PUERTO RICANS: THE INEQUALITY OF "EQUALS" THROUGH TIME*

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ARTICLE

Revisiting the Insular Cases doctrine in the light of Korematsu v. United States (1944); Brown v. Board of Education (1954); Obergefell v. Hodges (2015); and Article 2 of the Universal Declaration of Human Rights (1948).

Does the passage of time eventually bring justice? A short answer could be, sometimes, but its realization may take unpredictable routes, entanglements, setbacks and further excruciating injustices and time. One thing is certain though, the perennial pursuit of justice and dignity cannot be left to the passage of time; in a democratic society it requires relentless education,[1] legislation, litigation and vigilance.

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* This article presents opinions centered in the pursuit of democratic participation, equal rights, dignity and justice; it is not to be construed as an endorsement of any of the political alternatives and preferences that Puerto Ricans may or may not have and opt for in regard to the present and ultimate political status of Puerto Rico.

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[1] Defined in its broadest terms, education includes informal and formal schooling, university, other structured instruction, teaching and learning by example, public demonstrations, personal experiences, etc. The broadest meaning of education, as used in this article, refers to any kind of learning experiences from birth to death of an individual. As defined in *Weyl v. Commissioner of Internal Revenue*, 48 F.2d 811 (2d Cir. 1931):

> Education as understood today, connotes all those processes cultivated by a given society as means for the realization in the individual of the ideals of the community as a whole. It has for its aim the development of the powers of man (1) by exercising each along its particular line, (2) by properly coordinating and subordinating them (3) by taking advantage of the law of habit, and (4) by appealing to human interest and enthusiasm. It includes not only the narrow conception of instruction, to which it was formerly limited, but embraces all forms of human experience, owing to the recognition of the fact that every stimulus with its corresponding reaction has a definite effect on character. It may be either mainly esthetic, ethical, intellectual, physical or technical, but to be most satisfactory it must involve and develop all these sides of human capacity.

More specifically, should the geographic location of a United States [hereinafter *U.S.*] citizen within U.S. territory be relevant in regard to his or her right to equality under the law? The short answer, aside from extraordinary circumstances or an irrational discrimination, should be, NO. This brief article intends to provide a broader range of perspectives in considering answers to the preceding questions.

On July 25, 1898, during the Spanish–American War, the United States invaded Puerto Rico and as an outcome of the war, Spain ceded Puerto Rico to the U.S. under the Treaty of Paris, which had been a colony subject of Spaniard sovereignty for approximately 406 years. United States Congress' first delegation of power to Puerto Rico was the Foraker Act in 1900, which established a government for Puerto Rico and allowed Puerto Ricans to popularly elect their own House of Delegates.[2] In 1914, the Puerto Rican House of Delegates voted unanimously in favor of independence from the United States, but this was rejected by the U.S. Congress as "unconstitutional", and in violation of the 1900 Foraker Act.[3] In 1917 the U.S. Congress passed the Jones–Shafroth Act, also known as the Jones Act, which granted Puerto Ricans U.S. citizenship.[4] In 1950, the U.S. Congress enacted legislation authorizing the Puerto Rican people to establish a new territorial constitution, but retaining for itself the plenary authority to review the territorial constitution before it became effective. Although this legislation, known as Public Law 600, delegated additional powers to the Puerto Rican people, it did not change the territorial status of Puerto Rico. The House and Senate Committee Reports both stated that the law "would not change Puerto Rico's fundamental political, social and economic relationship to the United States."[5] It also made clear that the law in no way "preclude[s] a future determination by the Congress of Puerto Rico's ultimate political status."[6]

In accordance with Public Law 600, Puerto Rico called a convention to draft its preliminary constitution, which was ultimately approved by Puerto Rican voters in March 1952. However, the territorial constitution would take effect only "upon approval by the Congress" and by the President. Accordingly, President Truman confirmed that the territorial constitution created a republican form of government and urged Congress to approve it. Congress, however, unilaterally made some important changes, such as removing Section 20 of Article II, which had established a right to work, right to adequate standard of living, and social protection in old age or sickness; and adding a provision requiring that any amendment be consistent with the federal Constitution, the Puerto Rican Federal Relations Act, and Public Law 600.[7] Congress then approved the modified territorial constitution.[8] President Truman signed the

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[2] Pub. L. No. 56-191, Ch. 191, 31 Stat. 77 (April 12, 1900).
[3] The Foraker Act, Pub. L. 56–191, 31 Stat. 77, enacted April 12, 1900, officially known as the Organic Act of 1900.
[4] Pub. L. No. 64-368, 39 Stat. 951 (March 2, 1917).
[5] H.R. Rpt. 81-2275 at 3 (June 19,1950); S. Rpt. 81-1779 at 3 (June 6, 1950).
[6] H.R. Rpt. 81-2275 at 3; S. Rpt. 81-1779 at 4.
[7] *See* Pub. L. No. 82-447, 66 Stat. 327 (March 3,1952).
[8] H.R. Rpt. 82-1832 at 7 (April 30, 1952); *see also* S. Rpt. No. 82-1720 at 6-7 (June 10, 1952).

Congressionally-modified constitution on July 3, 1952, and then Puerto Rico's constitutional convention approved the constitution on July 25, 1952.[9]

The Preamble to the congressionally-approved constitution reads as follows:

> *We, the people of Puerto Rico, in order to organize ourselves politically on a fully democratic basis, to promote the general welfare, and to secure for ourselves and our posterity the complete enjoyment of human rights, placing our trust in Almighty God, do ordain and establish this Constitution for the commonwealth which, in the exercise of our natural rights, we now create within our union with the United States of America.*
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> *In so doing, we declare*:
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> The *democratic system is fundamental to the life of the Puerto Rican community.*
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> *We understand that the democratic system of government is one in which the will of the people is the source of public power, the political order is subordinate to the rights of man, and the free participation of the citizen in collective decisions is assured.*
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> *We consider as determining factors in our life our citizenship of the United States of America and our aspiration continually to enrich our democratic heritage in the individual and collective enjoyment of its rights and privileges; our loyalty to the principles of the Federal Constitution; the coexistence in Puerto Rico of the two great cultures of the American Hemisphere; our fervor for education; our faith in justice; our devotion to the courageous, industrious, and peaceful way of life; our fidelity to individual human values above and beyond social position, racial differences, and economic interests; and our hope for a better world based on these principles.*

Since 1901, a series of United States Supreme Court decisions[10] known as the Insular Cases, reflect the interpretation, at different times after the U. S. occupation of Puerto Rico in 1898, of the extent to which the Constitution of the United States applies to its possessions/territories.[11] Essentially, the Insular Cases decide that only fundamental constitutional rights extend to unincorporated United States territories, whereas in the incorporated territories all constitutional provisions are in force.[12] In

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[9] José Trías Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* 117-118 (*Yale University Press* 1997).

[10] *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze 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 & Porto Rico Steamship Co*., 182 U.S. 392 (1901).

[11] As set forth in the Territories Clause, and as confirmed repeatedly by the Supreme Court, Puerto Rico remains an unincorporated territory of the United States for which Congress remains fully and unambiguously responsible.

[12] *Balzac v. Puerto Rico*, 258 U.S. 298 (1922).

Balzac v. Puerto Rico,[13] the Court determined that Puerto Rico was an unincorporated territory.[14] The Court further decided that the United States Congress can discriminate against the unincorporated territory and its citizens using a minimum or rational basis of constitutional scrutiny,[15] whereas, in the incorporated territory, the strictest scrutiny will apply. In *Torres v. Puerto Rico*,[16] Justice Brennan wrote a concurring opinion, agreeing with what Justice Black said in *Reid v. Covert*:[17]

> Whatever the validity of [the Insular Cases], in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment — or any other provision of the Bill of Rights — to the Commonwealth of Puerto Rico in the 1970s. As Justice Black declared in Reid v. Covert: "neither the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperant when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government."[18]

Today, approximately 116 years after the commencement and development of the relationship between the United States and Puerto Rico, the latter is financially defenseless in not being able to restructure the debt of its public corporations under the provisions of the Federal Bankruptcy Law or a comparable state legal remedy. This, as the result of a judicial decision[19] which has profound impact on all socio-economic levels of the Puerto Rican society and particularly its most vulnerable communities,

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[13] *Id.*

[14] Under the Insular Cases and subsequent decisions, rights other than fundamental rights, even though they may be stated in the Constitution, do not apply to the territories or possessions unless Congress makes them applicable by legislation. Congress can by law extend the coverage of the Constitution in part or in its entirety to a territory or possession, and has done so with respect to some territories. The U.S. General Accounting Office, in its Letter Report, stated the following:

> In the absence of such congressional action, however, only fundamental rights apply. *The Insular Cases use the term "incorporated" to distinguish territories where all constitutional rights apply, because a statute has made them applicable, from "unincorporated" territories, where fundamental rights apply as a matter of law, but other constitutional rights are not available.* U.S. Gen. Accounting Office, No. GAO/OGC-98-5, Report to the Chairman, Comm. on Res., U.S. Insular Areas: Application of the U.S. Constitution 24 (Nov. 1997) (available at http://www.gao.gov/archive/1998/og98005.pdf) (emphasis ours).

[15] *Califano v. Torres*, 435 U.S. (1974); *Harris v. Rosario*, *446 U.S. 651* (1980).

[16] *Torres v. Puerto Rico*, 442 U.S. 465 (1979).

[17] *Reid v. Covert, 354 U.S. 1* (1957).

[18] *Torres*, 442 U.S. at 475-476.

[19] Currently, under consideration by the Supreme Court of the United States, *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 582 (2015).

which face an imminent danger of irreparable damage, development stagnation and regression, and undesired but sometimes necessary emigration.[20]

The mitigation of the basic social needs is tied to Puerto Rico's ability to restructure the debt of its public corporations. Thus, the exclusion of Puerto Rico from the protection and reorganization provided by the Federal Bankruptcy Law for the extreme financial hardship now facing its public corporations, via a rigid and inequitable judicial interpretation of the term "state",[21] constitutes a flagrant discrimination and fundamental violation of the principle of equal protection under the Fifth and Fourteenth Amendments of the Constitution of the United States and a violation of federal law.

This current year, 2015, Justice Anthony M. Kennedy delivered the opinion of the U.S. Supreme Court in the case of *Obergefell v. Hodges*[22] establishing that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. In the text of the opinion of the court in *Obergefell*, a brief but enlightening comment is made regarding the adaptability of the Constitution to the endless pursuit of justice through history:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[23]

Similarly, Justice Oliver Wendell Holmes, Jr. delivered the opinion of the Court in his judgment in *Missouri v. Holland*[24] and made the following remarks with regard to the nature of the constitution:

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[20] As the island population has decreased and the mainland population has grown, the number of stateside Puerto Ricans reached a record 4.9 million in 2012, and since at least 2006 has exceeded the number of Puerto Ricans on the island (3.5 million in 2012). Meanwhile, the overall population in the U.S. territory of Puerto Rico, including both Hispanics and non-Hispanics, declined to 3.6 million in 2013, according to U.S. Census Bureau population estimates. U.S. Census Bureau (available at *pewresearch.org/hispanic*

[21] 42 U.S.C. § 1983**.** Section 1983 protects individuals from deprivation of rights secured by the Constitution and laws of the United States, when this deprivation takes places "under any statute, ordinance, regulation, custom or usage, of any state." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). In the case of the *Commonwealth of Puerto Rico*, "for the purposes of section 1983, *Puerto Rico enjoys the functional equivalent of statehood, and thus the term state law includes Puerto Rico law..Barrios-Velázquez v. Asociación de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F.3d 487 (1st Cir. 1996).

[22] *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584 (2015).

[23] *Id.*

[24] *Missouri v. Holland*, 252 U.S. 416 (1920). The controversy before the U.S. Supreme Court was whether Congress has the power to enact a statute in order to give effect to a treaty authorized under the Executive's treaty power (Article II, Section 2), if that statute standing alone would be an unconstitutional interference with states' rights under the Tenth Amendment.

> With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.[25]

This pragmatist constitutional interpretation view embraces the idea that the Constitution should be seen as a living document. Under this method of scrutiny, for example, constitutional requirements of "equal rights" should be read with regard to current standards of equality, and not those of decades or centuries ago, because the alternative and consequences would equate to a disarticulation of justice.

Living constitutionalists suggest that broad ideals such as "liberty" and "equal protection" were included in the Constitution precisely because they are timeless, due to their inherently dynamic nature. Liberty, in 1791, understandably, was never thought to be the same as liberty in the 1800's, 1900's or 2015, but rather was seen as a principle transcending the recognized rights of that day and age. Giving them a fixed and static meaning in the name of "originalism", thus, it would violate the very theory it purports to uphold.

Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit, authored the opinion of a three-judge panel of the 7th Circuit Court of Appeals to rule that Indiana and Wisconsin's ban on same-sex marriage were unconstitutional. During oral arguments, Wisconsin's Attorney General cited *tradition* as a reason for maintaining the ban, prompting Posner to note that: "It was tradition to not allow blacks and whites to marry – a tradition that got swept away." Posner affirmed that the same-sex marriage bans were both "a tradition of hate" and "savage discrimination". Posner wrote the opinion for the unanimous panel, ruling the laws unconstitutional under the Equal Protection Clause.

Citing Justice Rehnquist, from his book titled *The Notion of a Living Constitution*, "the framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the endlessly changing environment in which they would live." Those who framed, adopted, and ratified the Civil War amendments[26] to the Constitution likewise used what have been aptly described

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[25] *Id.* págs. 433-434.

[26] U.S. Const. amends. XIII, XIV, XV.

as "majestic generalities"[27] in composing the Fourteenth Amendment. Merely because a particular activity may not have existed when the Constitution was adopted or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct. Where the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.[28]

In 1865, the Thirteenth Amendment of the U.S. Constitution was ratified and finally put an end to slavery. Subsequently, the Fourteenth Amendment (1868) strengthened the legal rights of newly freed slaves by stating, among other things, that no state shall deprive anyone of either "due process of law" or of the "equal protection of the law." Finally, the Fifteenth Amendment (1870) further strengthened the legal rights of newly freed slaves by prohibiting states from denying anyone the right to vote due to race. Despite these amendments, African Americans were often treated differently than whites in many parts of the country. In fact, many state legislatures enacted laws that led to the legally mandated segregation of the races. In other words, the laws of many states decreed that blacks and whites could not use the same public facilities, ride the same buses, attend the same schools, etc. These laws came to be known as Jim Crow laws. Although many people felt that these laws were unjust, it was not until the 1890's that they were directly challenged in court. In 1892, Homer Plessy refused to give up his seat to a white man on a train in New Orleans, as he was required to do by Louisiana state law. For this action he was arrested. Plessy, contending that the Louisiana law separating blacks from whites on trains violated the "equal protection clause" of the Fourteenth Amendment of the U.S. Constitution, decided to fight his arrest in court. In 1896, his case was considered by the United States Supreme Court, resulting in a vote of 8-1, by which the Court ruled against Plessy stating that racially separate facilities, if equal, did not violate the Constitution.[29] Segregation, the Court then said, was not discriminatory. Justice Henry Billings Brown, writing the majority opinion, stated that:

> The object of the [Fourteenth] amendment was undoubtedly to enforce the equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to endorse social, as distinguished from political, equality.[30]
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> If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.[31]

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[27] *Fay v. New York*, 332 U.S. 261, 282 (1947).
[28] William H. Rehnquist,, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976).
[29] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[30] *Id.* at 544.
[31] *Id.* at 550.

Justice John Marshal Harlan, dissented the majority decision interpreting the Fourteenth Amendment distinctly, stating that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."[32] Other injustices followed the *Plessy* decision, amongst which in *Gong Lum v. Rice,*[33] the United States Supreme Court held that the exclusion on account of race of a child of Chinese ancestry from a state high school did not violate the Fourteenth Amendment to the United States Constitution. The decision effectively approved the exclusion of minority children from schools reserved for whites.

Following the pragmatist or living constitution method of approaching the interpretation of the constitution, it took approximately 58 years before the *Law of the Land* was rightfully revoked and dignity restored by *Brown v. Board of Education*,[34] to correct the discriminating interpretation and extent of the *equal protection of law* under the Fourteenth Amendment of the Constitution of the United States.[35]

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[32] *Id.* at 559.

[33] *Gong Lum v. Rice*, *275 U.S. 78* (1927).

[34] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[35] Further in time, in 1967, the Supreme Court of the U.S. decided, in the case of *Loving v. Virginia***,** that:

> [T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. Slaughter-House Cases, 16 Wall. 36, 71, 21 L.Ed. 394 (1873); Strauder v. State of West Virginia, 100 U.S. 303, 307—308, 25 L.Ed. 664 (1880); Ex parte Virginia, 100 U.S. 339, 344—345, 26 L.Ed. 676 (1880); Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).
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> *11 7 There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated '(d)istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they 'cannot conceive of a valid legislative purpose * * * which makes the color of a person's skin the test of whether his conduct is a criminal offense.' McLaughlin v. Florida, supra, 379 U.S. at 198, 85 S.Ct. at 292, (Stewart, J., joined by Douglas, J., concurring).
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> 8 There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.11 We have consistently denied *12 the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving v. Virginia*, 388 U.S. 1, 10-12 (1967).

That same year, 1954, the Supreme Court of the United States had also decided the case of *Bolling v. Sharpe*,[36] which was a companion case to *Brown v. Board of Education*, determining that the schools of the District of Columbia were to be desegregated even though Washington D.C. is not a "state". The court decided unanimously that while the Fourteenth Amendment, whose Equal Protection Clause was cited in *Brown v. Board of Education* in order to declare segregation unconstitutional, did not apply in the District of Columbia because it was not a "state", but the Court did say that the Fifth Amendment did apply. While the Fifth Amendment, which was applicable in Washington D.C. lacked an equal protection clause, "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." Although equal protection is a more explicit safeguard against discrimination, the Court stated that "discrimination may be so unjustifiable as to be violative of due process." Referring to the technicalities raised by the case's location in the District of Columbia, the Court held that, in light of their decision in *Brown* that segregation in state public schools is prohibited by the Constitution, it would be "*unthinkable that the same Constitution would impose a lesser duty on the Federal Government.*"

Likewise, it is *also unthinkable and unfair that Puerto Rico be left defenseless in not being able to restructure the debt of its public corporations, whereas the other "states" are permitted to do so.*

The argument that allowing Puerto Rico to restructure the debt of its public corporations will undermine the contractual terms under which investors were induced to acquire the bonds, cannot supersede one of the medullar purposes of the Federal Bankruptcy Law, which is to provide protection to the debtor and creditor by allowing the reorganization of the debtor, the restructuring of the debt, and the establishment of a plan to repay creditors. The United Nations recently adopted a resolution by an overwhelming majority that established certain basic principles that should guide all sovereign debt restructuring processes.[37] These guiding principles include concepts like sustainability and fairness in order to assure that States can guarantee human rights of its citizens while also protecting creditors rights. The public corporations in Puerto Rico need a legal framework that allows them to restructure their debt, precisely, because they are responsible for providing vital utilities such as water and electricity to the people of Puerto Rico, and the payment of salaries to essential government agency employees such as administrators, teachers, police, firemen, etc.

The fiscal crisis which Puerto Rico is presently undergoing, similar to other crises in jurisdictions in the United States and worldwide, is not only of its own making, but multifactorial, including its present singular political status. During the last 523 years, under Spain's and U.S. sovereignty, Puerto Rico developed or was imposed political relationships with severe limitations. Presently, Puerto Rico is a "unincorporated" U.S. territory, and Puerto Ricans are U.S. citizens (purportedly like any other citizen born anywhere in the U.S.). Puerto Ricans, however, are subject to federal laws with

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[36] *Bolling v. Sharpe* , 347 U.S. 497 (1954).

[37] *Basic Principles on Sovereign Debt Restructuring Processes*, UN GAOR, 69th Sess., 102nd mtg., UN Doc. A/69/L.84 (2015).

no participation in the enactment of such legislative action. Puerto Ricans "have" the fundamental right of suffrage but can only exercise it while residing permanently in the U.S., *but not in Puerto Rico because it is merely a territory of the United States*. The Federal courts have exclusive jurisdiction over bankruptcy cases but Puerto Rico cannot seek protection to restructure the debt of its public corporations as other "states" are permitted to do. Puerto Ricans pay the same Medicare and Social Security tax as mainland residents, but receive less federal funding for healthcare.[38] For decades, Congress has capped federal reimbursements of Puerto Rico's healthcare costs, bringing its healthcare system to the brink of collapse. This chronic underfunding is causing the Island's healthcare system to breakdown, making Puerto Ricans (U.S. citizens) vulnerable to potential deprivation or severe deficiencies in their medical care services. Furthermore, considering that the healthcare industry represents 20 percent of Puerto Rico's GDP, such chronic underfunding further aggravates Puerto Rico's already fragile economy and stimulates emigration. These are only some instances of inequality which result in unfair disadvantages and discrimination to Puerto Rico and Puerto Ricans.

It is not uncommon to hear the rationalization for the differentiation or rather discrimination based in the incorrect assertion that Puerto Ricans in Puerto Rico do not contribute to the Federal Treasury. Statistics published by the IRS reveal that residents of Puerto Rico do pay federal taxes, and in some categories do contribute more to the U.S. Treasury than the residents of some states. The rationale of *Harris v. Rosario*, that Puerto Rico does not pay federal taxes is a false representation of Puerto Rico's contributions to the U.S. Treasury.[39]

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[38] Congresswoman Nydia Velazquez, who closely follows issues in Puerto Rico, stated that "Puerto Rico can no longer bear the burden of inequality from unconscionable federal cuts to essential services." Michael A. Fletcher, *Puerto Rico now faces a financial crisis in health care*, The Washington Post, http://www.dailyherald.com/article/20150531/business/150539979/ (May 31, 2015). Further on, she stated that "[a]ccess to quality healthcare is not a privilege; it is a right for every American. Puerto Rico is simply asking to be treated with the fairness and dignity that all Americans deserve." *Id.*

[39] Attorney Gregorio Igartúa, in his *Brief of Amicus Curiae in support of Puerto Rico as an incorporated territory of the United States*, states the following:

1. In 2011 the residents of Puerto Rico contributed 3.1 billion dollars to the U.S. Treasury, which is almost as much as the residents of Vermont (3.3 billion dollars), who have a per capita income which is approximately three times the per capita income of the residents of Puerto Rico.
2. In 2011 businesses in Puerto Rico contributed more to the U.S. Treasury than businesses from Montana and New Mexico.
3. In 2011 Employees and Employers in Puerto Rico contributed more to the U.S. Treasury in Social Security (FICA) taxes than Employees and Employers in Vermont and Wyoming.
4. In 2011 Employees and Employers in Puerto Rico contributed more to the U.S. Treasury in Unemployment Insurance than Employees and Employers in Alaska, Delaware, the District of Columbia, Hawaii, Idaho, Maine, Montana, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.
5. In 2011 residents of Puerto Rico contributed $988,000 in estate (inheritance) taxes to the U.S. Treasury.

These statistics published by the IRS reveal that residents of Puerto Rico do pay federal taxes, and in some categories do contribute more to the U.S. Treasury than

Evidently, the U.S. citizenship of Puerto Ricans has a gap of equality which represents ambivalence, historically parallel and comparable to the incongruity of the *"separate but equal"* doctrine, which urged and required the schools to be desegregated by mandate of the U.S. Supreme Court in *Brown v. Board of Education*. By such similarity, Puerto Ricans in Puerto Rico, after 117 years of U.S. sovereignty, may *de facto,* be considered subject to an "*unincorporated territory limitation but equal"* U.S. citizens under the law, which essentially is a mutated and camouflaged version of the *Plessy v. Fergusson "separate but equal"* discrimination, which still has not been *de facto* totally eradicated.

The "*separate but equal"* doctrine was then unequal because separate cannot be equal, as determined by *Brown v. Board of Education*. Consequently, the "*unincorporated territory limitation but equal"* equation of the Puerto Rican U.S. citizenship in Puerto Rico must be equally unequal because conditioning equality to a territorial exclusion cannot be "*equal"* as well, for approximately 3.7 million Puerto Ricans living in Puerto Rico. In other words, being a U.S. citizen cannot sometimes be different as to constitute a second class citizenship by reason of the territory where you are located or reside. Puerto Ricans are equal U. S. citizens anywhere or they are not; the rest is a flagrant aberration of the fundamental right to democratic participation, justice and equality under the law. Referring to Puerto Ricans as "*equal citizens"* but treating them differently by curtailing their rights when residing in their birth land, Puerto Rico (a U.S. territory), is, to say the least, an undignifying contradiction and an unjustified territorial stigmatization. Such differential treatment constitutes a suspect classification that does not even withstand the lesser of the constitutional levels of scrutiny.[40] Notwithstanding the controversial legal precedent in *Hirabayashi v. United*

> the residents of some states. Thus, reviving the rationale of Harris v. Rosario in 2013, that Puerto Rico does not pays federal taxes is a false representation of Puerto Rico's contributions to the U.S. Treasury. Notwithstanding this fact, Congress still discriminates against the American citizens of Puerto Rico by assigning Puerto Rico less in federal funds than it does to any of the individual states. Brief of Amicus Curiae in support of Puerto Rico as an incorporated territory of the United States, *U.S.A. v. Commonwealth of Puerto Rico*, http://www.clearinghouse.net/chDocs/public/PN-PR-0001-0006.pdf at 23, (No. 12-02039, March 26, 2013).

[40] After the Japanese attack on Pearl Harbor, approximately 74 years ago, there was no suspicion that suggested that citizens of Japanese ancestry should be placed under curfew order or moved into internment camps. Notwithstanding, by March 1942 *Executive Order 9066*, ordered *Japanese Americans* into *internment camps* during *World War II* regardless of their citizenship. About 120,000 persons were removed from their West Coast homes and jobs and were placed in internment camps in the interior of the country. About 70,000 of these *Japanese Americans* were citizens of the United States; two out of every five people sent to the camps were under the age of fifteen or over fifty. All were imprisoned for an indefinite time without any individualized determination of grounds for suspicion of disloyalty, let alone charges of unlawful conduct, to be held in custody until their loyalty might be determined. The basis for their imprisonment was the single common trait of their Japanese ancestry. The Supreme Court established the judicial precedent for suspect classifications in the cases of *Hirabayashi v. United States*¸ 320 U.S. 81 (1943) (curfew order), and *Korematsu v. United States*, 323 U.S. 214 (1944) (camp internment). The Supreme Court recognized that:

> Distinctions between citizens solely because of their ancestry are, by their very, nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason,

States[41] and *Korematsu v. United States,*[42] requiring the strict scrutiny in cases involving a suspect classification by reason of national origin and fundamental rights, the decisions in the Insular cases and its progeny continue using the minimum rational level of constitutional scrutiny.

Justice Murphy and Justice Jackson's, dissenting opinions in *Korematsu v. United States* are particularly worth of highlighting:

> I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution.[43]
>
> But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic."[44]
>
> However, in spite of our limiting words, we did validate a discrimina-

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legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. *Yick Wo v. Hopkins, 118 U. S. 356*; *Yu Cong Eng v. Trinidad, 271 U. S. 500*; *Hill v. Texas, 316 U. S. 400*. We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant, and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may, in fact, place citizens of one ancestry in a different category from others. We must never forget that it is *a constitution* we are expounding, a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. *Hirabayashi v. United States*, 320 U.S. 81, 100-101 (1943).

[41] *Hirabayashi,* 320 U.S. 81.

[42] *Korematsu*, 323 U.S. 214.

[43] *Id.* pág. 242.

[44] *Id.* pág. 246.

> tion on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is Hirabayashi.[45]

In 1865 before the Massachusetts Anti-Slavery Society at Boston, Frederick Douglass, said:

> I have had but one idea for the last three years to present to the American people, and the phraseology in which I clothe it is the old abolition phraseology. I am for the "immediate, unconditional, and universal" enfranchisement of the black man, in every State in the Union. Without this, his liberty is a mockery; without this, you might as well almost retain the old name of slavery for his condition; for in fact, if he is not the slave of the individual master, he is the slave of society, and holds his liberty as a privilege, not as a right. He is at the mercy of the mob, and has no means of protecting himself.
>
> [B]ut here where universal suffrage is the rule, where that is the fundamental idea of the Government, to rule us out is to make us an exception, to brand us with the stigma of inferiority, and to invite to our heads the missiles of those about us; therefore, I want the franchise for the black man.

On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights [hereinafter *UDHR*] which was co-signed by the United States. Article 2 of the UDHR reads as follows:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. *Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.*[46]

Subsequently, in 1992, the International Covenant on Civil and Political Rights [hereinafter *ICCPR*], which establishes universal standards for the protection of basic civil and political liberties, as one of three documents that comprise the International Bill of Rights, was ratified by the United States. Upon ratification, the ICCPR became the "supreme law of the land" under the Supremacy Clause of the U.S. Constitution, which gives acceded treaties the status of federal law. The U.S. must comply with and implement the provisions of the treaty just as it would any other domestic law, subject

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[45] *Id*. pág. 247.

[46] *Universal Declaration of Human Rights*, Art. 2 (1948).

to Reservations, Understandings and Declarations [hereinafter *RUD's*] entered when it ratified the treaty. Though the government retains the obligation to comply with the ICCPR, one of the RUD's attached by the U.S. Senate is a "not self-executing" Declaration, intended to limit the ability of litigants to sue in court for direct enforcement of the treaty.

The first article of the International Covenant on Civil and Political Rights provides as follows:

> Article 1
> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> …
> The States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[47]

Judge Juan R. Torruellas, former Chief Judge of the First Circuit Court of Appeals and still appellate judge, explains that the Insular Cases contravenes international commitments, such as the DUHR and ICCPR, entered into by the United States which constitute superseding "Law of the Land".[48] Judge Torruellas further affirms, and I must concur, that the present legitimacy of the Insular Cases is untenable. "The system of governance promoted thereunder can no longer be reconciled with a rule of law in which all citizens are entitled to equality."[49]

CONCLUSIONS

- Puerto Rico is a non-incorporated territory of the United States since 1898,[50] (although it is hereby affirmed that Puerto Rico is the equivalent of an incorporated territory for purposes of protecting equal rights of U.S. citizens in Puerto Rico).[51] The Court in *Consejo de Salud Playa de Ponce v. Rullan*, stated the following:

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[47] *International Covenant on Civil and Political Rights*, Art. 1 (1992).

[48] Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 286 (2007).

[49] *Id.* at 286-287.

[50] Justice Brennan, in *Torres v. Puerto Rico*, held that "[i]t may well be that over time the ties between the United States and any of its unincorporated territories strengthen in ways that are of constitutional significance." *Torres*, 442 U.S. 465 (1979) (Brennan, J., concurring).

[51] *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982). *See also*, *Bolling v. Sharpe* , 347 U.S. 497. In the case of the Commonwealth of Puerto Rico, "for the purpose of section 1983, Puerto Rico enjoys the functional equivalent of statehood, and thus the term state law includes Puerto Rico law.

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> [T]he ties between the United States and Puerto Rico have strengthened in a constitutionally significant manner. *Boumediene*, 128 S. Ct. at 2255. Congress, thus, is no longer justified in treating Puerto Rico as an unincorporated territory of dissimilar traditions and institutions, when the Constitutional reality is otherwise. *Id.* It is the judicial branch that determines when and where the full terms of the Constitution apply. *Id*. at 2259; *see also Trailer Marine Transport Corp.*, 977 F. 2d at 8 n. (holding that the issue of extending the Constitution to Puerto Rico is for the courts to decide). The Congressional incorporation of Puerto Rico throughout the past century has extended the entire Constitution to the island, and today entitles the territory and United States citizens thereof to full enjoyment of all rights and obligations under the Constitution.[52]

- Puerto Ricans are citizens of the U.S. since 1917.[53]
- Puerto Ricans in Puerto Rico are subject to the U.S. draft laws but have no voting rights for the election of the President and other executive branch members which ultimately rule the affairs of Puerto Rico.[54]

  Puerto Ricans have no voting representative in the U.S. Congress for the enactment of laws which apply to Puerto Rico.
- Puerto Rico is unable to restructure the debt of its public corporations under the provisions of the Federal Bankruptcy Law or a comparable state legal remedy because it is not a "state" and the field is "occupied" by the Federal Bankruptcy Law. In other words, the federal statute negatively "occupies" by not being applicable but still rejecting the enactment of a local law, thus not allowing Puerto Rico to restructure the debt of its public corporations.

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[52] *Consejo de Salud Playa de Ponce v. Rullan***,** 586 F. Supp.2d 22, 43 (D.P.R. 2008).

[53] 8 U.S.C.A. § 1402 (West 1952).

[54] An example of the inconsistency and unfairness of the extraterritorial criterion is explained in the following excerpt from *Consejo de Salud Playa de Ponce v. Rullan***,** 586 F. Supp.2d 22 (D.P.R. 2008) decided by Judge Gustavo Gelpi, which provides an in-depth analysis of the evolution of the relationship between the United States and Puerto Rico, and the Insular cases; recommended reading for those interested in this important constitutional and human rights matter.

> "Applying *Harris* and *Califano*, supra, one federal court of appeals has more recently held that United States citizens relocating to Puerto Rico and establishing residency therein lose their ability to vote in Presidential elections. Pursuant to the Overseas Citizens Absentee Voting Act., 42 U.S.C. § 1973 ff-1 *et. seq.,* United States citizens who relocate to any foreign nation may continue to exercise their federal voting rights. Such statute, however, is inapplicable to Puerto Rico because it is not a foreign country. Congress, under *Harris* and *Califano* "may treat Puerto Rico differently from States so long as there is a rational basis for its actions" and "every federal program does not have to be extended to it." *Romeu v. Cohen,* 265 F. 3d 118, 124 (2nd Cir. 2001). Accordingly, a United States citizen who moves from New York to Irak or Cuba, for example, may continue to vote in Presidential elections. That same citizen moves to Puerto Rico and loses his right to vote." *Consejo de Salud Playa de Ponce v. Rullan***,** 586 F. Supp.2d at 32 n. 16.

- The exclusion of Puerto Rico from the protection and reorganization provisions provided by the Federal Bankruptcy Law for the extreme financial hardship now facing its public corporations, via a rigid and unequitable judicial interpretation of the term "state", constitutes a flagrant discrimination and fundamental violation of the principle of equal protection under the Fifth and Fourteenth Amendments of the Constitution of the United States.
- Puerto Ricans in Puerto Rico have emigrated to the continental U.S. to the extent that the Island's population has decreased to 3.5 million and the number of stateside Puerto Ricans reached a record 4.9 million in 2012.
- "Puerto Rico has a relationship with the United States that has no parallel in our history."[55] Congress may distinguish between those U.S. citizens formerly residing in a State who live outside the U.S., and those who live in the U.S. territories.[56]
- The Insular Cases and their sequel[57] constitutes a wrongful limitation for Puerto Ricans residing in Puerto Rico in violation of their fundamental right to democratic participation that has created a second class of U.S. citizenship based on a extraterritorial, geographical discrimination and inequality that impacts the economy of the Island and nurtures emigration to the mainland.[58]
- The Insular Cases contravenes international commitments (such as DUHR and the ICCPR) entered into by the United States which constitute superseding "Law of the Land".

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[55] *Examining Bd. v. Flores de Otero,* 426 U.S. 572, 596 (1976).

[56] *Romeu v. Cohen* 265 F.3d 118 (2d Cir. 2001).

[57] Recently, the U.S. Supreme Court granted the petition to review the controversy in the case of *Puerto Rico v. Sánchez Valle*, 192 D.P.R. 594 (2015) in regard to whether the local legislature has the authority to pass criminal laws and the right to prosecute for a crime even if the federal government has already prosecuted that same crime. The Double Jeopardy clause and the "dual sovereignty" doctrine apply to criminal prosecutions brought against the same defendant in federal court and the Puerto Rico courts. The Double Jeopardy Clause protects against successive prosecutions only by the *same* sovereign; the States have long been treated as separate sovereigns from the federal government for these purposes. The question is whether the Commonwealth of Puerto Rico, established in 1952, should be treated similarly to a State for purposes of double jeopardy. Although Puerto Rico is not a State, the federal courts since the 1950s have treated Puerto Rico as a legal equivalent to a State for several selected legal purposes. The argument that Puerto Rico is *not* a distinct sovereign from the national government, which the current Supreme Court of Puerto Rico accepted, is that Puerto Rico is still a "territory" of the United States for constitutional purposes and that when Puerto Rico enacts its criminal laws—or any other laws—it is not exercising the powers of autonomous self-government but only the powers that have been delegated to it by Congress. Thus, the courts of Puerto Rico are in essence courts of the United States, Puerto Rico and the United States are "the same" sovereign, and once there has been a federal criminal conviction, a defendant cannot be tried for the same crime in the Puerto Rico courts. The controversy under the consideration of the U.S. Supreme Court is crucial in interpreting the current and future relationship Puerto Rico and the United States.

[58] This conclusion is best described by Judge Juan R. Torruella, in *The Insular Cases: The Establishment of a Regime of Political Apartheid***,** 29 U. Pa. J. Int'l. L. 307 (2007), in which he expresses that "[t]he continued vitality of the [Insular Cases and their progeny] represents a constitutional antediluvian anachronism that has created a de jure and de facto condition of political apartheid for the U.S. citizens that reside in Puerto Rico and the other territories." *Id.* at 347.

- The incongruence of the *ratio decidendi* of the Insular Cases is represented by Justice Marshall in his dissenting opinion in the case of *Harris v. Rosario*:

> 2
>
> It is important to remember at the outset that Puerto Ricans are United States citizens, see 8 U.S.C. 1402, and that different treatment to Puerto Rico under AFDC may well affect the benefits paid to these citizens. While some early opinions of this Court suggested that various protections of the Constitution do not apply to Puerto Rico, see, e. g., *Downes v. Bidwell*, 182 U.S. 244 (1901); *Balzac v. Porto Rico,* 258 U.S. 298 (1922), the present validity of those decisions is questionable. See *Torres v. Puerto Rico*, 442 U.S. 465, 475 -476 (1979) (BRENNAN, J., concurring in judgment). We have already held that Puerto Rico is subject to the Due Process Clause of either the Fifth or Fourteenth Amendment, *Calero-Toledo v. Pearson Yacht Leasing Co*., 416 U.S. 663, 668 -669, n. 5 (1974), and the equal protection guarantee of either the Fifth or the Fourteenth Amendment, E*xamining Board v. Flores de Otero,* 426 U.S. 572, 599 -601 (1976). The Fourth Amendment is also fully applicable to Puerto Rico, either directly or by operation of the Fourteenth Amendment, *Torres v. Puerto Rico*, supra, at 471. At least four Members of this Court are of the view that all provisions [446 U.S. 651, 654] of the Bill of Rights apply to Puerto Rico. 442 U.S., at 475 -476 (BRENNAN, J., joined by STEWART, MARSHALL, and BLACKMUN, JJ., concurring in judgment).[59]

The progression of the law and the interpretation of the constitution in the pursuit of justice for all, warrant Puerto Ricans, as U. S. citizens, the fair and equal protection and democratic participation under the law as it equally pertains to all other U.S. citizens, leaving aside the considerations of incorporated v. unincorporated territorial classifications. *Such recognition of equality does not require Constitutional Amendments or Congressional action, but to abandon the unrealistic, archaic and discriminatory "rationale" of the Insular Cases, and to interpret the constitution in accordance with its intention to provide a level field of fairness and justice that embraces and protects democratic participation, dignity, equality and rejects injustices throughout the passage of time.*

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[59] *Harris*, 446 U.S. at 653-654.

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