63] Formally, *Brignoni-Ponce* permits the use of racial appearance only when articulated in conjunction with other factors. But the body of case law has repeatedly affirmed the legitimate employ of often nominal "other" factors.

In *United States v. Montez-Hernandez*, four Mexicans were traveling by car and were stopped by two officers who testified that the "two men in the back seat had looked at them with apparent nervousness."[64] Though this case predates *Brignoni-Ponce*, it is legally consistent with it. The subtlety of "other" factors continues to be upheld as sufficient.

In *Marquez v. Kiley*, two Ecuadorians were stopped because of their physical appearance and the officers' belief that the area was one with a "fairly high concentration of illegal aliens, particularly from Central and South America."[65] The officers also noted various illegal alien activity in the past few months, as well as their training which taught them that ". . . .many illegal aliens find employment in factories. . . ." and their suspicion that the Ecuadorians were on their way.[66] Apparently, one should beware if he's a working class Latino in a Latino neighborhood.

In *State v. Castillo*, a Border Patrol agent stopped an El Expreso commercial bus, a line that specializes in transportation from Latin America.[67] The Court upheld the officer's reasonable suspicion based on ". . . .the circumstances surrounding this typical smuggling route, the number of illegal aliens regularly found on the El Expreso buses at the location, the regularity of finding these aliens on El Expresso buses at the location, and the agent's considerable experience as a border

63. *See id.*

64. U.S. v. Montez-Hernandez, 291 F.Supp. 712, 713 (1968).

65. Marquez v. Kiley, 436 F.Supp. 100, 107 (1977).

66. *Id. at 107.*

67. State v. Castillo, 2001-0570 (La. App. 1 Cir. 12/28/01); 805 So. 2d 393, 398 (La. Ct. App. 2001).

patrol agent in apprehending illegal aliens. . . ."[68] Note that all of these factors are external to the defendant's own appearance and conduct. This supports the need for Culp's requirement of ". . . .individualized suspicion of undocumented alienage."[69]

The narrow-tailoring requirement is formally met by the holding in *Brignoni-Ponce*, but practical enforcement has produced a *de facto* circumnavigation of the "other" factor requirement because such factors are often nominal. Furthermore, the use of race in conjunction with commonplace factors is both over and under inclusive, and it misses the narrow-tailoring requirement by a mile. This practice thus functions as the official casting, or caste-ing, of a culture into a suspect and stigmatized status.

In *Brignoni-Ponce*, the Supreme Court endorsed the INS's use of appearance markers, naming dress and hairstyle among others, to identify ". . . .the characteristic appearance of persons who live in Mexico."[70] As Culp describes,

> The border between the United States and Mexico is not a cultural barrier. Hispanics, be they citizens, legal resident aliens, or undocumented share a great number of social and cultural characteristics. Thus when the INS relies on such factors as ability to speak English, dress or other elements of appearance, it may very well be restating that the the suspects are Hispanic.[71]

So the factors allegedly justifying this doctrinal exception to the Fourth Amendment and a violation of Equal Protection describe native-born Latinos just as much as the factors describe undocumented aliens. With the vastly expanding Latino sector of the population, the use of the *Brignoni-Ponce* framework will become even more overly inclusive; that is not even considering undocumented aliens skirting under the radar of Mexican descent. As Culp writes, ". . . .[p]hysically intrusive or not, dragnet questioning serves notice on the nation's [then] 13.1 million legally resident Hispanics that their right to be in the country can be challenged."[72]

The application of Strict Scrutiny also requires that the Suspect Classification be in furtherance of a legitimate government interest. As Culp insists, the use of race furthers neither the administrative interest of the INS nor the national interest in cracking down on the problem of undocumented immigration.[73]

Studies have shown that the vast majority of apprehensions occur at or near the border—not

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68. *Id.*
69. *See* Culp, *supra* note 24, at 807.
70. *Id.* at 818-19 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975)).
71. *Id.* at 818.
72. Culp, *supra* note 24, at 822.
73. Culp, *supra* note 24, at 819.

employing the race-based stops at issue here.[74] Moreover, the use of racial appearance provides little marginal utility towards the end of apprehending unlawful entrants: all persons legally entering the United States must present documentation and those entering via stealth thereby furnish officers with probable cause for arrest without regard for the entrant's race.[75] Furthering the interests of the INS, it would seem, doesn't hold enough water to justify the use of a Suspect Classification.

Culp argues that, in 1986, illegal immigration hardly presented a severe enough national crisis as to warrant pervasive racial discrimination.[76] That characterization may be even less than apropos for today's immigration issue, but the concerns of the 1980s seem, oddly enough, to be in line with those in the news today. Culp asserts that undocumented aliens do not clearly harm the job market nor do they drain public welfare programs and pay little in taxes.[77] The Supreme Court seemed to agree with him in *Plyler v. Doe*, suggesting that illegal aliens underutilize public services while providing labor and tax money to the local economy.[78] Culp also asserts that concerns rooted in so-called "race anxiety" about the disincentive to assimilate created by undocumented aliens runs contrary to the heart of Equal Protection.[79]

Randall Kennedy also discusses the merits of an Equal Protection challenge to Racial Profiling, arguing that *Strict Scrutiny* is the appropriate lens through which such "factoring" should be examined by the Courts. He writes:

> The court seems to believe that facts dictate the way in which the legal order should respond. This is erroneous. The legal order always *chooses* how it shall respond to a given set of facts. Although U.S. constitutional law is inconsistent, it has now typically and rightly chosen to subject to strict scrutiny racial classifications used by public officials. . . .Subjecting racial policing to strict scrutiny, however, would not entail ignoring facts. It would require courts to determine whether, in light of the society's presumptive disapproval of race-dependent decisionmaking [sic], the facts in a given instance are such that drawing a racial line is permissible. . . .Even if race is only one of several factors behind a decision, tolerating it at all means tolerating it as potentially the *decisive* factor. In a close case, it is a person's race which might make the difference between being stopped by the police or being permitted to go on about one's business free from governmental intrusion.[80]

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74. *Id.* at 819.
75. *Id.* at 819-20.
76. *Id.* at 820-21.
77. *Id.* at 822.
78. Plyler v. Doe, 457 U.S. 202, 228 (1982).
79. *See* Culp, *supra* note 24, at 821.
80. KENNEDY, *supra* note 49, at 148-49.

Kennedy scoffs at the courts' justification for declining to apply strict scrutiny: that the unpleasant fact of minority crime does not warrant them being ignored.[81] He correctly identifies the is/ought fallacy as a justification for the exception, where the status quo justifies and defines proper prescriptive measures to preserve it. Indeed, even Justice Antonin Scalia averred that the Equal Protection clause was the proper basis for ". . . .objecting to intentionally discriminatory application of laws. . . ."[82] Courts exacerbate the damage of the fallacy by declining to apply Strict Scrutiny to the offense-specific racial profiling employed by the INS.

Not only is the standard of questionable probative value and fairness, but the rationale that a race-based stop is a modest curtail of rights is exactly the sort of discrimination that ought to be challenged. The "is" part of the fallacy is flawed in establishing the probative value; but, even if the probative value of Mexican descent were sufficiently high, the application of Strict Scrutiny would expose its principal flaw. Strict Scrutiny is not concerned with the extent of the discriminatory effect, and thus the "modest" rationale would fail forthwith. It is the race-based classification for any, or in this case a specific, offense that indicts all Latinos in the United States.

Both Kennedy and Culp advance methods for combating and prohibiting the use of race in predicting general and specific criminality. Kennedy challenges those supporting the crack down on crime to distribute the costs evenly or randomly among Americans. Culp challenges the legal basis for the suspect classification on Equal Protection grounds. Both agree that such classifications should not stand and I suspect that Kennedy would agree with Culp's Equal Protection analysis.

But why is Kennedy so quick to abandon the value of an Equal Protection claim in favor of his flat race tax? His writing suggests that such a claim should be successful, but he reminds that "American constitutional law is remarkably uneven. At the same time that it has shown increasing tolerance for police using race in making determinations of suspicion, it has shown increasing intolerance for lawyers using race to exclude prospective jurors pursuant to racially discriminatory peremptory challenges."[83] It seems that Kennedy doesn't trust the courts to apply the correct standard, and perhaps with good reason. There is not a case where a Strict Scrutiny Equal Protection challenge has been successfully brought against racial profiling for general criminality, let alone that for a specific offense—namely, an immigration offense.

C. *A Comment on Non-Federal Enforcement*

Brignoni-Ponce carved out an exception to the protections of the Fourth Amendment for the use of race in establishing Reasonable Suspicion—if race was not the sole factor and relying on the

81. *See Id.*

82. Whren v. U.S., 517 U.S. 806, 813 (1996).

83. KENNEDY, *supra* note 49, at 150.

characterization of a challenge to one's citizenship as "modest."[84] Arizona's SB1070 promulgated a self-dealing statutory scheme which provided for and encouraged the stopping of those believed to be in the country illegally.[85] Because unlawful presence is a deportable state offense, an officer may arrest a suspect without warrant if he has probable cause to believe such an offense has been committed. As Saenz and Ronstadt explain:

> [B]ecause SB 1070 also creates a new state crime for being undocumented, police officers could "convert" any. . . .interview into a stop or detention based on suspicion that the individual is in violation of that new state law. Under threat of private lawsuits—which SB 1070 invites—police officers would feel a great compulsion to engage in such bootstrapping.[86]

Arizona pays lip service to the Federal common law in another subsection: "A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not solely consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona constitution."[87] No such disclaimer appears in the warrantless arrest section and we therefore see an overzealous state attempting to curtail the rights of Latinos beyond even the circumscription *Bringioni-Ponce* effectuated. Though Judge Bolton has stricken these egregious provisions from the text of the law mostly on preemption grounds, a pending Ninth Circuit appeal should render them moot as well.[88] Though Preemption has proven to be the more successful argument against state enforcement, until a Court successfully applies Strict Scrutiny in vindicating the Equal Protection rights of Latinos, the marginalization of a class of citizens and lawfully-present individuals will continue.

III. THE CULTURAL FORCE OF IMMIGRATION STATUS

Recently at a bar in Chicago, several cousins and I gathered around a table to discuss the goings on in the family and somehow it kept coming back to sports and other, more germane, topics. One cousin of mine, fresh off a stint in prison, relished the opportunity to reconnect with the family from whom he had become somewhat estranged. The band that had been playing took a break and the conga player approached us—apparently he was a childhood friend of someone's husband. In introducing ourselves, it came out that my recently "emancipated" primo was living and working in nearby Cleveland, Ohio. "What?!?!," the conga player queried over the shrill

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84. *See generally* United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

85. *See* ARIZ. REV. STAT. ANN. § 13-3883 (2010).

86. Thomas A. Saenz and Linda Ronstadt, *Measuring SB 1070's Nationwide Detriment to Law and Order*, THE HUFFINGTON POST, June 7, 2010, http://www.huffingtonpost.com/thomas-a-saenz/measuring-sb-1070s-nation_b_599885.html.

87. ARIZ. REV. STAT. ANN. § 11-1051(B) (2010).

88. United StatesS v. Arizona, 703 F.Supp.2d 980 at 991-1006 (4th Cir. 2004).

*guitar riffs, "You're a **mojado**?" He smirked with the satisfaction of a playground bully who had landed a hit below the belt. Instantly my cousin's face burned red and he capitulated to the standard denial and macho claims of being born right wise—in the United States.*[89]

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An old girlfriend once recounted to me the manner in which she bucked the advances of a cell phone salesman. She told me that she deliberately mentioned that I was both over six-feet tall and Mexican. When my face reacted with a confused revulsion, she explained: "I think most people feel that, you know, it makes you more threatening. Black guys are the most threatening, then Mexicans, and to a much lesser extent, white dudes." I could not muster words to convey the deep sense of betrayal I felt—that she had been harboring this odium towards something I'd always be in her eyes: the threatening Mexican.

Cass Sunstein, a law professor at Chicago, describes the expressive function of law in related matters of race. For instance, we know that though *Plessy* and *Brown* both stand for certain conflicting propositions regarding the equality evoked by segregationist policies; they each also expressed principles of *who* was being segregated and whether the consequent damage to African-Americans should be legally recognized.[90]

Much of the debate over school segregation, for example, was also a debate about the meaning of laws calling for segregation. *Plessy v. Ferguson* asserted that such laws did not "mean" black inferiority; *Brown v. Board of Education* tried to respond to this assertion with empirical work suggesting the contrary.[91]

Further, Sunstein describes the way in which a discriminatory legal practice affects the behavior of those subject to it. "If a discriminatory act is consistent with prevailing norms, there will be more in the way of discriminatory behavior. If discriminators are ashamed of themselves, there is likely to be less discrimination."[92]

As discussed *infra*, the practice of using Mexican origin as a probative factor in the enforcement of immigration law is a discriminatory act that has not and would not survive the application of Strict Scrutiny in an Equal Protection analysis. This discriminatory act also affects the way in which Latinos are treated and how they view themselves. The discriminatory act is

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89. "Mojado" is a Spanish slang term with a meaning similar to "wetback," implying illegal entry into the United States. *See generally* Jorge A. Bustamante, *The "Wetback" as Deviant: An Application of Labeling Theory*, 77 AM. J. SOC. 706 (1972).

90. Sunstein, *supra* note 15, at 2022.

91. *Id.*

92. *Id.* at 2043.

consistent, whether flowing from or causing, the prevailing status of Latinos as suspect; according to Sunstein, the effect is more discrimination. Moreover, because so-called "discriminators" are encouraged by the legitimate use of race as probative of a suspect presence, their discrimination flows from the practice as well.

But, the contra-positive is somewhat helpful to what ought to be the case. If, as Sunstein suggests, discriminators are ashamed of themselves—presumably flowing from the import of the law—then there is likely to be less discrimination. If this practice is found to be violative of Equal Protection, the law's affirmative force in prohibiting it would likely result in *less* discrimination. The law is often used as a vehicle for social progress and in this instance it should modernize and make fair the enforcement of immigration law.

But stepping back for a moment, we note that the history surrounding the derogation of a Latino based on the myth that all are illegal is a time-honored tradition in the world of slurs and hate. As Jose Limón put it: "[a] lot of people who remember ["wetback"] must surely take offense that they are characterized that way, as people who are here illegally."[93] Indeed, Professor Yxta Maya Murray describes the motif as follows:

> Latinos are, first and foremost, portrayed as "aliens." Although other ethnic groups have integrated in the American citizenry, politicians and other officials continually characterize Latino-Americans as the example of the alien stranger who scuttles over the border secretly, has a cagey heart and a passive demeanor, and robs the nation of its hard won wealth by draining the welfare, educational and social security systems.[94]

Indeed, the sentiment against Latino immigration is aggravated by the apparently unpalatable nature of their culture. Cornelius writes that the tendencies of Latino immigrants clash with Anglo European cultural concepts like smaller families with individual households, English monolingualism, and a penchant against the bidding for day labor, et cetera.[95] Generally, the line between anti-immigrant and anti-Latino sentiment is blurred, but it is empirically clear that the latter contributes to the popular hostility towards immigration.[96] One notorious hostility is the public's correlation of "[t]he fact that many recent Latino immigrants are 'illegals'" and the way in which it ". . . .lends [itself] to the expectation that they will commit other types of crimes."[97] This negative expectation supports Cornelius's argument that ". . . .*noneconomic* factors (especially ethnicity, language, and culture) are highly influential in shaping Americans' response to the 'new' Latino

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93. Castillo, *supra* note 9.

94. Murray, *supra* note 10, at 518.

95. Wayne A. Cornelius, *Ambivalent Reception: Mass Public Responses to the "New" Latino Immigration to the United States*, in LATINOS: REMAKING AMERICA 165, 174 (Marcelo M. Suárzes-Orozco and Mariela M. Páez eds., 2002).

96. *Id.* at 174-175.

97. *Id.* at 174.

immigration."[98] This would seem to explain the caller's multifaceted protest to "wetbacks" during the KLBJ radio show, *infra.*

Murray notes several cultural effects and reverberations of the image of an illegitimate Latino in the United States. Central to Murray's discussion is the assertion that Latino-Americans maintain what she calls a "bordered identity": a link with Latin America beyond the southern border that is fueled by a common language and culture.[99] She points to the stigmatization of Latino-Americans (her term) through border enforcement policies, raids, and denial of rights to undocumented individuals.[100]

Murray notes such policies as the so-called "Tortilla Curtain": a ten-foot-high chain-link fence erected along the border in California. Murray writes that the fence was initially designed to keep out Mexican cattle and is now intended to keep out "coyotes" and "aliens"—descriptions that ". . . .evoke images of an inhuman pestilence that will bore into the pristine fabric of the nation or of a frightening, uncontrollable, and almost superhuman malevolent presence that will overtake the country."[101] Border enforcement is a racialized, "othering" practice that extends beyond mere legal enforcement.

In 1994, a ballot initiative in California known as Proposition 187 sought to preclude the use of certain social services by illegal immigrants, and in doing so, ignited a firestorm of controversy.[102] After it was passed by public referendum, a federal court ruled it unconstitutional mostly on the grounds of preemption by federal law.[103] Nevertheless, that the issue was so popularly supported indicates the subordinated status of Mexicans and Mexican descent: Proposition 187 profiled all Mexican-origin persons in California as immigrants seeking to deprive White persons of social and economic opportunity. One harmful effect of Proposition 187 was its portrayal of Mexican-origin persons as immigrants or foreigners that were out of control in California society. As such, their ethnic identity, Mexican, was associated with negative expectations, such as the abuse of social welfare programs, promoting perceptions that they needed to be controlled by deporting them back to Mexico.[104]

Though Arizona's state initiative to illegal immigration has so far met the same fate as Proposition 187, it has led to an even greater and more general indictment of those persons of

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98. *Id.* at 180.

99. Murray, *supra* note 10, at 511-14.

100. *Id.* at 545.

101. *Id.* at 524.

102. Todd. S. Purdum, *Judge Nullifies most of California Immigrant Law, in* N.Y TIMES, Mar. 19, 1998.

103. *Id.*; For a breakdown of the holding of Proposition 187's various provisions, *see* League of United Latin Am. Citizens v. Wilson, 908 F.Supp. 755 (C.D. Cal. 1995).

104. Adalberto Aguirre, Jr., *Profiling Mexican American Identity: Issues and Concerns*, 47 AM. BEHAVIORAL SCIENTIST 928, 933 (2004).

Mexican origin. Polls indicate that support for the law hasn't dropped below 61% of Arizona voters, peaking at "71% in May when the state was the target of repeated criticism by President Obama, major Hispanic groups and others."[105] Among the general public, polls indicate a similar level of support—62%—for the controversial provision allowing police to question anyone they think is in the country illegally.[106]

SB1070 also provoked more extreme responses like a Neo-Nazi march in support of the law that made its way towards the federal courthouse where the law would have many of its provisions killed.[107] Critics of SB1070 claim that it faces similar constitutional flaws as Proposition 187 which led to increased community conflict ". . . .as some interpreted the initiative's passage as license for private individuals to harass and interrogate those they believed to be undocumented, which then, as now, was usually based on racial stereotype." Though, they argue that SB 1070 is "an even more direct attempt to establish the state's own immigration law and enforcement scheme" as it "would drastically change every Arizonan's daily experience, especially anyone whose appearance, name, language or accents fits the stereotype of the undocumented."[108]

The gutting of the Fourth Amendment goes beyond the mere use of race in justifying a stop. The distinctive treatment in the Supreme Court's jurisprudence held as a matter of law that workers were not seized when INS placed agents at factory exits and questioned workers within factories.[109] Supposedly within the milieu of Fourth Amendment protections, workers were deemed free to go despite INS agents guarding the exits.[110] Murray describes the injury such raids and deportations cause bordered identity: "First, when the state targets those with a Latino appearance, it creates a significant amount of anxiety in some Latino-Americans who worry about their own illegal deportation. Furthermore, raids also injure Latino-Americans because they may identify and empathize with the non-U.S. Latinos who are rounded up and deported."[111] It is the empathy distinct from one's own citizenship status and common culture that reverberates the racial derogation of such policies.

More contemporary border enforcement issues have given rise to vigilante movements like those of the so-called "Minutemen." The National Citizens Neighborhood Watch, for example,

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105. *Most Arizona Voters Still Support Immigration Law*, RASMUSSEN REPORTS, (Oct. 31, 2010), http://www.rasmussenreports.com/public_content/politics/general_state_surveys/arizona/most_arizona_voters_still_support_immigration_law.

106. *Public Supports Arizona Immigration Law*, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, (May 12, 2010), http://pewresearch.org/pubs/1591/public-support-arizona-immigration-law-poll.

107. Nick Wing, *Neo-Nazis Rally For Arizona Immigration Law*, THE HUFFINGTON POST (Nov. 15, 2010, 11:30 AM), http://www.huffingtonpost.com/2010/11/15/neo-nazi-rally-arizona-immigration-law_n_783533.html.

108. *Id.*

109. INS v. Delgado, 466 U.S. 210, 218 (1984).

110. *Id.*

111. Murray, *supra* note 10, at 534.

names its mission: "[t]o secure United States borders and coastal boundaries against unlawful and unauthorized entry of all individuals, contraband, and foreign military."[112] But many mark the movement as ". . . .a practice of power that defines the juridical border between 'citizens' and '[o]thers,' that is 'illegal aliens.'"[113]

Both the history and substance of the immigration debate have contributed to a strong derogation of those of Mexican descent as a problem needing resolution. This denigration has sometimes given rise to a violent targeting of individuals believed to be undocumented Latino immigrants.[114] In July of 2000, a 66-year-old migrant worker in California, along with four others, was attacked by eight white teenagers, one of whom used a pitchfork while others beat the victims with pipes, shot them with pellet guns, and robbed them.[115] All of this they inflicted while shouting racist epithets.[116] In September of that year, "two Mexican day-laborers. . . .were lured into. . . . an ambush by young white men claiming to be contractors" who beat and stabbed the workers while shouting slurs.[117] Still another immigrant—Irineo Aguilar—was beaten by three skinhead types and thrown unconscious into a concrete storm drain; when the attackers returned they levied a "gruesome coup-de-grâce" by dropping a 43-pound boulder on his head.[118] But perhaps this is less alarming in the view of California state senator William Craven, who characterized migrant workers as ". . . .lower on the scale of humanity" in a 1993 public hearing.[119]

But even a misleading Latino likeness might place one in the cross-heirs of those who seek to wage this cultural battle. In July of 2006, three members of the Imperial Klans of America confronted a Native American teenager—Jordan Gruver— at a county fair in Brandenberg, Kentucky.[120] Mistakenly believing him to be an undocumented Latino, the Klansmen taunted him with ethnic slurs and doused him with alcohol.[121] Gruver was knocked to the ground and repeatedly struck and kicked; he sustained a broken jaw and forearm, and two cracked ribs.[122]

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112. National Citizens Neighborhood Watch Mission Statement, *available at* http://www.minutemanhq.com/hq/aboutus.php.

113. *See e.g.* Leo R. Chavez, *Spectacle in the Desert: The Minuteman Project on the U.S.-Mexico Border*, *in* GLOBAL VIGILANTES: ANTHROPOLOGICAL PERSPECTIVES ON JUSTICE AND VIOLENCE 3 (David Pratten and Atreyee Sen, eds. C. Hurst & Co. Pub. 2006).

114. Ann O'Neill, *Jury Award $2.5 Million to Teen Beaten by Klan Members*, CNN JUSTICE (Nov. 14, 2008), http://articles.cnn.com/2008-11-14/justice/klan.sued.verdict_1_jury-awards-damages-klan-group?_s=PM:CRIME.

115. MIKE DAVIS, MAGICAL URBANISM: LATINOS REINVENT THE U.S. CITY 78 (2000).

116. *Id.*

117. *Id.* at 81.

118. *Id.* at 79-80.

119. *Id.* at 79.

120. O'Neill, *supra* note 113.

121. *Id.*

122. *Id.*

If we consider illegal immigration as socially undesirable as other crime traditionally association with Racial Profiling, it seems that expectations and the construction of stereotypes can explain much. Aguirre explains that:

> In terms of racial profiling, racial and ethnic identity associated with negative expectations and perceptions legitimate the profiling of minorities in society. For example, the expectation that minorities are more likely to commit a crime than Whites legitimates profiling as a practice that seeks to control the violation of social norms by controlling and supervising minorities, for example, those most likely to violate social norms.[123]

For those of us from a "Mexican descent", the negative expectations that are attached plague on the faith and perception of legitimacy one has in their country and countrymen.

The use of Mexican descent as a legitimate probative factor affirmatively injures the relationship between Latinos and the legal system that indicts their culture. It also provokes a perversion of internal dynamics with the Latino community—risking the cooption of stereotypes and the reinforcing of the cycle of exclusion.

Murray attests to the impact of immigration policies generally on the Latino community. She writes that such policies are dangerous because by dirtying the Latino-American image the resulting response of some Latino-Americans is a parallel one—the rejection of that which rejects them.

From her conception of the bordered identity, Murray draws her ire of border enforcement policies—those that began with Operation Wetback, discussed *infra*. She describes her reaction to her research of the policy: "As a Latina-American, I became physically sick and felt like crying. . . . I felt personally attacked by that language, the denial of rights, and the intentional mixed-messages that Congress sent to the world. I felt personally insecure. . . . I felt alienated, hostile, lonely, and separated from my own country."[124]

She writes that some "Latino-Americans emphatically reject Anglo values" and mandate the constant reinforcement of a core Latino identity.[125] But, in an attempt to grab hold of Mexican identity and keep it safe in the face of xenophobia and racism, the Latino community faces a different problem: the recycling of stereotypes and the reinforcement of the cycle of exclusion from those who stigmatize them.[126] An expectation of criminality and the speaking of Spanish, among other things, are in part perpetuated in this way.

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123. Aguirre, *supra* note 103, at 932.

124. Murray, *supra* note 10, at 522.

125. *Id.* at 570.

126. *Id.* at 571.

Further, if Latinos loose faith that the state will do right by them then they are less likely to believe that the state's rules are righteous—compelling compliance not from a sense of duty but only when it avoids criminal sanctions.[127] If the state characterizes certain strains of Latino-American identity as inferior, or even "illegal," the regard of the state's authority in the Latino community will not be favorable.[128] It stands to reason, then, that subjects unjustly treated will loose faith in the sovereign's willingness to do justice.

The internalization of these negative expectations is in part explained by the proclivity of historically oppressed groups to impede their own progress by adopting views of their own inferiority and thus validating the denigrated perceptions many hold of them. Laura Padilla explored this phenomenon specifically in the Latino community and added that internalized oppression causes marginalized groups to turn on themselves, ". . . .thereby reinforcing self-fulfilling negative stereotypes and producing self-destructive behavior."[129]

Professor Patricia Williams argues that some blacks have ". . . .learned too well the lessons of privatized self-hatred and rationalized away the fullness of [their] public, participatory selves."[130] Though Racial Profiling contributes to the negative expectation of general criminality in Latinos, the legitimization of their color as a probative factor for a specific immigration offense compounds the already substantial damage. As prolific cultural writer Albert Memmi postulated, ". . . .the love for the colonizer is subtended by complex feelings ranging from shame to self-loathing."[131] This is no doubt a detrimental effect that should be avoided in a fair society.

In response to the pejorative status accorded them by various sources, some Latinos turned to a posture of capitulation and accommodation—affirmatively setting themselves apart from the denigrated status by way of an emphasis on similarities with the dominant culture. Because the hostile immigration climate intimidates undocumented immigrations into underground lifestyles, they became more exploitable and their "illegal" status served as an ". Falseobstacle to development of labor solidarity between immigrant and native-born workers. . . ."[132] This further compounds the incentive of some Latinos to distinguish themselves from the derogated immigrants. Professor and Historian Neil Foley discusses an example of an accomodationist Mexican-American group and their insistence on "Americanization":

LULAC members had tried just about everything they could to prove how Americanized

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127. *Id.* at 572.

128. *Id.*

129. Laura M. Padilla, *Social and Legal Repercussions of Latinos' Colonized Mentality*, 53 U. MIAMI L. REV. 769, 769 (1999).

130. KENNEDY, *supra* note 45, at 143 (quoting Patricia Williams, *Spirit-Murdering the Messenger*, 42 U. Miami L. Rev. 127, 129 n.6 (1987)).

131. ALBERT MEMMI, RETRATO DEL COLONIZADO 126 (Ediciones de la Flor, 1980)(*translated by author*).

132. DUNN, *supra* note 52, at 159.

they were: they spoke English, voted, used the court systems, got elected to office, actively opposed Mexican immigration, and excluded Mexican citizens from membership in LULAC.[133]

That non-citizens were excluded underscores the deliberate and affirmative statement made: *We are not like "them" and we don't want them here.* Indeed, LULAC's materials describe its genesis as including a ". . . .deference toward the American way of life [that] was done largely, in the beginning, to placate the American public's suspicion of the organization's motives and to satisfy the personal beliefs and political preferences of the league's membership."[134] An organization with a pronounced aim to better the stock of Latinos through assimilation and association with contemporary Americana signifies a prominent response to their social subjugation.

The expressive function of this unfair and obsolete practice is harmful to the intergroup dynamics between Latinos and others, as well as to their own faith the in the system which impugns their cultural identity—to which some respond with radical rejection and others with a denial of their bordered identity. This furthers the cause for its prohibition on the grounds of fundamental cultural fairness.

IV. CONCLUSION

The *Brignoni-Ponce* practice of using Mexican-origin as a relevant factor in establishing reasonable suspicion for a stop is, on all fronts, a legal and cultural travesty. Not only is it deficient with regard to the Fourth and Fourteenth Amendments, but this practice also flogs and hamstrings relations of Latinos with others and within their own communities.

Those rights codified in the aforementioned amendments exist to implement and maintain fairness in the government's treatment of its people—on this issue they have failed miserably. The principles underlying those amendments—equality, fairness, reasonableness of intrusion—are reason enough to prohibit this woeful custom.

But in the course of its execution, this exploitation of an ethnic identity has deformed the dynamics of the Latino community on an individual and group level. At once, this practice leads to a cleavage within the community, denigrates an identity, provokes resentment, and disenfranchises Latinos with a legitimate presence in the United States.

Proponents of this practice and other race-targeted immigration policing cite the probative

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133. Neil Foley, *Becoming Hispanic: Mexican Americans and the Faustian Pact With Whiteness*, *in* REFLEXIONES 1997: NEW DIRECTIONS IN MEXICAN AMERICAN STUDIES (1997) at 62-63.

134. Amy Walters Yarsinke, ALL FOR ONE AND ONE FOR ALL: A CELEBRATION OF 75 YEARS OF THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS (2004) 8, *available at* http://lulac.org/about/history.pdf

value of the Hispanic phenotype and its necessity in being employed to solve the "problem." Serious doubts—namely the insufficient probative force—undermine this position. But the employment of unjust and inhumane practices towards a putatively legitimate end falter in upholding the values this practice is ultimately supposed to protect. Justice Rehnquist characterized the stopping of individuals based, in part, on Mexican-origin as a ***modest*** intrusion on that person's Fourth Amendment rights. This was, in part, based on the reasonability of the probative value of his phenotype as indicating a likelihood of unlawful presence in the United States.

Modesty, it would seem, is in the eye of the beholder. Jonathan Swift declared it modest to propose the commoditization and consumption of the children of poor Irishmen, citing the various needs such a practice would satisfy.[135] The public concerns regarding the ". . . .deplorable state of the kingdom. . . ." gave reason enough for Swift to grow weary of those proposals ". . . .offering vain, idle, [and] visionary thoughts. . . ." and he set on solving the problems presented in a manner ". . . .cheap, easy, and effectual."[136] He touted his ***modest*** proposal as ". . . .solid and real. . . .full[y] in our own power, and whereby we can incur no danger in disobliging England."[137] The same, it would seem, could be said of the *Brignoni-Ponce* method to solve the various "problems" posed by illegal immigration from Latin America, or immigration *period.* But the satire of Swift seems to be lost on Rehnquist—unless it was the Justice's idea of a bad joke.

Almost invoking both Swift and Rehnquist, Sunstein writes that ". . . .if legal statements produce bad consequences, they should not be enacted even if they seem reasonable or noble."[138] I have argued that this practice is neither and that is all the more reason to do away with it. We should not allow this farce to stand as it defiles our constitutional principles and promotes the cannibalization of the Latino identity.

135. *See generally* JONATHAN SWIFT, A MODEST PROPOSAL (1729), *available at* http://www.gutenberg.org/files/1080/1080-h/1080-h.htm.

136. *Id.* at 2.

137. *Id.* at 11.

138. Sunstein, *supra* note 15, at 2025.