RACISM, CULTURE, LAW, AND THE JUDICIAL RHETORIC SANCTIONING INEQUALITY AND COLONIAL RULE

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Abstract

This article aims to stimulate discussions about the need for realism in studies of law and society, particularly in the context of United States domination over Puerto Rico. Cultures are the outcome of long-lived ideas that give continuity to human worldviews and endeavors. In the United States of America, the idea of "race" has been used to assign worth to humans and to determine civic membership. In turn, it produced the notions and practices that we call "racism." U.S. law has codified and legitimated racist, exclusionary ideologies and practices, and helped to provide justification to the displacement of Native Americans, the mistreatment and oppression of the descendants of slaves, and the colonial domination of Puerto Ricans and other peoples. The existence to the present day of structural inequalities along "racial" lines, and of colonial hegemony over "alien races," attest to the inherent stability of cultures. All that exists in the context of nationalism and stakeholders in the status quo, who dread changes that they perceive as threatening. To this day, judicial decisions reflect and embody that resistance to change, adding to the stability of exclusionary practices and outcomes.

Resumen

Este artículo busca estimular discusiones sobre la necesidad del realismo en estudios de derecho y sociedad, particularmente en el contexto del dominio de los Estados Unidos sobre Puerto Rico. Las culturas son el producto de ideas de larga vida, las cuales le proveen continuidad a las cosmovisiones y quehaceres

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humanos. En los Estados Unidos de América, la idea de "raza" se ha utilizado para asignar valor a los seres humanos y para determinar membresía ciudadana. A su vez, ha producido las nociones y prácticas que llamamos "racismo". El derecho estadounidense ha codificado y legitimado ideologías y prácticas excluyentes, y racistas, y contribuyó a proveerle justificación al desplazamiento de las naciones nativas del continente, al maltrato y la opresión de los descendientes de los esclavos, y a la dominación colonial de los puertorriqueños y otros pueblos. La existencia hasta hoy de inequidades estructurales determinadas por la "raza" de los seres humanos, y de hegemonía colonial sobre "razas extrañas", son testimonio de la inherente estabilidad de las culturas. Todo ello se da en el contexto del nacionalismo y de personas interesadas en que se mantenga el *status quo*, quienes a su vez le temen a los cambios, los cuales perciben como amenazantes. Al día de hoy, las decisiones judiciales reflejan y encarnan esa resistencia al cambio, sumando a la estabilidad de prácticas y resultados excluyentes.

I. Introduction

The history of the United States exhibits tension between liberal, democratic ideals and illiberal, exclusionary ideologies. Membership in "we the people" [1] has been a contested question. "Race," wealth, religion, and gender have been the main criteria upon which that civic membership[2] has been determined.[3] Among the bases for exclusion from the American polity, "race" appears as the most glaring and enduring. This work explores some of the confluences between American law and culture, as well as Americans' sense of identity and the idea of "race." [4] Thus,

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[1] The Declaration of Independence of July 4, 1776, begins by announcing to the world the existence of "one people," urged by "the course of human events . . . to dissolve the political bands which have connected them with another." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). The United States Constitution, signed by its drafters on September 17, 1787, begins stating that:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl.

[2] Citizenship, or civic membership, is a status endowed with "political rights." Citizenship allows humans living in a place organized under a government to participate in the decisions of that polis. That includes, not only the right to vote, but the possibility of holding public office, notably as legislator, judge or as a decision maker in the executive department. Those who lack those rights enjoy no "full civic membership." *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 13-14 (1997).

[3] The United States:

> [H]as not marched single file down a single straight liberal highway . . . What has been continuous is a series of conflicts arising from enduring anti-liberal dispositions that have regularly asserted themselves, often very successfully, against the promise of equal political rights contained in the Declaration of Independence and its successors, the three Civil War amendments. It is because slavery, racism, nativism, and sexism, often institutionalized in exclusionary and discriminatory laws and practices, have been and still are arrayed against the officially accepted claims of equal citizenship that there is a real pattern to be discerned in the tortuous development of American ideas of citizenship. If there is permanence here, it is one of lasting conflicting claims.

JUDITH SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 13-14 (1997). Professor Smith stresses that "many Americans through much of U.S. history have not possessed equal political rights." SMITH, *supra* note 2, at 14.

[4] The quotation marks imply that there is no such thing as "races." In any event, there is only one, human "race." Therefore, "race" is an artificial, although admittedly powerful, cultural construct. That artificiality, however, seems to be directly proportional to its cultural impact and its effective use by lawmakers, policymakers, and judges. As Hall reminds us, law has been at the center of the historical domination exerted in the United States over those human beings with relatively more melanin, whose ancestors were forcibly brought from Africa to be enslaved, and over humans of other groups: "The legal history of race relations is one of the most tragic and complicated stories in American history. There is simply no doubt that white Americans have repeatedly used the law to implement public policies based on racism. Blacks, Chinese and Native Americans have all suffered." *Introduction*, *in* RACE RELATIONS AND THE LAW IN AMERICAN HISTORY ix (Kermit L. Hall, ed. 1987).

it touches upon social dynamics which yield a particular relationship between law and culture, wherein the first reflects the second, while it also influences the same.

The beginning of the journey of race as an American idea is usually traced to sixteenth century England. The attention then shifts to the colonial era, in the early seventeenth century. Those points of departure allow for the study of primal circumstances which contributed to shape what is now the United States. By the middle of the eighteenth century, new circumstances contributed to the attraction exerted by liberal and democratic ideas.[5] However, those ideas would have to compete with exclusionary notions rooted in earlier colonial times and even farther back in time. The older, illiberal strand of ideas would contribute in determining the limited fashion in which American society and the dominant groups would be willing to implement the equality creed of the Declaration of Independence.[6] Since then, the American saga has been characterized by the coexistence of liberal and democratic ideas with ideas that support a social and civic hierarchy, which enshrines as genuine "Americans" those who feature the ascriptive trait of "whiteness."

The displacement and killing of Native Americans, the enslavement of Africans, the mistreatment of Asian and Latin American immigrants, segregation on the basis of "race," the acquisition of overseas colonies in 1898 and the subjugation of their inhabitants: All that took place in an ideological context that featured the notion of race and the classification of human beings according to a racialized and outright racist worldview. American law sanctioned all that, and more, in the service of the building of the American empire. [7] There is a *continuum* here, which remains

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[5] For purposes of this article, liberalism is the ideology that stresses individual rights and equality. Central to liberalism is the notion that human dignity is boundless –that is, irrespective of nationality, gender or social position. Democracy, or democratic republicanism, is the ideology stressing that governments are instituted to allow individual expression and prosperity and to advance the common good. It includes principles like government by consent of the governed, representative governance and limits to the exercise of power. In the 18th century, republicanism "was a theory of politics that stressed the need for citizens to guard against the corruption that occurred when rulers were not answerable to the citizens." DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 12 (2009). For the role of both sets of ideologies in the civic identity of the United States, see SMITH, *supra* note 2, at 35-36. Liberalism and democracy, however, have had competition from illiberal, exclusionary notions, inasmuch as "liberal and democratic republican ideals have offered few reasons why Americans should see themselves as a distinct people, apart from others." *Id*. at 38.

[6] Those who wrote the Declaration of Independence famously proclaimed that they "hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Given that slavery was not abolished until after the Civil War, the United States arguably was "founded on contradiction and compromise." JAMES M. JONES, PREJUDICE AND RACISM 29 (2nd ed. 1997).

[7] Slavery was essential to the economy of the colonies, and later of the entire new nation, not only of the South. Morality and liberal notions were no ramparts against keeping slavery, in no small part because everything that affects economic interests is often "negotiable." Principle gave way to practical considerations. *See*, *e.g*., EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM 5

unbroken to this day, despite changes in circumstances. Bad ideas and cultural maladies die hard. Ideas and practices display a permanence and power which account for the stability of cultures. [8]

In 1898, the United States of America culminated its imperial expansion by acquiring Puerto Rico and other populated "overseas" lands. However, it made clear its intention of keeping them indefinitely as colonial possessions. By then, relying on race-based categories to determine who is fit to be a civic member of the nation was a salient feature of American culture, politics and law. American-style apartheid had received its legal benediction by the same justices of the United States Supreme Court who would later provide legal clothing to colonialism. Beginning in 1901, that Court issued the *Insular Cases*. In so doing it held that imperialism does not offend the Constitution, while sealing the fate of peoples with which the members of the Court had never had contact. The Court relied on the characterization of those peoples as members of "alien races" unfit for self-government. It thusly justified treating them as colonial subjects under the plenary power of Congress, relying on a doctrine that, to this day, has enabled the denial of the possibility of self-determination, government by consent or separate nationhood to Puerto Ricans.

Part II of this article discusses the notion that ideas are the core of human cultures, and that the existence of long-standing ideas account for the stability of cultures. It also touches upon the intersections between culture and psychology, identity, the concept of race and sociopolitical imperatives. Lastly, it briefly discusses the role of law in the reproduction of cultural notions and practices.

Part III examines the codification of "white" and "black" servitudes in early colonial Massachusetts, which received different treatment in the colony's "Body of Liberties," and includes a look at early colonial Virginia. That examination yields

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(1976) (pointing out that the connection between American slavery and freedom includes the use of tobacco profits to finance the American War of Independence, a crop produced with slave labor). Jones asserts: "This country was founded and grew on the back of black labor." JONES, *supra* note 6, at 31. The South, both before and after the Civil War, "produced the cotton for Northern mills" and was otherwise vital to the economy of the North, providing "a market for Northern manufacturers, farmers, and financial services." WILLIAMJAMES HULL HOFFER, PLESSY V. FERGUSON: RACE AND INEQUALITY IN JIM CROW AMERICA 14 (2012). A late cultural critic observed that the violence that 19th century Americans turned against the Native populations was joined by the imposition "of a new order designed to keep impulse in check while giving free reign to acquisitiveness." CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS 10-11 (1979). Capital accumulation, achieved by an American pioneer who "gave full vent to his rapacity and murderous cruelty," was subordinated "to the service of future generations." *Id.* That "American Adam" imagined "that his offspring, raised under the morally refining influence of feminine 'culture,' would grow up to be sober, law-abiding, domesticated American citizens, and the thought of the advantages they would inherit justified his toil and excused, he thought, his frequent lapses in brutality, sadism, and rape." *Id*. at 11.

[8] After all, "the past is a stubborn thing. History can impose burdens on a society long after its members have felt the desire to move on." ROBERT J. COTTROL, THE LONG, LINGERING SHADOW: SLAVERY, RACE, AND LAW IN THE AMERICAN HEMISPHERE 211 (2013).

clues, which demonstrate that race prejudice existed at the outset of the colonial era. Further, it argues that a plausible answer to what came first, if race prejudice or slavery, is that both coincided and reinforced each other. In doing so, they paved the way for racism and the exclusionary practices that would plague American culture and law during the colonial era, the Revolutionary and post-Revolutionary period, the *antebellum* and *postbellum* nineteenth century, and continue to do so today.

Part IV begins with a critical discussion of certain claims made by Chief Justice Taney in his opinion for the majority in the *Dred Scott* case, which the U.S. Supreme Court decided in 1857. The analysis centers on Taney's pronouncement that the founders of the Republic were free of moral scruples at the moment of protecting slavery in the 1787 Constitution and excluded More-Melanin-Humans ("Blacks") from "the people" who ordained that fundamental law. It also includes a discussion of the Supreme Court's obliteration of legislation and constitutional amendments meant to protect the recently-freed humans from the abuses that followed. These abuses were exacerbated –even legitimated– by the judicial nullification of those protections. Part IV also includes a discussion of the stance of Justice Harlan, who protested both the nullification of the Fourteenth Amendment and the justifications for the possession of colonies like Puerto Rico. It also echoes the critical assessment that several authors have articulated to the resilient presence of a stale judicial rhetoric, which is based on the concept of "innocence."

While not even scratching the surface of U.S. colonial domination over Puerto Rico, Part V describes the ideological aspect of that domination. It connects racialized and outright racist ideas of human worth to the rhetoric included in one of the early *Insular Cases*, which relied on pseudo-intellectual and pseudo-historical notions of racial superiority already in circulation. Those ideas, which postulate that Americans of Anglo-Saxon descent possess a genius for institution-building and government that was denied to "alien races," are part of the *continuum* of a racialized vision of social and political life, which is present in decisions and utterances of American judges and policymakers anteceding and following the *Insular Cases*. Conclusions follow.

II. Perceptions and Reality: Race, Reality, and the Role of Law

A. Ideas, Memes, and the Stability of Cultures

Humans, *qua* social beings, are shaped by ideas. A culture is comprised of ideas, which cause their holders to behave in particular ways, while bolstering their sense of a shared collective identity. [9] Events are important, whereas ideas are the currency

[9] DAVID DEUTSCH, THE BEGINNING OF INFINITY: EXPLANATIONS THAT TRANSFORM THE WORLD 369 (2011). Ideas are information, stored in brains and thus capable of affecting human behavior. *Id.* Most ideas

through which humans assign meaning to events and values, as well as to aspirations and community membership. Some ideas, and the attitudes and actions they foster, are resilient, contributing to the stability of human cultures. Called *memes*, those ideas –which are transmitted from person to person and lodge themselves in the members of a culture– can have long lives, spanning many human generations. [10] Thus, in principle, it is possible to trace back the core of cultural notions, biases and practices, to hundreds of years ago and disparate places. One set of ideas that has shaped American culture revolves around the notion of racial hierarchy. This is the notion pursuant to which the worth of human beings and their place in the social structures and in the political community hinge upon their "race." The idea of race, its ubiquity in American history up to the present day, and its role in Americans' sense of identity are matters still relevant and worth pondering.

Before there was a whole ideology under the banner of what is known as "racism," its predecessors were race prejudice and, before it, tribal distrust or enmity.[11] That is, before race was a circulating concept, there was prejudice toward "others," particularly in the context of self-proclaimed exceptionalism.[12] After all,

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that define the world's cultures, including the inexplicit or unarticulated ones, have a history of transmission from one person to another, analogous to the transmission of genes. Like genes, some ideas are replicators. Called *memes*, those types of ideas sometimes fail to replicate themselves perfectly –they are usually modified, however slightly, by those who receive the information before transmitting it further. That is why ideas and cultures evolve. *Id*. For Deutsch's full exposition of the evolution of cultures, see *Id*. at 369-97. The word "meme" was first coined by evolutionary biologist Richard Dawkins. *See* RICHARD DAWKINS, THE SELFISH GENE 192 (1976). Dawkins defined it as "an entity that is capable of being transmitted from one brain to another." *Id*. at 196. Since then a whole discipline, known as memetics, has developed. Scholars from many fields, including law, have explored the implications of Dawkins' idea to different aspects of human cultures. Law is one of those human, cultural practices "which depend upon the existence of shared knowledge and understanding among a given population of actors." Simon Deakin, *Evolution for Our Time: A Theory of Legal Memetics*, 55 CURRENT LEGAL PROBS. 1, 2 (2002)..

[10] After all, "[t]he world's major cultures –including nations, languages, philosophical and artistic movements, social traditions and religions– have been created incrementally over hundreds and even thousands of years." DEUTSCH, *supra* note 9, at 369.

[11] Ideology is "the set of perceptions, assumptions, ideas, beliefs, explanations, and values dominant at a given time and place or within particular social groups or movements . . . ." EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 35 (2001).

[12] Prejudice and racism have both a negative and a positive dimension, inasmuch as they:

> [D]escribe ways in which people devalue, disadvantage, demean, and in general, unfairly regard others. In this sense, they refer to negative attitudes about, and negative treatment of, people who belong to other groups. Prejudice and racism are also concepts that encompass the ways in which people value, advantage, esteem and, in general, prefer and positively regard people who are like themselves or belong to their own group. Therefore, prejudice and racism are processes by which people separate themselves from others who are different in certain ways and attach themselves more closely to people who are like them in certain ways.

JONES, *supra* note 6, at 7.

notions of exceptionalism require "others" with which to effectuate, and accentuate, the contrast between them and the exceptional ones. British colonials, and later Americans, would embark in a journey of exclusion. It was their illiberal answer to the question of who are the legitimate members of the political community that ultimately coalesced in the United States.[13] Individuals and cultures often hold contradictory ideas and practices. Moreover, no rational notion is "self-evident" to humans *qua* emotional and pragmatic beings who, in turn, have made illiberal ideas theirs, which do not allow much room for a thorough internalization of liberal ones. Qualifications to the principle that "all men are created equal" would be rationalized and articulated in order to maintain the existent sociopolitical and economic order.

Notions of superiority provided the rationale, not only for the subjugation of Native Americans, but also for the enslavement of Africans. After all, profits –made possible by abundant land and the unfree labor of Africans– began to yield considerable wealth. Few things quell moral scruples as profit does. Once exploitation makes wealth possible, all kinds of rationalizations follow. [14] Moreover, it seems that humans do not just invent ideas, on the spot, in support of bias against other humans or to justify their ill treatment of "others." Instead, they rely on ideas already in circulation, which in turn are intelligible to a wide portion of their interlocutors, allowing for common ground and tacit understandings.

When societies, as well as individuals, hold contradictory ideas and behave accordingly, they create a sense of normalcy that allows the contradictions to become

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[13] In the sixteenth century, the European speakers of the different vernaculars had begun to substitute their primary sense of identification and membership with the larger Christian "community," a process catalyzed by the Reformation. The "imagined community" of Christendom eventually gave way to multiple, newly imagined "national" communities. The emergence of European nations and nationalism has been traced to the Protestant Reformation and Martin Luther's use of the invention of the printing press to spread his ideas in languages other than Latin, and the fact that most prints were in the hands of entrepreneurs looking for profit, which prompted them to eventually ditch Latin and embrace the vernaculars of Europe in order to widen their clientele. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES (2nd ed. 2006). What gradually emerged was a sense of identity along linguistic and "national" lines, a process that was taking place while many Europeans were encountering peoples from Africa and America. A sense of identity and contrast based on "race" would emerge with the European interaction with African and Native Americans. The worldviews of those Europeans determined in important ways how they would perceive and treat human beings from other continents. Prejudice was an important component of the uneven, violent contact between Europeans and the Natives and Africans, who purportedly fitted European notions of "barbaric peoples and heathens" with no proclivity for "civilization." *See Id.*

[14] Professor Cottrol stresses that:

> [T]he legal history of race in the United States . . . involves more than the histories of those we have come to call black and white. The law has regulated the statuses of other groups –peoples of indigenous descent, and those whose ancestors came from Latin America and Asia as well.

COTTROL, *supra* note 8, at 2. Thus, the importance of studying "the role of law in creating and sustaining systems of racial hierarchy." *Id*. at 3.

part of the cultural common sense. In time, the contradictions and inconsistencies tend to become invisible, undetected, and unproblematic. The survival of certain ideologies is due to, or aided by, human proclivities, both psychological and cultural. Of course, it is also due to the cold realities of power as domination and exploitation, which appear time and time again as an adversary of empathy and compassion, foe of notions of equality and human dignity. Race has been at the heart of the American schizophrenia of holding illiberal ideas and behavior, as well as a liberal and democratic creed and the concomitant practices. That seeming contradiction urged Rogers M. Smith to develop his "multiple traditions approach."[15] A liberal tradition and an exclusionary one still coexist.

B. Is Race a Zero-Sum Game? Reality and Perceptions

In 2011, researchers from Harvard and Tufts published a study [hereafter *Norton/Summers Study*] showing the belief in the existence of "reverse racism" and of an increase in "anti-white bias" among "white" Americans. Those notions reduce themselves to a view of racism as a "zero-sum game," according to which "decreases in perceived bias against Blacks over the past six decades are associated with increases in perceived bias against Whites."[16] These researchers also found that humans with more Melanin ("Blacks") do not perceive the gains obtained by them as losses for humans with less Melanin ("Whites").[17]Meanwhile, a 2011 analysis of 2009 government data yields that the median wealth of white households is 20 times that of black households and 18 times that of hispanic households, and that those

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[15] *See* SMITH, *supra* note 2, at 17-18. Since the creation of the United States, there have existed certain:

> [I]deological and institutional traditions of political identity [which] do not define civic status by consent or by universal rights. Instead, they provide elaborate, principled arguments for giving legal expression to people's ascribed place in various hereditary, inegalitarian cultural and biological orders, valorized as natural, divinely approved, and just. That is why a multiple traditions approach to American political culture is necessary.

Id. at 18.

[16] Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They are Now Losing*, 6 PERSPECTIVES OF PSYCHOLOGICAL SCIENCE, no. 3, 2011, at 216 (*available at* http://pps.sagepub.com/content/6/3/215). These authors point to previous research which "suggests that White Americans perceive increases in racial equality as threatening their dominant position in American society, with Whites likely to perceive that actions taken to improve the welfare of minority groups must come at their expense." This "emerging perspective is particularly notable because by nearly every metric –from employment to police treatment, loan rates to education– statistics continue to indicate drastically poorer outcomes for Black than White Americans." *Id*. (citations omitted).

[17] The present article is sprinkled with an experimental use of the term "More [Less]-Melanin-Humans," instead of the usual "Blacks" and "Whites." Melanin is the broad term for pigments produced by the human body, which are responsible for skin, hair, and eye pigmentation. Albinos have very little or no melanin. Everyone else's bodies produce those pigments in different degrees. Hence, the differences in pigmentation.

"lopsided wealth ratios are the largest since the government began publishing such data a quarter century ago and roughly twice the size of the ratios that had prevailed between these three groups for the two decades prior to the Great Recession that ended in 2009." [18]

The *Norton/Sommers Study* shows that people's "race" accounts for the differences in perception concerning racial bias, particularly for the one-sided perception of racism as a "zero-sum game." This shows how many factors often account for and shape human subjectivity, often leading humans to own perceptions that are not consonant with reality. Both psychological and social components play roles in shaping those perceptions. The psychological factors include humans' cognitive and intellectual limitations. The social aspect includes individual and collective experiences; ideas and culturally transmitted biases, including religious beliefs and belief systems in general.

Also relevant is the legal regime under which people live, since law is constitutive of social realities and contributes to shaping behavior and expectations. Law's commands include principles, prohibitions –as well as rights and duties– with the concomitant expectations and assignments of legitimacy.[19] Law is an important component of the social order; the social order –which operates in the context of human nature, that is, human psychology as it evolved up to the present time– determines the kind of people produced in each culture and era. That is, sociocultural forces and ideas, *in tandem* with human brains, determine the kind of people that emerges from the socialization and historical processes. They determine how people in general think and how they act in the presence of concrete situations, stimuli, and conflicts.

Cultures and socialization shape peoples' "worldview." That is, they shape how people perceive the world, how they perceive everything "out there" and how they see themselves, as individuals and as part of a community or culture. In

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[18] Rakesh Kochhar, at al., *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics*, PEW RESEARCH CENTER (July 26, 2011), http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/. The government data, taken from an economic questionnaire distributed periodically to tens of thousands of households by the U.S. Census Bureau, shows that "the bursting of the housing bubble in 2006 and the recession that followed from late 2007 to mid-2009 took a far greater toll on the wealth of minorities than whites." Moreover, after the financial setbacks of the recession, the wealth of the typical white household amounts to $113,149; that of a typical Hispanic and Black household $6,325 and $5,677, respectively. For a more recent study, also about this significant wealth gap between the white and black population, see Thomas Shapiro, et al., *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, IASP (February 2013), http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf.

[19] See RIVERA RAMOS, *supra* note 11, at 20, which, like the present article, "relies on the assumption that law possesses the capacity to construct social realities." For a brief, cogent discussion of the constitutive theory of law, see *Id*. at 20-22.

short, the key concept is subjectivity. [20] A people's worldview is a manifestation of their subjectivity, including how they see themselves and other human beings and what their view is of each other's place in that "world." That leads to the notion of *identity*. Since humans are social beings, there is a connection between individual and collective identity. Historical, social, and psychological factors resulted in identity in the United States being shaped, primordially or to a large extent, by notions of race and racial hierarchy.

The data analyzed by the Pew Research Center is another example of the frequent and often unfortunate divergence between reality and human perceptions. In this context, "reality" is represented by the government data analyzed by the Pew Research Center, while "perceptions" are those described in the *Norton/Sommers Study*. It is apparent that the subjectivity of both populations diverges on racial lines. The perceptions of "Whites" do not coincide with their material and social reality and their social, economic, and political advantages over "Blacks." The perceptions of the latter are the opposite of those of the former, and indeed closer to reality. This suggests that, in the Unites States, differing perceptions about social reality are shaped in very concrete ways by people's "race." [21] It also means that the idea of race determines in no small part the personal and collective experiences and expectations of Americans.

Those who feel that they are stakeholders in a given social *status quo* are particularly sensitive to the prospect of change. Transformations that improve the living conditions of people belonging to other "groups" or "races" tend to create or heighten a sense of insecurity and anxiety in those stakeholders. On the other hand, those with inferior social and material conditions tend to view every little measure of positive change as a welcomed development. But, when their conditions do not improve substantially or quickly enough, they perceive that people in the superior social position are safely entrenched in their privileged status.

Moreover, the concept of race lacks empirical foundation. It seems to have sprung from the human tendency to ascribe traits to "others," to develop prejudices, resentment, distrust or enmity toward people who "belong" to "other groups," with

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[20] *Id*. at 197 (subjectivity means "the categories of perception and evaluation social agents use to assess the world").

[21] The present article is premised on the "realist" posture. Hence, the epistemological point of departure of the present work is that there is a "reality," which is independent of humans and of their ability to "perceive" or to "grasp" it. Under that posture, reality "is what it is," and all sound attempts to acquire the most complete understanding of reality emerge as a worthy human endeavor. For authors who embrace and expound on the realist position, see: STEVEN WEINBERG, DREAMS OF A FINAL THEORY: THE SCIENTISTS' SEARCH FOR THE ULTIMATE LAWS OF NATURE (1993); STEVEN WEINBERG, FACING UP: SCIENCE AND ITS CULTURAL ADVERSARIES (2003); ALAN SOKAL & JEAN BRICMONT, FASHIONABLE NONSENSE: POSTMODERN INTELLECTUALS' ABUSE OF SCIENCE (1998); DEUTSCH, *supra* note 9.

the concomitant feelings of superiority. [22] Notions of race and the set of attitudes and behavior we call "racism" developed before the discovery of the mechanism of heredity (the molecule known by the acronym "DNA"), which was unknown even to Charles Darwin.[23] Before Darwin, ideologues of "racial" prejudice began to ascribe all kinds of undesirable traits to humans superficially "differentiated" from them. As good Jeffersonians,[24] they pretended to rely on Science to back their claims. Their "heirs" eventually developed the Social Darwinism notions, which

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[22] Reality, in this realm deciphered through Biology, indicates that there is only one species of bipedal hominids left on Earth, the *Homo sapiens*. The superficial differences between human groups are a product of historical isolation and mild differences in environmental conditions, plus sexual selection. None of those circumstances effectuated a change in the DNA sequence of those human groups to yield several hominid species. *See*, *e.g.*, JARED DIAMOND, THE THIRD CHIMPANZEE: THE EVOLUTION AND FUTURE OF THE HUMAN ANIMAL 64, 112-17 (1992). That is why it is common for each human being to have a genome sequence that is more similar to a human of another "race" than to another individual of their "race" or even to a relative. *See*, *e.g.*, RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 8-9 (2012):

> [R]ace and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient. People with common origins share certain physical traits, of course, such as skin color, physique, and hair texture. But these constitute only an extremely small portion of their genetic endowment, are dwarfed by that which we have in common, and have little or nothing to do with distinctly human, high-order traits, such as personality, intelligence, and moral behavior.

See also Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610 n. 4 (1987): "It has been found that differences between individuals of the same race are often greater than the differences between the 'average' individuals of different races."

[23] Professor Weiner expounds that, in 1735, Carolus Linnaeus published his *Systema Naturae*, thereby dividing human beings into four categories: European, Asian, African and American. MARK S. WEINER, AMERICANS WITHOUT LAW: THE RACIAL BOUNDARIES OF CITIZENSHIP 12 (2006). Also, that in 1775, Johann Friedrich Blumenbach "further elaborated" that classification by establishing "the Caucasian, Mongolian, Ethiopian, American, and Malay division of the human family still roughly in use today." *Id*. *Cf. Saint Francis College*, 486 U.S. at 610 n. 4:

> Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist, and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance.

[24] *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 144-48 (1829). Professor Smith points out that in the 19th century, the Jacksonians found themselves in the contradiction that they were "the party of Jefferson, who had declared all men equal in basic rights, and the party of democracy." Hence, they articulated "strong arguments" that "made bans on political rights for 'lower' races seem progressive. It was wonderfully helpful that Jefferson himself had pioneered scientific 'proofs' of black inferiority in his *Notes*. Particularly as abolitionist sentiments grew during the 1840s, white supremacist writers followed Jefferson's lead with accelerating zeal." SMITH, *supra* note 2, at 203.

are so infamous today, but were *en vogue* in and outside of Academia in the late nineteenth and early twentieth century.[25]

In sum, the rational and empirical treatment of this matter leads to the dismissal of the purportedly common-sense idea that not all human beings are equal, inasmuch as they can be classified under the category of "race." That classification is central to the set of ideas, actions, and omissions we call "racism." The consensus today is that race and racism are cultural notions and practices, arising from ideas and historical experiences and their influence on human subjectivity. After all, subjectivities are shaped by socialization, and based on good and bad ideas with enough staying power through the ages to establish discernible patterns and a cacophony of attitudes and actions. Hence, in principle, their historical and psychological origins are traceable. One of the difficulties of that task is that cultural mores and ideas are transmitted in insidious ways. For the most part, humans do not notice how ideas are transmitted to them and lodged in their minds, beginning in the infantile stages, thus becoming powerful determinants of behavior.[26]

C. Race, Identity and Realpolitik

The rhetoric of politicians everywhere and in all epochs articulates those cultural raw materials known as ideas, which often include some sort of civic mythology. Given that politics' power game has basically been the same since the first complex societies emerged after the invention of agriculture, politicians of all ages and places display similar behavior. Smith emphasizes the role of civic myths in a community's sense of nationhood.[27] Politicians in the United States have

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[25] Extrapolating the knowledge of the natural world to human affairs is problematic. Darwin's theory of evolution by natural selection proved to be successful, but its explanatory prowess is only valid in the realm of Biology. *See* DEUTSCH, *supra* note 9, at 370-72. Therefore, the attempt to export that theory to a "survival of the fittest" ideology, and apply it to humans as social entities, was doomed.

[26] Professor Lawrence affirms that

> [C]ulture –including, for example, the media and an individual's parents, peers, and authority figures– transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.

Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

[27] He contends that "civic myths" are useful for notions of peoplehood and for making possible governance. In using the term "myth," he "admittedly wish[es] to highlight the unpalatable fact that

relied on mythical notions of civic identity, which American culture has created and developed. In doing so, they have contributed to the reproduction of that mythology and of their group's hegemony.

Politicians use whatever mythology has become part of the "common sense" of the people they want to lead and to serve themselves from. This, in turn, implies that politicians do not care about the truth, but about expediency and convenience (mainly, of course, *their* convenience and political viability). That does not mean that the politician is the sole contributor to the reproduction or utilitarian use of civic myths. For instance, the *Gramscian* concept of "organic intellectual" refers to that other character, "who emerges from a particular social group, shares the group's basic conceptions, and conducts thinking and organizing functions closely related to the process whereby the group seeks to establish or reproduce hegemony over other groups." [28]

Rarely inventing the wheel, politicians instead resort to the set of ideas that circulate in their cultural milieu. Those ideas are the currency politicians use to influence the populace. They exert power by mobilizing the populace to fulfill the goals set by themselves and their allies. A realist view of politicians as the ultimate pragmatists yields skepticism. Through that focus, politicians emerge as articulating a public rhetoric, which in turn is consonant with what they perceive that people want to hear, while striving to push the "right" emotional bottoms of their constituents. Thus, studying the sociopolitical usefulness of the category of race encompasses the behavior of politicians and social actors engaging in power games. In any event, it seems that a sense of collective identity and social cohesion is a necessary ingredient of a stable political community. Furthermore, the deeper such sense runs through the undercurrents of human ideas and behavior, the easier it

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stories buttressing civic loyalties virtually always contain elements that are not literally true." However, "actual elements may well be present in myths." SMITH, *supra* note 2, at 33. The attractiveness of civic myths lies in the fact that people "want to believe that a membership as important as that of their political society is an intrinsically right and good one." *Id*. at 34. He adds: "It takes no high-powered psychology to observe that people also have considerable capacity to believe what they want, including great improbabilities that are intermingled with undeniable truths." *Id*. There is a close connection between identity and people's need to feel good about themselves, both as individuals and as members of a collective.

[28] RIVERA RAMOS, *supra* note 11, at 123 n. 9. For a discussion of the concept of hegemony, see *Id*. at 14-20. Sometimes, both characters –the politician and the intellectual– merge in one person, as was the case of Henry Cabot Lodge. As is discussed further in this article, Lodge had a role, *qua* "organic intellectual," in the development of the Teutonic thesis of the origins of American law and Americans' supposed natural disposition for law and governance. *See* WEINER, *supra* note 23, at 51-66.

[29] Professor Smith recognizes the governance role of notions of identity, of which politicians are also aware. A providential notion of identity is particularly powerful: "Civic myths inspiring faith that memberships are preordained and blessed can especially foster prejudices that may do more than 'enlightened reason' to instill 'reverence' for the laws constituting their society. That advantage is not easily forgone." SMITH, *supra* note 2, at 33. *See also, supra* note 27.

is for elites to appeal to it and steer social action their way; although, their objectives are also somewhat constrained by the cultural and social context in which they operate.

Governance, therefore, depends to some important extent on the inability of humans to escape the tyranny of the ideas that define their cultures and the concomitant manipulations of the dominant group(s).[29] In the United States, so-called leaders have conformed their rhetoric to certain ideas, in order to bank on the collective sense of identity. This identity, through time, has made the inhabitants of that country "feel" like Americans, members of a people, of a cultural and political community, the United States of America. [30]

Smith stresses the need to recognize and keep in mind the reality "that political elites must find ways to persuade the people they aspire to govern that they are a 'people' if effective governance is to be achieved."[31] At the same time, he calls attention to "the failure of liberal democratic civic ideologies to indicate why any group of human beings should think of themselves as a distinct or special people," deeming that failure "a great political liability."[32] Moreover, liberal principles "instead challenge many traditional claims supporting such conceptions of peoplehood as irrationally hostile to universal human rights. They are often thought to point instead to a cosmopolitan world order in which membership in particular political communities would have little or no importance."[33] *Realpolitik* plays a role here, because "politicians proposing a just, democratic regime to govern all the world's people as one are not likely to compete for power successfully against those offering more particularist political visions."[34]

In sum, "liberal democratic traditions . . .remain in some ways ill-equipped to combat the politically potent illiberal strains in American civil life and in political

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[30] The emergence of nations and nationalism is a recent phenomenon, produced by cultural and historical forces. A nation is an "imagined political community." ANDERSON, *supra* note 13, at 6. It is "imagined" because its members "will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion." *Id*. Moreover, nations "are based on myths." WEINER , *supra* note 23, at 6. Thus, Weiner adds, the "'imagined community' of the United States," like any other nation, is "grounded in often tacit beliefs about the meaning and purpose of the state –beliefs that determine who can and cannot achieve full civic belonging, or citizenship." *Id*. Of course, Americans do debate what is it that makes them distinct, that is, "American." That debate is also implicitly or explicitly present in the current "culture wars."

[31] SMITH, *supra* note 2, at 9.

[32] *Id*.

[33] *Id*. Arendt used the term "solidarity," which "partakes of reason, and hence of generality . . . ." As such, solidarity "is able to comprehend a multitude conceptually, not only the multitude of a class or a nation or a people, but eventually all mankind." HANNAH ARENDT, ON REVOLUTION 88 (1963). In contrast to the emotion of pity, solidarity "may appear cold and abstract, for it remains committed to 'ideas' –to greatness, or honor, or dignity– rather than to any 'love' of men." *Id*. at 89.

[34] SMITH, *supra* note 2, at 9.

life generally."[35] Moreover, there is an "inability of liberal democratic precepts even to affirm why Americans should be Americans. . . ." [36] This explains –at least in part– why "many U.S. citizens remain unpersuaded that conforming more fully with egalitarian liberal democratic ideals, instead of adhering to other long-held values, is good or right."[37]

The inability of liberal precepts to lodge themselves in the collective consciousness, and consequently in the social structures, stems from parochial, mythological senses of identity and the need for security. All that tends to foster contrary "illiberal" sentiments. In fairness to politicians in general, the pertinent political imperatives often do not provide enough flexibility to those in leadership roles, who recognize and act on the tendency of their constituents to be sensitive to emotional appeals –in this instance, the illiberal strands of civic identity and the need for security in an uncertain world– as means for mobilizing them, to attain particular political results.

D. The Role of Law

Law reflects the perceptions, biases, notions of identity –the subjectivities– present in the cultural medium in which it operates. Law often "codifies" those subjectivities, which legislators, judges and administrators participate in or use *qua* politicians for their advantage and that of their allies and sponsors. Consonant with the importance of the notion of race in American history and culture, American law has contributed to the construction of race. Law is arguably the main means by which the modern state elicits consent. It accomplishes that feat by either persuasion or coercion. When it fails to persuade, law is used coercively. That reality justifies the notion of "the violence of the law" wielded by the State, the entity with the virtual monopoly of power and hence the capacity to obtain social consent through means that include repression and violence. [38]

American law reflects the social hierarchy that emerged from the American experience. Law is the product of myriad social forces and worldviews, which are

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[35] *Id*. at 10.

[36] *Id*. at 9.

[37] *Id*.

[38] When school desegregation orders failed to elicit consent through persuasion in Arkansas, particularly and significantly from State and local authorities, President Eisenhower sent troops to Little Rock. *See* Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Education, 347 U.S. 483 (1954). For those with somewhat long memories, the image of Union soldiers in the *postbellum* South came to mind in 1957, almost 100 years later. It is correct, however, that "[c]ontemporary states cannot rely simply on forced compliance. They must be able to persuade. The legitimation needs of the welfare state –despite its apparent retrenchment in the age of neo-liberalism– still require the production of persuasion through various mechanisms." RIVERA RAMOS, *supra* note 11, at 16.

authoritatively articulated in legal events, including legislation, executive actions and judicial decisions. That is why "many of the restrictions on immigration, naturalization and equal citizenship . . . manifested passionate beliefs that America was by rights a white nation, a Protestant nation, and nation in which true Americans were native-born men with Anglo-Saxon ancestors." [39] Law "codifies" the dominant sense of identity that prevails at one point in space and time. At the time of the enactment of the Constitution, when the dominant group was comprised of white, male, protestant proprietors, law again responded –was made to respond– by excluding others from full civic membership because of race, class, gender, religion and wealth.

Moreover, it is significant that the 1791 amendments to the Constitution did not include the right to formal equality. This was enshrined in 1868 with the enactment of the Fourteenth Amendment. After all, "equal protection of the laws" was a concept known even to the early Massachusetts colonists. Such omission suggests that the equality *dictum* of the Declaration of Independence made the framers of the Constitution and of the Bill of Rights pause. Otherwise, they would have included equality as a right opposable to a government created by a Constitution that protected slavery and slave owners, a glaring anomaly. It also gives credence to the notion that the liberal principles of the Declaration were an expedient means used by separatists to justify their cause, and Lockean tenets were as useful as any for that purpose.[40] In designing the structure of a truly national government, the gentlemen gathered in the Summer of 1787 left undisturbed the *fait accompli* of slavery, even protecting "the peculiar institution" while empowering the Southern states. The Constitution of 1787 contained six clauses concerning slaves and their owners; five others had implications for slavery. As a historian points out, "[i]n growing their government, the framers and their constituents created fundamental laws that sustained human bondage." [41]

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[39] SMITH, *supra* note 2, at 2-3.

[40] British philosopher John Locke (1632-1704) wrote, *inter alia*, about epistemology, religious toleration and politics. His political philosophy influenced the ideologues of the American Revolution. In 1689, Locke postulated that humans are born free and equal, as well as naturally prone to cooperation and solidarity. Their freedom is only constrained by natural law as discovered through their reason. They institute governments to protect their life, liberty and property from transgressions from those few who act as beasts. Governments are legitimate as long as they honor the trust of their constituents; insofar as they keep their side of the bargain as protectors of human rights and the common good. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed. 1988).

[41] WALDSTREICHER, *supra* note 5, at 3. *See* U.S. CONST., art. I, § 2, cl. 3; § 7, cl. 1; § 9, cl. 1; art. IV, § 1; § 2, cl. 3; § 4. Waldstreicher contends that "slavery was as important to the making of the Constitution as the Constitution was to the survival of slavery." WALDSTREICHER, *supra* note 5, at 17. That was so, because:

> [S]lavery was a major aspect of the American economy. The livelihoods of people in the North as well as the South depended on the products of slave labor, on import and export

One of Smith's conclusions is that "through most of U.S. history, lawmakers pervasively and unapologetically structured U.S. citizenship in terms of illiberal and undemocratic racial, ethnic, and gender hierarchies, for reasons rooted in basic, enduring imperatives of political life."[42] Those imperatives are the pragmatic exploitation of the prevalent notions of civic identity most people share and the concomitant exclusionary practices, which have been crystallized in American law "with forms of second-class citizenship, denying personal liberties and opportunities for political participation to most of the adult population on the basis of race, ethnicity, gender, and even religion." [43] Professor Weiner stresses that this phenomenon is not exclusive of the United States:

> The mutual constitution of the idea of race and the concept of law is implicit in the life of most nations. Groups achieve a feeling of solidarity in part through the exclusion of outsiders, typically justified by the belief that those excluded lack some essential normative quality that members of the group share, for instance racial descent or the observance of a particular religion.[44]

The legal codification of civic inclusion and exclusion is what makes law "a morally integrative force that holds complex societies together through its expression and formation of collective values." [45]

> policies, and on the running of related services. The stronger federal government created by the Constitution had become desirable in part because of the economic vulnerability of the less united states during the 1780s. Therefore, because the Constitution had economic implications, and set the stage for a national economy, it could not avoid having implications for slavery and creating a constitutional politics of slavery.

Id. at 17-18. For the economic importance of slavery, see also, *supra*, note 7. Zinn asserted: "The United States government's support of slavery was based on an overpowering practicality. In 1790, a thousand tons of cotton were being produced every year in the South. By 1860, it was a million tons. In the same period, 500,000 slaves grew to 4 million." HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 171 (1999). Moreover, "the plantation system, based on tobacco growing in Virginia, North Carolina, and Kentucky, and rice in South Carolina, expanded into lush new cotton lands in Georgia, Alabama, Mississippi –and needed more slaves." *Id*. at 172.

[42] SMITH, *supra* note 2, at 1.

[43] *Id*. at 2. Another author points out that:

> Just as the color of a person's skin was and is used as a way of demarcating 'us' and 'them', a person's spiritual affiliation also historically functioned and continues to function as a marker of cultural identity and differentiation that can justify both explicit and implicit legalized intolerance. Significantly, racial and religious intolerance are not mutually exclusive practices; in many cases prejudices dovetail and overlap.

EVE DARIAN-SMITH, RACE, RELIGION AND RIGHTS: LANDMARKS IN THE HISTORY OF MODERN ANGLO-AMERICAN LAW 15 (2010).

[44] WEINER, *supra* note 23, at 7.

[45] *Id*.

III. The Continuum of Race and Racism in American Culture

A. Nationalism and Exclusionary Identities

In the creation of national identities, societies rely on traits –real and imaginary– rooted in parochialism and cultural contingencies. That leaves out universal values or a pan-cultural view of humankind. National legal regimes reflect those notions and codify them, thus contributing to their reproduction and legitimacy. This raises the question of whether nationalism is yet another obstacle to the fullest implementation of the equality principle. Maybe, by definition, a national polis cannot be all-inclusive. The "political imperatives" stressed by Professor Smith occur in the context of those imagined and powerful monsters we call nation-states. In that setting, the equality principle finds a powerful nemesis.

Perhaps, the failure of liberal democratic ideologies to lodge themselves in the deep confines of the consciousness of citizens of nation-states is due, in no small part, to the emotional, visceral appeal of nationalism. Those who first imagined the American nation conceived it as made up of White, Protestant, Anglo Saxon, Male, Capitalist beings. That primal conception, modified as it has been through the ages, seems to still hold considerable sway. An alternative imagining is still "a dream," as characterized by Martin Luther King in his 1963 speech in Washington. King's own imagined community –one where the absurd currency of "race" determines nothing and limits or favors nobody– will arguably never exist in the United States.

There seems to be a link between nationalism and exclusionary ideologies, a seemingly parallel historical development. Before the emergence of the European nation-states, there was an imaginary religious community. Then, Christendom was "imaginable largely through the medium of a sacred language [(Latin, of course)] and written script."[46] Admission to those communities linked by sacred languages was possible by the simple desire to learn, if not necessarily master, those languages. "Conversion" to one of these "truth-language communities" was an "alchemic absorption," states Anderson, and "not so much the acceptance of particular religious tenets. . . ."[47] The imagined community of the nation-state would not be based on political or spiritual notions of membership, but on inflexible characteristics, such as linguistic, ethnic or racial considerations. In nations defined

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[46] ANDERSON, *supra* note 13, at 13.

[47] *Id*. at 15. "Chinese mandarins looked with approval on barbarians who painfully learned to paint Middle Kingdom ideograms. These barbarians were already halfway to full absorption. Half-civilized was vastly better than barbarian. Such an attitude was certainly not peculiar to the Chinese, nor confined to antiquity." *Id*. at 13. Said ideas are foreign to those brought up in the age of nationalisms. *Id*. at 14.

by a "racialized sense of identity," racism would flourish and become resilient. The notion that the nation is "eternal" requires and fosters that resiliency.

In the United States, the cultural elements that coalesced in a sense of common identity began to emerge early in colonial times. The colonists brought with them the notion that British subjectship was unique, and that they could freely practice their religion, a liberty providentially granted to "Englishmen." Added to the mix were strong patriarchal notions, a sense of cultural superiority, the view of wealth as the reward for hard work and piety (conveniently, not of the exploitation and uprooting of fellow humans). Further added were a rejection of political and ecclesiastical notions of civic and spiritual membership, and a proto-capitalist mode of production based on exploitation of unfree labor that eventually fostered rationalizations based on those notions of superiority, exceptionalism and providentialism.[48]

What emerged in the early American Republic was the full citizen: White, North European (preferably "English"), Male and Protestant. Given (1) the complexities and contradictions of that vision; (2) the eventual immigration of so many non-Protestants (Catholics) from Eastern and Mediterranean Europe; and later, (3) the gradual incorporation of women to civic and socioeconomic life, that exclusive notion of civic identity transformed itself to yield as citizen –as full member of that imagined community– the so-called White of European stock.

Professor Weiner asserts that "the fundamental ideas upon which the United States was founded were created under conditions of African chattel slavery, and the nation has been grappling ever since with [their] consequences . . . ."[49] Smith agrees, stating that "by legislating black chattel slavery, Americans went beyond any explicit provisions in English law and gave legal expression to an increasingly racialized sense of their identity so powerful that the very humanity of these outsiders was denied."[50] In sum, slavery and racial bias against "black" human

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[48] It may be worth exploring whether the psychological concept of "narcissism" is useful in shedding light on the extreme, jingoistic versions of nationalism. Living under a delusion is the central feature of narcissism. Notions of exceptionalism, superiority, infallibility, and Manichean goodness are delusional.

[49] WEINER, *supra* note 23, at 7.

[50] SMITH, *supra* note 2, at 64. Smith indicates that "black chattel slavery amounted to a new kind of subjectship –a subjectship to an individual master so complete that American legal authorities strove, never quite successfully, to ignore the slaves' humanity and to view them simply as property." *Id*. at 63-64. There was a need to justify such monstrosity. According to Smith, that task "prompted the colonists to elaborate the doctrines of racial inequality that they had begun to devise to defend taking Native American lands." *Id*. at 64. See *State of North Carolina v. John Mann*, 13 N.C. 263 (1830), which involved the conviction of John Mann, found guilty by a jury of battery for shooting a female slave. Although the man was not the slave's master, the Court equated him to one, while stating that, for slavery to work, "[t]he power of the master must be absolute, to render the submission of the slave perfect." *Id.* at 266. The court overturned Mann's conviction. The *Mann* case illustrates how "Southern lawyers and judges depersonalized the slave system, pulling on professional masks that obscured the slave's humanity and the master's moral responsibility." KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 143 (2nd ed. 2009).

beings have been at the heart of the tension between the liberal and democratic ideals that the U.S. purported to embrace and still pledges to live by; and of that racialized sense of identity, as well as the concomitant racially-based prejudices and structural inequities.

B. Race and Disparate Treatment in the Early Colonial Era

The 1641 Body of Liberties of the Massachusetts Bay Colony is the earliest codification of a proto-American social structure, in that case of a Puritan community. The Body recognized liberties only to the Englishmen, the "freemen" of the colony.[51] That colonial legal code is also the oldest example of codified distinctions between White and African unfree workers.[52] It included a section concerning the "liberties of servants" and another concerning the "liberties of foreigners and strangers." According to its Article 91, the term "strangers" referred to slaves, that is, those who "willingly sell themselves or are sold to us."[53] Servants, that is "white" indentured servants, had the right to "flee from the Tiranny and crueltie of their masters to the howse of any freeman of the same Towne," and they "shall be protected and susteyned till due order be taken for their relief." [54]

If a master disfigured or maimed a white servant, "unless it be by mere casualtie, he shall let them goe free from his service." [55] Significantly, "Servants that have

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[51] Irons puts it thusly:

> The promise of equal justice . . . extended only to the 'freemen' of the colonies. This favored group, in fact, made up only a small minority of the colonial population. The ranks of freemen were generally limited to white males who owned some property and who belonged to the dominant religious denomination of the colony. In short, the freemen were the precursors of the WASP (or White Anglo-Saxon Protestant) elite that owned and operated American business, government, and culture for more than three centuries, and that still maintains a disproportionate share of power in these areas. In the process of taking power for themselves, the freemen of colonial America consciously employed the legal system to keep the members of other groups in subordinate roles.

PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 8-9 (1999).

[52] Among the "liberties" therein established were what we now call due process of law, equal protection of the laws and prohibition of cruel and unusual punishments, among others that are familiar today. Also, that document contained more than just the "liberties" of the Massachusetts inhabitants (limited to the "freemen" of the colony). It also included a list of capital crimes, all but one –treason– derived from the Old Testament. By limiting the enjoyment of those liberties to the "freemen," it excluded most of the population: women, servants, slaves, Native Americans, and even white men with no property. *See* THE MASSACHUSETTS BODY OF LIBERTIES (1641) http://history.hanover.edu/texts/masslib.html (last visit May 26, 2019).

[53] At first glance, referring to slaves with the term "stranger" may appear as an instance of circumlocution. But that nomenclature is taken from the King James Bible, where "stranger" referred to "slave." *See*, *e.g.*, *Exodus* 23:9 (King James).

[54] *See* BODY OF LIBERTIES, *supra* note 52, at art. 85.

[55] *See* BODY OF LIBERTIES, *supra* note 52, at art. 87. This is also taken from the Bible. *See Exodus* 20:26: "And if a man smite the eye of his servant, or the eye of his maid, that it perish; he shall let him go free for his eye's sake."

served diligentlie and faithfully to the benefit of their masters seaven years, shall not be sent away emptie." [56] The Body of Liberties provided no such protections for black slaves, who had only "the liberties and Christian usages which the law of god established in Israell concerning such persons doeth morally require. This exempts none from servitude who shall be Judged thereto by Authoritie."[57]

The early Puritan codification of indefinite, basically life-long African slavery, raises the question of the relationship, if any, between New England slavery and Puritan theology. There seems to be a case for the conclusion that Puritan theology was expressly relied upon in the early enslavement of Africans, as it was expressly codified in 1641 with clear allusions to the Old Testament.[58]

In any event, such early codified distinction between white and black servants is significant.[59] In Maryland, in 1642, thirteen Africans arrived at the first English establishment in that colony, St. Mary's City. In 1663, Maryland codified hereditary, chattel slavery, as Virginia had done in 1661.[60] The early codification of slavery took place twenty years after the Mayflower, in the case of Massachusetts, and

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[56] *See* BODY OF LIBERTIES, *supra* note 52, at art. 88. Given the theocratic slant of the Puritan colony, it is no coincidence that the Old Testament established that "if thou by an Hebrew servant, six (6) years he shall serve: and in the seventh he shall go out free for nothing." *Exodus* 21:2 (King James).

[57] *See* BODY OF LIBERTIES, *supra* note 52, at art. 91.

[58] *See* Paul R. Griffin, *Protestantism and Racism*, *in* THE BLACKWELL COMPANION TO PROTESTANTISM 357-64 (Alister E. McGrath & Darren C. Marks eds. 2004); PAUL R. GRIFFIN, SEEDS OF RACISM IN THE SOUL OF AMERICA 11-21 (1999); FORREST G. WOOD, THE ARROGANCE OF FAITH: CHRISTIANITY AND RACE IN AMERICA FROM THE COLONIAL ERA TO THE TWENTIETH CENTURY (1990). Professor Jones expounds that the Protestant Reformation, particularly the work of John Calvin:

> [P]ut humanity in direct contact with God on one of two levels –saved or damned. How did one know? One looked around at one's fellows –those who led the good life were saved, the 'elect'; those who did not were damned. The Calvinist influence prompted the Puritan revolution in England . . . The strong Puritan tradition in the New World provided a handy formula for distinguishing between the 'elect' and the damned in a socioeconomic order of racist slavery.

JONES, *supra* note 6, at 26-27.

[59] Smith indicates, however, that "[i]n their initial entry as indentured servants, blacks in North America apparently could become freemen and property owners after their time was served, like European servants." But, he adds:

> [S]oon the English began regarding Africans with a contempt exceeding the hostility they showed toward all outsider groups. Special restrictions were imposed on blacks that expanded into an extraordinary variety of legal burdens during the last decades of the seventeenth century. The most important of these was legal recognition of hereditary lifetime bondage itself.

SMITH, *supra* note 2 at 63.

[60] *Id.* Maryland's 1663 slave code provided that:

> [A]ll Negroes or other slaves within the Province, and all Negroes and other slaves to be hereinafter imported into the Province shall serve Durante Vita [(during life)]; and all children born of any Negro or other slave shall be slaves, as their fathers were, for the term of their lives.

only ten years after Puritans began to arrive in significant numbers. In Maryland, it happened twenty years after the arrival of the first African "servants" to that colony. All that could very well mean that, from the outset, there were white indentured servants, and then there were the Africans, brought forcibly for indefinite servitude time-wise, most for the rest of their lives. If that is so, the codification of that reality came later than the actual distinction. [61]

If what triggered the hereditary, perpetual enslavement of the African servants was its legal codification, twenty years –even thirty or forty years– is a very short period in which to transform indentured servants into slaves-for-life. If the codification was immediate to the actual change in status, it still yields a very narrow window of black indentured, not-for-life servitude. In any event, questions that arise include: What were the bases for that early distinction in the treatment of white servants and black slaves? If it was basically race, does servitude inevitably produces prejudice? Was early racist prejudice mainly an expedient justification for slavery, to qualm humanitarian or religious sensibilities? Was race prejudice, and not necessarily a cogent ideology we would call "racism," sufficiently developed in the seventeenth century to facilitate that rationalization? Rather, is race prejudice merely one of the instinctive ways to show antipathy and contempt toward "the other"?

C. Racial Prejudice and Slavery in Early Colonial Virginia and Beyond

Besides the early treatment by the New England colonists of the African unfree laborers already discussed, there is the early colonial experience of the Virginia colonists. The Puritan worldview was rooted in theology, including their sense of being God's "chosen people." They also relied on the notion that blacks were the descendants of Ham, and as such destined by God to be less than others not so related.[62] But, what was the dominant worldview of the early Virginia colonists?

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[61] According to Professor Zinn, "[e]verything in the experience of the first white settlers acted as a pressure for the enslavement of blacks." ZINN, *supra* note 41, at 24. Zinn points to facts in support of the "strong probability" that the first blacks "were viewed as being different from white servants, were treated differently, and in fact were slaves." *Id*. at 23.

[62] *See* GRIFFIN, *supra* note 58 at 27, 29. Hannaford indicates that the Ancient Greco-Roman culture devised and developed a "political" basis for civic membership, which in the Middle Ages gave way to a "spiritual" one. IVAN HANNAFORD, RACE: THE HISTORY OF AN IDEA IN THE WEST 12, 87 (1996). The Reformation Era buried an attempt, signified by authors like Bartolomé de las Casas and Niccolo Machiavelli, to revive the Ancient political conception of civic membership. New circumstances would lead to the "pre-idea" and later to the "idea" of race, by definition a non-political concept inasmuch as it excludes people, in *a priori* fashion, from the possibility of community membership. *Id*. at 147-50. In true liberal fashion, Locke also postulated a political, non-ascriptive conception of civic membership. *See* SMITH, *supra* note 2, at 77-82.

Professor Vaughan calls attention to the work of Winthrop Jordan,[63] who examined "16th century English sources, particularly travel accounts," leading him to assess:

> [T]he depth and breadth of English prejudice against Africans before 1619. The English propensity to identify Africans with apes, with unbridled sexuality, and with extremely un-Christian behavior engendered a profound, though still inchoate, prejudice against Africans that the Jamestown colonists unconsciously carried to America. Equally important, Jordan demonstrated that to Elizabethan and early Stuart Englishmen black was 'an emotionally partisan color,' laden with implications of filth, evil, and repugnance. Thus Africans in early Virginia were not merely one group of strangers on whom the English settlers cast general scorn . . .; instead, the colonists considered them a visually, socially, and perhaps biologically distinct people, in almost every way inferior to everyone else.[64]

Vaughan examined the admittedly scant documentation of the 1620-1630 period, prominently the censuses of 1624 and 1625. What those sources revealed:

> [was] inconclusive but not insignificant. It show[ed] with alarming clarity that blacks from the outset were objects of a prejudice that relegated most, perhaps all, of them to the lowest rank in the colony's society, and there are strong hints that bondage for blacks did not carry the same terms as for whites.[65]

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[63] *See* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO (1968).

[64] ALDEN T. VAUGHAN, ROOTS OF AMERICAN RACISM: ESSAYS ON THE COLONIAL EXPERIENCE 144 (1995). *See also,* HANNAFORD, *supra* note 62. Reacting to Jordan's conclusions, Professor Cottrol has expressed:

> The record in Virginia and other colonies indicate a trek toward a body of law designed to foster racial separation that was uneven and tentative. It was dictated more by the evolving needs of the emerging slave system than by ancient prejudices. The English of the seventeenth century were a broadly intolerant people, eager to celebrate what they termed the rights of Englishmen and also convinced that those rights belonged peculiarly to them. Their subjugation of the Irish was ruthless. For the English, the division between English and non-English was probably, at least initially, of as great a concern as the distinction between black and white.

COTTROL, *supra* note 8, at 87-88. Likewise, Smith mentions "the pervasive disdain of the English . . . toward all other peoples they encountered." SMITH, *supra* note 2, at 59.

[65] VAUGHAN, *supra* note 64, at 134. That is, those sources:

> [S]how with disturbing clarity that the black men and women brought to Virginia from 1619 to 1629 held from the outset a singularly debased status in the eyes of white Virginians. If not subjected to permanent and inheritable bondage during that decade –a matter that needs further evidence– black Virginians were at least well on their way to such a condition. For

What Vaughan finds "most striking" about the 1624 census is that none of the 22 blacks listed therein as living in the colony (they had been there for at least 5 years) were assigned a last name, while half of them had no name at all.[66] The 1625 census listed 23 blacks. According to Vaughan, that second Virginia census:"

> [I]s more complete as well as more ambitious. Very few names are incomplete; age is indicated for the vast majority of inhabitants, and the remaining information –date and ship of arrival, provisions, cattle, and so forth– shows few gaps. But again, most of the Negroes are relegated to anonymity or partial identification.[67]

Other circumstances which suggest an inferior status for black laborers in contrast with whites, that "they were already a different category of labor," include "the absence for most of the blacks of age and date of arrival –crucial data for white servants since terms of indenture usually stipulated service for a specified number of years or until a specified age." [68] Also, although most had been in the colony for at last six years, "none of them is shown as free . . . And their anonymity, in conjunction with their status as servants or slaves, is telling too." [69] For Vaughan, it is also telling that there was a colonial statute requiring, on penalty of a fine, to submit the names and terms of servitude of all servants.

> the Elizabethan Englishmen's deep-rooted antipathy to Africans . . . reveals itself in a variety of subtle ways in the records of early Virginia.

Id. at 129. Jones asserts –consonant with Jordan's, and Hannaford's contentions that the British were prejudiced toward Africans even before colonizing North America–, that "the British attitude was predisposed toward racism before any Englishman had ever beheld a Black African. The very *color* black had long possessed strong negative meaning and emotional ties . . . Not only was black bad; its opposite, white, was very good." JONES, *supra* note 6, at 26 (emphasis added). Probably as important, if not more, was the thirst for riches. In that regard, Jones points to the "individualistic worldview" of the Renaissance, according to which the "measure of a man was his achievements on earth," not his faith in the Christian god or his compliance with the tenets of the Medieval Church. *Id*.

> In the economic sphere, the accumulation of capital became an attractive way for an individual to become worthy . . . It was not long before one of the principal commodities was black bodies. Politically, the existence of nation-states independent of religious control from Rome led to large-scale nationalistic competition for the world's wealth. Freedom and individualism without any social responsibility characterized sixteenth-century England and gave a strong push toward the enslavement of black Africans.

Id.

[66] VAUGHAN, *supra* note 64, at 130. In contrast, "very few entries for non-Negroes have incomplete names . . . Negroes as a group received by far the scantiest and most impersonal entries in the census. Ten of the twenty-three are without first or last names, the rest have first names only." *Id*. at 131. "Typical entries read 'One negar,' 'A Negors Woman' or just "negors" with no name at all. *Id*.

[67] *Id*. at 132.

[68] *Id*. at 133.

[69] *Id*.

> [Y]et very few Africans were named in the censuses or in other extant documents of the 1620s and after. It seems likely that [this was because] they were considered slaves to be owned and hence not encompassed by the law that required the registration of servants. In any event, the overall impression conveyed by the census of 1625 is of a significantly separate and inferior position for the Negro in the social structure of white Virginia.[70]

In sum, "on balance, the scattered evidence from the first decade strongly supports the contentions of [other authors, including Winthrop Jordan] that a deep and pervading racial prejudice served as a formative precursor to American Negro slavery."[71] It is also noteworthy that in 1668, eight years before Bacon's Rebellion, Virginia enacted a code that denied equality to free blacks. This is not unlike the restrictive "equality" of the Massachusetts 1641 code, which was also concerned exclusively with the rights of certain Englishmen.[72] What about the Revolutionary Era and the latter years of the eighteenth century? Do they point to a better treatment of the free black population? At best, the record of that era is mixed; while the nineteenth century, and particularly the Jacksonian era, shows the disenfranchisement of that population, among other restrictions to their liberty.

Smith points to exclusionary and pro-slavery measures, implemented between 1789 and 1800 by the federal and state governments. [73] The same include: (1) The Governor of the Northwest Territory, in what Smith calls "a dubious reading of Congress' action," interpreted the ban on slavery included in the ordinance "as applying only prospectively. Existing property rights in slaves must, he insisted, be respected;" [74] (2) under pressure from the Southern States, Congress organized the Southern territories allowing slavery there, including Kentucky and Tennessee, admitted as slave states in 1792 and 1796 respectively. By 1799, Kentucky "excluded blacks, mulattos, and Native Americans from the vote;" [75] (3) Congress sanctioned

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[70] *Id*.

[71] *Id*. at 135.

[72] SMITH, *supra* note 2, at 65: "As early as 1668, the Virginia Assembly added that free blacks 'ought not in all respects to be admitted to a full fruition of the exemptions and immunities of the English,' an attitude all the colonies shared." The concept of "the rights of Englishmen" is, of course, inherently exclusionary. It implied, both in theory and in practice, that the rest did not enjoy those rights.

[73] *Id*. at 143. Cottrol observes that the American Revolution prompted a questioning of slavery. The revolutionary rhetoric and the Afro-American role in the war caused, not only a reexamination of the practice of human bondage, but the first abolitions of slavery in the Western hemisphere, with Massachusetts and Vermont leading the way. Moreover, in the late eighteenth century most northern and some southern states allowed free blacks to vote. COTTROL, *supra* note 8, at 92-93. The nineteenth century, however, would bring numerous setbacks to the path toward more equality. *Id*. at 97-109.

[74] SMITH, *supra* note 2, at 143.

[75] *Id*.

slavery in the District of Columbia; (4) in 1792, Congress passed a Militia Act calling for the enrollment of all "free, able-bodied, white male" citizens[76]; (5) At the same time, most states, "including all the Northern ones, went on to ban blacks in their own militia laws;" [77] and, finally, (6) Congress passed the Fugitive Slave Act of 1793.[78] The Act went against all notions of due process of law. "On balance, both by silent consent and active legislation, Congress did much to perpetuate slavery in these years and virtually nothing to move blacks toward freedom or citizenship."[79]

Finally, since colonial times, the set of ideas we call "racism" have enabled American elites to diffuse class resentment. They would have accomplished that feat by giving lower class Less-Melanin-Humans a potent, visceral reason to feel good about themselves. After all, those who have little or no wealth, no political power, no talent, no artistic or intellectual accomplishments, could always look down on the slaves and, later, the former slaves and their descendants, as well as on the free More-Melanin-Humans who in *antebellum* United States were even lesser citizens than the Less-Melanin-Humans at the bottom of the socioeconomic ladder.[80]

After white servitude disappeared, the legal distinctions between the rights and privileges of free More-Melanin-Humans ("Blacks") and those of poor Less-Melanin-Humans ("Whites") were useful not only for ensuring a steady supply of cheap labor –both "White" and "Black"– but also to prevent class resentment and unrest.[81] Everything points to the conclusion that race did play that sociopolitical function, and it is worth exploring whether it still plays that role, even if by default or to a lesser extent than in eras past. Moreover, it is worth exploring whether such function is embedded in the ideological structure of contemporary American

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[76] *Id*.

[77] *Id*.

[78] *Id*.

[79] *Id*. Smith adds to his unflattering assessment:

> Federalist concerns to ensure support for the new nation by placating the slave states, fears raised by the Haitian blacks' rebellion in 1791, and the religious and scientific arguments that slavery's defenders mounted easily trumped religious and rationalist arguments for equal human rights. Yet Northern Federalists still managed only to alienate anti-slavery forces while failing to end Southern suspicions that they would move against the institution if they could.

Id. at 143-44.

[80] SMITH, *supra* note 2, at 38.

[81] Smith expounds that the resurgence after the Civil War:

> [O]f notions of racial superiority in the … American political and intellectual climate gave value to the 'psychological wage' of white supremacy, a 'wage" that [W.E.B.] Du Bois correctly invoked to explain alliances of rich and poor that fly in the face of both Marxian and liberal notions of self-interest.

Id. at 288.

society. The social-control role of the notion of race has been both another good reason to foster it, as well as a consequence of the central role that it has played and continues to play in the United States.

It is also likely that bias based on the concepts of race and racial hierarchy was not invented to rationalize or justify exploitation, enslavement, extermination and displacement. Instead, the ideas associated with those abuses were already in circulation and then used for such purposes. Several authors have suggested, and maybe demonstrated, that those concepts were already sufficiently entrenched in the minds of early colonials to become the building blocks of an ideological justification for domination and human exploitation. In that view, cultural transmission has produced over hundreds of years a *continuum*, a set of ideas and practices with a permanence and power for which the inherent stability of cultures account and make possible. Moreover, familiarity is key: Ideas which are rapidly becoming or already became part of the social "common sense," are useful for supporting the existing material and power structures; and for providing justifications for exploitation and oppression. If that is so, the permanence of racism to this day –even if more covert than in the past– is not bewildering.[82]

IV. The Judicial Construction of Inequality

A. The Dred Scott Decision: Taney's Benediction of Exclusion and Immorality

In *Dred Scott* v. *Sandford*, [83] the Supreme Court ruled that the descendants of Africans, slaves and non-slaves alike, had been excluded from "the people" that declared independence in 1776, as well as from "the people" that enacted the Constitution of 1787. The Court also excluded them from civic membership altogether, by holding that they were not "citizens" of the United States.[84] In his now infamous majority opinion, Chief Justice Roger Brooke Taney described the

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[82] Lawrence has asserted that:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.

Lawrence, *supra* note 26, at 322 (citations omitted).

[83] 60 U.S. 393 (1857).

[84] *Id.* at 407.

political implications of belonging to a "people" who established a constitutional regime and lived under it. He also equated "people of the United States" and "citizens" thereof, stating that they "are synonymous terms, and mean the same thing," [85] adding: "They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives."[86] They are, thus, "the sovereign people," and "every citizen is one of this people, and a constituent member of this sovereignty."[87]

Taney held that, in 1787, More-Melanin-Humans, both enslaved and free, were not considered as citizens of the *polis* created by the Constitution. They were not part of "We the People" who "ordain[ed] and establish[ed] this Constitution of the United States."[88] Taney's opinion has been ably dissected and criticized many times, beginning shortly after it was issued in 1857.[89] Here, I explore the Court's claim that the founders had no moral qualms about slavery or about supposedly establishing that humans of African descent were not to be citizens of the political community known as the United States of America.

In 1852, Dred Scott, who was born a slave (*circa* 1799, probably in Virginia), brought an action in federal court against his "master" John Sanford (misspelled as "Sandford" in the decision), [90] claiming that he had become free when he was brought by a previous master to jurisdictions (Illinois and the then Wisconsin

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[85] *Id.* at 404.

[86] *Id*.

[87] *Id*.

[88] U.S. CONST. pmbl. In the 1787 document, the term "the people" appears again in the clause establishing that the House of Representatives "shall be composed of members chosen every second Year by the People of the several States." U.S. CONST. art. I, § 2, cl. 1. The term "citizen" is used in five clauses of the original Constitution, when establishing the qualifications for federal office in the legislative and executive branches; to establish the diversity jurisdiction of federal courts; and in the privileges and immunities clause. *See* U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States"); art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States"); art. II, § 1, cl. 5 ("No person except a natural born Citizen, or a Citizen of the United States, at the time of Adoption of this Constitution, shall be eligible to the Office of President"); art. III, §2, cl. 1 ("The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made … [and to all Controversies] between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants from different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). The Constitution gave Congress the power to establish uniform rules of naturalization. U.S. CONST. art. I, § 8, cl. 4.

[89] *See*, *e.g*., BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 105-25 (1993); IRONS, *supra* note 51, at 157-78; SMITH, *supra* note 2, at 243-71; COTTROL, *supra* note 8, at 80-81; 107-09.

[90] IRONS, *supra* note 51, at 163.

territory) where there was no slavery.[91] Scott filed his suit in the U.S. circuit court in Missouri, alleging that the court had diversity jurisdiction, because he was a citizen of Missouri, while Sanford was a citizen of New York.[92] Sanford claimed that Scott was not a citizen of Missouri, because of his condition of "negro of African descent," whose ancestors "were brought into this country and sold as negro slaves . . . ."[93] The Supreme Court agreed, holding that Scott was neither a citizen of the United States, nor a citizen of Missouri and, thus, that the court below had no diversity jurisdiction to decide the case. The Court also ruled that humans of African descent had not been part of "the people" who declared independence in 1776, nor had they been subsumed in the people that created the American polity through the constitutional process of 1787-1788. Further, it ruled that they were not citizens of the United States at the time of the decision, in 1857.

i. The Political Meaning of "We the People"

Taney's immediate predecessor, Chief Justice John Marshall, had succinctly expounded on the role of the "sovereign people" in the foundation of the American constitutional regime. In his opinion in *Marbury* v. *Madison*,[94] Marshall articulated the principles of modern constitutionalism, relying on the "constituent power" doctrine. According to that doctrine, a Constitution is the outcome of a sovereign people, who exercise their constituent power to give way to a process of deliberations, drafting and voting. A deliberative process held by a Constitutional Convention culminates with the drafting and approval of a Fundamental Law, a Supreme Law. When that Law is adopted by the people on whose behalf it was established, the constituted powers –the branches of government as created by the Constitution– then become subordinate to that foundational, paramount Law. Hence, they are not to act contrary to the Constitution, because its legal supremacy must be respected. That way, the juridical principle of constitutional supremacy substitutes the political, impracticable fiction of popular sovereignty.[95]

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[91] *Dred Scott,* 60 U.S. at 394:

> [Scott] states that he is of African descent, was born a slave, and claims that he and his family became entitled to freedom by being taken, by their owner, to reside in a Territory where slavery is prohibited by act of Congress –and that, in addition to this claim, he himself became entitled to freedom by being taken to Rock Island, in the State of Illinois– and being free when he was brought back to Missouri, he was by the laws of that State a citizen.

[92] The diversity jurisdiction of federal courts is established in the Constitution: "The Judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1.

[93] *Dred Scott*, 60 U.S. at 393.

[94] 5 U.S. 137 (1803).

[95] For a thorough exposition of the constituent power doctrine, see PEDRO DE VEGA GARCÍA, LA REFORMA CONSTITUCIONAL Y LA PROBLEMÁTICA DEL PODER CONSTITUYENTE (1985).

A Constitution is, therefore, a legal instrument, and the product of a peculiar political process, which must be and can only be the offspring of a sovereign entity, "the people." Therefore, it accepts no superior legal authority, as "the people" themselves admitted no superior political power. That legal instrument must be a Supreme Law, to compensate for the fact that the sovereign people exit the stage as soon as they create and approve their government charter, their Constitution. [96] Marshall did assign the constituent power to "the people," defining it as their "original right [(power)] to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness . . . ."[97] Since "this original right [(power)] is a very great exertion," it is not "to be frequently repeated."[98] Therefore, the "principles so established . . . are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent." [99]

Aware of those principles, Taney wrote that certain humans were excluded from the foundation of the American constitutional regime and that their exclusion was not due to their lack of democratic or civic virtues, but to their heritage as descendants of Africans. The Supreme Court thus erased from the foundational events of the nation –the 1776 Declaration of Independence and the 1787 Constitution– those humans of African descent, many of whom even joined the revolutionary troops in the war against Britain. Taney also ruled that they were excluded altogether from civic membership in the polity created by the Constitution. That is, in its illiberality, the Taney court excluded from "the sovereign people" other humans besides the "White, Anglo-Saxon, Male Protestant" or, simply, "Whites." In principle, however,

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[96] Once a constitutional regime is established, the people organize as the electoral body to participate in the periodical election of those who govern. That participation is what provides formal legitimacy to governmental actions –to the laws, the executive policies, and the judicial judgments. What provides those actions with substantive legitimacy is their consonance with the civil, fundamental rights of the people. Moreover, without formal, that is electoral, legitimacy and without substantive legitimacy there is no law, because legal commands must be legitimate to qualify as "law."

[97] *Marbury*, 5 U.S. at 176.

[98] *Id.*

[99] *Id.* at 177-78. The term "power" is preferable to "right," because Marshall was referring to an extra-juridical, political prerogative, which in turn creates a legal instrument that, peculiarly, is a Supreme Law. Smith points out that the constituent principles expounded by Marshall are both a rationalist political doctrine and also a civic myth. Those principles are fictional, inasmuch as the political decision-making which coalesced in the text of the Constitution was "in reality . . . more a matter of elite bargaining than popular deliberation." SMITH, *supra* note 2, at 36. That republican fiction was preceded by the liberal myth of the Declaration of Independence, with its "unproved but sanctifying claim that men have individual rights 'endowed by their Creator.'" *Id*. Smith also observes that three-quarters of the adult male population did not care to vote in the elections for the state conventions that ratified the Constitution, "a low turnout that probably aided the nationalist cause." *Id*. at 118.

belonging to the people of a constitutional democracy depends, first and foremost, on a commitment with democratic and human rights values.[100]

In this regard, the question that Taney chose to answer was "whether [More-Melanin-Humans, both enslaved and emancipated] compose a portion of this people, and are constituent members of this sovereignty?"[101] Taney's answer for the majority of seven justices was a resounding NO because, he contended, at the time of adoption of the Constitution, More-Melanin-Humans:

> [W]ere 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 choose to grant them.[102]

For the Taney court, the question of civic membership hinged neither on a commitment to liberal, individual rights, nor to republican, democratic governance.

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[100] Professor Oquendo affirms that:

> [T]he modern [liberal] state purports to unify its citizens not on the basis of common national language, ethnicity or culture, but through a shared political culture. In other words, the state acts exclusively on the basis of a general set of norms –democratic principles, the notions of rule of law, and human rights– to which a very heterogeneous citizenry can assent. Beyond this political culture, the state agenda takes no particular content –religious or national. The citizens come together through and identify with a constitution embodying that political culture.

Ángel Ricardo Oquendo, *Puerto Rican National Identity and United States Pluralism*, *in* FOREIGN IN A DOMESTIC SENSE. PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION 328 (Christina Duffy Burnett & Burke Marshall eds. 2001). However,

> [F]or over 80 percent of U.S. history, American laws declared most people of the world legally ineligible to become full U.S. citizens solely because of their race, original nationality, or gender . . . For these people, citizenship rules gave no weight to how liberal, republican, or faithful to other American values their political beliefs might be.

SMITH, *supra* note 2, at 15. It is telling that American politicians have stressed the liberal meaning of citizenship in times of crisis, including during the two world wars. *Id*. at 15 n. 3.

[101] Dred Scott v. Sandford, 60 U.S. 393, 404 (1857).

[102] *Id.* at 404-05. After a historical survey of the treatment given by American and English society and law to enslaved and freed blacks, the Chief Justice added, laying bare American racism:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.

Id. at 407. Schwartz comments: "The Taney conclusion rested ultimately upon the concept of Negro inferiority, which was also the basis of the Southern slavery jurisprudence . . . ." SCHWARTZ, *supra* note 89, at 119.

It rested, instead, on the ascriptive trait of skin color –as well as on gender– preferably joined by a certain ethnic heritage and religious outlook. Likewise, civic membership did not depend on a recognition that "the Creator" to whom the Declaration of Independence alludes, endowed all humans with inalienable rights "to life, liberty and the pursuit of happiness," which purportedly includes the people of European descent as well as women and those of African descent. It was also not based on notions of birthright citizenship, giving humans a natural law claim upon the country in which they were not only born but where they toiled, contributing to the creation of wealth. To Taney and his fellow brethren, only Male, Less-Melanin-Humans were "the people." Besides women altogether, More-Melanin-Humans were excluded in 1787, and were still excluded seventy years later, in 1857. According to Taney, that determination of civic membership in the political entity created in 1788, with the ratification of the Constitution, was not for the Court to alter, regardless of whether it was of its liking.[103]

ii. The Freezing in Time of Immorality

In 1776, Taney acknowledged, independence had been declared under the banner of the "self-evident truth" that "all men are created equal." But, for him, the contradiction of declaring the equality of all humans while owning slaves, and of later upholding slavery in the Constitution, was the mere product of a different worldview. The Chief Justice did not portray it as a deliberate, conscientious carving of an exception to the universality of human dignity. He refused to characterize the founders as hypocrites or contradictory. Instead, they were men of their time, of an era when the meaning of the concept of equality differed from that held by the people living in 1857. In his own utterances:

> [Those words in the Declaration] would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead

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[103] *Dred Scott*, 60 U.S. at 405:

> It is not the province of the court to decide upon the justice or injustice . . . of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

> of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation. [104]

Taney chose to be bound by the founders' outdated sensibilities and conceptions, while not pausing at the prospect that, by doing so, he would himself "deserve and receive universal rebuke and reprobation."[105] That choice –portrayed as inevitable– implies that he and his brethren did not bother shielding the opinion from the charge that they were embracing an outdated, morally objectionable view of human existence, and a mutilated conception of democracy and civic status.[106] Instead, Taney was content with perpetuating the morality and politics of the 18th century, as he said he saw them, stating that the conviction that More-Melanin-Humans were inferior and that their reduction to slavery was in their benefit:

> [W]as 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.[107]

Is all that true? Is Taney's version of history undebatable? Was he correct in asserting that no one in the 18th century disputed the inferiority of those human

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[104] *Id.* at 410. Taney added that:

> [T]he men who framed this declaration were great men . . . high in their sense of honor and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property . . . ."

Id.

[105] *Id.*

[106] Shklar would concede to Taney that, from the outset, Americans have defined their "standing" of full civic membership "very negatively, by distinguishing themselves from their [alleged] inferiors, especially from slaves and occasionally from women." SHKLAR, *supra* note 3, at 15. Moreover, even before Taney issued his opinion, slavery "stood at the opposite social pole from full citizenship and so defined it. The importance of . . . citizenship as standing emerges out of this basic fact of our political history." *Id*. at 16.

[107] *Dred Scott*, 60 U.S. at 407. Waldstreicher, however, contends that the Constitution's framers were aware of the moral dilemmas raised by slavery, but kept that source of cheap labor, out of pure interest: "They wanted the wealth and power that slavery and its governance brought without the moral responsibility that . . . they also knew came with slavery." WALDSTREICHER, *supra* note 5, at 19.

beings and their proper place as slaves or non-citizens? Even if that was so, is it true that from 1776 to 1788 no one questioned the morality of slavery? Moreover, even if Taney's depiction of the founders of the republic as undisturbed by moral misgivings was correct, other questions arise: Why did the Court have to perpetuate, seventy years later, the founders' exclusionary, ascriptive views of political membership?

iii. It is More Complicated Than That, Mr. Taney

According to Taney, the meaning of human equality had changed ever since. That raises other questions: Was the Court justified in disregarding the morality of its own time, thus perpetuating that of the founders? What about moral progress? Is not law without morality an instrument of tyranny?[108] Given that the Court seemed intent on ruling as it did, perhaps the proper question is whether Taney's reasoning was persuasive, even back in 1857. In any event, it is not idle to examine Taney's premises and version of history, because of what that examination may yield about, *inter alia*, the judicial function, constitutional adjudication, the intricacies of demagogy and the use of history as an ideological battlefield.

Since the 16th century, English law disallowed slavery in the British Isles.[109] However, there were pressures to permit it in the American colonies, beginning with sugar-producing Barbados and, later, the North American settlements. Economic convenience and political expedience required the carving of that exception.[110] Otherwise, the rationale went, Britain could not compete with Spain, Portugal and France, rivals who had no scruples in exploiting the labor of humans of African descent.

Then came the 1772 decision by Lord Mansfield in *Somerset* v. *Stewart*. [111] In 1769, Charles Stewart –a Virginia customs official, originally from Boston– traveled to London with James Somerset, his slave. Once in London, Somerset escaped, but was recaptured. Stewart intended to ship his slave to Jamaica in the vessel of a Captain Knowles, in order to sell him. Somerset was able to seek help from English abolitionists, who intervened on his behalf with a petition of *habeas corpus*. The case, decided by Lord Mansfield, Chief Justice of the Court of King's Bench, raised

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[108] In Dworkin's exposition: "The liberal position should be argued . . . by emphasizing moral principles that act as constraints on the law rather than citing the law's conflicting goals." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 26 (1978). This author argued that "though history may show how difficult it is to decide where moral progress lies, and how difficult to persuade others once one has decided, it cannot follow from this that those who govern us have no responsibility to face that decision or to attempt that persuasion." *Id*. at 181.

[109] As early as 1569, an English court decided in the *Cartwright's* case that the very presence in England of a Russian slave had set him free. *See* COTTROL, *supra* note 8, at 83.

[110] COTTROL, *supra* note 8, at 83-84; WALDSTREICHER, *supra* note 5, at 22.

[111] (1772) 98 Eng. Rep. 499.

the issue of whether Somerset's detention was legal. Context is important. As a Member of Parliament, in the House of Lords, Mansfield had argued that the British colonials in North America were subordinated to Parliament and English law in general. That was in 1765, in the midst of the debate on whether to repeal the Stamp Act. On that occasion, Mansfield expressed that those colonials were, like everyone else in England, bound by the laws of Parliament, and that parliamentary sovereignty was not contingent on "whether such subjects have a right to vote or not." [112]

Lord Mansfield used the *Somerset* case to reassert the supremacy of English law. Only "positive law" as enacted by Parliament could allow slavery in the British Isles, he ruled. Slavery, Mansfield wrote in his decision, is "so high a dominion," that it:

> [M]ust be recognized by the law of the country where it is used. The state of slavery is of such nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law.[113]

It was irrelevant that positive law, as enacted by the colonial legislatures, allowed and regulated slavery on the other side of the Atlantic. Through his decision, Mansfield "declared the Americans subject to parliamentary statutes regardless of their local laws."[114] Charles Stewart, one of those colonials "subject to parliamentary statutes," lost his "property" by transferring it to England, because the supremacy of English law superseded whatever property rights he thought he had over his slave.[115]

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[112] WALDSTREICHER, *supra* note 5, at 34. The rhetoric of the British colonials of the revolutionary era often included the notion that such subordination was a form of enslavement. However, after the United States grabbed colonies of its own, Congress would also rule over them regardless of their lack of representation in that body. Puerto Rico is still under the "plenary power" of Congress. Laws apply to the Island at the will of legislators who are not accountable to its residents. In the rhetoric of the American Revolution, that subordination makes Puerto Ricans slaves.

[113] 98 Eng. Rep. at 510. *See* HANNUM, ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 23 (5th ed. 2011). According to Hall and Karsten, the *Somerset* decision "passed into American common law, where it left slavery vulnerable to certain legal challenges. Slavery in the United States resulted directly from state, not federal, statutory law. It either existed by local, positive law, or it did not exist at all." HALL & KARSTEN, *supra* note 50, at 143-44.

[114] WALDSTREICHER, *supra* note 5, at 40.

[115] In *Dred Scott*, Taney had different priorities. He wanted to reaffirm the proprietary rights of masters over their slaves and to declare that the United States was a "white republic." He made the supreme law of the land support that result, annulling, for the first time ever, a law of Congress.

Dred Scott is anti-matter to *Somerset*. Taney ruled that, although states can decide not to have slavery, the transport of a slave to jurisdictions which disallow slavery does not alter the rights of the owners to their "property." Moreover, the federal government cannot enact "positive law" establishing non-slavery zones, like it did in 1820 with the act known as the Missouri Compromise. The 1772 "Mansfieldian moment"[116] that helped fuel the separatist sentiments in the colonies was rejected by the colonials. Eighty-five years later, the Taney Court also recoiled from it.

The colonial elites who declared independence did so mostly to put an end to policies which they considered that made them "slaves." [117] They were being taxed without having a say in the parliamentary laws that established the impositions. Likewise, they were told with whom to have commerce and how much iron they should produce.[118] Also, they felt that the West Indies elites had much more influence in London than they had.[119] Then came Mansfield's pronouncements, and the colonials added another grievance, in the form of a perceived threat to their primary source of cheap labor.[120] Merchants in the colonies already felt that they were under the Sword of Damocles with parliamentary tax laws. Mansfield's decision, in *Somerset*, meant that slaveholders had another reason "to fear . . . parliamentary sovereignty." [121] North American slaveholders "had to either accept the [*Somerset*] decision or risk taking other actions that might prove just as disruptive to their rule."[122] They chose the second avenue, and its risks were already apparent at the very moment they announced their will to separate from England, with their declaration of human equality.[123]

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[116] WALDSTREICHER, *supra* note 5, at 41, 54, 156. The "specter of Lord Mansfield" consisted in the prospect that a "stronger union, an American empire, might decide that slavery ought to be discouraged or regulated, despite the reality of property rights in slaves." *Id*. at 54.

[117] "Slavery was no metaphor: it was a struggle for life, the liberty of self-government, and property, for people of any race." *Id. at* 32. Accordingly, Stephen Hopkins, of Rhode Island, stated that "those who are governed by the will of another, or of others, and whose property may be taken from them by taxes, or otherwise, without their own consent, and against their will, are in the miserable condition of slaves." *Id*. (citation omitted). Waldstreicher expounds:

> The metaphor of slavery was far too entrenched in British politics to be separated from the colonial controversy . . . The comparison of political liberties to bondage did not have to be discovered: it had been there from the start. If British freedom could be construed to mean that taxation without representation equaled enslavement, something had to give. Either colonists had to be defined as constitutionally unequaled Britons, or taxes like the Stamp Act could be declared unconstitutional.

Id. at 33-34.

[118] WALDSTREICHER, *supra* note 5, at 25-26, 30-31.

[119] *Id*. at 29.

[120] *Id*. at 40-41.

[121] *Id*. at 40.

[122] *Id*. at 41.

[123] According to Smith, they espoused "rationalist liberalism without fully recognizing the threats it posed to their sense of inborn superiority." SMITH, *supra* note 2, at 83.

For starters, the revolution "began with Jefferson's ringing declaration proclaiming the equality of all men," generating in turn "strong antislavery sentiment"[124] and, at the least, "large-scale public questioning of slavery."[125] The liberal ideas in circulation in the mid-eighteenth century, the colonists' notion that their condition of British subjects was defined by English liberties,[126] and the need for a rhetoric legitimating their elites' separatist sentiments, all contributed to the creeds included in the Declaration of Independence.[127] To be sure, the liberal and democratic ideas trumpeted by the elites who led the independence movement were used by them as a rallying cry, a convenient rhetoric to gather support among the populace. But illiberal, exclusionary ideas had already taken hold in those elites and in the colonials in general. That is, the exclusionary, racialized notions of identity were older than the Lockean, liberal notions of civic membership and resistance to tyranny.[128] Those "older, ascriptive beliefs and practices"[129] originated in disparate sources and traditions, including religious and historical notions of ethnic origins. At the end of the colonial period, those notions had coalesced in distinct discourses of civic identity: "Most religious-minded Americans thought . . . that being English meant sharing in the divine mission of Anglo-Saxon peoples to bring about some sort of Protestant millennium, overcoming Papist (Roman, French, and Spanish) spiritual tyranny and securing the freedom to practice 'true religion.'" [130]

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[124] COTTROL, *supra* note 8, at 92. The declaration was meant as the justification for the extraordinary step of claiming a separate station among the nations of the world. Besides its liberal and democratic justifications, it accused the British government of all sorts of abuses and missteps, which trampled on the colonists' rights and liberties and even threatened their safety and overall well-being.

[125] *Id. See also,* WALDSTREICHER, *supra* note 5, at 28.

[126] WALDSTREICHER, *supra* note 5, at 23-24.

[127] Ironically, by 1750, people in the mother country saw the colonies as an unfree realm, with its indentured servants and slaves. *Id. at* 28.

[128] Still today, the question of what it means to be American is a contested one, with at least two different versions: One, liberal and democratic; the other, illiberal and racialized. Trumpism is the latest, extreme example of politicians taking advantage of the presence of the latter version, in this instance at the service of a full-blown narcissist. Donald J. Trump, who frantically cares to feed his need for narcissistic supply in the form of praise and servile obedience, found that such supply is to be found among people vulnerable to the exploitation of the more extreme illiberal notions and practices.

[129] SMITH, *supra* note 2, at 81-82.

[130] *Id*. 72-73. Moreover, the colonists:

> [A]ssumed . . . that Britain's legal traditions were uniquely protective of political, religious, and personal liberties . . . They wholeheartedly embraced the now long familiar myth that . . . all Englishmen were proud descendants of a 'golden age of Anglo-Saxon purity and freedom,' and they believed that they had special capacities for liberty that were culturally and providentially, if not biologically, definitive of their race.

Id. at 73. For the blending of religious and historical notions of identity in a somewhat coherent, certainly illiberal, ascriptive discourse, see *Id*., at 74, 85.

Many Afro-Americans gained their freedom by fighting on the American side, a participation that also had an impact in the weakening of northern slavery.[131] It also contributed to the increase in the number of free More-Melanin-Humans, from a few hundred in 1770 to tenth of thousands by the end of the 18th century.[132] After independence, that increase was joined by the first emancipations. These were immediate and court-ordered in Massachusetts and Vermont. They were by statute and gradual in other northern states. [133]

It is significant that Jefferson's "original rough draft" of the Declaration included a passage, which was removed from the definitive version, chastising the British monarch for having:

> [W]aged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of infidel powers, is the warfare of the CHRISTIAN king of Great Britain. Determined to keep open a market where MEN should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce: and this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which *he* has deprived them, by

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[131] COTTROL, *supra* note 8, at 92-93. In New England, although Afro-Americans "made up only 5 percent of the new nation's total black population, they were 50 percent of the black men in the American forces." *Id*. at 92. Waldstreicher points out that recent estimates of the number of slaves liberated during the Revolutionary War vary from 25,000 to 100,000. WALDSTREICHER, *supra* note 5, at 49. But the war also preserved slavery, as it derived in part "from the desire of slaveholders to protect their lives, their fortunes, and their sacred honor, goals they pursued by trying to keep hold of their slaves." *Id*.

[132] WALDSTREICHER, *supra* note 5, at 92. Indeed, many slaves from the southern colonies joined the British, engrossing Cornwallis' troops before the Yorktown fiasco.

[133] *Id*. at 93. "If the progress of northern abolition was gradual and at times, halting," comments Cottrol, "it was nonetheless the first large-scale emancipation in the Western hemisphere, a testament to the power of the ideals generated by the American Revolution." COTTROL, *supra* note 8, at 93. Smith describes the *realpolitik* side of this matter:

> The needs of revolutionary leaders to win support for their dangerous war undeniably formed the immediate cause for the Americans' advocacy of comparatively radical versions of the rights of man and republicanism . . . Leaders who resort to such tactics then usually face pressures to live up to them; many Americans were in any case genuinely persuaded that they should do so.

SMITH, *supra* note 2, at 87-88. The Pennsylvania Quakers apparently were the most sincere and vocal abolitionists. *Id*. at 82, 88. Meanwhile, the prospect of a slave-British alliance "pushed planters [in the southern colonies] toward independence." *Id*. at 45.

> murdering the people upon whom *he* also obtruded them; thus paying off former crimes committed against the liberties of one people, with crimes which he urges them to commit against the *lives* of another. [134]

So, the reality is that for Thomas Jefferson (1743-1826) and his colleagues –men of their time, as we all are–, the slave trade was an "execrable commerce," [135] and slavery itself was against human nature, in violation of the sacred "rights of life and liberty." Africans, brought forcibly to North American shores, were as human as the American colonists. They were, wrote Jefferson, "people" from another "hemisphere." [136] Hence, in 1776 it was clear to Jefferson, the other signers of the Declaration, and presumably many others, that slavery presented a major contradiction to the ideals espoused by the revolutionaries. That is not what Taney would have us believe. In his version of history and of the evolution of human morality, slavery and race-based discrimination were seen by the revolutionary elite as natural and unproblematic. Is that an instance of judicial persiflage?

At the Philadelphia Convention of 1787, the delegates adopted a rule of secrecy of the deliberations, which allowed for candidness. That candor was apparent as they

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[134] For the text of Jefferson's draft, see *The Papers of Thomas Jefferson,* PRINCETON UNVERSITY, https://jeffersonpapers.princeton.edu/selected-documents/jefferson's-"original-rough-draught"-declaration-independence (last visit May 26, 2019). That passage was the subject of debate in the Continental Congress, before it cut it out of the declaration. Jefferson preserved the draft among his papers. WALDSTREICHER, *supra* note 5, at 46. The passage was substituted with the following: "He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions." Thus, the Declaration, "made slave insurrection, with Indian warfare, the latest and perhaps greatest example of the king's tyranny. The Declaration, then, had turned from antislavery in draft to anti-antislavery (if not proslavery) in publication." *Id*. at 47. The allusion to "domestic insurrections" has obscured the fact that blacks, mostly slaves, were soldiers on both sides of the independence conflict. *Id*. at 57.

[135] A legal historian asserts that by 1776 "[t]here was, in fact, widespread agreement that the slave trade was an abomination; that it had to be ended." LAWRENCE W. FRIEDMAN, A HISTORY OF AMERICAN LAW 154 (3rd ed. 2005).

[136] For Smith, the exclusion from the final document of Jefferson's original indictment concerning slavery signifies that "enough of the most powerful among [Jefferson's] countrymen thought black slavery either right or expedient." SMITH, *supra* note 2, at 67. Waldstreicher expounds that it made sense to "de-emphasize actual slaves in favor of the king's tyranny . . . ." WALDSTREICHER, *supra* note 5, at 47. Meanwhile, Jefferson could "feel as if he had tried his best to seize the Revolutionary moment to give American slavery a fatal wound." *Id.* According to Arendt, the American Revolution lacked "the passion of compassion", which she deemed to be "the most powerful and perhaps most devastating passion motivating revolutionaries. . . ." ARENDT, *supra* note 33, at 72. During the revolutionary years, almost one in every five inhabitants was a slave. However, Arendt points out, slaves were totally overlooked by the American revolutionaries. But Jefferson, "and others to a lesser degree, were aware of the primordial crime upon which the fabric of American society rested . . . ." ARENDT, *supra* note 33, at 71. They "were convinced of the incompatibility of the institution of slavery with the foundation of freedom, [but] not because they were moved by pity or by a feeling of solidarity with their fellow men." *Id*.

expressed their thoughts on slavery. Some, including Virginia slaveholders James Madison and George Mason, condemned slavery; others were ambivalent about it; others defended it, resorting to realism and convenience, discarding idealistic trains of thought. James Madison said: "We have seen the mere distinction of color made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man." [137]

While discussing how representation in the House would be determined, Pierce Butler –a wealthy South Carolina, Irish-born rice planter– uttered that the labor of a slave in his state "was as productive and valuable as that of a freeman in Massachusetts," and that "an equal representation ought to be allowed for them in a government which was instituted principally for the protection of property . . . ."[138] Butler also told the convention that "the security the southern states want is that their Negroes may not be taken from them, which some gentlemen within or without doors, have a very good mind to do."[139] James Wilson, of Pennsylvania, answered Butler that "all men wherever placed have equal rights and that he could not agree that property was the sole or the primary object of government and society."[140]

Maryland's Luther Martin, who had "domestic" slaves, presented a motion to give Congress the power to bar the further importation of slaves. He stressed that slavery "was inconsistent with the principles of the Revolution and [it was] dishonorable to the American character to have such a feature in the Constitution."[141] John Rutledge, from South Carolina, took exception, stating that religion and humanity "had nothing to do with this question . . . Interest alone is the governing principle with nations."[142] Irons describes Virginian George Mason's position: "Despite being a slave owner himself, he denounced the 'infernal traffic' in slaves and rebuked those northern states that allowed a 'lust of gain' from commerce to cloud their moral vision. Mason added that 'the judgment of heaven' fell on countries that allowed the 'nefarious traffic' in slaves."[143]

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[137] WALDSTREICHER, *supra* note 5, at 75; IRONS, *supra* note 51, at 31.

[138] IRONS, *supra* note 51, at 31.

[139] *Id*. at 32.

[140] *Id*. (quotation marks omitted).

[141] *Id*. at 34.

[142] *Id*. (quotation marks omitted). Rutledge seemed to echo the Aristotelian notion that interest, what we know as economic motivation, "does and should rule supreme in political matters." ARENDT, *supra* note 33, at 22.

[143] IRONS, *supra* note 51, at 34-35. The Southern elites used slavery as a perennial trump card. There are many instances when they reminded those less attached to slavery that they would not join the Confederacy, or the regime to be established under the 1787 Constitution, or that they would secede, if their "property" rights over slaves was threatened. Emancipation provided to the Northern elites the political benefit of taking away from the Southern ones that source of extortion which slavery had represented.

Those debates illustrate the fact that the 1776 separatists and the 1787 framers (both times convening at the same State House in Philadelphia) had a hard time squaring slavery with their liberal/republican notions, and with the establishment of a national, republican government in the new Constitution. The moral dilemma was always there and they were very much aware of it, even if some dismissed it. The Taney court has no excuse, as it was familiar with the Madison notes on the debates of the 1787 convention. The same had been available since 1840.[144] Since the creation of the short-lived Confederation, when slavery and its implications were first debated among the elites, "no one," including the Southerners, "tried to justify slavery beyond asserting its necessity and Northerners' complicity."[145] Why?

It is not a stretch to assert that the elites that declared independence knew all-too-well that slavery contradicted their liberal creed, and that no moral justification was available to them. After all, the immorality of slavery was an extreme form of "treat[ing] people as means rather than ends."[146] The moral principle of human dignity commands "treating someone else as a fellow human being" instead of as "a resource for the benefit of others."[147] However, *realpolitik* and economic interests carried the day, as it often happens. The inability to live up to the dictum that "all men are created equal" would haunt the United States to the present day.

iv. Reality and Dishonor

In order to write, and accept, Taney's opinion in *Dred Scott*, selective memory and outright lies must pass for history and truth, while amoral notions of humanity are seen as the inevitable order of things. To be persuaded by the opinion's version of history and morality is tantamount to accepting the thesis that, when the separatists at Philadelphia declared the self-evident truth of human equality, those humans of African descent gave them no pause; that More-Melanin-Humans never entered their minds; and that, somehow, such obliviousness redeems the founding elites. Moreover, in Taney's version of history, nothing in the culture or law of the times

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[144] In his concurrence, Justice Campbell quotes from Madison's notes. Dred Scott v. Sandford, 60 U.S. 393, 498 (1857).

[145] WALDSTREICHER, *supra* note 5, at 54. During the process of deliberation and debate that took place in the states prior to ratifying the Constitution, the moral problem posed by slavery and the slave trade was brought up by those who opposed ratification. Some men with impeccable revolutionary credentials deemed that the pro-slavery constitution which emerged from Philadelphia betrayed the principles of freedom that justified the violence of the Independence War. George Washington and others who owned slaves were even denounced as hypocrites. *See Id.* at 108-09, 115-23, 126-32.

[146] DWORKIN, *supra* note 108, at 11. Likewise, "government must treat its citizens with the respect and dignity that adult members of the community claim from each other." *Id*.

[147] *Id*.

hinted toward another way of viewing those humans, other than as "property" or as "beings of an inferior order."

In Taney's picture, there were no abolitionists; no slaves demanding the freedom declared in 1776; no debates among the elites as to the abhorrence of slavery; no denouncing of the compromises with the slave owners that reached the letter of the 1787 Constitution. Taney's version is simplistic, incomplete, and tailor-made for a racist worldview and an exclusionary constitutionalism. It is true that the fervor of the revolutionary period waned quickly and, when the dust settled, free Afro-Americans were treated, at best, as second-class citizens. Even those More-Melanin-Humans who fought in the revolutionary army for "life, liberty, and the pursuit of happiness" would have a hard time trying to enjoy the "blessings of liberty." By the early 19th century, most of them would be denied the right to vote, an essential civic prerogative in a republic. However, that reality is unable to hide the fact that slavery, and treating free Afro-Americans as second-class citizens, were a betrayal of the principles of 1776, and the founders knew it. They just opted for founding their empire.

Dred Scott was the climax of a body of law that had been moving in the *antebellum* years:

> [T]oward a goal it never quite reached: the declaration that not only was the U.S. a white man's nation, but black chattel slavery was constitutionally protected throughout the land. That was the legal prison in which Roger Taney tried to lock Dred Scott and his people forever. It was what had to be broken open by new laws hammered home by Union arms.[148]

For a little while, though, that was the law of the land: "Throughout the Americas differing legal regimes supported systems of slavery based on race. Taney's opinion took American law a step further. It endorsed race-based citizenship." [149]

According to Shklar, that very American version of citizenship has had effects that include a particular way of viewing civic membership, which gives emphasis to citizenship's capacity to provide respect and social dignity.[150] The denial of full civic membership has produced a constant struggle for recognition of the trappings of citizenship, a demand "for inclusion in the polity."[151] That struggle has defined

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[148] SMITH, *supra* note 2, at 252-53.

[149] COTTROL, *supra* note 8, at 81. Cottrol adds that "Taney's jurisprudence of exclusion was . . . ironically enough, more related to the greater democratization and heightened egalitarianism of the United States in the antebellum era and how the nation would handle the tensions inherent in a society that celebrated freedom and equality while also practicing slavery and inequality." *Id*.

[150] SHKLAR, *supra* note 3, at 1-2, 16.

[151] *Id*. at 3.

how Americans, first and second class, have viewed civic membership in the United States.[152] Because exclusion has been so common throughout American history, "citizenship was . . . always something that required prolonged struggle, and this has also molded its character."[153] Moreover, "[t]he value of citizenship was derived primarily from its denial to slaves, to some white men, and to all women."[154]

It is anachronistic to still hold that heredity defines humans' station in life. Monarchs, noblemen and the Church resorted to that idea to claim the legitimacy of their power. Still today, in 21st century United States, that view holds considerable sway. There is still the tendency to assign automatic merit and worthiness to a certain kind of humans, and to negate them to others, based on the irrelevant criterion of the hue of their skin. Pigmentation as a proxy for merit is a bad idea, but it is still present in American culture. It still holds sway, however insidiously and unacknowledged. Chief Justice Taney punctuated that the men who framed the Declaration of Independence were "high in their sense of honor." That raises the question whether there is honor, or dignity, in claiming that the United States was, is, and must continue to be, a "white country."

B. The Death Knell of a Constitutional Clause

One of the outcomes of the Civil War, or the War of the Rebellion,[155] was the formal emancipation of the slaves. The tragedy of the supposedly freed humans, who saw emancipation as a new beginning, was the rapid dashing of their hopes by a legally-sanctioned regime of inequality, quasi-slavery, and terror, which was explicitly and unapologetically based on the notion of "race" and outright racism.

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[152] *Id*. at 15.

[153] *Id*. at 15.

[154] *Id*. at 16. Citizenship in the United States has entailed free labor and political rights, expounds Shklar, which in turn provide social standing. *Id*. at 1-2. Working, and earning a reward for one's labor, is considered a "social right," a "primary source of public respect." *Id*. at 2. Moreover, "paid labor separated the free man from the slave;" while the central political right, the right to vote ("the ballot") has "always been a certificate of full membership in society, and its value depends primarily on its capacity to confer a minimum of social dignity." *Id*. at 2. In the United States, those "two great emblems of public standing" have been so significant that those excluded from their exercise "feel dishonored, not just powerless and poor." *Id*. at 3. Lasch, however, argues that selling our labor led to new forms of dependence which shattered competence and self-reliance, substituting the 19th century individualist with the current insecure, self-absorbed narcissist. More generally, new forms of dependence substituted the defunct paternalisms of monarchs, authoritarian fathers and slave masters. The corporate monopoly –all needs are now satisfied, and even created, by corporations– killed self-reliance and even citizenship, turning Americans into passive, neurotic, illiterate consumers. *See* LASCH, *supra* note 7, at 8-12, 228-32. *See also*, CHRIS HEDGES, EMPIRE OF ILLUSION: THE END OF LITERACY AND THE TRIUMPH OF SPECTACLE (2009).

[155] *See* COTTROL, *supra* note 8, at 109.

Professor Tribe has expounded that the Civil War "settled at least two issues, the existence of slavery and the supremacy of the national government."[156] The military victory of the Union was "given constitutional expression" in the Thirteenth, Fourteenth and Fifteenth Amendments.[157] The Fourteenth Amendment "approached unification under a supreme national government" by making "state citizenship derivative of national government and [transferring] to the federal government a portion of each state's control over civil and political rights."[158] The Civil War Amendments were supposed to aid the new freedmen and women.[159] But, after the Civil War, the situation for the newly-freed humans was dire.[160] The approval of the Thirteenth Amendment only exacerbated the resolve of the defeated southerners. For More-Melanin-Humans "across the South, 1865 and 1866 were years of terror."[161]

As Justice Powell acknowledged it in *Regents of the University of California* v. *Bakke*,[162] the Fourteenth Amendment's Equal Protection Clause was "virtually

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[156] I LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 148 (2nd ed. 1988).

[157] *Id*.

[158] *Id*.

[159] The term "Civil War Amendments" refers to the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution, ratified in the aftermath of the Civil War, in 1865, 1868 and 1870 respectively, to minimize that insecurity and hostility. A better term, used by Professor Tribe and others, might be the "Reconstruction Amendments." The Thirteenth Amendment abolished slavery and involuntary servitude "within the United States, or any place subject to their jurisdiction," except "as a punishment for crime whereof the party shall have been duly convicted." Section 1 of the Fourteenth Amendment declared that all persons born or naturalized in the United States "are citizens of the United States and of the State wherein they reside." It also mandated that "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Fifteenth Amendment established that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The three amendments provide that "Congress shall have power to enforce" each one of them "by appropriate legislation." The Reconstruction Congress did enact legislation to enforce the amendments. *See*, *e.g*., I TRIBE, *supra* note 156, at 330 n. 2; ZINN, *supra* note 41, at 198; SMITH, *supra* note 2, at 286. The story of the virtual annulment of those provisions by Supreme Court decisions –issued mainly between 1873 and 1896, but even thereafter– is another complex and unfortunate chapter in the history of the United States. *See* I TRIBE, supra note 156, at 330-31; IRONS, *supra* note 51, at 198-205, 211-15, 224-32.

[160] The Civil War "left some four million newly freed Blacks with little security in a hostile environment. State Black Codes, severely restricting the new freedmen's mobility, employment, and civil status, promised to replace the formal institution of slavery with a new form of subjugation." BARRON, ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 453 (8th ed. 2012).

[161] IRONS, *supra* note 51, at 191. For a description of the violence and outright massacres suffered by "freed" humans at the hands of "white" mobs during 1865 and 1866, see *Id*. at 191-92; HOFFER, *supra* note 7, at 23-25; DAVID O. STEWART, IMPEACHED: THE TRIAL OF PRESIDENT ANDREW JOHNSON AND THE FIGHT FOR LINCOLN'S LEGACY 30-33 (2009).

[162] 438 U.S. 265 (1978).

strangled in infancy by post-civil-war judicial reactionism."[163] In the *Slaughter-House Cases*,[164] the Supreme Court inflicted the first casualty of that "judicial reactionism," victimizing the Fourteenth Amendment's Privileges or Immunities Clause, thus paving the way for the subsequent nullification of the Reconstruction Amendments.[165] That was one of the ways in which the law sanctioned the inequities and abuses suffered by millions of supposedly freed Americans of African descent for the next one hundred years and beyond.

i. An Unintelligible Majority Opinion

In *Slaughter-House*, butchers challenged a Louisiana statute which gave to a certain corporation the monopoly of slaughtering cattle in the City of New Orleans. The law proscribed everyone else from engaging in such occupation, except in the facilities of the newly-created entity, and with payment of a fee.[166] Plaintiffs, all of them Less-Melanin-Humans, relied on the recently enacted Thirteenth and Fourteenth Amendments, particularly the privilege and immunities, equal protection of the laws and due process clauses of the latter's Section 1.[167] The Opinion for the majority, by Justice Samuel Miller, had the ultimate effect of allowing the States alone to determine which civil rights –if any– they would recognize to the "newly-freed" population. *Slaughter-House* was the Court's first effort toward that result,

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[163] *Id.* at 291 (brackets omitted).

[164] 83 U.S. 36 (1876).

[165] The Court defined Reconstruction as "[t]he process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion . . . ." *Id.* at 70.

[166] The challengers of the statute:

> [D]enounced [it] not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons . . . but . . . that it deprives a large and meritorious class of citizens –the whole of the butchers of the city– of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families, and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

Id. at 60. Regardless of the real pollution and health problems that the Louisiana statute was to remedy, the legislators were bribed by those who were granted the monopoly. *See* IRONS, *supra* note 51, at 199.

[167] Miller rejected at the very beginning of his opinion the claim that the Louisiana statute deprived plaintiffs of their right to work as butchers. According to the Court, the butchers are "permitted to slaughter, to prepare, and to sell [their] own meats; but [they are] required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished [them] at that place." *Slaughter-House,* 83 U.S. at 61. The Court added: "The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation . . . ." *Id*. Since the states have ample police power, which the Constitution normally does not limit, this type of regulation is valid. *Id.* at 62-63. Given the majority's stance, there seemed to be no need to decide the constitutional intricacies supposedly raised by the plaintiffs' challenge under the Reconstruction amendments.

while *Plessy* v. *Ferguson* stroke the *coup de grace*, by sanctifying the segregation laws passed by the states of the rebelling Confederacy and elsewhere.

Miller first asserted that the purpose of the Reconstruction amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." [168] He added, however, that the amendments also protect everyone else, regardless of race or color.[169] Immediately thereafter, the Court acknowledged its decision in *Dred Scott*, particularly its holding "that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States."[170] Such ruling:

> [H]ad never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.[171]

Section 1 of the Fourteenth Amendment sought to overturn *Dred Scott*, "and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State . . . ."[172]

Justice Miller then proceeded to face plaintiffs' challenge under the privileges and immunities clause of the Fourteenth Amendment. The original Constitution included a privileges and immunities clause, which provides that "[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[173] Section 1 of the Fourteenth Amendment also includes a privileges and immunities clause, establishing that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[174] But then, the trouble begins, as the opinion turned convoluted and ugly; thus, hard to follow.

Miller recognized that the citizenship clause of Section 1 "declares that persons may be citizens of the United States without regard to their citizenship of a

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[168] *Id.* at 71.

[169] *Id.* at 72.

[170] *Id.* at 73.

[171] *Id*.

[172] *Id*. On this point, the dissenters would beg to differ with Miller. For the minority, the Fourteenth Amendment was meant to establish that those born or naturalized in the United States are citizens of the nation and of the states in which they would reside, thus giving primacy to United States citizenship and making state citizenship dependent on it.

[173] U.S. CONST. art. IV, § 2, cl. 1.

[174] U.S. CONST. amend. XIV, § 1.

particular State . . .”[175] and that to convert a U.S. citizen into a citizen of a State, he “must reside within the State to make him a citizen of it . . . .”[176] But, he qualified, Section 1 created a “distinction” –there is “a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.”[177] And that distinction is “of great weight,” because Section 1:

> [S]peaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.[178]

Miller rejected that “assumption,” giving significance to the clause’s omission of the phrase “citizens of the States;” and deducting that there are two sets of privileges and immunities, with different contents: those of citizens of each of the States (pursuant to Art. IV); and those of citizens of the United States (pursuant to the 14th Amendment’s Section 1).[179]

The sophistry acquired epic proportions. Miller surmised that only “the privileges and immunities of the citizen of the United States . . . are placed by [Section 1] under the protection of the Federal Constitution . . .” while “the privileges and immunities of the citizen of the State . . . are not intended to have any additional protection by this paragraph of the amendment.”[180] Section 1’s privileges and immunities clause, held the Court through Miller, offers “no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.” [181]

> [Its] sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on [its] exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.[182]

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[175] *Slaughter-House Cases*, 83 U.S. at 73.
[176] *Id.* at 74.
[177] *Id*.
[178] *Id*.
[179] *Id*.
[180] *Id*.
[181] *Id.* at 77. If the clause offers “no security for the citizen of the State in which they were claimed or exercised,” in which situations does it offer security? Since Section 1 is to be raised against the States, that question is pertinent indeed.
[182] *Id*. Was not that the purpose of the original privileges and immunities clause of Article IV? Why need then another privileges and immunities clause?

And what, according to Miller, are the privileges and immunities of the "citizens of the United States" that the States shall not abridge? Those are, he asserts, in the Constitution already: The prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. Apart from those, "the entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal government."[183] Are there other "privileges and immunities" attached to the United States citizenship? Miller said that there are. And which are those? According to Miller, they amount to the citizen's rights to:

> [C]ome to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.[184]

The privileges and immunities of citizens of a State, on the other hand, are those which are "fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign."[185] They include, but are not limited to "protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." [186]

ii. The Dissents Make Sense of It All

In his dissent, Justice Field exposes the absurdity of Miller's stance, observing that Miller's construction is tantamount to a Fourteenth Amendment which accom-

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[183] *Id*.

[184] *Id.* at 79 (quotation marks omitted). To that list, the Court added the following:

> Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State.

Id. at 79-80.

[185] *Id.* at 76.

[186] *Id*.

plished nothing, "a vain and idle enactment . . . ."[187] Had Justice Field written the opinion for the majority, the Court would have reasoned that the Thirteenth, Fourteenth and Fifteenth Amendments protect the citizens of the United States against the deprivation of their rights by the States; that the Fourteenth Amendment overturned *Dred Scott*, by making the citizenship of the United States dependent upon the place of the person's birth, or their naturalization, and not upon the condition of their ancestry; that citizens of a State are now citizens of the United States residing in a State. This would result in that those new citizens, like every other citizen, have fundamental rights, privileges, and immunities, as citizens of the United States, which are not dependent upon their citizenship of any State. Those rights are now under the protection of the federal government.

Field reminded Miller and others with short memories how Congress had passed the Civil Rights Act of 1866 as a step toward the enforcement of the Thirteenth Amendment, which abolished slavery and involuntary servitude.[188] That 1866 statute, significantly, established that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are "citizens of the United States." This entailed that such citizens shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of

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[187] *Id.* at 96. Field estimated that the challenged Louisiana statute went too far in detriment of plaintiffs' civil rights:

> The act . . . presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively for twenty-five years, for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and there allowed only upon onerous conditions.

Id. at 88-89. However, he was not prepared to accept the argument that the act was tantamount to enslaving plaintiffs, although he observed that the Thirteenth Amendment "is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of black men is prohibited, and not merely slavery in the strict sense of the term, but involuntary servitude in every form." *Id.* at 90.

[188] Field expounded that the words "involuntary servitude" must at a minimum encompass "something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others." *Id.* at 90. The abolition of slavery and involuntary servitude gave everyone "the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor." *Id*. A prohibition "to pursue certain callings, open to others of the same age, condition, and sex, or to reside in places where others are permitted to live, would so far deprive [the citizen] of the rights of a freeman, and would place him, as respects others, in a condition of servitude." *Id*.

person and property, as enjoyed by white citizens.[189] As Field correctly expressed it, the Fourteenth Amendment was approved by Congress to ensure the validity of the 1866 Civil Rights Act, which Congress then reenacted after the ratification of the Amendment. [190] That statute, argued Field, established what amounted to "privileges and immunities," which belong to every citizen of the United States.

In contrast to the majority's stance, Field took the position that the purpose of the Fourteenth Amendment, including its privileges and immunities clause, was "to place the common rights of American citizens under the protection of the National government."[191] It did so by overturning Taney's holding in *Dred Scott* that only whites living in the States in 1788 were "the people," the citizens of the United States, and that only their descendants are entitled to that civic membership in exclusion of blacks and their descendants. The amendment, wrote Field:

> [R]ecognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.[192]

In his separate dissent, Justice Bradley stressed how the Fourteenth Amendment settled once and for all "that citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence."[193] He immediately added:

> The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every

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[189] *Id.* at 92. Relying on the act's legislative history, Field asserted that the statute in question found support "upon the theory that citizens of the United States as such were entitled to the rights and privileges enumerated, and that to deny to any such citizen equality in these rights and privileges with others, was, to the extent of the denial, subjecting him to an involuntary servitude." *Id.* at 91-92.

[190] *Id.* at 93, 96-97.

[191] *Id*. at 93.

[192] *Id.* at 95. Notice the clarity of Field's opinion, in contrast to Miller's almost unintelligible play-on-words.

[193] *Id.* at 112.

> other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.[194]

Bradley even included the rights listed in the amendments of 1791 –the Bill of Rights– as part of the "privileges and immunities" of citizens of the United States, presaging by many decades the doctrine of incorporation.[195] In words that he and his fellow justices would not exactly heed in future cases, he asserted that "we shall be a happier nation, and a more prosperous one than we now are" if and when "the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to this right" to equality.[196]

iii. The Significance of Nullifying the 14th Amendment

Mob violence, and plain old terror, was visited upon the former slaves from 1865 up to the abrupt end of Reconstruction in early 1877 and would continue for decades to come. It was a daily occurrence when *Slaughter-House* was decided.[197] *Slaughter-House* was the beginning of the judicial nullification of the Reconstruction Amendments, facilitating not only Jim Crow regimes, [198] with the

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[194] *Id*. at 112-13.

[195] *Id.* at 118-19. Meanwhile, the following passage of Bradley's dissent presaged his opinion in *Civil Rights Cases*, 109 U.S. 3 (1883), and the court's decision in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896):

> The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the State, or city, or town where he resides. They are thus affected in a State by the wisdom of its laws, the ability of its officers, the officiency [sic] of its magistrates, the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the State, or by the residence of the citizen therein.

Slaughter-House Cases, 83 U.S. at 95.

[196] *Slaughter-House Cases,* 83 U.S. at 113.

[197] The Colfax Massacre, in Louisiana, took place the day before the Court issued its decision in *Slaughter-House Cases*. That "real slaughter" was the background of another Supreme Court decision which facilitated mob rule and terror, *United States* v. *Cruikshank*, 92 U.S. 542 (1875). *See* IRONS, *supra* note 51, at 202.

[198] Jim Crow legal regimes were characterized by state statutes "mandating separate and stigmatizing treatment for Americans of African descent . . . ." COTTROL, *supra* note 8, at 1. Those regimes "would come to dominate race relations in the American South for the first six decades of the twentieth century." *Id*. at 174. Originally, "Jim Crow" was a character of one of the minstrel shows that crisscrossed the United States in the nineteenth century, providing entertainment to the population. In many of those shows, "white performers blackened their faces, allowing them to tell crude stories and sing lewd lyrics, included stock negative stereotypes." HOFFER, *supra* note 7, at 11-12. However, segregation of

concomitant disenfranchisement and socioeconomic marginalization of More-Melanin-Humans, but also lynching, outright terror and the virtual return to slavery of scores of Southern More-Melanin-Humans through the peonage and arbitrary incarceration. [199]

The proper construction of the Fourteenth Amendment was not adopted by the Court in 1873, a course of action that was not corrected during the remainder of the 19th century, but which was followed in later decisions.[200] Why? Zinn answers that question thusly: "Northern political and economic interests needed powerful allies and stability in the face of national crisis. The country had been in economic depression since 1873, and by 1877 farmers and workers were beginning to rebel . . . It was a time for reconciliation between southern and northern elites." [201]

Professor Smith focuses on the seeming contradiction of the Republican Party's dominance of American politics from 1860 until 1912, and the demise of

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schools and public spaces was not invented by the Southern states, but by the North. *Id*. at 40. After all, the South had no need to mandate the segregation of people of African descent, since almost all of them were already segregated as plantation and house slaves. Emancipation prompted the South to imitate the segregation measures invented elsewhere. Moreover, segregation did not come all at once in the South, and it was arguably stimulated in no small part by "the urbanization, industrialization, and transformation of the South from a cash-crop economy into a more diversified, commercial one." *Id*. at 42. The impetus of American-style *apartheid*, however, had a political and a psychological dimension. That was so, inasmuch as it was another instance of exploitation of human proclivities and deficiencies at the service of the social and political control of both whites and blacks, particularly the masses of poor and working-class white citizens and newly freed blacks. Professor Cottrol draws attention to the fact that at the end of the Civil War, blacks amounted to no more than ten percent of the U.S. population. Yet, "that numerical dominance did not bring sufficient comfort to American advocates of white supremacy." COTTROL, *supra* note 8, at 173. Hence:

> [T]he concern of white supremacists in the United States had less to do with the possibilities of black majorities than with how to maintain white domination, a superiority that would have to be regularly reaffirmed, preferably on a daily basis. To achieve that end, white supremacists would fashion a legal regime [(Jim Crow)] mandating strict separation and formal definition of the races that would be unique in the post-emancipation Americas.

Id. at 173-74.

[199] Peonage, also known as debt slavery or debt servitude, was an abusive, exploitative system akin to slavery. It allowed "employers" to compel black workers to work for them until they paid off a debt. In the South, black men were arrested for minor crimes and even on trumped-up charges. When faced with staggering fines and court fees, they were forced to work for someone who would pay the fines for them. Southern states also leased *en masse* their convicts to local industrialists. To compound the abuse, the paperwork and the debt records of those men were often "lost," trapping them in inescapable, hopeless situations. That modality of peonage took advantage of the loophole embodied in the Thirteenth Amendment, which allowed involuntary servitude "as a punishment for crime."

[200] Zinn asserted: "The Supreme Court played its gyroscopic role of pulling the other branches of government back to more conservative directions when they went too far. It began interpreting the Fourteenth Amendment –passed presumably for racial equality– in a way that made it impotent for this purpose." ZINN, *supra* note 41, at 204-05.

[201] *Id*. at 205.

Reconstruction, aided by "lethal blows against Reconstruction statutes" struck by the Supreme Court. [202] Smith finds part of the explanation to Reconstruction's collapse in the economic, capitalist and sociocultural factors, which W.E.B. Du Bois developed. [203] However, relying on his "multiple traditions approach," Smith disagrees with DuBois in the assessment that race hatred obscured the real underlying industrial causes. Smith contends that "white commitments to racial hierarchy emerge as even more pivotal than capitalism in explaining the end of America's radical hour."[204] Moreover, asserts Smith, "the broader resurgence of notions of racial superiority . . . gave value to the 'psychological wage' of white supremacy, a 'wage' that Du Bois correctly invoked to explain alliances of rich and poor that fly in the face of both Marxian and liberal notions of economic self-interest." [205]

In any event, law enabled the oppression of human beings, but it eventually began carving a path toward making good on the Fourteenth Amendment's pledge of admittedly modest formal equality. Even before *Brown* v. *Board of Education*, [206] the Supreme Court had begun to undermine what amounted to a regime of segregation and utter socioeconomic marginalization, although under the "separate but equal" framework of *Plessy*.[207] The civil rights legislation of the 1960s was

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[202] SMITH, *supra* note 2, at 287: "If Reconstruction is seen as triumphantly correcting the one great exception to a hegemonic liberal democratic creed, then its collapse despite its sponsoring party's hold on power seems inexplicable."

[203] A plausible account of the eclipse of Reconstruction "must give weight to all the factors Du Bois identified: Northern capitalist and Southern planter desires for a stable economy untainted by labor radicalism, white labor fears of black competition, ideological beliefs in private property and the adequacy of market systems for all, as well as the reinvigorated racist doctrines he described." *Id.* at 288.

[204] *Id*. He also underscores the emergence of new notions of racial differences based on biological and social evolution, "elevating the intellectual credibility of scientific racism to new heights." *Id*. This racism, "old and new, mass and elite, proved most crucial to Reconstruction's demise." *Id*.

[205] *Id*. Smith acknowledges Du Bois' contribution to the understanding of the role of race in the broader cultural ethos of the late 19th and early 20th centuries. Du Bois identified that racism "divided labor and facilitated the capitalist-planter alliance" which Zinn also emphasized. *Id.* at 287.

[206] *Supra*, note 37. By definition, inequality is the absence of law. That principle justifies the question of whether there was in the United States a regime of law before the civil rights reforms. That country, I sustain, began to walk a path toward the "rule of law" only when it started to recognize equal formal rights. The end of that road has not been attained for myriad reasons, including the structural defects of American representative democracy, historically and culturally sustained structural inequities, and the substantive deficiencies of the current civil rights regime.

[207] *See*, *e.g*., McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) ; Sweatt v. Painter, 339 U.S. 629 (1950); Shelley v. Kraemer, 334 U.S. 1 (1948); Smith v. Allwright, 321 U.S. 649 (1944); State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1939); Buchanan v. Warley, 245 U.S. 60 (1917).); For a discussion of the 20th century civil rights litigation that produced those and other decisions, mostly the work of the NAACP, see ROBERT J. COTTROL, ET AL., BROWN V. BOARD OF EDUCATION: CASTE, CULTURE AND THE CONSTITUTION (2003).

also an important step. Legal changes and developments were the product as well as the catalyst of the advancements in the realm of civil rights. The concomitant transformations in American society show that, contrary to what the Court stated in *The Civil Rights Cases*[208] and in *Plessy* v. *Ferguson*,[209] law is not powerless in the face of cultural forces, practices and mores. Law can be used, and sometimes aims, to civilize.[210]

C. The Lone Dissenter: Presentism is Not Necessary

In *Plessy* v. *Ferguson*, [211] the Supreme Court rejected Homer Plessy's argument that Louisiana's Separate Car Act of 1890 abridged his rights to equal protection of the laws under the Fourteenth Amendment; or that such law was a badge of inferiority that made it an incident of slavery, in violation of the Thirteenth Amendment.[212] If presentism is to be avoided, an examination of contemporary critics of what we

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[208] 109 U.S. 3 (1883).

[209] 163 U.S. 537 (1896). Professor Dudziak found that the U.S. Government undertook civil rights reforms, as part of its Cold War effort to win "the hearts and minds" of the third world. Dudziak encountered multiple State Department sources, beginning in the late 1940s, showing concern with the image of "American democracy" abroad, particularly in the face of Jim Crow regimes and the abuses spawned by racism and inequality. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000). She also found that, since the Truman Administration, the U.S. Justice Department urged the Supreme Court, in the Amicus Curia briefs it filed in cases involving challenges to segregation, to consider the foreign relations and image implications of decisions upholding Jim Crow practices. *Id*. at 90. Consonant with those findings, Professor Smith contends that "there have been three great eras of democratizing American civic reforms: The Revolution and Confederation years, the Civil War and Reconstruction epoch, and the civil rights era of the 1950s and 1960s." SMITH, *supra* note 2, at 16. Accordingly, it is telling that "during all these periods Americans fought great wars against opponents hostile to such ideals, first the British monarchy, then the Southern slavocracy, then the totalitarian regimes of Hitler and Stalin in World War II and the Cold War years." *Id*. Smith's sobering conclusion is that only "when those circumstances made fuller pursuit of egalitarian liberal republican principles politically advantageous –indeed necessary for national elites– did Americans create state and national democratic republics, free slaves, end Jim Crow, and expand women's rights." *Id*.

[210] Professor Cottrol thus asserts that "the civil rights movement demonstrated the law's liberating power. As the law changed, the nation changed, and for the better . . . The civil rights movement and the legal change it brought stands as testimony to the transformative power of law." COTTROL, *supra* note 8, at 211.

[211] 163 U.S. 537 (1896). *Plessy* was the climax of a set of Supreme Court decisions that obliterated the Civil War Amendments and nullified Reconstruction. *See* Slaughter-House Cases, 83 U.S. 36 (1876); United States v. Cruikshank, 92 U.S. 542 (1875); The Civil Rights Cases, 109 U.S. 3 (1883).

[212] The narrow judicial interpretation of the Reconstruction amendments was another compromise, yet another concession to the South: "The unconstitutionality of state secession had been settled by violence within recent memory. Sectional reconciliation now rested on the unsteady foundation of reinvented racial subjugation, redesigned to pass constitutional muster." Christina Duffy Burnett, *The Constitution and Deconstitution of the United States*, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSION 183 (Sanford Levinson & Bartholomew H. Sparrow eds. 2005).

now consider bad law and horrible policy is in order. In his dissent in *Plessy* v. *Ferguson*, Justice John Marshall Harlan denounced the Jim Crow legal regimes already in place in many States, particularly those of the old Confederacy.

Harlan observed that the white population in those states was pretending "to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race."[213] He called that body of regulations a "sinister legislation,"[214] pointing that its goal was "to defeat legitimate results of the war . . ."[215] namely the new legal regime that the three Civil War Amendments were supposed to establish. Justice Brown's majority opinion does not even attempt to contradict Harlan's characterizations. The majority simply washed their hands and let the Southerners have it their way. The militarily vanquished won the war after all, by keeping their cherished white supremacy and their access to cheap labor, now sanctioned by state and federal law.

The Fourteenth Amendment, Harlan reminded, was designed to overrule the doctrine of white supremacy expounded by Chief Justice Taney in *Dred Scott* v. *Sandford*,[216] which stated that since the adoption of the Constitution, More-Melanin- Humans were "considered as a subordinate and inferior class of beings . . . ."[217] As already noted, in ruling against Scott, Taney pretended that he was upholding the original understanding of the place of More-Melanin-Humans in the American Republic. In *Plessy*, the Court sided with Taney, as if the Fourteenth Amendment made no difference. [218] Segregation and oppression represented the victory of Taney's racist vision. Harlan recognized the significance of the majority's decision, which not only sanctioned the American brand of apartheid, but scores of concomitant abuses and injustices, including the pseudo slavery of the peonage system and the terror of lynching. [219]

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[213] *Plessy*, 163 U.S. at 560.

[214] *Id*. at 563.

[215] *Id*. at 560-561.

[216] 60 U.S. 393 (1857).

[217] *Plessy*, 163 U.S. at 559 (*quoting Dred Scott*, 60 U.S. at 404-05).

[218] The Court stated that the purpose of the Fourteenth Amendment "was undoubtedly to enforce the absolute equality of the two races before the law . . . ." *Plessy*, 163 U.S. at 544. Immediately thereafter, it qualified that statement, clarifying that "in the nature of things," the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either." *Id*. It cites *Strauder* v. *State of West Virginia*, 100 U.S. 303 (1879) and *The Civil Rights Cases*, 109 U.S. 3 (1883), for the proposition that the Court had already distinguished between "laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages . . . ." *Id*. at 545. According to such distinction, excluding black jurors on account of their race violates the Fourteenth Amendment (*Strauder*), but it is valid to enact laws which permit and even require the separation of whites and blacks "in places where they are liable to be brought into contact . . ." (*The Civil Rights Cases*). *Id*. at 544.

[219] Harlan articulated a prescient warning:

Harlan also had no difficulty identifying the purpose of the Louisiana legislation at issue in *Plessy*, "to compel [More-Melanin-Humans] to keep to themselves while traveling in railroad passenger coaches."[220] Harlan deemed that as an abridgment of their civil rights, inasmuch as it interfered "with the personal freedom of citizens," which includes "the power of locomotion, of changing situation."[221] He articulates a libertarian stance: "If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each." [222] Harlan also recognized the constitutive role of law and the psychological effects of state-mandated apartheid:

> What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?[223]

> The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution, by one of which the blacks of this country were made citizens of the United States and of the states in which they respectively reside, and whose privileges and immunities, as citizens, the states are forbidden to abridge.

Plessy, 163 U.S. at 560. Harlan was proven right, of course. Some of the darkest episodes of lynching and outright abuses and injustices were still ahead.

[220] *Id*. at 556.

[221] *Id*. at 557.

[222] *Id*. As already noted, the era known as Jim Crow spawned from the concern of white supremacists with maintaining white domination, "a superiority that would have to be regularly reaffirmed, preferably on a daily basis." COTTROL, *supra* note 8, at 173. Jim Crow:

> [W]ould come to dominate race relations in the American South for the first six decades of the twentieth century . . . Voting would be restricted to white people. Government officials would openly support lynching and race riots . . . But Jim Crow was by no means restricted to the former slave states. It would infect the nation as a whole. School segregation existed in a number of states in the North and the West . . . Discrimination in employment, housing, public accommodations, and the provision of government services existed throughout the nation. The federal government would follow suit, maintaining a rigid segregation of black and white soldiers in the American armed forces through two world wars.

Id. at 174.

[223] *Plessy*, 163 U.S. at 560. Professor Tribe sums it up thusly: "Racial separation by force of law conveys strong social stigma and perpetuates both the stereotypes of racial inferiority and the circumstances on which such stereotypes feed. Its social meaning *is* that the minority race is inferior." II LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1477 (2nd ed. 1988).

D. Race and a Recycled Judicial Rhetoric

There are similarities between certain aspects of the rhetoric of the American legal regime on race relations, as it appeared in the 19th and 20th centuries, and, also, through the years of the young 21st century. The 19th century is a point of departure because much of the discourse had to be developed then, since that era was characterized by an intense attention to the race issue, particularly after the Civil War. Before the war, slavery almost disappeared in the Northern states, but continued unabated in the South and many "border states." In that same era the tensions brought by the clash between European Americans and Native Americans were reflected in the law, including the Indian Removal Act of 1830 and the decision of the Supreme Court in *Worcester* v. *Georgia*. [224]

There are parallelisms –and contrasts– between the role played by the law in the post-abolition, Reconstruction era and its role in the 1950s and 1960s. After the judicial, political, and social nullification of the promises of Reconstruction; the nadir period of the living conditions of blacks; and almost one century of Jim Crow laws and practices, the law responded with the line of judicial decisions that reached a climax in *Brown* v. *Board of Education* and the civil rights legislation of the 1960's. But there is much left to be done. Structural, material inequalities are very hard to tackle, more so, when they are rooted in that immovable force we call "culture."

In *Regents of University of California* v. *Bakke*, the first Supreme Court decision concerning affirmative action in higher education, the Court refused to create a category of "benign" racial distinctions because it would purportedly harm innocent "whites." [225] That rhetoric of innocence has found its way in other opinions.[226] The

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[224] 31 U.S. 515 (1832).

[225] *See* California v. Bakke, 438 U.S. 265, 298 (1978) ("there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making."). *Id.* at 307 ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.").

[226] *See*, *e.g.*, Parents Involved v. Seattle School Dist., 551 U.S. 701, 750 (2007) (Thomas, J., concurring) ("Racial imbalance is not segregation. Although presently observed racial imbalance might result from past *de jure* segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices."). Professor Bracey has argued that:

> [P]roponents of racial innocence assume that . . . racism is not a cultural or structural phenomenon but a product of individual racists. The rhetoric of racial innocence rests on the idea of the individual, intentional discriminator. According to this view, racism is the result of racist acts perpetrated by rogue individuals acting outside of society's rules or conventions. The focus is on the "perpetrator" as opposed to the victim of racism. The objective of antidiscrimination law, then, is to prevent the replication of racist acts by punishing the individual perpetrators of those acts.

same rhetoric partakes of the vision that race, racial preferences, and the social and economic opportunities afforded to blacks and whites are part of a zero-sum game in which the advancement of blacks in turn hurts the prospects of the white population. [227]

In his plurality opinion, Justice Powell –an aristocratic Virginian– wrote that "[t]he clock of our liberties . . . cannot be turned back to 1868. It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." [228] There is an eerie similarity between that passage and the following one in Justice Bradley's opinion in *The Civil Rights Cases*:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws,

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Christopher A. Bracey, *The Cul de Sac of Race Preference Discourse*, 79 S. CAL. L. REV. 1231, 1243 (2006) (footnotes omitted). A "related assumption underlying the rhetoric of racial innocence is that racial progress for minorities only comes at the expense of whites--a zero-sum understanding of the nature of racial progress. According to this view, racial progress for blacks cannot be obtained without some concomitant losses sustained by whites." *Id*. at 1244. Another author stated that:

> [M]any believe that blacks and other minorities luxuriate in preferential treatment at the expense of victimized and innocent whites. They believe that if minorities have not benefited from antidiscrimination laws and remain poor and powerless, it is their own fault for not mustering the skill or will to make it. It is tempting to dismiss the proponents of such views as mindless, uncaring racists who refuse to acknowledge the objective plight of minorities in America in the late 1980s. Yet that temptation must be resisted because the very same views, however despicable, are now enshrined in Supreme Court opinions, and thereby possess a frightening degree of cultural legitimacy.

Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1408 (1989). *See also* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 301 (1990) ("the rhetoric of innocence avoids the argument that white people generally have benefited from the oppression of people of color, that white people have been advantaged by this oppression in a myriad of obvious and less obvious ways. Thus, the rhetoric of innocence obscures this question: What white person is 'innocent,' if innocence is defined as the absence of advantage at the expense of others?").

[227] Professor Bell argued that, since emancipation, there has been a recognizable "apprehension about the prospect of blacks living free in white America," which:

> [C]ontinues to echo through contemporary civil rights decisions in which the measure of relief from discrimination blacks are able to gain is determined less by the character of harm suffered by blacks than the degree of disadvantage the relief sought will impose on whites. This unacknowledged formula … has resulted in an increasing number of black people being left outside the law's protection and placed at risk at a time when this country's economic and political policies are in great turmoil.

DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 1 (6th ed. 2008).

[228] California v. Bakke, 438 U.S. 265, 294-95 (1978) (citations omitted).

> and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[229]

As Justice Harlan responded to Justice Bradley, Justice Brennan responded to Justice Powell, stating that, until recently, "the Equal Protection Clause of the Amendment was largely moribund . . . ." [230] He added that:

> [W]orse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a "separate but equal" status before the law, a status always separate but seldom equal. Not until 1954 . . . was this odious doctrine interred by our decision in [*Brown*] and its progeny, which proclaimed that separate schools and public facilities of all sorts were inherently unequal and forbidden under our Constitution.[231]

Therefore, concluded Brennan:

> [C]laims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities.[232]

Today, the inequalities that still affect More-Melanin-Humans and other minority groups are harder to detect. But the impact of centuries of subordination and abuse is visible and palpable. It is doubtful, to say the least, that the law's proper response includes clinging to the same visions of the past. The same reflex responses were inadequate in the 19th century and are still inadequate today. Law reflects the culture in which it operates, as lawmakers, judges and policy makers are shaped since childhood by their culture. But cultures change at the pace of snails.

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[229] The Civil Rights Cases, 109 U.S. 3, 25 (1883). But, responded Justice Harlan in dissent, the "tyranny" of a culture that forged a society with an entrenched, structural inequality and injustice can be worse than the whims of a despot. *Id.* at 61-62.

[230] *Bakke*, 438 U.S. at 326 (citations omitted).

[231] *Id.* (citations omitted).

[232] *Id.* at 327. To Freeman, colorblindness "would be the appropriate rule in a society that had totally eliminated racial discrimination, or, more likely, had never had such a problem at all." Freeman, *supra* note 228, at 1412.

V. Teutonic Illiberality, Racism and the Rationale of Colonial Rule

A. Pseudo-Historical Ideologies of Exceptionalism and Colonial Domination

In 1898, the United States began a new stage of territorial expansion by acquiring "overseas" colonies. In doing so, the United States displayed yet another tension, that between the political and economic impetus behind expansionism and imperialism –in an ideological context that includes at its core a racist view and interpretation of social reality, history, and politics– and the official discourse of constitutionalism, which encompasses the notions of equality, political participation, and government by consent.[233] American imperial policy has been another instance of the carving of exceptions to democratic ideas and practices.

Except for the Philippines, the United States still retains the colonies it acquired in 1898. These are Puerto Rico and Guam. Puerto Rico is the most populated of the remaining overseas "possessions," which include American Samoa and the U.S. Virgin Islands, acquired in 1900 and 1917 respectively. Today, the inhabitants of Puerto Rico continue living under the laws of the United States, while the U.S. executive and judicial branches exercise their jurisdiction, as they do in the 50 States. But the residents of Puerto Rico have no political rights, no participation in Presidential and Congressional elections. That makes Puerto Rico one of the last colonies on the planet.

Spanish rule over Puerto Rico ended with an Armistice signed on August 4. This was followed by the Treaty of Paris, signed on December 10, 1898, and ratified by the United States Senate on April 11, 1899. Pursuant to Articles II and III of the Treaty, Spain ceded the archipelago of Puerto Rico ("the island of Puerto Rico and other islands now under Spanish sovereignty in the West Indies"), as well as the Island of Guam and "the archipelago known as the Philippine Islands" to the United States. Article IX of the Treaty of Paris established that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." [234] Puerto Rico became a colony of

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[233] Colonialism is also proscribed by International Law. The United Nations Charter included among the purposes of the United Nations the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." U.N. CHARTER, art. 1(2). *See also* arts. 55, 56 & 73. On December 14, 1960, the U.N. General Assembly issued a resolution declaring that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of World peace and cooperation." G.A. Res. 1514(XV).

[234] Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754. Indeed:

> [I]n the intervening century not only Congress but also the executive branch and the federal courts have determined the political and economic conditions of the people of Puerto Rico. This unilateral and arbitrary authority to determine the political condition

the United States. [235]

The late 19th century stage of United States expansionism had clear and explicit strategic, economic and political impetus, as well as historical roots.[236] There was also an ideological basis for United States overseas expansion in that period, which arguably stems from the notion of "American exceptionalism" and a concomitant superiority complex.[237] Like the idea of race, the idea of American exceptionalism goes back hundreds of years and has evolved ever since.[238] A dominant narrative in the second half of the 19th century, a variation of earlier versions of that brand of exceptionalism and mythical origins, postulated that Americans of Anglo-Saxon origins are the biological and cultural heirs of Germanic tribes with a genius for self-government and institution-building.

There were already glimpses of the idea of American specialness during the colonial era and the revolutionary period, from John Winthrop in 1625 to Benjamin Franklin, Thomas Jefferson and John Jay in the late 18th century. The set of ideas which coalesce in the notion of American uniqueness and superiority would continue to evolve and keep its vitality, up to the present day. Edmund S. Morgan describes how the 16th Century Englishmen thought of themselves as better than the Spanish, whom the English portrayed as an image of cruelty and tyranny, particularly in their colonization of the lands of the New World. [239]

England's desire for colonizing ventures of their own was joined by notions of English benevolence. English rule in America would be much better for the natives than Spain's or Portugal's had been. The English dislike of those countries and of France had, for sure, a religious undertone too. Catholic, papists countries did not practice the one, true religion; and did not share England's passion for freedom. [240]

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of Puerto Rico is the essence of colonialism. Colonialism has been and continues to be an essential element of the Puerto Rican condition and identity.

PEDRO A. CABÁN, CONSTRUCTING A COLONIAL PEOPLE. PUERTO RICO AND THE UNITED STATES, 1898-1932 1 (1999).

[235] Instead of "colony," the term that American commentators, scholars and legal actors use is "territory."

[236] *See*, *e.g.*, 1 JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 135-40 (1980); RIVERA RAMOS, *supra* note 11, at 27-34; ZINN , *supra* note 41, at 297-320.

[237] Professor Rivera Ramos indicates that "the ideology of expansion in the United States … must be included among the factors that converged to produce the imperial enterprise." RIVERA RAMOS, *supra* note 11, at 36. The notions, the "constituent elements" of that ideology, include the right to expand; the inequality of peoples; racial superiority; and a belief in free enterprise, progress, rationality, and control. *Id*. at 36-39.

[238] On American exceptionalism, see SACVAN BERCOVITCH, THE PURITAN ORIGINS OF THE AMERICAN SELF (1979); JACK P. GREENE, THE INTELLECTUAL CONSTRUCTION OF AMERICA: EXCEPTIONALISM AND IDENTITY FROM 1492 TO 1800 (1993); GODFREY HODGSON, THE MYTH OF AMERICAN EXCEPTIONALISM (2010).

[239] MORGAN, *supra* note 7, at 6-7.

[240] *Id*. at 8-9.

Indeed, abhorrence of Catholicism was part of the ideological mix. [241] During the reign of Elizabeth, "some Englishmen were ready to think of English freedom in global terms."[242] Some authors began concocting mythical, epic stories of English exploration and exploits, looking for inspiration in a mostly imaginary past to forge a vision of glorious deeds ahead.[243] One of those authors, Richard Hakluyt, "was convinced that the world would be better off under his country's dominion, and indeed that all good people would welcome it. Who would not gladly abandon the tyranny of Spain for the benevolence, the freedom of English rule?" [244]

Francis Drake's exploits in the Spanish Caribbean "suggested that liberating victims of Spanish oppression was part of the plan . . . England was bringing freedom to the New World." [245] Those ideas percolated in the colonists of North America, which were particularly visible by the time of the Revolution. By then, they saw themselves as bearers of English liberty, and as "a superior breed, with qualities that made them not only properly independent but quite possibly mankind's 'redeemer nation.'" [246] After all, those colonists did believe from the outset that they shared in a unique inheritance of liberty –English liberty. It was more myth than reality, which attest to the power of fiction in human minds and the deeds inspired by mythical ideas. An important aspect of that mythical past and present was "that Britain's legal traditions were uniquely protective of political, religious, and personal liberties." [247] The British colonists would assimilate and reproduce that idea, and use it in the mid-18th century to justify their demands of "no taxation without representation."

The sense of exceptionalism would eventually be connected with the idea of race and its ugly child, the idea of racial hierarchy. Myth and racial superiority would converge in a mythical vision of the past that reverberated through the ages and that gave national identity a boost. Professor Weiner coined the term "judicial racialism" to refer to the "language of national identity" that American law created in the 19th century as part of imagining "the racial limits of American civic belonging . . . ." [248] Weiner characterizes such legal rhetoric as a "component

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[241] *Id*. at 12.

[242] *Id*. at 14.

[243] *Id*. at 15.

[244] *Id*. at 16.

[245] *Id*. at 36. According to Waldstreicher, this was a case of "early idealism," whereby "Englishmen imagined they would find more peaceful ways to exploit the New World's resources and compete with the rest of Europe for the balance of power on the Continent . . . ." WALDSTREICHER, *supra* note 5, at 22. Of course, that idealism soon "gave way to battles for conquests and similar strategies" including the use of slaves, first in Barbados, later in Virginia and South Carolina, colonies which "grew rapidly on the Caribbean model." *Id*.

[246] SMITH, *supra* note 2, at 71.

[247] *Id*. at 73. *See also,* WALDSTREICHER, *supra* note 5, at 23-24.

[248] WEINER, *supra* note 23, at 1.

of the imaginative history of American nationhood."[249] The resort to that discourse was limited to a particular period –late nineteenth and early twentieth centuries– and it was a "civil rhetoric" that combined the mutually constitutive notions of race and law "into a single idea." [250] For instance, Native Americans became named, conceptualized, and objectified by a particular racialized legal rhetoric, according to which they were deemed unable to uphold "American legal norms. . .", a supposed deficiency that made them "fit largely for subjugation." [251]

Another, related incarnation of judicial racialism was "the Teutonic origins thesis of American government, a blend of legal history and legal anthropology central to academic life in the late nineteenth century." [252] The American exponents of the "Teutonic origins thesis" made the mythological claim that Americans, with their "Anglo-Saxon" ancestry, have a special genius for law and government, which they traced to "the legal thought of the free and strong warrior peoples Tacitus describes in his celebrated account of ancient Germany."[253] In contrast, they deemed "dark-skinned peoples as incapable of legality and congenitally criminal."[254] Peoples who lacked that "genius" were ripe for colonization and domination. Puerto Ricans, lacking those features, were among the "alien races" who had to be tutored in the nuances of government. Those notions, developed in the late 19th century by Henry Cabot Lodge, and others, have roots which go back no later than 16th Century England.

In their version of legal history, "organic intellectuals" like Harvard's Henry Brooks Adams and Lodge himself claimed that America somehow can trace its origins to the "wide plains of Northern Germany." Accordingly, it was purportedly from those plains that "the United States drew its special destiny, to bring to those peoples of the world sitting in the darkness of legal incapacity the law of a nation whose racial genius was jurisprudential –whose innate, Teutonic juridical abilities lay in the construction and administration of modern bureaucratic governance." [255] The Treaty of Paris was a vehicle of that ideology, which served as the guide of early American colonial domination over the new overseas possessions, including Puerto Rico. The Treaty, in turn, laid the foundation for what would happen with Puerto Rico in the next 120 years and beyond.

Lodge's ethno-juridical views were common to other imperialists as well. This included his colleague, Albert J. Beveridge, who proclaimed after the cessions of

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[249] *Id*. at 6.

[250] *Id*. at 1.

[251] *Id*. at 51.

[252] *Id*. at 52. *See also* SMITH, *supra* note 2 at 355.

[253] WEINER, *supra* note 23 at 52.

[254] *Id*.

[255] *Id*. at 62.

territories included in the Treaty that Filipinos "are not yet capable of self-government. How could they be? They are not a self-governing race . . . What alchemy will change the oriental quality of their blood . . . and set the self-governing currents of the American pouring through their malay veins?" [256] According to Beveridge, Anglo-Saxons were unique in their capacity for state-building. For him, American imperialist policy "thus arose 'not from necessity, but from irresistible impulse, from instinct, from racial and unwritten laws inherited from our forefathers.'" [257] The same was true of Puerto Ricans. Given their inferiority and incapacity for governing themselves, the "Anglo-Saxons" had to govern them.

B. Race-Based Colonial Domination Becomes Part of Constitutional Law

In 1900, Ohio Republican Senator Joseph Foraker made clear that there was no intention to incorporate Puerto Rico as a State. Instead, Puerto Rico would stay in the same limbo in which it finds itself today. Foraker said:

> We understand that the effect of the treaty [of Paris] was to put the United States into possession of Puerto Rico. We do not understand it was intended or expected to make them a State, or to do that which entitled them to be called even a Territory. We understand . . . that we have a right to legislate with respect to them as we may see fit.[258]

At the outset of American rule, the Puerto Rican elites were naïve in expecting a liberal treatment from the United States government. They were blinded by the light of the supposedly liberal institutions and mentality of the Colossus of the North. The disappointment led to a split in Puerto Rican politics, with statehood supporters keeping their faith in American "democracy" until today. After 120 years, they still are uncritical apologists of American rule. Their servility, however, has not made statehood any more likely than it was in 1900.

Between 1900 and 1917, the human beings who lived in the Islands that comprise the archipelago of Puerto Rico were deemed "citizens of Puerto Rico" and United States "nationals," pursuant to section 7 of the Organic Act of 1900. [259] The

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[256] Mark S. Weiner, *Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War*, *in* FOREIGN IN A DOMESTIC SENSE, PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION 62 (Christina Duffy Burnett & Burke Marshall eds. 2001) (citation omitted).

[257] *Id*.

[258] RONALD FERNANDEZ, THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY 9 (1992)(citation omitted).

[259] When the Foraker Act was reported from committee, it included a provision conferring U.S. citizenship upon the residents of Puerto Rico. The same was eliminated by the Senate, however, and the final act did not include it. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians,*

Supreme Court gave legal clothing to the United States colonial domination that this provision presupposed by devising the "incorporated/unincorporated" dichotomy in the *Insular Cases*.[260] The doctrine that eventually emerged from those cases is still law today. According to that doctrine, Puerto Rico is a territory of the United States, but of a particular kind. An "incorporated territory" is on the path to statehood. An "unincorporated territory" is not. It "belongs to but is not part of" the United States. Unincorporated territories are overseas colonies and will be so indefinitely.

In one of the early, pivotal *Insular Cases*, Justice Brown made it clear that the need for a disparate treatment of the inhabitants of the recently acquired island-territories was based on the notion of racial fitness for civic membership in the American polity. Brown wrote:

> It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.[261]

Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 TEX. L. REV. 1, 210 (2002). Section 7 of the Foraker Act established:

> That all inhabitants continuing to reside [in Puerto Rico] who were Spanish subjects on the eleventh of April, eighteen hundred and ninety-nine, and then resided in Puerto Rico, and their children born subsequent thereto, shall be deemed and held citizens of Puerto Rico, and as such entitled to the protection of the United States … and they, together with such citizens of the United States as may reside in Puerto Rico, shall constitute a body politic under the name of The People of Puerto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such.

[260] For a thorough discussion of the *Insular cases* by Professor Rivera Ramos, see RIVERA RAMOS, *supra* note 11, at 73-120.

[261] Downes v. Bidwell, 182 U.S. 244, 282 (1901). Section 3 of the Foraker Act imposed a special duty on all goods imported from Puerto Rico. *Downes* decided a challenge to the tariff as an alleged violation to the Uniformity Clause of the Constitution. U.S. CONST. art. I, § 8, cl. 1. The case thus raised the question of whether Puerto Rico was part of the "United States" for purposes of the Uniformity Clause. *Downes,* 182 U.S. at 287. Notwithstanding the language of the Treaty of Paris, Brown stated that Congress cannot negate certain rights to the inhabitants of the new territories, those in the first category just described:

> Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect.

Id. at 283 (citations omitted). This is the same Justice Brown who wrote the majority opinion in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

Brown added that:

> A false step at this time might be fatal to . . . the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.[262]

Brown ended his opinion thusly:

> We are therefore of opinion that the island of Porto Rico [sic] is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island.[263]

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[262] *Downes*, 182 U.S. at 286-87. In his dissent, Justice Harlan responded to Brown, stating that:

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

Id. at 384.

[263] *Id.* at 287. In his concurrent opinion, Justice Edward White asserted that:

> [W]hilst in an international sense Porto Rico [is] not a foreign country, since it [is] subject to the sovereignty of and [is] owned by the United States, it [is] foreign to the United States in a domestic sense, because the island [has] not been incorporated into the United States, but [is] merely appurtenant thereto as a possession.

Id. at 341-42. In other words, Puerto Rico has been treated ever since "as property, an ideological stance that justified governing [it] with faculties akin to those enjoyed by property owners." Efrén Rivera Ramos, *Puerto Rico's Political Status: The Long-Term Effects of American Expansionist Discourse*, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSION 170 (Sanford Levinson & Bartholomew H. Sparrow eds. 2005). White's famous concurrence inaugurated the distinctions between "incorporated" and "unincorporated" territories and that between "fundamental" and "non-fundamental" constitutional rights. White equated the power to acquire territory that was not subject to full constitutional protections as a power "absolutely inherent in and essential to national existence." 182 U.S. at 310-11.

The "judicial racialism" version of Teutonic constitutionalism, described by Professor Weiner, is thus found in *Downes*. The Court articulated the racialized assumptions of American policymakers and pseudointellectuals, personified in Lodge, who was both a politician and, before that, an aspiring legal historian.[264] That is the basis American legislators and policymakers have relied on since, while discarding both an independent Puerto Rico and a "State of Puerto Rico". Thus, they also disallow Puerto Rico's inhabitants to become full members of the polity, with the same formal participatory rights of those living in the States. [265]

Living in one of the last colonies on the planet, the inhabitants of Puerto Rico are subject to the authority of the United States. But, as the residents of Puerto Rico have no political rights nor participate in Presidential and Congressional elections, the principle of "government by consent of the governed" is absent. Hence, a legal scholar has stated that "the Puerto Rican legal subject has been denied one of the most basic goods promised by the regulating ideals of modernity: the condition of being a self-determining subject," defining a self-determining subject as one who gives himself his own norms. "This is, in sum, what is meant by the concept of 'self-government.'" [266]

Puerto Rico still has no international identity, as it is not allowed to send representatives to international and regional organizations. Its so-called "local" government cannot negotiate and sign treaties with other countries. The Constitution of the United States, the laws passed by Congress and the treaties which the U.S.

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[264] In 1909, the Puerto Rico House of Representatives –the only elected body under the regime of the Foraker Act– refused to pass the budget. That action caught the attention of the U.S. Congress, many of its members characterizing it as proof of the islanders' incapacity for self-government. After all, they were not "Anglo-Saxons." For some of the racist "gems" uttered in the U.S. Senate, see FERNANDEZ, *supra* note 260, at 56-57.

[265] The doctrine of the *Insular Cases:*

> [A]nd congressional policy designed to deal with the territories after 1898 were permeated by an ideological outlook that incorporated many of the beliefs of the times: Manifest Destiny, Social Darwinism, the idea of the inequality of peoples, and a racially grounded theory of democracy that viewed it as a privilege of the 'Anglo-Saxon race' rather than as a right of those subjected to rule." Rivera Ramos, *Puerto Rico's Political Status*, *supra* notes 266, at 170. Professor Cleveland argues that these decisions "were largely motivated by the juxtaposition of an expansionist desire to acquire territory in the far reaches of earth, with all the benefits of commerce and international status that this entailed, and a xenophobic desire not to allow the inhabitants of such regions to partake of the American birthright.

Cleveland, *supra* note 259, at 212.

[266] RIVERA RAMOS, *supra* note 11, at 230. Smith calls the exercise of the franchise "the core power of self-governing citizens." SMITH, *supra* note 2, at 22. According to Professor Shklar, "[t]he ballot has always been a certificate of full membership in society, and its value depends primarily on its capacity to confer a minimum of social dignity." SHKLAR, *supra* note 3, at 2. *See also,* Wesberry v. Sanders, 376 U.S. 1, 17 (1964): "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

enters with other countries are "the supreme law" in Puerto Rico, as in the fifty states. The difference is that the U.S. governs Puerto Ricans with no formal, electoral legitimacy. The formal component of democracy is still absent today. [267]

VI. Conclusions

The study of humans *qua* social beings includes accounting for long-lived ideological and behavioral undercurrents which define human cultures. Ideas are surreptitious, stabilizing forces that do their job in the deep realms of the unconscious sections of human minds and the intricate web of social interactions and power dynamics. Those virtually invisible aspects of socialization processes are influential, in part because human beings hardly notice them. By the time ideas –good and bad, innocuous and dangerous, enlightened and stupid– are lodged in the common sense of individuals and cultures, their origins and their modes of reproduction become hard, although not impossible, to identify.

National identities are mostly built around incidental features elevated to the rank of virtues: Race, religion, language, sexuality. Those who lack certain characteristics or beliefs are excluded from the "we" and become the "others." The American experience is hardly unique in that respect. Humans have been oppressed for all sorts of reasons, including gender, race, national or ethnic origin, religion, and sexual orientation. To allow themselves to mistreat fellow humans, oppressors have to somehow deny their victims' full humanity.

The idea of race and the set of practices and structures known as racism are cultural phenomena and, as such, difficult to trace, identify and explain. The present work is an attempt to begin to account for the origins and ways of social reproduction of the American obsession with the category of "race" and the set of attitudes which fall under the banner of "racism." But a look at cultural practices leads to opaque, powerful psychological gambits, which in turn are used by power actors striving for social control and domination. Those actors are in turn moved by the same primal self-interest of the alpha males found in other social animals.

The category of "race" and the notion of racial hierarchy began to appear and evolve before the English colonists imported African human beings as slave laborers. By the late nineteenth century, even Science was made to support the ideology of racial determinism as an explanation for the disparate fates of human groups and

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[267] Professor Oquendo:

> Despite being a territory of the world's largest exporter of democratic rhetoric, Puerto Rico is the only place in all of Latin America where not even a pretense of democracy exists: Puerto Ricans have absolutely no electoral say with respect to the institutions that enact and execute the supreme laws of the land.

Oquendo, *supra* note 100, at 315.

societies. Meanwhile, the slavery of Africans and the displacement and murder of the "Native Americans" was joined by the articulation of justifications rooted in the category of race. When the United States acquired oversees colonies, those same rationalizations were applied for the subjugation of Puerto Ricans and other "alien races." There was no need or occasion to come up with original justifications.

Law has been at the center of the domination strategies of the American "white" elites. The same Court which gave in *Plessy* the legal benediction to Jim Crow provided, only five years later, legal sanctioning to the arbitrary rule of the new "insular" possessions and of its perplexed inhabitants. In one of many ironies, only a former slave owner protested both the judicial nullification of the Civil War Amendments and the enthusiastic judicial blessing of an overseas imperial policy.

In honing ideas of exceptionalism and racial superiority, pseudointellectuals and statesmen tried to rely on Science and History. The notions that they developed percolated into the law. Members of the U.S. Supreme Court repeated discourses that had elevated to the category of dogma the notion that "race" is a determinant of the destiny of human groups, thus rationalizing and justifying slavery, displacement, inequality, and colonialism as inevitable outcomes.

The inherent stability of cultures account for the resiliency of the American structural inequities along "racial" lines. Perhaps few things are as artificial as legal commands seeking the implementation of equality. Besides the question of which the concrete contents of equality are, human societies are full of contrasts that arise and reproduce outside the margins of the legal system. Some consider that law should not toy with those social realities, while others may put too much faith in law's ability to correct embedded inequities and ancient biases.

That the realities depicted in the present article are mostly ignored or hidden from view may be another instance of the reproduction of fantasy and ignorance at the expense of reality and knowledge. Critical thinking, opposed to magical thinking, demands a life of learning, reading, thinking, and conversing. Besides knowledge, it requires the courage to face reality; while knowledge is a necessary condition for casting off fears and insecurities, and for acquiring a no-nonsense understanding of human nature. Since 1898, Puerto Rico has been subjected to United States rule and domination. Yet, most Puerto Ricans ignore the origins and history of that rule. Ignorance could hardly yield informed choices or the dissipation of ancient fears.