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Volumen LIII agosto – mayo 2018-2019 Número 3

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CITACIÓN: El texto y la citación de la Revista Jurídica se rigen por las reglas establecidas en THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n *et al*., eds., 20th ed. 2015).

TABLA DE CONTENIDO: Cada número tiene una tabla de contenido de los escritos publicados en él. Anualmente, se publica un índice general en el tercer número de cada volumen. Los índices generales de Revistas Jurídicas de Puerto Rico, correspondiente uno hasta el 1982 y el otro hasta 1998, están disponibles a un costo de $15.00 cada uno.

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Cítese esta revista de la siguiente manera:

53 REV. JUR. UIPR ___ (2019).

The *Revista Jurídica de la Universidad Interamericana de Puerto Rico*, founded in 1964, is published by Law School students once (1) a year.

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CITATION: Both the text and the quotations in *Revista Jurídica* follow the rules established in THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n *et al*., eds., 20th ed. 2015).

TABLE OF CONTENTS: An index is published in the third number of each volume every year. The general indexes of Puerto Rican Law Reviews, one covering up to 1982 and the other covering up to 1998, are available at a cost of $15.00 each.

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Cite this journal as follows:

53 REV. JUR. UIPR ___ (2019).

Revista Jurídica
Universidad Interamericana
de Puerto Rico

Volumen LIII agosto - mayo 2018-2019 Número 3

Miembro del *National Conference of Law Reviews* y del
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Revista Jurídica
Universidad Interamericana
de Puerto Rico

Volumen LIII agosto - mayo 2018-2019 Número 3

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REQUIEM POR LEY

*Andrés L. Córdova©**

En alguna sala de un tribunal, desnuda por completa, sin banderas, escudos o símbolos. Entra un juez, taciturno, revestido de su toga negra, se dirige solemnemente a la audiencia.

"Estamos reunidos hoy para conmemorar la pasión y muerte ante la Ley. Esa pasión, su muerte, es causa y efecto, simultáneamente, de nuestra decadencia y lamentos en estos tiempos de cal y arena.

La letra de la Ley mata, su espíritu, sin embargo, vivifica. Celebramos esta misa, esta despedida, como acto de recordación del espíritu que alguna vez latió entre nosotros. Comencemos, pues, en silencio, recordando el misterio que alguna vez nos fue revelado, que olvidamos, y hoy despedimos".

El juez y la audiencia inclinan la cabeza. El juez procede a la invocación tradicional: "En el principio fue la Ley y era una, y se reunieron todos ante ella y reclamaron la igualdad. Y la Ley dijo: 'Soy quien soy. Ante mi todo, fuera de mi nada'. Y la Ley se asentó sobre sí misma y todos se maravillaron ante su propia hechura".

La audiencia responde:

"Ante la Ley todo, fuera de la Ley nada".

El juez se acerca a unos libros colocados sobre un atril, abre su portada y procede con ponderada lentitud a leer en alta voz:

Primera lectura del ***Código Justo*** (31, 2***)***: "La ignorancia de la ley no exime de su cumplimiento".

La audiencia responde al unísono golpeándose en el pecho:

"Por nuestra ignorancia,
Por nuestra ignorancia,
Por nuestra santísima ignorancia".

El juez mueve el libro a un lado y toma el próximo. Mojándose los dedos con la boca, pasa las páginas con estudiada solemnidad hasta detenerse, y dice.

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*Catedrático Asociado de la Facultad de Derecho de la Universidad Interamericana.

Segunda lectura de los ***Relatos ante la Ley*** (31, 7-11***)***: "Y al colocar al hombre en el Paraíso la Ley le advirtió: no comerás del árbol de la ciencia del bien y el mal. Y el hombre, terco, no entendió la Ley y comió del árbol. Y el espíritu de la Ley, que se movía en el Paraíso, observó al hombre de rodillas vomitando.

– '¿Qué has hecho?' le preguntó la Ley al hombre.

– 'Comí del árbol prohibido', le contestó el hombre con su nuevo sentido de culpa.

– 'Por tu ignorancia serás libre, pero morirás lejos de aquí', sentenció la Ley.

Y el hombre fue expulsado del Paraíso, y desde entonces busca cómo regresar ante la Ley".

La audiencia responde desigualmente:

"La cosa habla por sí sola".

El juez da dos pasos hacia atrás y declara dogmáticamente:

"Nuestra humanidad se inaugura bajo la sombra de la prohibición. La fuente de la legalidad es el resentimiento. Nuestra ignorancia invita la expulsión y la muerte".

La audiencia tiembla y responde, dándose tres golpes en el pecho:

"Por nuestra ignorancia,
Por nuestra ignorancia,
Por nuestra santísima ignorancia".

El juez regresa al atril, mueve los libros a un lado y extrae un papel doblado de su toga y lee:

Lectura del ***Libro de los Jueces*** (31, 45-57). **"**Y el hombre caminó la tierra, y la tierra estaba vacía, hasta que llegó a un pueblo y se encontró con otros hombres. Sorprendido, pensó, 'no estoy solo' y procedió a decirles a los otros lo que le había ocurrido. Los otros se molestaron con él y le dijeron que se callara, que ellos tenían leyes. El hombre les respondió que las leyes no eran necesarias, que eran libres. Al escuchar estas declaraciones los otros se escandalizaron y empezaron a tirarle piedras. Luego trajeron el hombre ante un juez y le relataron lo que había pasado. Y el juez le preguntó al hombre si todo lo relatado era cierto. Y el hombre tuvo miedo, pues intuía la crueldad en sus ojos, y le admitió que sí lo había dicho. Entonces el juez se montó en tribuna y le habló al hombre:

– 'Quién eres tú que vienes de afuera de la ley para cuestionarla, debes someterte a ella. No puede haber proceso sin jurisdicción'.

Y cuando el hombre iba a hablar el juez lo interrumpió,

– 'Hay que someterse a la ley si se le quiere cuestionar'. Y se llevaron al hombre y lo encerraron solo en un cuarto por mucho tiempo".

Algunos en la audiencia responden con el Salmo responsorial (30, 12-13):

"Ante ti llegamos mudos,
Ante ti llegamos sin esperanza,
Tú que eres justa,
En tus manos nos encomendamos ,
Bendito sea el que viene en nombre de la Ley".

El juez invita al frente a dos miembros de la audiencia a leer de las escrituras. El primer lector, flaco y calvo, con voz trémula comienza a leer:

Lectura de ***La Escritura del Hombre*** (32, 23-26): "Y sucedió que el hombre le dijo a su carcelero que no entendía por qué estaba allí, y el carcelero le dijo, que él tampoco, pero que él no era quien para cuestionar sus órdenes. El hombre le dijo que eso no era verdad, que él sí podía cuestionar. Entonces el carcelero le entró a golpes".

La audiencia responde:

"No hay redención sin transgresión".

El segundo miembro de la audiencia, como buen ladrón, procede a leer con voz barítona:

Lectura de ***La Escritura del Hombre*** (32, 32-38): "Luego de haber sido maltratado, el hombre se fue caminando en busca del lugar de dónde había venido. En su marcha sufrió hambre y sed, y algunos le cogieron pena y lo ayudaban. Los más lo evitaban y se decían que era un ilegal, que no creía en la ley.

Luego de un tiempo llegó a un río y le dijeron que al otro lado estaba el Paraíso, pero que tuviera cuidado, porque la corriente era muy fuerte. El hombre les dijo que no importaba, que tenía que cruzar, que lo estaban esperando. Y el hombre se lanzó al agua, y se lo llevó la corriente y nunca más se supo de él".

La audiencia repite:

"No hay marcha atrás,

El camino de regreso nos está vedado.
Dura es la Ley, pero es la Ley".

Los lectores se retiran y el juez se toma unos minutos en silencio para preparar el estrado y colocar la balanza a su diestra y el mallete a su siniestra.
Luego, levantando los brazos declara con solemnidad:

"Recordemos a la Ley, para que su pasión y muerte no haya sido en vano, para que atienda nuestras súplicas y nos proteja de nosotros mismos".

La audiencia, confundida, responde:

"Amén".

SOUTH AFRICA'S FORWARD-LOOKING CONSTITUTIONAL REVOLUTION AND THE ROLE OF COURTS IN ACHIEVING SUBSTANTIVE CONSTITUTIONAL GOALS

*Jorge M. Farinacci-Fernós**

Abstract

South Africa's Constitution has been characterized as one of the most progressive and forward-looking in the world. Much has been written about how it was created and its substantive content. Much less attention has been given to *how* the South African Constitutional Court has actually interpreted and applied it from a methodological point of view. In particular, how that substantive content, and its historical background, becomes tangible law through judicial enforcement.

This Article explores how the South African Constitutional Court has taken into consideration the history of South Africa, its constitutional experience and the progressive substantive content of its constitutional text when engaging in adjudication. Also, it analyzes how this practice impacts the role of courts in similar constitutional systems where the constitutional text embodies social goals and is the direct result of important historical processes.

Resumen

La Constitución de Sur África ha sido caracterizada como una de las más progresistas y visionarias del mundo. Mucho se ha escrito sobre cómo fue creada y cuál es su contenido sustantivo. Poca atención se ha otorgado a *cómo* el Tribunal Constitucional Surafricano la ha interpretado y aplicado, desde una perspectiva metodológica. En particular, cómo ese contenido sustantivo, y su contexto histórico, se convierte en derecho tangible a través de la implementación judicial.

Este Artículo explora cómo el Tribunal Constitucional de Sur África ha tomado en consideración la historia de ese país, su experiencia constitucional

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y el contenido sustantivo progresista de su texto constitucional al llevar a cabo su ejercicio adjudicativo. De igual forma, analiza cómo esta práctica afecta el rol de los tribunales en sistemas constitucionales similares en los que el texto constitucional incorpora objetivos sociales y es el resultado directo de procesos históricos significativos.

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I. Introduction

In this Article, I analyze the decisions of the South African Constitutional Court during the first years of its existence. In particular, I focus on the adjudicative and interpretive methodologies adopted by the Court, as well as on how it implemented the substantive provisions of the 1994 and 1996 Constitutions. As we will see, because of the substantive nature of the South African Constitution, which can be described as teleological and post-liberal, given its attention to socio-economic rights and other progressive policy provisions, the adjudication of constitutional cases in South Africa has been transformed. Since the Constitution takes a stance on many issues normally delegated to legislative discretion, the South African Constitutional Court has been *forced* by the constitutional legislator to intervene in policy matters. This requires abandoning more traditional notions on the judicial role and the so-called *proper* role of courts.

The South African Constitutional Court has been able to adequately implement many of the substantive provisions of the Constitution, disproving the notion that these types of constitutional commands are merely symbolic or aspirational, and that courts are ill-equipped to enforce them. On the contrary, the main lesson from the constitutional revolution that took place in South Africa during the 1990's is that courts can effectively put into practice these types of provisions, including socio-economic rights and other policy commands.

In terms of interpretive methodology, South Africa's Constitutional Court is not originalist nor intentionalist. *With a few, yet important, exceptions that will be discussed later on*, South Africa's top judicial body has mostly shied away from using an intent-based interpretive methodology, whether it is original intent, original public meaning, the subjective teleological model or the original explication approach.[1] In general terms, the main methodological model employed by the Court places is it closer to the objective teleological model.[2] But intent has *not* been

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[1] *See* Jorge M. Farinacci-Fernós, *When Social History Becomes a Constitution: the Bolivian Post-Liberal Experiment and the Central Role of History and Intent in Constitutional Adjudication*, 47 SW. L. REV. 137, 154 (2017), explaining that the subjective teleological model "searches for the original *purpose* that inspired the framers, the [original explication model] focuses on what the framers *said about what they were doing*, and the [original intent approach] searches for what the framers *wanted to do*."

[2] *See* Adriane Janet Hofmeyr, *Constitutional Interpretation Under the New South African Order*, LL.M. Dissertation, Faculty of Law, University of Witwatersrand, Johannesburg (1998) for a comprehensive analysis of the early jurisprudence of the South African Constitutional Court and its use of the objective teleological model. While Hofmeyr emphasizes a more *classic* and *framework*-oriented separation of powers approach to constitutional interpretation, I will focus on the *substantive* content of the South African Constitution as the result of popular constitutional politics. As such, instead of focusing on the legislature versus judiciary issue —particularly as it relates to the classic counter-majoritarian dilemma—, as Hofmeyr does, I focus on the *majoritarian* elements of the Constitution, and the courts as the enforces of constitutional judgments over ordinary political action. I also tackle the role of adoption history in constitutional interpretation in South Africa.

wholly absent. At the same time, *history* has played a central role in constitutional adjudication in South Africa.

In the end, the South African Constitutional Court seems to have embraced history, while focusing much less on intent. Two things should be said about this phenomenon. First, as a normative matter, this Article will argue that the South African Constitutional Court *should* pay more attention to issues of intent, although not necessarily embrace a wholly originalist approach. Second, *it should be noted that it makes perfect sense for the Court, given South Africa's constitutional history, to embrace history and ignore the intent of the framers as the main interpretive approach*.[3] Since, as we will see, South Africa's Constitution was the result of a *negotiation* between an ascendant liberation movement and an oppressive white minority government, it is reasonable and legitimate for the Constitutional Court to pay more attention to the *historical context* of South Africa's constitutional process and its past social struggles, while, at the same time, not give too much importance to the intent of the *framers* of the Constitution. Also, we must consider the fact that the Interim Constitution of 1994 was the result of negotiation while the Final Constitution of 1996 was the result of a combination of elements, including normative principles adopted during the negotiation process *and* a popularly elected Constitutional Assembly.

In the South African context, the fundamental aspects of its constitutional system are the *historical grievances and societal goals* of the South African People as a whole. Since South Africa's Constitution was the result of compromise and was created in a controlled environment with little room for high-energy democratic politics *in terms of the deliberation process*, *the Constitutional Assembly cannot be characterized as the center of gravity of the constitution-making process*.[4] As such, there seems to be a *direct* link between the popular view about the substantive nature of the society to be built by the Constitution and the Constitution itself. Here, the framers are somewhat less important. Yet, as will be argued here, they still have a significant role to play, *even if it is reminding us of the brokered nature of the constitution-making process*. But, in the end, the South African model holds: The Constitution has more to do with the *external* processes that developed before and during the constitution-making process than with the *internal deliberations of the Constitutional Assembly*. Because of the *sui generis* nature of the constitutional

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[3] This apparent contradiction fits in nicely with the notion that the process of *constitutional creation* is critical to the kind of interpretive methodology that is selected. *See* Jorge M. Farinacci-Fernós, *Post-Liberal Constitutionalism*, 54 TULSA L. REV. 101 (2018). There I discuss how constitutions that were the result of highly democratic, popular and participatory processes of creation have a stronger normative case in favor of an intent-based method of interpretation. As a result, when such a process is missing, the case for an intent-based model is weaker.

[4] This is different from the constitutional creation processes that occurred in Bolivia and Puerto Rico. Because of this, both jurisdictions have used intent-based methods of interpretation as the preferred model. *See* Farinacci-Fernós, *When Social History Becomes a Constitution*, *supra* note 1; Jorge M. Farinacci-Fernós, *Originalism in Puerto Rico: Original Explication and its Relation with Clear Text, Broad Purpose and Progressive Policy*, 85 REV. JUR. UPR 205 (2015).

drafting process in South Africa, content does not lie with the framers, but with the text and the history that gave it life.

But the lessons to be derived from the cases of the South African Constitutional Court have less to do with methodology and more to do with *the actual enforcement of the substantive content of the Constitution*, such as socio-economic rights and other policy-laden provisions. The South African Constitutional Court's emphasis on clear and expansive text, broad purpose and substantive content has a lot to offer us.

In that sense, two things emerge. First, in terms of *methodology*, the South African Constitutional Court has been *more* intentionalist than it thinks it has been,[5] but *less* that it should be, from a normative standpoint. Second, and more importantly, in terms of *judicial enforcement*, the South African Constitutional Court offers an effective model, particularly with respect to the more substantive provisions of the text, which are the centerpiece of post-liberal teleological constitutions.

In this Article, I will deal with the following issues: (1) the substantive nature of South Africa's Constitution, focusing on its over-arching teleological characteristic and some of the specific policy-laden provisions; (2) the interpretive models used by the Constitutional Court; (3) the role of history and intent in constitutional adjudication; (4) the conceptual challenges relating to the separation of powers, the role of courts and judicial enforcement of constitutional provisions; and (5) some final thoughts on the jurisprudence of the Constitutional Court.

This Article will combine cases decided by the Constitutional Court of South Africa, as well as secondary sources.[6]

II. South Africa's Post-Liberal Teleological Constitution

South Africa's Constitution is the crown-jewel of modern constitutionalism.[7] Many different ideological currents claim it as their own. Liberal democratic

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[5] It should be noted that one of the most interesting features of the early methodological debates within the South African Constitutional Court was the *lack of a consensus as to interpretive method*. This resulted in either fragmentation within the Court or punting the issue, leaving a normative vacuum. As Hofmeyr explained, "the Constitutional Court itself has to date failed to articulate a clearly comprehensive theory of constitutional interpretation." Hofmeyr, *supra* note 2, at 5.

[6] In particular, I will focus on the decisions handed down by the South African Constitutional Court from 1995 until 2002. This is so, because it was during this period that the normative debate as to method was most important and marked the initial developments as to judicial enforcement of the Constitution.

[7] Although, it should be noted, it is not the only one. On the one hand, we should give it due credit for protecting a whole array of socially-oriented rights and paving the way for a just and democratic society. It is the stuff of teleological constitutions. On the other hand, there does seem to be a bias among Western scholars that seem to see the South African Constitution as a sort of *sui generis* creature that sits alone in a world full of framework constitutions. It should be noted that countries like Portugal, Ecuador, Venezuela, India, Bolivia and Puerto Rico, as well as many U.S. states, have similar types of constitutions. South Africa's teleological constitution is not alone and not even the first one to be adopted in modern times. *But*, its significance should not be underestimated either. *No modern constitutional analysis can ignore the South African constitutional experience*.

scholars emphasize its democratic nature and its commitment to pluralism, openness and individual freedom. On the other hand, progressives and socialists argue that its commitment to social justice and re-distribution, as part of a longer march towards the creation of a just and democratic society, separates South Africa's Constitution from its German, Canadian and U.S. counterparts and places it in the post-liberal camp.[8]

In this section, I wish to focus on the following things: (1) the transformative and teleological characteristics of South Africa's Constitution; (2) the South African version of constitutionalism; (3) the inclusion of post-liberal ideological tenets; and (4) the larger role of ideology and popular social movements in the substantive content of the Constitution, including the interaction between constitutional law and policy.

A. South Africa's Teleological Constitution

There seems to be universal consensus that South Africa's Constitution does not fit into the classic framework model.[9] Also, there seems to be consensus on its characterization as transformative. In other words, that the Constitution adopts a substantive blueprint for society that looks ahead to the future.[10] This fits perfectly with the teleological constitutional type.[11]

According to Eric Christiansen, South Africa's constitutional system adopts as a goal the "substantial realization of a socially just society."[12] In that sense, "[t] ransformation is the primary theme of post-apartheid South Africa and affects virtually every sphere of life."[13] As Morné Olivier explains, "transformation lies at the heart of the constitutional enterprise and goes *beyond* the reform of state institutions *to the transformation of society more broadly* in order to remedy past

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[8] *See* Hofmeyr, *supra* note 2, at 31, noting that courts in South Africa were "expected to take into account the revolutionary political and legal changes which have occurred in this country and develop an appropriate theory of constitutional interpretation which is in keeping with the new role of the judiciary."

[9] *See* Farinacci-Fernós, *Post-Liberal Constitutionalism, supra* note 3. There I explain how *framework* constitutions mostly focus on structure and process, including individual political rights, leaving most policy decisions to ordinary politics. I should also note that although there are differences between the 1994 Interim Constitution and the 1996 Final Constitution –which I will discuss later on – I will analyze them jointly in the rest of the article.

[10] HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS 2 (2010).

[11] For their part, *teleological* constitutions are designed to actively shape society by adopting substantive policy provisions.

[12] Eric C. Christiansen, *Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lessons from South Africa*, 13 UCLA J. INT'L L. & FOREIGN AFFAIRS 369, 390 (2008). *See also* SIRI GLOPPEN, SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION 33 (1997).

[13] Morné Olivier, *Competing Notions of the Judiciary's Place in the Post-apartheid Constitutional Dispensation*, *in* THE QUEST FOR CONSTITUTIONALISM: SOUTH AFRICA SINCE 1994 70 (Hugh Corder, Veronica Federico & Romano Orrù, eds., 2014). *See also* Heinz Klug, *South Africa: From Constitutional Promise to Social Transformation, in* INTERPRETING CONSTITUTIONAS: A COMPARATIVE STUDY 266 (Jeff Goldsworthy & Jeffrey Denys eds., 2006).

inequalities, discrimination and injustice."[14] In that same vein, Linda Stewart argues that "[t]he Constitution of South Africa of 1996 *differs* from *classic liberal constitutions* in other parts of the world and is perceived as a *progressive* and *transformative* document."[15] As she explains, the "Constitution is an engagement with a future that it will partly shape."[16] That's the quintessential characteristic of teleological constitutions. Here, the Constitution points the way and, though giving substantial leeway to institutional actors to choose how to get there, restricts its options so they don't veer off the constitutionally mandated course.[17] In summary, "[t]he goals of government activity in the areas of social policy, economic policy and environmental policy, as well as the direction of change, [are] laid down in the constitution itself."[18]

The teleological and transformative nature of the South African Constitution has not been lost on the Constitutional Court, which has noted the text's commitment to a collective social project.[19] This responds to a recognition that the Constitution "unlike its dictatorial predecessor, is value-based."[20] In that sense, the Constitution has "widely acclaimed and celebrated *objectives*."[21] This has led the Court to affirm that "[o]ur Constitution is different from the American constitution,"[22] which, in turn, requires a different method of enforcement. While the latter is still an outstanding question, the former is not: South Africa's constitutional system is different from the classic liberal framework model.

Concurrent with the Court's acknowledgment of the Constitution's teleological character is a recognition of its transformative nature, particularly in terms of its goal of breaking from the previous regime.[23] This includes achieving the goals of the Constitution, which comprises the establishment of "a society based on the

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[14] Morné Olivier, *supra* note 13, at 10-71 (emphasis added).

[15] *See* Linda Stewart, *Depoliticizing Socio-economic Rights*, *in* THE QUEST FOR CONSTITUTIONALISM: SOUTH AFRICA SINCE 1994 81 (Hugh Corder, Veronica Federico & Romano Orrù, eds.,2014) (emphasis added). As Stewart elaborates, the Constitution envisages change "of the county's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction through a long-term project of constitutional enactment, interpretation, and enforcement."

[16] *Id.* at 84. As such, the State is affirmatively empowered to carry out that transformation. *See* SIRI GLOPPEN, SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION 62 (1997); Dawood v. Minister, 2000 (8) BCLR 837 (CC), para. 35.

[17] Bertus de Villiers, *The Constitutional Principles: Content and Significance*, in BIRTH OF A CONSTITUTION 47 (Bertus De Villiers, ed., 1994).

[18] GLOPPEN, *supra* note 16, at 66.

[19] *See* S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 262 (Mahomed, J., concurring).

[20] *Id*. at 313 (Mokgoro, J., concurring).

[21] S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 8. (emphasis added); *See also Id*. at 46.

[22] S. v. Williams, 1995 (7) BCLR 861 (CC), para. 37.

[23] Du Plessis v. De Klerk, CCT 8-95, paras. 90, 145.

recognition of fundamental human rights."[24] In the end, the Court has consistently stated that the new Constitution is not just a new text, but also heralds a "new constitutional order."[25] And this new constitutional order is articulated in a "commitment to the attainment of social justice and the improvement of the quality of life for everyone."[26]

Crucial to this teleological design is the issue of *social* transformation which includes economic redistribution: "We live in a society in which there are great disparities of wealth…These conditions already existed when the Constitution was adopted and a commitment to address them, and to *transform our society* into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order."[27] This is inherently linked with the notion of the background "of constitutional and social transformation that is under way in South Africa."[28] This is not the typical western Constitution.

B. South Africa's Post-Liberal Constitution

South Africa's constitutional system is not merely teleological. It is also explicitly, even if partially, post-liberal. According to Linda Stewart, South Africa's "[t]ransformative constitutionalism furthermore demands critical approaches to law which calls for a *post-liberal reading* of the Constitution."[29] This has resulted in a critical view of classic liberal constitutionalism,[30] and it has allowed the Constitutional Court to take into account the egalitarian characteristics of the Constitution in the process of adjudication.[31] It would not seem outrageous to conclude that South Africa's Constitution is of the post-liberal persuasion.[32] Of course, the devil is in the

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[24] Minister of Justice v. Ntuli, 1997 (6) BCLR 677 (CC), para. 32. *See also* President of the Republic of South Africa v. Hugo, 197 (6) BCLR 708 (CC), para. 41.

[25] City Council of Pretoria v. Walker, 1998 (3) BCLR 257 (CC), para. 17.

[26] Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC), para. 1.

[27] Soobramoney v. Minister of Health (Kwazulu-Natal), CCT 32/97, para. 8 (emphasis added). *See also Grootboom* at 25; Bel Porto School Governing Body v. Premier of the Province, Western Cape, 2002 (9) BCLR 891 (CC), para. 6.

[28] Premier, Province of Mpumalanga v. Executive Committee, 1999 (2) BCLR 151 (CC), para. 7. *See also* Moseneke v. The Matter of the High Court, 2001 (2) BCLR 103 (CC) para. 1.

[29] Stewart, *supra* note 15, at 84 (emphasis added). *See also* Heinz Klug, *South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid, in* CONSTITUTIONAL COURTS: A COMPARATIVE STUDY 274 (Andrew Harding & Peter Leyland, eds., 2009.

[30] GLOPPEN, *supra* note 16, at 131.

[31] *See, for example,* President of the Republic of South Africa v. Hugo, 197 (6) BCLR 708 (CC), para. 41. In a separate opinion, Kriegler stated that the "South African Constitution is primarily and emphatically an egalitarian constitution." *Id.* at 74. (Kriegler, J., dissenting).

[32] Heinz Klug, *Constitutional Authority and Judicial Pragmatism: Politics and Law in the Evolution of South Africa's Constitutional Court*, *in* CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 101 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan, eds., 2013).

details, and I will return to this issue when analyzing socio-economic rights, as well as other substantive provisions that deal with economic, labor and property rights issues. For now, I propose we characterize South Africa's Constitution firmly in the teleological camp, with recognizable post-liberal elements and content.

C. Building a New Constitutionalism

From the previous discussion, we can summarize the South African constitutional experiment as one of "transformative constitutionalism."[33] It is a "new" constitutionalism that "entails the ideas of an open and democratic society and of social justice."[34] This includes an alternative vision as to new forms of constitutional self-government which encompasses substantive elements.[35] As Heinz Klug explains, "in South Africa, a domestic debate continues regarding the nature of constitutionalism in a post-apartheid society…This debate is reflected in different characteristics of the Constitution and the [Constitutional] Court's jurisprudence as being either a form of *liberalism or* as a potentially *transformative constitutionalism*."[36] It is worth noting, however, that the South African experience is hardly an isolated one; transformative post-liberal teleological constitutions can be found all over the globe.

Yet, the dispute about the ideological nature of South Africa's Constitution need not be resolved here. In fact, it need not be resolved at all.[37] First, post-liberal constitutionalism has a lot in common with its classical liberal antecessor. Much of the *substantive* content of teleological constitutions is merely an *extension* of the rationale underlying liberal democratic framework constitutions. In fact, we see this rationale first hand in the decisions of the South African Constitutional Court, when it links social rights with democratic self-government. Teleological constitutions are the offspring of liberal democratic constitutions, in that they *add* substantive provisions, not only as ends in themselves, but as part of the accessorial rationale which states that some rights are needed in order to make democracy work better.[38]

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[33] Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid, supra* note 29, at 274.

[34] Veronica Federico, Hugh Corder & Romano Orrù, *Introduction* to THE QUEST FOR CONSTITUTIONALISM: SOUTH AFRICA SINCE 1994 3 (Hugh Corder, Veronica Federico & Romano Orrù, eds., 2014). These authors also characterize the South African Constitution as a form of transformative constitutionalism. *See also* S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para 357. (O'Regan, J., concurring).

[35] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra*, note 13, at 261.

[36] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 293. *See also* Pierre Olivier, *Constitutionalism and the New South African Constitution, in* BIRTH OF A CONSTITUTION 55-57. (Bertus De Villiers, ed. 1994).

[37] *See* GLOPPEN, *supra* note 16, at 274.

[38] *See Id.* at 64. Describing the Constitution of South Africa as one "which, through providing for a fair and democratic political process, works to transform the social structure itself."

Second, mixed constitutional types can exist. In other words, a particular constitutional system can be both liberal and post-liberal at the same time. Hybrids are not anomalies. Actually, it would seem that *pure* systems are the exception. As such, South Africa's Constitution can serve as a bridge between the different constitutional types. Yet, it does seem that, within this hybrid character, the post-liberal and teleological aspects of the South African Constitution stand out. There is a strong case in favor of characterizing it as part of the post-liberal teleological family. The decisions of that country's Constitutional Court reinforce this conclusion.

This dual nature can be explained by South Africa's history. P*recisely because the Constitution was part of a democratic transition from authoritarian apartheid to a more progressive pluralist society*, political democratization and social justice were at the top of the constitutional agenda. Thus, we can expect to encounter both liberal democratic and post-liberal elements in the constitutional text. Because of the central role of history in South Africa's constitutional revolution, it is to history we turn first. But before we do that, we should reference, however briefly, other political and ideological elements that can be found in the South African Constitution outside its specific policy provisions.

As Linda Stewart argues, the Constitution "as a transformative text embodies a political character demanding positive action from all branches of government, including the judiciary, to achieve this transformative tension."[39] Although I will specifically tackle the issue of judicial enforcement and the role of courts in this constitutional model, this passage illustrates the political, yet enforceable, elements of the constitutional text.

This includes the issue as to what policy preferences should be entrenched in the constitutional text and which should be left up to ordinary politics.[40] In turn, this can blur the line between legal and political issues.[41] It is not unheard of that the Constitutional Court must tackle "complex and interrelated questions of law and policy."[42] For example, labor cases in South Africa are almost unavoidably a constitutional issue.[43] As the Constitutional Court has recognized in the context of a particular labor dispute, "[i]f the effect of this requirement is that this Court will have jurisdiction in all labor matters [,] that is a consequence of our constitutional democracy."[44]

A final element that must be addressed is the issue of popular ideology and its role in constitutional creation. Although in the next section I will focus on the

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[39] Stewart, *supra* note 15, at 84.

[40] GLOPPEN, *supra* note 16, at 66.

[41] De Villiers, *supra* note 17, at 48.

[42] Mistry v. Interim National Medical and Dental Council, CCT 13/97, para. 2.

[43] NEHAWU v. University of Cape Town, 2003 (2) BCLR 154 (CC), para. 16.

[44] *Id*. (quotation omitted)

actual process of constitutional creation in South Africa, it is worth mentioning here the important role that social forces had in that process, particularly popular organizations such as labor unions, women's groups, farmer organizations, among others.[45] In the end, particular mention must be made to the African National Congress (ANC) as the representative of the social majority in South Africa,[46] in particular its approach to rights,[47] as well its insistence of the eventual creation of a popularly elected Constitutional Assembly.[48] This also includes the use of mass actions *during* the constitution-making process, giving it a popular character.[49] We should also take note that "[t]he ideological underpinnings of the liberationist movement range from social democracy to democratic socialism, with the former probably predominating."[50] As the Constitutional Court has acknowledged, "[i]n a country of great disparities of wealth and power it declares that whoever we are whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destines are intertwined in a single interactive polity."[51]

III. South Africa's Constitutional Creation Process: A Multi-Stage History

South Africa's constitutional making process was characterized by violence and peace, liberation and moderation, majoritarian rule and accommodation, politics and compromise. It was a highly complex process constituted by separate yet integrated moving parts. As Willem De Klerk commented, "[t]he design of a constitution does not come out of the blue."[52]

If ever there was a case where the history of constitutional creation was relevant to constitutional adjudication, it's this one. But not, as we saw, because it was the most democratic and participatory process of constitutional framing; but because its transitional and negotiated nature highlights the process of creation. *How* the constitution was *created* influences *how* it is *implemented*.

The South African constitutional creation process was complex and, to some extent, simultaneously contradictory and complementary. As Heinz Klug explains,

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[45] GLOPPEN, *supra* note 16, at 65.

[46] *Id.* at 200.

[47] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 3.

[48] *Id.* at 14.

[49] Willem De Klerk, *the Process of Political Negotiation*, in BIRTH OF A CONSTITUTION 7. (Bertus De Villiers, ed. 1994).

[50] Lourens M. Du Plessis, *A Background to Drafting the Chapter on Fundamental Rights*, in BIRTH OF A CONSTITUTION 91-92. (Bertus De Villiers, ed. 1994).

[51] *August v. Electoral Commission*, 1999 (4) BCLR 363 (CC), para. 17.

[52] De Klerk, *supra* note 49, at 1.

the constitution-making process was composed of two stages.[53] Let's break them down.

The final Constitution of 1996 represented the "end of a six year long battle over the constitution where competing visions of the new South Africa, formed during decades of struggle, clashed through paragraph after paragraph."[54] In terms of process, we must turn to May of 1990 when the ANC and the National Party-led government started to have talks about talks.[55] This process included bumpy multi-party talks and negotiations.[56] Concurrent with this complex formal process was a period of "mass action and escalating political violence."[57]

The first landmark of the constitutional making process was the interim Constitution which "was adopted with 'sufficient consensus' on 18 November 1993."[58] As Siri Gloppen explains, "[t]he interim constitution is an intriguing document, marked by the bargaining that brought it about."[59] The first phase of the constitutional making process not only produced an interim Constitution; it also created a set of *Constitutional Principles* that would direct the work of the Constitutional Assembly when it addressed the adoption of a final constitutional text.[60] While the interim Constitution could not bind the options available to constitutional framers when drafting the final text, the Constitutional Principles would. Curiously enough, "[t]he interim constitution and the constitutional principles represent, however, significant *deviations* from the favored constitutional model of the ANC."[61]

The second phase of the constitution-making process was the calling of a Constitutional Assembly composed of 490 members, of which 312 were from the African National Congress, "just short of the two thirds majority required to single-handedly adopt a new constitution."[62] The work of the Assembly was not entirely smooth, and even included a boycott by the Inkatha Freedom Party.[63] As

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[53] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 266. For an in-depth description of the negotiation process. *See* KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10; Theuns Eloff, The Process of Giving Birth, in BIRTH OF A CONSTITUTION (Bertus De Villiers, ed. 1994).

[54] GLOPPEN, *supra* note 16, at 3.

[55] *Id.* at 201.

[56] *Id*.

[57] *Id*. *See also* KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 15 (in reference to how the ANC was "supported by street demonstrations and other forms of mass action").

[58] GLOPPEN, *supra* note 16, at 201.

[59] *Id.* at 202.

[60] *Id*.

[61] *Id.* at 204 (emphasis added).

[62] *Id.* at 205.

[63] *Id.* at 207.

Gloppen explains, "[t]he obvious problem with regard to the IFP boycott is, of course, the negative effect on the *legitimacy of the constitution*."[64] Because of these circumstances, even though the ANC dominated the Assembly, the final Constitution was also the result of compromise. Yet, the final text is much closer to the views of the ANC than the interim document: "Compared with the 1993 interim constitution, the text that was adopted on 8 May is less consociational and more in line with the justice model and the ANC's negotiating position."[65]

More importantly, the second phase was characterized by *public participation and monitoring of the constitution-making process.*[66] This strengthens constitutional legitimacy and aids in the process of consolidation behind the constitutional project. According to Gloppen, the issue of constitutional legitimacy "is also affected by the character of the *process* that brought it into being," including "an *impressive public participation programme [that] was implemented*."[67] This program included calls for "public submissions", in order to create a better product "in harmony with the concerns and normative conceptions of the South African people," promote understanding of the different proposals, stimulate development of a civil society and *take ownership of the final product*.[68] The program also included written submissions, oral statements, as well as uses of the internet and phone talk lines which resulted in "more than two million submissions and petitions."[69] Other examples of the public and participatory nature of the constitution-making process abound.[70] In the end, "the public participation succeeded in *creating a sense of ownership in the product*."[71] This is the stuff of teleological constitutions.[72] As one very influential member of the Constitutional Court has observed: "The Constitution was the first public document of legal force in South African history to *emerge* from an *inclusive process* which the overwhelming majority were represented."[73]

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[64] *Id.* at 208 (emphasis added).

[65] *Id.* at 210.

[66] In contrast, the IFP demanded that "a new Constitution be produced by an 'independent' panel of experts and adopted by a simple majority in a national referendum." KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 14.

[67] GLOPPEN, *supra* note 16, at 247.

[68] *Id.* at 257.

[69] *Id*.

[70] *Id.* at 258. In reference to the "popularized newsletter" *Constitutional Talk* and the face-to-face outreach program, which included over a thousand workshops, briefings and meetings.

[71] *Id.* at 264 (emphasis added).

[72] *See* Farinacci-Fernós, *Post-Liberal Constitutionalism, supra* note 3.

[73] S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para 362. (Sachs J., concurring) (emphasis added); *see also* S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 127 (Sachs J., concurring) (in reference to the need of acknowledging the way in which the Constitution "came into being").

In the end, while many legal experts aided in the actual drafting process, the constitutional venture "took place in *full view of the public.*"[74] As a result, the "members of the Constitutional Assembly found themselves *subject to greater pressures from their constituencies*."[75] This would indicate that there is *some* basis for a more intent-based mode of interpretation.[76] In the end, Klug suggests that "[t]he degree of public exposure to the Constitution-drafting process was probably without historical precedent anywhere in the world."[77]

The constitution making process in South Africa ended with a particular twist: The Constitutional Court *created by the interim Constitution* would certify that the *final* Constitution was compatible with the Constitutional Principles adopted during the first phase.[78] I will deal with this issue separately later on. For now, it is worth mentioning that the Constitutional Court is very aware of the Constitution's particular *creation* process: "Our Constitution was the product of negotiations conducted at the multi-party negotiating process," which was "advised by the technical committees."[79] I now turn to the role of adoption history and intent in constitutional adjudication.

IV. Legislative History and Intent: More than Useful, Less than Determinative

Here I deal with the issue of the uses of legislative history and intent jointly. As we are about to see, both of these sources play a role in constitutional adjudication in South Africa; but it is a limited one. I start with legislative or "adoption" history.

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[74] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 52 (emphasis added).

[75] *Id*. (Emphasis added).

[76] Hofmeyr, *supra* note 2, at 125 noting that the Constitutional Assembly not only carried "tremendous popular support, but the entire process of drafting the final Constitution was an immensely publicised affair".

[77] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10. At 54. Klug goes on to explain that "[t]he genesis of the Constitution from the first draft to the final product could be followed on a daily basis on the Internet site of the Constitutional Assembly." *Id*. This is reminiscent of the daily media reports and radio broadcasts in the Puerto Rican constitutional making experience.

However, as we have seen, the South African experience has not been unique. A similar process happened in Puerto Rico in 1952 and in Bolivia in 2009. There are other similar experiences in other countries and U.S. states.

[78] Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid*, *supra* note 29, at 263.

[79] S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 17. *See also* Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 13. In this case, the Court also made reference to the fact that the constitution was drafted concurrently with an "intensive country-wide information campaign." *Id*. at16.

The cases of the Constitutional Court of South Africa rarely mention adoption history in order to adjudicate a particular controversy, whether it is to find the semantic meaning of a word or set of words, or to discern the intent of the framers. Yet, it is not wholly absent.[80] Curiously enough, it is worth mentioning the fact that some early members of the Constitutional Court were members of the Constitutional Assembly.[81] As an empirical matter, it is interesting when drafters are still around when their text is being interpreted and applied. According to Lourens du Plessis, "[p]roximity in time to a major constitution-making process has made South African constitutional scholars privy to how original writers of a constitutional text cultivate their own confident (though by no means unanimous) understandings of what their 'creation' says –and will say, according to them, in time to come."[82]

Adoption history has been used sparingly in South African constitutional adjudication. This is part of a tradition of only using legislative history in order to find evidence "on the *purpose and background* of the legislation."[83] This is reminiscent of the objective and subjective teleological models. This includes reference to the reports and debates that formed part of the legislative process.[84] In particular, the relevant statements of the drafters are those that are made *during the formal legislative process*.[85]

The problem here is that this historical resistance to using legislative history *is different in the constitutional sphere, particularly when the constitution-making process, unlike ordinary legislation, is the result of a transcendental social process*.[86] Yet, the resistance endures: "any attempt to ascertain [the framers'] intent…is confounded by the Constitution-making process itself."[87] As such, purposivism is becoming a "substitute for clear language (and authorial intent)."[88]

However, constitutional adoption history has made it into the decisions of the South African Constitutional Court. One of the leading examples is *S. v.*

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[80] *See* Du Plessis v. De Klerk, CCT 8-95, paras. 32-41. ("In quite a number of South African Constitutional Court cases reference has been made to what the framers of both the Interim and Final Constitutions would (or would not) have thought or foreseen or 'intented'"). *See also* Hefmeyr, *supra* note 2, at 130.

[81] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 286.

[82] Lourens du Plessis, INTERPRETATION, CONSTITUTIONAL LAW OF SOUTH AFRICA, 2 ed., sec. 32-25, V. 2 (2002).

[83] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 286. *See also* KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 74 ("Historically, South African courts refused to give much weigh to legislative history").

[84] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 286.

[85] *Id*. This is very similar to the original explication model used in Puerto Rico and Bolivia. *See* Farinacci-Fernós, *When Social History Becomes a Constitution, supra* note 1; Farinacci-Fernós, *Originalism in Puerto Rico, supra* note 4.

[86] *See* du Plessis, *supra* note 82, at sec.32.28.

[87] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 75.

[88] du Plessis, *supra* note 82, at sec 32-37.

Makwanyane.[89] The question in that case was whether the death penalty was compatible with the interim Constitution. The problem was that the text made no explicit reference to this issue: "It would no doubt have been better if the framers of the Constitution had stated specifically, wither that the death sentence is not a competent penalty, or that it is permissible in circumstances sanctioned by law."[90] In the absence of a specific textual rule, the Court embarked on a process of interpretation; in particular, a contextual analysis of the Constitution "which includes the *history* and *background to the adoption* of the Constitution."[91] As such, the Court dove into the "debate which took place in regard to the death penalty *before* the commencement of the constitutional negotiations."[92] That it, it did not limit itself to the internal adoption history of the Constitution. And even then, the Court was careful with its characterization of the role of adoption history in constitutional adjudication: "It was argued that this background information forms part of the context within which the Constitution should be interpreted."[93]

The Court fell back on its practice as to *statutory* interpretation: "Our courts have held that it is permissible in interpreting a statute to have regard to the purpose and background of the legislation in question."[94] In other words, the question is not whether adoption history is authoritative or determinative, but whether it is even permissible to use it at all. Yet, the Court does not offer a normative justification for this, but instead references its prior practice as to statutory interpretation. This fails to take into account the democratic and participatory nature of the constitution-making process, which may require a different approach as opposed to the adoption of ordinary legislation.

In its comparative analysis, the Court referenced that "[i]n other countries in which the Constitution is similarly the supreme law, it is not unusual for the Courts to have regard to the circumstances existing at the time the Constitution was adopted, including the debates and writings which formed part of the process."[95] There may yet be hope for the original explication model, keeping in mind that this case was handed down *before the final Constitution was adopted in 1996, which was not just the result of negotiations but a more popular based process of constitutional creation*. As to the negotiation process itself that gave birth to the interim Constitution, the Court stated that the "reports of [the technical committees which advised the parties] on the drafts are the equivalent of the *travaux préparatoires*, relied upon by the

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[89] 1995 (6) BCLR 665 (CC).

[90] *Id*. at 5.

[91] *Id*. at 10. (Emphasis added).

[92] *Id*. at 12. (Emphasis added).

[93] *Id*.

[94] *Id*. at 13.

[95] *Id*. at 16.

international tribunals."[96] The Court further explained: "Such background material can provide a context for the interpretation of the Constitution, and, where it serves that purpose, [we] can see no reason why such evidence should be excluded."[97] In the end, "[t]he precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it."[98] Adoption history is linked with the identification of the purpose of a particular provision.[99]

But the Court held back, leaving for the future the actual role of legislative history in constitutional adjudication: "It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence."[100] However, the Court did give legislative history some breathing space: "It is sufficient to say that where the background material is *clear*, is *not in dispute*, and is *relevant* to showing *why* particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution."[101] Original explication may live to fight another day. In fact, one member of the Court stated that "[i]n the absence of the clearest indications that the framers of the Constitution intended [giving a particular provision a different reading]…section 9 [of the interim Constitution] should be read to mean exactly what it says: every person shall have the right to life."[102] Note that there seems to be an admission there that, in fact, the existence of such clear indication *would trump the ordinary meaning of the text*.

As to the particular issue of the death penalty, the Court noted that "it is clear that the failure to deal specifically in the Constitution with this issue was not accidental."[103] As most relevant here, *the Constitutional Court was able to use adoption history in order to conclude that the drafters of the interim Constitution actually intended the Court itself to answer the question as to the legality of the death penalty*.[104] This "is apparent from the reports of the Technical Committee on Fundamental Rights, and, in particular, the Fourth and Seventh reports."[105] In the end, the Court struck down the death penalty.

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[96] *Id*. at 17.
[97] *Id*.
[98] *Id*.
[99] *Id*. at 19. ("Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution").
[100] *Id*.
[101] *Id*. (Emphasis added).
[102] *Id*. at 357 (Sachs, J., concurring).
[103] *Id*. at 20.
[104] *Id*. at 324 (O'Regan, J., concurring).
[105] Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid*, *supra* note 29, at 274.

But legislative history has remained in the backburner in constitutional adjudication in South Africa. Examples are rare.[106] My main objection to that practice is that *no direct normative justification is given, particularly as to the 1996 Constitution which was partially the result of a popular, democratic and participatory process of creation*. For now, legislative history is either missing or limited to a confirmatory role.[107] Other times it has even been given that secondary role grudgingly.[108]

Yet, there seems to be *some* daylight between formal legislative history and the intent of the framers in general. References to the latter have been relatively more prevalent, allowing for potential future development of that interpretive tool.

The drafters have been present in the decisions of the South African Constitutional Court. This presence links the constitutional product with the social forces behind it. As Christiansen explains, "[i]t is true that historical and popular expectations applied substantial pressure on the drafters of the Constitution."[109] As a result, when courts apply the teleological constitution they are "[r]einforcing the founding generation's constitutional values."[110] Another of the many interesting features of this issue is the fact that some of the constitutional designers would later be appointed to the Constitutional Court.[111] Finally, we should also remember here the considerable paper trail that the constitution making process left available.[112] Yet, because of the different viewpoints that were present in the entire

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[106] *See, for example*, S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 128 (Sachs, J., concurring).

[107] *See* Ferreira v. Levin, CCT 5/95, para. 46. ("The legislative history of the section would seem to confirm this," in reference to the Sixth Report of the Technical Committee on Fundamental Rights during the multi-party talks); Du Plessis v. De Klerk, CCT 8/95, para. 84 (Mahomed, DP) ("[I]t is, I think, permissible to have some regard to that history, *although this cannot in itself ever operate decisively*") (Emphasis added); Case and Another v. Ministry of Safety and Security, CCT 20/95.

[108] *Du Plessis*, at 56. ("I have arrived at the conclusions set above without any references to the drafting history of Chapter 3, and in particular of Section 7…We heard no argument on that history, but it is referred to frequently in the literature which I have cited. It is perhaps sufficient to say that there is nothing in the legislative history referred to in that literature which requires the adoption of the [proposed] interpretation"). Curiously enough, this statement is followed by homage to the framers: "I do not believe that such a state of affairs could ever have been *intended by the framers of the Constitution*." *Id*. at 57.

[109] Christiansen, *supra* note 12, at 387. The author goes on to say: "However, that is the nature of constitutional drafting processes generally, not just in South Africa." *Id*. This is particularly true in the case of teleological constitutions, where the link between text and adoption history seems stronger.

[110] *Id*. at 403. As a result, when the Constitutional Court applies a policy-laden provision, it is not substituting the legislator' will with their own, but with the will of the constitutional drafter. Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid, supra* note 29, at 275.

[111] *See, for example*, GLOPPEN, *supra* note 16, at 59.

[112] Theuns Eloff, *The Process of Giving Birth*, in BIRTH OF A CONSTITUTION 16-17 (Bertus De Villiers, ed. 1994).

constitutional making process, ascertaining on-point intent from those sources may be tricky.[113] Other times it is much easier.[114]

As we already saw, the Constitutional Court's most intentionalist decision is *S. v. Makwanyane*, particularly as to the actions and mindset of the drafters.[115] But there are other decisions that, although not wholly intentionalist, do make sufficient reference to the framers so as to assign them a role in constitutional adjudication. Some of those references are in negative terms: "It would be extremely distressed to accept that is what the Constitution intended."[116] And if the framers made a judgment, that judgment stands: "Rightly or wrongly the framers of the Constitution chose the latter option and we are required to give effect to that choice."[117] In that sense, a policy-heavy decision that overturns the legislature's judgment is not an exercise in judicial usurpation: "But that is beside the point, This Court did not draft the Constitution;"[118] "[t]his is not the case of making the Constitution mean what we like, but of making it mean what the framers wanted it to mean; we can gather their intention not from our subjective wishes, but from looking at the document as a whole."[119] Yet, this last statement seems to blur the lines between an intentionalist approach and the objective teleological model.[120]

But the idea that what the framers did and *intended* are determinative has not been lost on the Court: "In my view there is no argument for such an approach, for at least two reasons. First, *it would constitute an unjustified 'second-guessing' of the framers' intention*. They must have been only too well aware that at least some of the section 11(1) rights were residual freedoms."[121] Yet, some problems remain, such as the collective intent issue: "One also knows that the Constitution did not spring pristine from the collective mind of its drafters."[122] But that has not been an

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[113] De Villiers, *supra* note 17, at 46-47.

[114] Certification of the Constitution of the Republic of South Africa*, 1996*, 1996 (10) BCLR 1253 (CC), fn. 47; Du Lange v. Smuths *NO*, 1998 (7) BCLR 779 (CC), para. 16.

[115] *See, for example,* S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 388 (Sachs, J., concurring).

[116] S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 8. "If the intention of the section was…" *Id*. at 12; Du Plessis v. De Klerk, CCT 8/95, para. 57; Ynvico Limited v. Minister of Trade and Industry, CCT 47/95, para. 7; Ex Parte the President of the Republic of South Africa; in re Constitutionality of Liquor Bill, 2000 (1) BCLR 1 (CC), para. 57.

[117] *Mhlungu*, at 72 (Kentridge, A.J., dissenting). *See also Id*. at 102 (Sachs, J., concurring) ("My disagreement with Kentridge AJ's judgment is that even if it bases itself on the most natural and spontaneous reading of the section, it gives too little weight to the overall design and purpose of the Constitution, producing results which the framers could have never intended." *Id*. at 105; Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 104.

[118] *Du Plessis,* at 123 (Kriegler, J.).

[119] *Mhulungu*, at 112.

[120] *See Du Plessis*, at 44; Premier of Kwazulu-Natal v. President of the Republic of South Africa, 1995 (12) BCLR 1561, para. 12.

[121] Ferreira v. Levin, CCT 5/95, para. 58 (emphasis added).

[122] *Du Plessis,* at 123 (Kriegler, J.).

absolute impediment to using intent. In fact, sometimes this intent can actually be used to expand on the text: "The manifest intention of the drafters of the subsection was to *expand* its scope to the *widest* limit that *their language could express*."[123] Sometimes that intent as to important substantive policy issues is evident.[124]

V. When Looking Back Helps to Go Forward: The Uses of History in South African Constitutional Adjudication

It would be an understatement to say that history plays a crucial role in the jurisprudence of the South African Constitutional Court. The 1996 Constitution *is an intentional product of history*.[125] As a teleological document, it addresses the past and looks to the future. As such, "in the light of our own particular history, and our vision for the future, [the] constitution was written with equality at its center."[126]

The past is present in the decisions of the Constitutional Court.[127] References to history permeates them. This requires analyzing "both the constitution-making process and the process of implementation of the Constitution, against the background of the heavy legacy of apartheid, the reality of everyday life, and finally against the hope and enthusiasm and civil, political and academic interest stimulated by the transition two decades ago."[128] In particular, South African constitutional law takes into account historical grievances that interrelate race and class,[129] as well as others form of social injustice.[130] It also includes the

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[123] *Id*. at 130 (emphasis added).

[124] President of the Republic of South Africa v. Hugo, 1997 (6) BCLR 708 (CC), para. 73 (Kriegler, J., concurring) ("Discrimination founded on gender or sex was manifestly a serious concern of the drafters of the Constitution"); Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 51.

[125] *See* KLUG THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 1.

[126] *Hugo,* at 74 (Kriegler, J., concurring).

[127] Du Plessis v. De Klerk, CCT 8/95 para. 125 (Kriegler, J.).

[128] Federico, et al., *supra* note 34.

[129] *See* Nic Olivier, Nico Olivier & Clara Williams, *Land Reform and Constitutional Rights*, *in* THE QUEST FOR CONSTITUTIONALISM 207 (1994); Case and Another v. Ministry of Safety and Security, CCT 20/95, para. 80; Dawood v. Minister, 2000 (8) BCLR 837 (CC), para. 35.

[130] Fraser v. Children's Court, 1997 (2) BCLR 153 (CC), para. 44; S. v. Lawrence; S. v. Negal; S. v. Solberg, 1997 (10) BCLR 1348 (CC), para. 31 ("In light of our history in job reservation, influx control and monopolies it is understandable that there should be such a provision in the bill of rights"); Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC), para. 6 ("The cause of the acute housing shortage lies in apartheid"); Moseneke v. The Master of the High Court, 2001 (2) BCLR 103 (CC), para. 20 ("The Act systematized and enforced a colonial form of relationship between a dominant white minority who were to have the rights of citizenship and a subordinate black majority who were to be administered"); Bel Porto School Governing Body v. Premier of the Province, Western Cape, 2002 (9) BCLR (891 (CC), para. 8 (in reference to the history of racially-segregated education); NUMSA v. Bader Bop (Pty) Ltd, 2003 (2) BCLR 182 (CC), para. 13 (indicating that the right of workers to strike "is both of historical and contemporaneous significance").

history of the main political actor behind the constitutional project: the African National Congress.[131]

The South African Constitutional Court has consistently recognized that its constitutional structure must be analyzed in the context of its particular legal history, traditions and usages.[132] As such, the provisions of the Constitution must not be read in isolation but in context, "which includes the history and background to the adoption of the Constitution."[133] In that sense, even the purposive approach to constitutional interpretation –which I will address later on- has to take into account history: "In seeking the purpose of the particular rights, it is important to place them in the context of South African society;"[134] "[i]t is essential, in my view, to consider our constitutional history prior to the introduction of the interim and 1996 Constitutions in the process of determining what the purpose of the 1996 Constitution is."[135] That historical context can even affect the semantic meaning of words and their legal effect: "Given the specific meaning that the phrase 'detention without trial' has acquired in South Africa, however, I prefer not to apply these words literally to the situation under discussion."[136]

In *Anzanian Peoples Organization v. President*, the Constitutional Court started its analysis with a direct reference to history: "For decades South African history has been dominated by a deep conflict between a minority which reserved for itself a central role over the political instruments of the state and a majority who sought to end that domination."[137] The Court goes on:

> The result was a debilitating war of internal political dissension and conflict, massive experience of labour militancy, perennial student unrest,

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[131] *See* GLOPPEN, *supra* note 16, at 69.

[132] S. v. Zuma*,* 1995(4) BCLR 401 SA (CC), para. 15; S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 361 (Sachs, J., concurring); Fedsure Life Assurance LTD v. Greater Johannesburg Transnational Metropolitan Council, 1998 (12) BCLR 1458 (CC), para. 2.

[133] *Makwanyane,* at 10. *See also* S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 28 ("Whatever be the exact phraseology used, however, the basic idea of legitimizing the authority of the old to continue with that authority under a new regime has a long and very well established constitutional history"); Du Plessis v. De Klerk, CCT 8/95, para. 119 (Kriegler, J.) ("The legal issues involved are inherently complex. The conundrum is compounded by percepts of its social, political and economic implications, as also by inarticulated premises, culturally and historically ingrained"); Certification of the Constitution of the Republic of South Africa*,* 1996, 1996 (10) BCLR 1253 (CC), para. 1; ANC v. Minister, 1998 (4) BCLR 399 (CC), para. 4 ("It is necessary to set the provisions of section 182 in their historical context").

[134] S. v. Williams, 1995 (7) BCLR 861 (CC), para. 51; Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill of 1995, CCT 39/95, paras. 8 and 19; Prinsloo v. Van Der Linde, 1997 (6) BCLR 759 (CC), para. 20.

[135] De Lange v. Smuths NO, 1998 (7) BCLR 779, para. 43.

[136] Coetzee v. Government; Matiso v. Commanding Officer, 1995 (10) BCLR 1382 (CC), para. 43 (Sachs, J., concurring).

[137] 1996 (8) BCLR 1015 (CC), para. 1.

> punishing international economic isolation, widespread dislocation in crucial areas of national endeavor, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among expanding portions of the populace. The legitimacy of law itself was deeply wounded as the country hemorrhaged dangerously in the face of this tragic conflict which had begun to traumatize the entire nation.[138]

Such historical experiences cannot be ignored when engaging in constitutional adjudication.[139]

VI. Because the Constitution Says So: The Enforcement of Socio-Economic Rights and a Broad Reading of Rights in General

Constitutional scholars constantly mention South Africa's catalogue of justiciable socio-economic rights as a distinctive characteristic of that country's constitutional model.[140] This has led scholars to state that "[t]he Constitution of South Africa of 1996 differs from classical liberal constitutions in other parts of the world and is perceived as a progressive and transformative document."[141] This is the result of the view that "[t]he goals of government activity in the areas of social policy, economic policy and environmental policy, as well as the direction of change, should be laid down in the constitution itself."[142]

Of course, as we have seen, that feature is not unique to South Africa. While the *existence* of a broad array of constitutionalized socio-economic rights is not exclusive to South Africa, its approach to their *enforcement* has much to offer other teleological constitutional systems. In this section, I will focus on the treatment of socio-economic rights in particular and of rights in general in the South African constitutional experience, beginning with a descriptive account of the *content* of the constitutional text and finishing with an account of their actual *enforcement*.

A. Socio-Economic Rights

It should be mentioned that South Africa's catalogue of justiciable socio-economic rights is not merely an abstract list of generic aspirations; some see it as

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[138] *Id*.

[139] *See* Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), paras. 3-6; August v. Electoral Commission, 1999 (4) BCLR 363 (CC), para. 17.

[140] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 267 (stating that the Constitution's list of socio-economic rights "mark the unique character of this Constitution as the crowning achievement of South Africa's democratic transition").

[141] Stewart, *supra* note 15, at 81.

[142] GLOPPEN, *supra* note 16, at 66.

a tool that "can advance the case of social justice."[143] In other words, it is part of a specific policy view. As Heinz Klug explains, the African National Congress pushed "for the expansion of rights to include a range of socio-economic rights that were central to its constituencies' demands."[144] Unfortunately, much of the debate about South Africa's justiciable socio-economic rights focuses on its positive and vertical application.[145] Much less attention has been paid to the issue of horizontality, which I will discuss separately later on.

Taking into account the applicable distinctions as to the nature, effect and scope of rights, we have to differentiate positive and vertical rights from those that are negative and horizontal.[146] South Africa's 1996 Constitution includes *both*; from socio-economic rights that create a positive obligation on the state, such as education rights,[147] housing,[148] healthcare, sufficient food and water, social security,[149] to socio-economic rights that are opposable to private parties, such as employers.[150]

But the South African Constitution does not merely incorporate socio-economic rights; it also *broadens* the scope of rights in general, including civil and political rights.[151] While the content of the right may be similar, its scope and effect are enhanced. As the Constitutional Court has observed: "It should be emphasized that in general the Bill of Rights drafted by the [Constitutional Assembly] is as extensive as any found in any national constitution."[152] Other decisions of the Constitutional Court reflect this approach.[153]

B. Judicial Enforcement of Socio-Economic Rights

The *enforcement* of constitutionalized socio-economic rights constitutes a revolution in the conceptualization of the judicial role. As Linda Stewart explains, "socio-economic rights interpretation and adjudication is by its very nature political

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[143] Christiansen, *supra* note 12, at 371.

[144] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 4.

[145] Christiansen, *supra* note 12, at 374.

[146] *See* Jorge M. Farinacci-Fernós, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect and Reach*, 41 HASTINGS INT'L & COMP. L. Rev. 31 (2017).

[147] *See* Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill of 1995, CCT 39/95, para. 5.

[148] Soobramoney v. Minister of Health (Kwazulu-Natal), CCT 32/97, paras. 9-10.

[149] Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 76.

[150] South African National Defence Union v. Minister of Defense, 1999 (6) BCLR 615 (CC), para. 20.

[151] *See* S. v. Zuma, 1995(4) BCLR 401 SA (CC), para. 16.

[152] *Certification of the Constitution of the Republic of South Africa, 1996*, at 52.

[153] August v. Electoral Commission, 1999 (4) BCLR 363 (CC), paras. 1-5 (on the voting rights of convicted persons).

and the judiciary plays a significant role in shaping the political discourse on needs and poverty not only in the language they use, but also the conceptual structures and rhetorical remedies they employ and rely on when adjudicating socio-economic rights."[154]

While many countries do, in fact, incorporate socio-economic rights in their texts, these "are infrequently enforced by courts" and are deemed to be non-justiciable by scholars.[155] South Africa has challenged that common wisdom and serves as a "counter-example."[156] According to Eric Christiansen, "South Africa is the first nation that has adjudicated a sufficient number of cases to evidence a comprehensive jurisprudence,"[157] as it relates to socio-economic rights. However, *this does not mean that there aren't problems of under-enforcement in South Africa*: "[T]he Court has been criticized far more for the excessive *restraint* it has shown than for *judicial over-reaching*."[158]

Before diving in to the specific examples of the enforcement of socio-economic rights in South Africa, it is worth mentioning how the Constitutional Court has adopted self-imposed limitations as to this issue. Among these are: (1) an avoidance of individual remedies, (2) an unwillingness to recognize unqualified textual rights, (3) a rejection of a 'minimum core' standard for social welfare entitlements which would guarantee a minimum level of sustenance, (4) the application of a reasonableness standard that allows for great deference for legislative judgment, and (5) a rejection of any form of unrestrained enforcement of these rights.[159] And, in terms of the actual analysis of these provisions, we should be aware as to how the Court takes into account (1) text, (2) its approach to rights adjudication in general, (3) separation of powers issues, (4) federalism issues, (5) the country's legal culture, (6) the capabilities and credibility of the judiciary itself, (7) procedural issues that impact the court's capacity to solicit information, and (8) the scope of the court's remedial powers.[160] I will analyze many of these factors later on in the Article. But, as can be appreciated from this list, the Constitutional Court has been reluctant "to provide normative content to socio-economic rights and resorted to a procedural and formalistic approach to measure the reasonableness of the measure taken by the State."[161] Under-enforcement remains an issue. While it is true that courts in South Africa can do a lot more than has been done until now, they have done much more

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[154] Stewart, *supra* note 15, at 81-82.

[155] Christiansen, *supra* note 12, at 373.

[156] *Id*. at 376.

[157] *Id*. at 377.

[158] *Id*. (emphasis added).

[159] *Id*. at 385-386.

[160] *Id*. at 388-389.

[161] Stewart, *supra* note 15, at 84.

than they think, particularly as opposed to courts in other constitutional systems. But, as Heinz Klug points out, "the inherent positivism of South African lawyers may restrict or serve as a drag on the interpretive project so central to the transformative potential of the Constitution."[162] That's the stuff of under-enforcement by clinging to outdated views on constitutionalism or the judicial role.

According to Eric Christiansen, "South Africa evidences that courts can adjudicate [positive and vertical] socio-economic rights without destroying the rule of law or the fiscal security of the country."[163] This requires more careful analysis, as even the author recognizes that "[t]he general conclusion, required by the limited role of courts and the uncertain interaction of popular processes and adjudication, is that court enforcement can *support* social change within institutional constraints."[164] In that sense, even the comprehensive enforcement of these rights, as well as other substantive provisions, is not a *permanent* substitute for effective use of the legislative process and ordinary politics. This dissertation has now argued for such replacement; judicial enforcement merely works as a temporary tool until ordinary politics and constitutional politics line up again.

The enforcement of socio-economic rights in South Africa, and its impact on the judicial role, has not been lost on scholars: "To the extent that these rights are justiciable –which at least some of them are formulated to be- they confer great powers on the courts in matter of social and economic policy."[165] Let's break this down.

First, we should distinguish between judicial usurpation and constitutional delegation. There is a critical difference between a court that makes up the law along the way unconstrained by constitutional commands and a court that intervenes in a policy issue *because the constitutional legislator orders it to by adopting enforceable policy provisions, such as a socio-economic right*. Second, *negative* socio-economic rights, whether vertical or horizontal in their reach, limit the role of the Court to that of negative legislator –although, as we saw, in teleological contexts this can have substantial policy implications-. Third, it is in the *positive* manifestation of socio-economic rights that courts are more likely to carry out policy analysis and reach independent conclusions.[166] But, in any event, there is no denying the impact of justiciable and enforceable socio-economic rights as to the nature of courts. I will return to this latter issue later on.

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[162] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 73.

[163] Christiansen, *supra* note 12, at 400.

[164] *Id*. (emphasis added).

[165] GLOPPEN, *supra* note 16, at 232.

[166] *See Id.* ("Social and economic rights leave even greater potential for disagreement on what 'justice' requires, than do other aspects of the Bill of Rights").

Negative socio-economic rights have been easier to enforce.[167] This is simply an extension of the classic negative legislator role. Positive rights are trickier.[168] This is true whether we are addressing socio-economic rights or even civil and political ones; it applies to all positive rights. In the South African context, positive socio-economic rights that are also vertical –that is, opposable to the state-, are analyzed under a standard of *reasonableness*. In other words, if the action –or lack thereof- on the part of the state is reasonable as to the enforcement of the particular constitutional right. Let's dive a little deeper.

All rights in South Africa are subject to limitations.[169] The Constitution offers two types of limits. First, some rights have *specific limitations written into the right itself*. Socio-economic rights are among these. Second, there is a *general* limitations clause contained in the Constitution that applies to all constitutional rights. I will now discuss both.

The reasonableness standard used to enforce *positive* socio-economic rights stems from the constitutional text itself.[170] This is so, because the text (1) conditions the enforcement of the rights to the existence of available resources and (2) requires the state to take reasonable legislative and other measures to achieve the progressive realization of socio-economic rights.[171] In other words, the text itself rejects an unqualified enforcement of socio-economic rights, conditioning it to the existence of resources and the taking of reasonable steps towards their gradual realization. This language has led to the reasonableness standard. This brings us to *Grootboom*.[172]

In *Grootboom*, a suit was brought demanding the state to comply with its constitutional duty to provide adequate housing. This required judicial evaluation of the government's housing program.[173] The text of the constitutional provision limited the existence of the right, "imposing an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources."[174]

The Constitutional Court first dealt with the justiciability issue as it relates to socio-economic rights in general, particularly of the positive sort. Its conclusion was forceful, *as required by the constitutional text itself*: "While the justiciability of socio-economic rights has been the subject of considerable and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa

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[167] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 307.

[168] *See* Farinacci-Fernós, *Looking Beyond, supra* note 146.

[169] The standard we are about to see is very similar to Canada's rights structure.

[170] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 143.

[171] Soobramoney v. Minister of Health (Kwazulu-Natal), CCT 32/97, para 10.

[172] Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC).

[173] *Id*. at 12.

[174] *Id*. at 13.

has been put beyond question by the text of the Constitution as construed in the *Certification* judgment."[175] In other words, "[s]ocio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist in paper alone."[176]

As a result, "courts are constitutionally bound to ensure that they are protected and fulfilled."[177] According to the Court, "[t]he question is therefore not whether socio-economic rights are justiciable under our Constitution, but *how* to enforce them in a given case."[178] Once the general justiciability issue was resolved, the Court turned its attention to the actual enforcement of positive socio-economic rights that have vertical reach and positive articulation. For that analysis, the Court used both textual and socio-historical factors and considerations, in particular, the socio-economic rights as an extension of political rights rationale.[179]

Once the existence of a socio-economic right and its justiciability are recognized, "[t]he state is obliged to take positive action to" enforce the specific socio-economic right, and the Court must determine, using a reasonableness standard, whether the state "has met its obligation."[180] As such, legislative or executive *inaction* is constitutionally impermissible. Also, these *positive* rights have *negative, and even horizontal, effects*: "Although the subsection does not expressly say so, there is, at the very least, a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right."[181]

The reasonableness standard offers great room for maneuver for the legislature and the executive: "The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive."[182] These, however, must be reasonable, which is a matter for judicial review. Within the realm of what is reasonable, the elected branches get to choose. This is not a toothless tiger type of standard; in *Grootboom*, the Constitutional Court held the government's housing program to be insufficient and, thus, unconstitutional. The reasonableness standard announcer in *Grootboom* has been used in other cases.[183]

Another critical case that aids in the analysis of the enforcement of positive and vertical socio-economic rights is *Minister of Health v. Treatment Action Campaign*.[184] This case involved the government's duty to provide health care to

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[175] *Id*. at 20 (emphasis added).
[176] *Id*.
[177] *Id*.
[178] *Id*. (emphasis added).
[179] *Id*. at 22.
[180] *Id*. at 24.
[181] *Id*. at 34.
[182] *Id*. at 41.
[183] *See, for example*, Minister of Public Works v. Kyalami Ridge Environmental Association, 2001 (7) BCLR 652 (CC), para. 38.
[184] 2002 (10) BCLR 1033 (CC).

HIV/AIDS patients. There, the Constitutional Court stressed *both* the existence and justiciability of positive socio-economic rights *and* their textual limitations.[185] Also, the Court emphasized that these rights are to be "interpreted in their social and historical context."[186] It's not just all about the text.

Once justiciability was reaffirmed, the Constitutional Court framed the issue thusly: "The question is whether the applicants have shown that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution."[187] This statements reaffirms the reasonableness test, as well as make clear that the initial burden of proof falls on the plaintiff.

But the Court in *Treatment Action Campaign* hit the brakes a bit, particularly as to the issue of the so-called 'minimum core': "The minimum core might not be easy to define, but includes at least the minimum decencies of life constant with human dignity. No one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a court."[188] In the end, though, the Court rejected an out-right right to a minimum core approach to socio-economic rights, *but*, it did hold that if a particular situation falls below that threshold, that fact will be most relevant to the reasonableness analysis itself. In other words, it is part of the analysis instead on a self-standing right.[189]

In the end, the doctrine stands as follows: when it comes to *positive* and *vertical* socio-economic rights, the Court will apply a deferential standard of reasonableness.[190] This standard takes into account available resources. And while it does give some leeway to legislative and executive judgment, in the end, courts have to decide whether a particular action, or lack thereof, is sufficient to comply with the constitutional command.

Once we address the specific limitations textually built-in as to socio-economic right, we still must face the general limitations provision, which requires courts to analyze: (1) the nature of the right involved, (2) the purpose of the limitation, (3) the nature and extent of the limitation, (4) the relation between the limitation and its purpose, and (5) the existence of less restrictive means to achieve such ends.[191] In

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[185] *Id*. at 25 ("The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are").
[186] *Id*. at 23.
[187] *Id*. at 25.
[188] *Id*. at 28.
[189] *Id*. at 34.
[190] The reasonableness test has not been without its critics, as it "transforms poverty and needs issues into technical and administrative issues which can only be addressed by formal political and governmental structures (Based on a liberal-capitalist economic system)". Morné Olivier, *supra* note 13, at 82.
[191] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 117.

addition, limitations will only be upheld if they are reasonable and justifiable in an open and democratic society based on dignity, equality and freedom.[192] This is the South African version of the proportionality test.

This limitation provision should be seen jointly with the fact that, as a threshold matter, rights are given a *generous and purposive* interpretation in South Africa. As such, courts will almost always find a violation of the right and turn immediately to the limitation analysis. This brings us to the issue of the relation between generous and purposive interpretation, since these are not always in-tuned with each other. They are, after all, different concepts.[193] The South African Constitutional Court has recognized this. A generous interpretation can actually run contrary to the purpose of a right.[194]

This brings us to *Coetzee v. Government*; *Matiso v. Commanding Officer*, where a generous interpretation actually *defeated* the purpose of the right, which was to protect poor people who couldn't pay instead of rich people who refused to pay their debts. The South African Constitutional Court actually gave preference to *purpose over generosity*.[195]

In that sense, generous interpretation broadens the scope of a right, while purposive interpretation requires "identifying the core values that underlie the inclusion of a particular right in the Bill of Rights and adopting an interpretation of the right that 'best supports and protects these values'."[196]

C. Horizontality

Rights can be either vertical or horizontal, independent of their nature –that is, political and civil or socio-economic- or their scope –that is, negative or positive-. Some socio-economic rights are clearly horizontal in their reach; labor rights are a good example of this. Here I wish to focus on the horizontality of rights that are mainly designed as vertical. More to the point, I will address the *general horizontal effect of rights that are not explicitly horizontal*.

Anti-discrimination provisions are at the heart of this analysis. As Gloppen suggests, "[h]orizontal application of constitutional rights is controversial."[197]

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[192] S. AFR. CONST., 1996. § 36.

[193] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 121 ("In addition to a generous interpretation, the Constitutional Court has repeatedly referred to the necessity of adopting a purposive approach to the interpretation of rights").

[194] *Id.* at 122; Coetzee v. Government; Matiso v. Commanding Officer, 1995 (10) BCLR 1382 (CC), para. 13 ("The sanction of imprisonment is ostensibly aimed at the debtor who will not pay. But in is unreasonable in that it also strikes at those who cannot pay").

[195] Coetzee v. Government; Matiso v. Commanding Officer, 1995 (10) BCLR 1382 (CC), para. 13 ("The sanction of imprisonment is ostensibly aimed at the debtor who will not pay. But in is unreasonable in that it also strikes at those who cannot pay").

[196] *Id.* at 121.

[197] GLOPPEN, *supra* note 16, at 233.

The horizontal effect of constitutional rights "enables rather than restraints the state,"[198] as part of the post-liberal, teleological view of using state power to generate social transformation, particularly in the private sphere. In terms of labor rights, "[t]he horizontal rights provisions add to the workload of courts in general, and the Constitutional Court in particular."[199] These "add to the Court's potential 'legislative' powers."[200]

In *Du Plessis v. De Klerk*, the Constitutional Court faced the question of whether the anti-discrimination provisions of the constitution had "only 'vertical' application or ha[ve] in addition 'horizontal' application."[201] After noting that the horizontal-vertical dichotomy may be misleading, the Court focuses on the German and Canadian experiences of giving *indirect* horizontal effect to this type of constitutional provision.[202]

This indirect horizontal effect requires courts to develop private law and other statutory provisions *in accordance* with constitutional requirements. Statutory interpretation becomes the tool for the indirect constitutionalization of private law. While not giving constitutional provisions full horizontal effect, the importance of such *indirect* horizontality should not be underestimated. As one member of the Court put it, in reference to the "egregious caricature" given by the detractors of horizontality: "That this so-called direct horizontality will result in an Orwellian society in which the all-powerful state will control all private relationships…is nonsense...[I]t is malicious nonsense preying on the fears of privileged whites, cosseted in the past by *laissez faire* capitalism thriving in an environment where the black underclass had limited opportunity to share in the bounty…Direct horizontality is a boogeyman."[203]

Curiously enough, the Constitutional Court used *text* and *intent* to justify not giving the Constitution full and direct horizontal effect: "Had the *intention* been to give [the Bill of Rights] a more external application that could have been readily expressed."[204] In terms of using *legislative history* to arrive at this conclusion, the Court's statement are ambiguous, yet revealing:

I have arrived at the conclusions set out above *without* any reference to the *drafting history* of Chapter 3, and in particular Section 7. We heard no argument on that history, but it is referred to frequently in the literature which I have cited. It is

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[198] *Id*.

[199] *Id*.

[200] *Id*.

[201] Du Plessis v. De Klerk, CCT 8-95, para. 8.

[202] *Id*. at 36.

[203] *Id*. at 120 (Kriegler, J., dissenting).

[204] *Id*. 45 (emphasis added) ("It would be surprising if as important a matter as direct horizontal application were to be left implied").

perhaps sufficient to say that *there is nothing in the legislative history* referred to in the literature which *requires* the adoption of the horizontal interpretation.[205]

It would seem that, although there was some resistance as to the use of legislative history to ascertain the scope and reach of the constitutional provisions under review, the Constitutional Court did admit that there *could have been* some sort of legislative history that could *require* a particular outcome. In the end, the Court recognizes: "I do not believe that such a state of affairs could have been *intended by the framers of the Constitution*."[206]

The issue of horizontality would come up again when the Constitutional Court certified the *final* Constitution of 1996. In the *Certification* case, the Court addressed horizontality. According to the new Article 8, Section 2, "[a] provision of the Bill of Rights binds natural and juristic persons, if, and to the extent that it is applicable, taking into account the nature of the right and duty imposed by the right."[207] In other words, the *direct* horizontal effect of a particular right would be analyzed using this constitutionally-prescribed standard. Once again, labor rights are a good example of the sort of constitutional provision that, by its nature, requires horizontal effect. As to the objections made against this provision, the Constitutional Court simply *rejected* them, deferring to the judgment of the constitutional legislators.

In summary, while the Bill of Rights applies directly to the organs of state and some particular rights have direct horizontal effect, the Bill of Rights "indirectly applies to persons other than organs of state," mostly by way of the development of the common law in a manner consistent with the Constitution.[208] Still, some gray areas remain.[209]

D. Constitutionalized Statutory Interpretation

The issue of indirect horizontality through the constitutionally-compatible development of private law brings us to the general issue of constitutionally-sensitive statutory interpretation. This combination has not been lost on the Constitutional Court.[210] This includes making older statutes, which were adopted before the

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[205] *Id*. at 56.

[206] *Id*. at 57. (Emphasis added). *See also*, *Id*. at 111. (Ackermann, J., concurring).

[207] Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 52.

[208] Fedsure Life Assurance LTD v. Greater Johannesburg Transnational Metropolitan Council, 1998 (12) BCLR 1458 (CC), para. 104.

[209] *See* Carmichele v. Minister of Safety and Security, 2001 (10) BCLR 995 (CC), para. 57 ("[I]t is by no means clear how these constitutional provisions on the state translate into private law duties towards individuals").

[210] Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid*, *supra* note 29, at 283; Du Plessis v. De Klerk, CCT 8-95, para. 60.

adoption of the new Constitution, compatible with the "new constitutional order."[211] The same thing happens with the common law.[212] Labor laws are a good example of the constitutionalization of statutes.[213]

E. Dealing with Discrimination

The South African Constitution's anti-discrimination provisions are considerably strong. This should come as no surprise given the recent history of that country, yet, these constitutional provisions are by no means limited to issues of race. But, it is sensitive to the historical fact that "[i]t is the majority, and not the minority, which has suffered."[214]

South Africa's constitutional anti-discrimination regime has several layers. All of them protect against direct and indirect discrimination.[215] At the bottom of the scale is "mere differentiation" which is distinguished from discrimination or illegitimate differentiation. When addressing mere differentiation, the court will uphold it as long as it is *rational*.[216] This constitutes a general requirement of the equal protection of the law.[217]

Besides mere differentiation, the Constitution distinguishes between two forms of illegal discrimination.[218]The first was discrimination as to specifically enumerated classifications, such as race, gender, sex, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, language and sexual orientation. Quite the list.[219] If there was discrimination as to these classifications, these are "presumed unfair until the contrary is established."[220] It is not an easy hurdle to meet.[221] Unlike the general limitations clause which requires some

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[211] Case and Another v. Ministry of Safety and Security, CCT 20/95 para. 17. *See also* Prinsloo v. Van Der Linde, 1997 (6) BCLR 759 (CC), para. 13; Fredericks v. MEC*,* 2002 (2) BCLR 113 (CC), para. 10.

[212] Carmichele v. Minister of Safety and Security, 2001 (10) BCLR 995 (CC), para. 33.

[213] NEHAWU v. University of Cape Town, 2003 (2) BCLR 154 (CC), para. 14.

[214] *Prinsloo,* at 20.

[215] City Council of Pretoria v. Walker, 1998 (3) BCLR 257 (CC), para. 30. Indirect discrimination refers to disparate impact.

[216] *Prinsloo,* at 25.

[217] Larbi-Odam v. Member of the Executive Council for Education, 1997 (12) BCLR 1655 (CC), para. 15.

[218] This is equally applicable to the interim and final Constitutions.

[219] *Prinsloo,* at 27.

[220] President of the Republic of South Africa v. Hugo, 197 (6) BCLR 708 (CC), para. 75 (Kriegler, J., dissenting).

[221] *Id*. at 76 ("The drafters of the Constitution could hardly have established a presumption of unfairness in [Section] 8(4) only to have the burden of rebuttal under the section discharged with relative ease.").

sort of justification, the discrimination provisions require that the reasons for the classification are fair. This combination can be quite powerful, as the classification must overcome both analyses.[222]

The second form of unconstitutional discrimination is called "unfair discrimination, on grounds which are *not specified* in the subsection. In regard to this second form there is not presumption in favour of unfairness."[223] The question remains *which* un-enumerated classifications fall under this category, as opposed to mere differentiation. The Constitutional Court resorted to history: "Given the history of our country [discrimination] has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them."[224] Among the factors that will be used in determining which groups and classifications fall under this second level are: (1) the position of the group in society, including past suffering and patterns of disadvantage; (2) the nature and purpose of the provision and how it affects vulnerable groups; and (3) the level of impairment of fundamental human dignity.[225] The more vulnerable the group is, the more likely the discrimination will be deemed unfair.[226] All of this allows the text to update itself by including a *specific list of prohibited discrimination* mixed with *broad language* that allows for expansion of the protection.

Finally, it should be noted that the Constitution does not envisage "a passive or purely negative concept of equality; quite the contrary."[227] In other words, the Constitution allows for affirmative action to redress past discrimination and inequality.

VII. Economic Policy, Property Rights, Personal Autonomy and Labor Relations

At the heart of the post-liberal teleological constitution are substantive provisions that address the actual organization of society. Economic policy, property and labor are central among these. This includes a non-private property-based notion of personal autonomy.[228] In particular, a protection of the private sphere while facilitating state regulation and intervention in the economy."[229] This is so

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[222] *See* Larbi-Odam v. Member of the Executive Council for Education, 1997 (12) BCLR 1655 (CC), para. 26; Harken v. Lane, 1997 (11) BCLR 1489 (CC), para. 52.

[223] *Prinsloo,* at 28 (emphasis added).

[224] *Id*. at 31.

[225] *Harken*, at 51.

[226] City Council of Pretoria v. Walker, 1998 (3) BCLR 257 (CC), para. 45.

[227] National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517 (CC), para. 16.

[228] Federico, et al., *supra* note 34, at 3.

[229] GLOPPEN, *supra* note 16, at 64.

because, as the Constitutional Court recognized when analyzing the validity of the 1996 Constitution, if one were to take a survey of different national constitutions and other international covenants, "one is immediately struck by the wide variety of formulations adopted to protect the right to property, as well as by the fact that significant conventions and constitutions *contain no protection of property at all*."[230] The Court goes on: "Several recognized democracies provide no express protection of property in their constitutions or bills of rights."[231]

Although not forcefully,[232] the Constitution of South Africa has redistributive goals.[233] This is linked to the policy views of the ANC. However, it must be stressed that the property rights provisions were some of the most heatedly debated and negotiated elements of the interim Constitution. It was, according to Gloppen, "among the most difficult issues on which to reach an agreement."[234] The text that was produced at the negotiations "is carefully worded to appease local as well as foreign investors, but without barring social reform."[235] Yet, as the Constitutional Court has recognized, "[c]onstitutional property clauses are notoriously difficult to interpret."[236]

During the negotiations, there was a strong split between the ANC and the NP-supported white government. While the ANC "was willing to protect the undisturbed enjoyment of personal possessions, it wanted legislation to determine property entitlements and provisions for the restoration of land to people disempowered under apartheid."[237] In fact, the ANC "suggested that no property clause was necessary."[238] On the other hand, the National Party was in favor of "protecting all property rights and would only allow expropriation for public purposes, subject to cash compensation, determined by a court of law according to the market value of the property."[239]

While property clause of the interim Constitution reflected a compromise between *the ANC and the NP, "[t]he final property clause reflects the *democratic origins of the Constitutional Assembly*."[240] In the end, the Constitution creates a

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[230] Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para 71 (emphasis added).

[231] *Id*.

[232] *See* GLOPPEN, *supra* note 16, at 236. ("But there are elements in the 'final' Constitution that hamper radical change; the Constitution protects property rights (although not unconditionally) as well as other prerequisites of a market economy").

[233] *Id*. at 171.

[234] *Id.* at 231.

[235] *Id*.

[236] First National Bank v. Commissioner, 2002 (7) BCLR 702 (CC), para. 47.

[237] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 54.

[238] *Id*.

[239] *Id*.

[240] *Id.* 57 (emphasis added).

positive duty on the state to restore dispossessed land, guarantee access to land and eliminate past discriminatory practices related to this issue.[241] In terms of general economic policy, particularly of the interventionist bent, the Constitutional Court has butt out.[242] The open question is if it is because of an institutional impediment or because the current ordinary politics sufficiently reflect the constitutional preferences so as to make judicial intervention unnecessary.[243]

In particular, the current property rights regime prohibits *arbitrary* deprivation of property.[244] And as to compensation when property is expropriated in the public interest, the value will depend on (1) the current use of the property, (2) its history of acquisition and use, (3) its market value, (4) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and (5) the purpose of the expropriation.[245] This allows for great leeway in favor of the state, and is quite similar to the Bolivian structure we saw in the last chapter. It should also be noted that the concept of the public interest in the expropriation context "includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."[246] When an expropriation has occurred, then it must be for a public purpose or in the public interest and be accompanied by compensation. If merely a depravation has occurred, then only due process requirements apply.[247]

The South African Constitutional Court has held that the Constitution "embodies a negative protection of property and does not expressly guarantee the right to acquire, hold and dispose of property."[248] Hardly a liberal approach to property. The reason for this is historic. According to the Court, property rights provisions should be interpreted in "their historical context,"[249] particularly given apartheid's legacy of "grossly unequal distribution of land in South Africa."[250]

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[241] Olivier, et al., *supra* note 129, at 207.

[242] *See* S. v. Lawrence; S. v. Negal; S. v. Solberg, 1997 (10) BCLR 1348 (CC), para. 42.

[243] *See, for example, Id*. at 44 ("Section 26 should not be constructed as empowering a court to set aside legislation expressing social or economic policy as infringing 'economic freedom' simply because it may consider the legislation to be ineffective or is of the opinion that there are other and better ways of dealing with the problems"). In this case, the Constitutional Court refused to use the right to economic freedom to invalidate progressive regulatory legislation.

[244] Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 70.

[245] *Id*.

[246] *Id*.

[247] Harken v. Lane, 1997 (11) BCLR 1489 (CC), para. 31.

[248] First National Bank v. Commissioner, 2002 (7) BCLR 702 (CC), para. 48.

[249] *Id*. at 49.

[250] *Id*.

Constitutionalized worker rights was also a particular victory for labor unions.[251] This includes a constitutional policy that recognizes the interests of workers.[252] All of this is the result of the post-liberal Constitution where, according to the Constitutional Court, "the interventionist state is no longer seen, in broad terms, as being limited to protecting its citizens against brute physical force and intimidation from other only, but is seen as extending to the economic and social realm as well."[253] For example, such is the strength of constitutionalized labor rights that, with important qualifications, the Constitutional Court allowed for labor organization within the armed forces.[254]

VIII. Other Substantive Elements

South Africa's Constitution is expressly teleological and value-laden. The main substantive feature is the defense of human dignity as the main guiding value. As a result, the concept of dignity has had a central place in South African constitutional jurisprudence,[255] alongside equality and freedom.[256] According to the Constitutional Court, "[r]espect for the dignity of all human beings is particularly important in South Africa."[257] History compels it, as "apartheid was a denial of a common humanity."[258]

Another important substantive value that was embedded in the constitutional text was the concept of *ubuntu*, which "carries in it the ideas of humaneness, social justice and fairness."[259] Other key constitutional values are "group solidarity, compassion [and] respect."[260] Another important source of substantive content is the Preamble. We should not forget that "[t]he preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value."[261] On the contrary, [i]t connects up, reinforces and underlies all of the text that follows."[262]

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[251] Du Plessis, *A Background to Drafting the Chapter on Fundamental Rights*, *supra* note 50, at 96-97.

[252] Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 66.

[253] Ferreira v. Levin, CCT 5/95, para. 66.

[254] South African Defence Union v. Minister of Defence, 1999 (2) BCLR 615 (CC).

[255] Edwin Cameron, *Dignity and Disgrace – Moral Citizenship and Constitutional Protection in* THE QUEST FOR CONSTITUTIONALISM: SOUTH AFRICA SINCE 1994 95.

[256] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 4.

[257] S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 329 (O'Regan, J., concurring).

[258] Ferreira v. Levin, CCT 5/95, para. 51.

[259] *Makwaynane,* at 237 (Madala, J., concurring).

[260] *Id*. at 307 (O'Regan, J., concurring).

[261] S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 112 (Sachs, J., concurring).

[262] *Id*.

IX. Between Text and Purpose: The Search for Meaning

A. General Issues Regarding Text and Interpretation

When addressing issues of interpretation, we must take into consideration that the South African Constitution is an "extremely detailed document containing a comprehensive catalogue of citizen's rights as well as a clear map of government structures and duties."[263] We already saw how the text itself, in many instances, spells out specific interpretive tools, including, for example, limitations on rights. Finally, the South African Constitution includes a combination of specific text and broad language.[264] This allows for great dynamism in the process of interpretation.

Clear text makes it difficult for interpreters to simply ignore language when engaging in constitutional adjudication. Text will almost always have a central role to play. In the end, text constrains courts.[265] But, many questions are left open, such as the use of plain meaning or adopting a purely textualist approach,[266] which seems to have been rejected in South Africa.[267]

Yet, there also seems to be a tendency to "assert the importance of the ordinary or plain meaning of the text as the primary source of constitutional rules."[268] For example, plain meaning was central in the death penalty case.[269] And, although purposivism is central to interpretation in South Africa, it is nevertheless superseded by text: "While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written document."[270] But, as we are about to see, great effort is made to make purpose and text co-exist, particularly with the practice of using purpose in order to ascertain meaning.

B. The Interpretation-Construction Distinction: South African Style

Even the extremely detailed South African Constitution has problems of ambiguity, vagueness and under-determinacy.[271] Sometimes, the Constitution expressly gives courts the power to insert meaning to its provisions.[272] As a result,

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[263] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 284.
[264] *Id.* at 284-285.
[265] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 72.
[266] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 285.
[267] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10. 73.
[268] *Id*.
[269] *See* S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 26.
[270] S. v. Zuma, 1995(4) BCLR 401 SA (CC), para. 17.
[271] *See Id*. at 12.
[272] *See Makwanyane,* at 8. ("There is no definition of that is to be regarded as 'cruel, inhuman or degrading' and we therefore have to give meaning to those words ourselves"); Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 42.

the Constitutional Court starts its analysis with a search for communicative meaning, which fits into the interpretation-construction distinction.[273] And the Court does it this while *rejecting* a literalist approach.[274]

This search for meaning can split the Court, as sometimes plain meaning is not so plain at all.[275] Dictionary usage in order to find communicative meaning is commonplace,[276] as well as paying attention to the nuances of translations.[277] Also, due recognition is given to the fact that some words have *acquired particular meaning in the South African political and historical context*.[278] In that sense, context helps give words meaning. For example, when addressing constitutional rights, "[i] nterpreting a right in its context requires consideration of two types of context."[279] This requires, first, that "rights must be understood in their textual setting."[280] And, second, "rights must also be understood in their social and historical context."[281]

But the interpretation-construction distinction can sometimes be blurred, especially *when purpose is part of the communicative content of the words*: "This Court has given its approval to an interpretive approach which, whilst paying due regard to the *language* that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution."[282] When this happens, purpose will be given full communicative effect as long as the language bears it. As such, giving purposive meaning to the text "is appropriate only where the language of the provision will fairly beat the restricted reading. Otherwise, it amounts to naked judicial law-making."[283] But, an effort will be made to make text and

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[273] Makwanyane, at 132; Harken v. Lane, 1997 (11) BCLR 1489 (CC), para. 31; Sanderson v. Attorney General, Eastern Cape, 1197 (12) BCLR 1675 (CC), paras. 18-20. ("The word 'charge' is ordinarily used in South African criminal procedure as a generic noun to signify the formulated allegation against an accused"); S. v. Lawrence; S. v. Negal; S. v. Solberg, 1997 (10) BCLR 1348 (CC), para. 32; Du Lange v. Smuths NO, 1998 (7) BCLR 779 (CC), para. 12; Soobramoney v. Minister of Health (Kwazulu-Natal), CCT 32/97, para. 13. For a description of the interpretation-construction distinction, *see* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010). According to this distinction, interpretation is the process of ascertaining the semantic and communicative meaning of words, while construction is the process of giving that meaning legal effect.

[274] S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 3.

[275] *Id*. at 77 (Kentridge, A.J., dissenting) ("I cannot accept that the words 'dealt with' are words of uncertain meaning").

[276] *Id.*; S. v. Williams, 1995 (7) BCLR 861 (CC), para. 24; Du Lange v. Smuths NO, 1998 (7) BCLR 779 (CC), fn. 31; National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517 (CC), para. 18.

[277] Du Plessis v. De Klerk, CCT 8-95, para. 44.

[278] De Lange v. Smuths NO, 1998 (7) BCLR 779, para. 127(Mokgoro, J., dissenting).

[279] Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC), para. 22.

[280] *Id*.

[281] *Id*.

[282] Ferreira v. Levin, CCT 5/95, para. 46 (emphasis added).

[283] Case and Another v. Ministry of Safety and Security, CCT 20/95, paras. 76-78.

purpose work together, *using purpose to give meaning to the text*: "In giving meaning to Section 9, we must seek the purpose for which it was included in the Constitution."[284]

C. Teleological Interpretation

We already saw how the Constitutional Court has used intent and history in adjudication. Now we turn to the relation between text and purpose. While it would seem that the Court's main interpretive approach is the *objective teleological model*,[285] it is not the only one. Yet, there is a strong emphasis as to this model, *which is seen as a control on courts so that they do not substitute the Constitution's commands with their own*: "This is not the case of making the Constitution mean *what we like*, but of making it mean what the *framers wanted it to mean*; we gather their intention not from *our* subjective wishes, *but from looking at the document as a whole*."[286] This is one of the strongest statements in favor of the objective teleological model,[287] and it is interesting to see how this model *is mentioned as a counterweight to judicial creativity*, which once again questions the mainstream view that purposivism is *carte blanche* for courts to engage in judicial legislation.

Previously, I mentioned the relationship between a generous and a purposive approach to rights. While these two models sometimes overlap, they sometimes contradict each other. When this clash is clear, purpose seems to trump generosity.[288] As such, the Constitution must be interpreted to give clear expression to the values it seeks to nurture for the future society.[289] But, as a general matter, a teleological approach to interpretation will be attempted to yield generous results in terms of constitutional rights.[290] While history and intent have made some headway, *text is still the main source of purpose*. And because of the *teleological character of the text*, even a somewhat textualist approach will reveal purpose. This is the crux of the objective teleological model.

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[284] S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 325 (O'Regan, J.., concurring).

[285] Du Plessis v. De Klerk, CCT 8-95, para. 89. (Ackermann, J., concurring); *Case and Another,* at 19; Anzanian Peoples Organization v. President1996 (8) BCLR 1015 (CC), para. 27; ANC v. Minister, 1998 (4) BCLR 399 (CC), para. 19; Du Lange v. Smuths NO, 1998 (7) BCLR 779 (CC), paras. 17-21; Western Cape Provincial Government v. North West Provincial Government, 2000 (4) BCLR 347 (CC), para. 17.

[286] S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 112 (emphasis added).

[287] Other times, a more general reference to purposivism is made, without specifying whether it refers to the subjective or objective articulation. *See* S. v. Williams, 1995 (7) BCLR 861 (CC), para. 51.

[288] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 293.

[289] S. v. Zuma, 1995(4) BCLR 401 SA (CC), para. 17; *Makwanyane*, at 9.

[290] Ferreira v. Levin, CCT 5/95, para. 51 ("A teleological approach also requires that the right to freedom be construed generously and extensively.").

X. South Africa's Separation of Powers: Empowering Courts to Apply Constitutional Policy

A. A Different Model of the Separation of Powers

There are hardly categorical answers to questions about constitutional design and theory. It all depends. In particular, some teleological constitutions, particularly those that were the result of a highly democratic and participatory process of creation, have *transformed* mainstream views about constitutionalism and the role of courts. As a result, these teleological systems require judicial intervention into policy matters, changing how we perceive the notion of the separation of powers.

The South African constitutional experience is most helpful in giving content to those assertions. As the Constitutional Court has observed: "There is, however, *no universal mode of separation of powers*."[291] According to the Court, "[t]he practical application of the doctrine of separation of powers is influenced by the history, conventions and circumstances of the different countries in which it is applied."[292]

Many have noted how the inclusion of justiciable positive socio-economic rights has affected the traditional model of the separation of powers in South Africa.[293] As Linda Stewart observes, the interpretation and adjudication of these rights are "[p]ossibly the most difficult area, under the Constitution requiring a balance in the separation of powers."[294] But that phenomenon is not limited to socio-economic rights; it is a byproduct of the teleological constitution itself: "Given the character of the 'final' Constitution, and of the Bill of Rights in particular, *the Constitutional Court could end up with what amounts to significant legislative powers.*"[295]

The Constitutional Court has recognized how the Constitution reshaped the traditional notion of the separation of powers:

The Constitution makes provision for a separation of powers between the legislature, the executive and the judiciary. This separation ordinarily implies that the legislature makes the laws, the executive implements them and the judiciary determines whether in the light of the Constitution and the law, conduct is lawful or unlawful. Though the separation prescribed by the Constitution is not absolute, and on occasion *some overlapping of functions is permissible*, action that is inconsistent with the separation demanded is invalid.[296]

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[291] Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), para. 108 (emphasis added).

[292] South African Association of Personal Injury Lawyers v. Heath, 2001 (1) BCLR 77 (CC), para. 24.

[293] Morné Olivier, *supra* note 13, at 69.

[294] Stewart, *supra* note 15, at 83.

[295] GLOPPEN, *supra* note 16, at 227 (emphasis added).

[296] Minister of Public Works v. Kyalami Ridge Environmental Association, 2001 (7) BCLR 652 (CC), para. 37 (emphasis added).

In the end, if the Court "should hold in any given case that the State has failed to do [its duty], it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, this is an intrusion *mandated by the Constitution itself*."[297]

Some scholars point to the dangers of this re-balancing, which "could erode the separation of legislative[,] executive and judicial powers as significant and inherently controversial legislation in effect would be 'delegated' to judges who are neither elected, nor accountable."[298] But, there is a difference between naked judicial usurpation of a power that was not delegated or judicial substitution of the policy preferences of the framers, and *courts enforcing the policy preferences of the constitutional legislator over the ordinary legislator or even using power by the constitutional framers to legislate*. But, in the end, it is the duty of the Constitutional Court to make sure that the other branches comply with the policy provisions of the teleological constitution, for when legislatures veer off the constitutionally-prescribed path, it is *they* who are usurping power away from the sovereign people that exercised constitutional politics.[299]

As a result, the South African Constitutional Court has often opted for engagement with the other branches, all the while maintaining constitutional supremacy. As Morré Olivier explains, "[i]n basic terms, constitutional dialogue occurs whenever a decision by the court prompts a formal response of some kind from the legislature or executive, such as the enactment of legislation or a change of policies."[300] Dialogue has been favored over confrontation.[301] I will return to this issue when discussing the approach of the Constitutional Court to the issue of remedies, particularly when there is a nullification of a legislative act.

B. The Role of the Constitutional Court in Enforcing the Teleological Constitution

According to Morné Olivier, "[i]n democracies around the globe, the role of the judiciary is contested and controversial. South Africa is no exception."[302] This is closely linked with the issue of the separation of powers we just discussed and requires more careful analysis: what is the role of the Constitutional Court of South Africa in the enforcement of the teleological constitution.

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[297] Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC), para. 99 (emphasis added).

[298] *Id.* 232.

[299] *See* Anzanian Peoples Organization v. President, 1996 (8) BCLR 1015 (CC), para. 14.

[300] Morné Olivier, *supra* note 13, at 76.

[301] Dawood v. Minister, 2000 (8) BCLR 837 (CC), para. 65.

[302] Morné Olivier, *supra* note 13, at 69.

As we saw earlier, the Constitutional Court has been mostly criticized for doing less instead of more. Until now, *compared to the potential that the constitutional text holds*, the Court has played a modest role in governance.[303] This, even though South Africa has adopted a very far reaching constitutional jurisdiction for the Constitutional Court.[304]

The issue of what is the specific role for the Court as to democratic self-government in South Africa is still an elusive issue.[305] As we've seen, "[t]he role of the judiciary in any legal system is never neutral."[306] Nor are teleological constitutions. As a result, "the Constitution as a transformative text embodies a political character demanding positive actions from all branches of government, *including the judiciary*, to achieve this transformative vision."[307] As such, while the scope of judicial intervention broadens, it is still the preferences of the constitutional legislators which are being enforced.[308]

In the end, "courts cannot inaugurate a socially just society on their own."[309] But they still have a crucial role to play, particularly in teleological systems: "The general conclusion, required by the limited role of courts and the uncertain interaction of popular processes and adjudication, is that court enforcement can *support* social change within institutional constraints."[310]

Teleological systems transform the role for courts: "[I]t must be admitted that the potential impact of courts in the area of social welfare sounds unlike the role traditionally ascribed to the judiciary."[311] In these cases, it is the *Constitution itself* which reorients the judicial role. As Christiansen explains, what the Court actually does is "judicial enforcement of express constitutional values, enumerated in the official text by the constituent authority body with an expectation of realization."[312] As such, "in the 'final' Constitution the judiciary has the double role of a 'neutral' watchdog keeping the majority within the bounds of the Constitution, and a

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[303] Christiansen, *supra* note 12, at 389.

[304] Klug, *South Africa: From Constitutional Promise to Social Transformation*, *supra* note 13, at 283. At the same time, "[t]he Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these means to evaluation." Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC), para. 38 (emphasis added).

[305] Christiansen, *supra* note 12, at 393; KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 5.

[306] Federico, et al., *supra* note 34, at 8.

[307] Morné Olivier, *supra* note 13, at 84. (emphasis added).

[308] Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid*, *supra* note 29, at 275.

[309] Morné Olivier, *supra* note 13, at 85; Christiansen, *supra* note 12, at 397.

[310] Christiansen, *supra* note 12, at 400 (emphasis added).

[311] *Id*. at 404.

[312] *Id*.

'progressive' agent of social change."[313] As Heinz Klug explains, this has led to an "increasing turn to the law and courts as a means and venue to both resolve political and social conflicts."[314] But, unlike framework constitutional systems, this turn is wholly compatible with the teleological model where courts are called upon to enforce the substantive policy preferences of the Constitution.

The South African Constitutional Court "has always been concerned about its own role in the new political order."[315] This has led, in part, to the relatively modest role it has carved out for itself. This leads us into an analysis of how the Court has articulated its own role, considering the teleological nature of the constitutional structure: "Courts do have a role to play in the promotion and development of a new culture 'founded on the recognition of human rights'."[316]

There is a difference between a Court that substitutes the legislature's judgments with its own and a Court that substitutes the legislature's judgments for those of the constitutional legislators. As to the former, the members of the Constitutional Court have "always been careful to define their own interventions as merely upholding the law and have declined claims that they might be substituting their own political decisions for those of elected officials in their roles as interpreters of the Constitution."[317] This dissertation argues that original explication, as will be better developed in Chapter 10, can aid the Court in its duty to enforce the will of the constitutional legislators and the social forces that legitimized them.

The difference between these two types of substitutions of legislative judgment has not been lost on the Court: "But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean."[318] This includes a rejection of popular opinion as a measurement of what the Constitution says: "The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence;"[319] "[b]ut that is beside the point. This Court did not draft the Constitution."[320]

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[313] GLOPPEN, *supra* note 16, at 234. The author adds: "It is a question to what extent these roles are compatible." This dissertation argues that they are.

[314] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, 223.

[315] *Id.* at 242.

[316] S. v. Williams, 1995 (7) BCLR 861 (CC), para. 8.

[317] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 242.

[318] S. v. Zuma, 1995(4) BCLR 401 SA (CC), para. 17. *See also* Mistry v. Interim National Medical and Dental Council, CCT 13/97, para. 3 ("Whilst it may not be easy to 'avoid the influence of one's personal intellectual and moral perception'. . .This Court has from its very inception stressed the fact that 'the Constitution does not mean whatever me might wish it to mean'").

[319] S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 87.

[320] Du Plessis v. De Klerk, CCT 8-95, para. 123.

As a result, the South African Constitutional Court has been able to avoid the pejorative 'activist' label, given the clarity of the constitutional text and its evident policy orientation. If anything, as we saw, *the charges of activism has been made because of its passivity and restraint,*[321] which is reminiscent of the trichotomy created by teleological constitutions. This trichotomy distinguishes between (1) active and passive courts, (2) constrained and unconstrained courts, and (3) courts that intervene or abstain. The first distinction is based on the times a court is willing to strike own legislation. The second distinction measures if the court's actions are required by the Constitution or if the court is acting on its own. The third distinction measures if the court is involving itself into policy matters. These elements can interact in many different combinations, including one where a court is very active and interventionist, yet wholly constrained because its involvement in such areas is not the product of judicial usurpation but the requirement of constitutional command.

All of this requires a balancing act. On the one hand, "[w]e have said previously that our role as Justices of this Court is not to 'second guess' the executive or legislative branches of government or interfere with affairs that are properly their concern."[322] On the other hand, "[w]e have also said that we will not look at the Constitution narrowly."[323] As we already saw, if the Court "should hold in a given case that the State has failed to do [its constitutional duty], it is obliged by the Constitution to say so. In so far that constitutes an intrusion into the domain of the executive, that is an intrusion *mandated by the Constitution itself*."[324] In the end, it is the Constitution that reigns supreme, not the Court.

As previewed, the Constitutional Court has threaded carefully:

> We are a new Court, established in a new way, to deal with a new Constitution. We should not rush to lay down sweeping and inflexible rules governing our mode of analysis. We need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, *acknowledgement of the way it came into being, its language, spirit, style and inner logic, the interests it protects and the painful experiences it guards against*…[325]

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[321] Christiansen, *supra* note 12, at 377.

[322] Executive Council of the Western Cape Legislature v. President of the Republic of South Africa, CCT 27/95, para. 99.

[323] *Id*.

[324] Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC), para. 99. (emphasis added).

[325] S. v. Mhlungu, 1995 (7) BCLR 793 (CC), para. 127 (emphasis added).

C. Legitimacy and Institutional Capability

One of the main objections against too much judicial intervention in policy matters are issues relating to democratic legitimacy and institutional capacity. Teleological constitutions have addressed the democratic issue by using courts as a tool for the enforcement of a constitution that was the result of a highly democratic process which, in several respects, is superior to ordinary politics.[326] In particular, I wish to focus on how the South African Constitutional Court has addressed this issue and, more importantly, the institutional capacity problem.[327] This includes issues of procedural limitations, fact-finding capabilities and possible remedies.[328]

As Eric Christiansen explains, "[a]t a practical level the courts need the bureaucracy of the state to implement any significant change."[329] For example, "[l] itigation is a resource –and labor- intensive undertaking and its capacity for social transformation is weakest when the court acts at odds with popular opinion."[330]

One of the main challenges that teleological courts have is shedding off the framework rationale that adopts a more classic view of the judicial role: "Courts are ill equipped to [sit in judgment on legislative policies on economic issues] and in a democratic society it is not their role to do so."[331] But teleological constitutions have questioned this common wisdom, enlisting courts to enforce the constitutional legislator's policy preferences, including as to economic matters, over those of the legislature. Teleological constitutions settle the conceptual objection. We still have the practical ones.

As the Constitutional Court has recognized: "This Court does not have the information of expertise to enable it to decide what those arrangements should be or how they should be effected."[332] But this could refer more to *details* and specific measures, as opposed to ensuring that these actions are compatible with the constitutionally-entrenched policy preferences, as part of the negative legislator role of courts. Courts don't choose *which* measures are adopted; they merely analyze if these are constitutionally compatible.[333] In teleological systems, the options available to legislatures are reduced, but they are not obliterated.

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[326] *See* Farinacci-Fernós, *Post-Liberal Constitutionalism, supra* note 3.
[327] *See, for example*, Christiansen, *supra* note 12, at 373.
[328] *Id.* at 374.
[329] *Id*. at 390.
[330] *Id*. at 391.
[331] S. v. Lawrence; S. v. Negal; S. v. Solberg, 1997 (10) BCLR 1348 (CC), para. 42.
[332] August v. Electoral Commission, 1999 (4) BCLR 363 (CC), para. 39.
[333] *See* Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC), para. 37. (emphasis added). ("It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political inquires necessary for determining what the minimum-core standards…should be, nor for deciding how public revenues should be most effectively spent").

D. Constitutional Supremacy and the Effects of Entrenchment

The South African Constitutional Court is able to wield enormous power because the Constitution adopts many policy preferences and is universally acknowledged to reign supreme.[334] The constitutionalization of policy preferences has a great impact on how the Court goes about its judicial undertakings.

Constitutional Supremacy is universally accepted in South Africa.[335] In particular, the teleological constitution results in a "voluntary foreclosure of issues,"[336] including individual right, but also important substantive policy matters. As a result, the South African structure can be described as a "system of democratic constitutionalism in which the democratic will is enveloped within and construed by the national pre-commitments outlined in the Constitution."[337] This is characterized as the new constitutional order.[338] As a result, *constitutional politics are given clear supremacy over ordinary political acts,* in accordance with the teleological model. According to the Constitutional Court, this supremacy preempts the "political agendas of ordinary majorities in the National Parliament."[339]

Finally, it should be noted that the decisions of the Constitutional Court are binding on lower courts and "[i]t is a fundamental principle that a Court adheres to its previous decisions,"[340] including the Constitutional Court.

XI. Procedure and Remedies: How the Constitutional Court Enforces the Constitution

A. Process

Cases can only be referred to the Constitutional Court by lower ones when there is a pending case that includes a decisive constitutional issue that falls within the exclusive jurisdiction of the Court.[341] Also, the lower court must consider it to be in the interests of justice.[342] Only a small number of cases have direct to the

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[334] *See* Parbhoo and Others v. Getz No and Another, 1997 (10) BCLR 1337 (CC), para. 2.

[335] Morné Olivier, *supra* note 13, at 77.

[336] GLOPPEN, *supra* note 16, at 47; Pharmaceutical Manufacturers Association of SA; in re: ex parte Application of President of the RSA, 2000 (3) BCLR 24 (CC), paras. 19-20.

[337] KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 5.

[338] Executive Council of the Western Cape Legislature v. President of the Republic of South Africa, CCT 27/95, para. 61.

[339] Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC), para. 149.

[340] In re: Constitutionality of the Mpumalanga Petitions Bill*,* 2001 (11) BCLR 1126 (CC), para. 7.

[341] Ferreira v. Levin, CCT 5/95, para. 6.

[342] State v. Bequinot*,* CCT 24/95, para. 7.

Constitutional Court.[343] Direct access occurs "in exceptional circumstances only, which will ordinarily exist only where the matter is of such energy, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government."[344] The Constitutional Court has not allowed for free-for-all access.[345] Finally, the Constitution "confers on the Constitutional Court the inherent power to protect and regulate its own process."[346]

Aside from individual or rights-based litigation, the Constitutional Court can also receive cases referred by other branches, such as 1/3 of the National Assembly or by the President. In *Ex Parte the President of the Republic of South Africa; In re: Constitutionality of the Liquor Bill*,[347] the Parliament passed a Bill and sent it to the President. Before signing it, the President referred the Bill to the Constitutional Court. The procedural question before the Court was if it could only review the matters that were raised in the referral, could it review the entire Act under consideration or reserve some matters for future adjudication. The Court held, first, that it could hear later challenges to the statute, but not as to the specific matter before it. Second, it held that it would only review what the President raised in his referral.[348]

As to matters of justiciability, the Constitutional Court avoids categorical rules. For example, moot cases do not "necessarily constitute an absolute ban to its justiciability."[349] In those circumstances, the Court "has a discretion to decide issues on appeal even if they are no longer present existing or live circumstances. That discretion must be exercised according to what the interests of justice require."[350]

B. Standards and Remedies

The issue of remedy is crucial for courts charged with enforcing teleological constitutions. The experience of the South African Constitutional Court has a lot to

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[343] Executive Council of the Western Cape Legislature v. President of the Republic of South Africa, CCT 27/95, para 15.

[344] Transvaal Agricultural Union v. Minister of Land Affairs, 1996 (12) BCLR 1573 (CC), para. 2.

[345] *See* Christian Education SA v. Minister of Education, 1998 (12) BCLR 1449 (CC); Fraser v. Naude, 1998 (11) BCLR 1357 (CC).

[346] Parbhoo and Others v. Getz No and Another, 1997 (10) BCLR 1337 (CC), para. 4.

[347] Ex Parte the President of the Republic of South Africa; in re Constitutionality of Liquor Bill, 2000 (1) BCLR 1 (CC), para. 57

[348] *See also* In re: Constitutionality of the Mpumalanga Petitions Bill, 200, 2001 (11) BCLR 1126 (CC), para. 9.

[349] Independent Electoral Commission v. Langeberg Municipality, 2001 (9) BCLR 883 (CC), para. 9.

[350] *Id*. at 11. This, in turn hinges on (1) the need for "some practical effect either on the parties or on others;" (2) "the nature and extent of the practical effect that any possible order might have;" and (3) "the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced."

teach us. The devil is in the details. Here, I analyze this issue jointly with the matter of standards of review.

As we saw, the reasonableness test links the negative legislator role to the enforcement of *positive* rights. It also allows for *temporary* measures in situations of legislative inaction.[351] This allows for the limited exercise of some sort of legislative power,[352] and the exercise of judicial discretion.[353] Yet, it should be stressed that these powers are given, not usurped. Also, "[t]he power to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented."[354]

We also saw how the Court applies the general limitation clause in cases dealing with constitutional rights. That is, how limitations of rights must be justifiable in an open and democratic society based on dignity, equality and freedom. The burden of proof as to the issue of the infringement of a right rests with the plaintiff.[355] Once that is established, the burden of proof as to the general limitation clause shifts the defendant.[356] We must not forget that the content of the limitation clause "is not merely aspirational or decorative, it is *normative*, furnishing the matrix of ideas within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conducts."[357] This approach to enforcement is linked to the proportionality test that is generally applied by the Constitutional Court.[358]

As a negative legislator, the Constitutional Court will normally strike down unconstitutional legislation, avoiding corrective surgery: "For this Court to attempt that textual surgery would entail it departing fundamentally from its assigned role under our Constitution. It is trite but true that our role is to review, rather than re-edit, legislation."[359] But, in limited circumstances, "it is permissible and appropriate" to read-in provisions into a particular statute to preserve its

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[351] Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC), para. 96.

[352] GLOPPEN, *supra* note 16, at 227.

[353] Dawood v. Minister, 2000 (8) BCLR 837 (CC), para. 53.

[354] Minister of Health v. Treatment Action Campaign.2002 (10) BCLR 1033 (CC) para. 104.

[355] Ferreira v. Levin, CCT 5/95, para. 44.

[356] *Id.*; Moise v. Transitional Local Council of Greater Germiston, 2001 (8) BCLR 765 (CC), para. 19 ("Once a limitation has been found to exist, the burden of justification under section 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of this section.").

[357] Coetzee v. Government; Matiso v. Commanding Officer, 1995 (10) BCLR 1382 (CC), para. 46 (Sachs, J., concurring).

[358] S. v. Makwanyane, 1995 (6) BCLR 665 (CC), para. 94. This is related to a balancing analysis, where the Court will take into account the need to address the wrong, deter future violations, issue an order that can be complied with and ensure fairness to all who might be affected by the relief. Hoffman v. South African Airways, 2000 (11) BCLR 1211 (CC), para. 45.

[359] Case and Another v. Ministry of Safety and Security, CCT 20/95, para. 73.

constitutionality.[360] This is accompanied by the power to *declare a statute unconstitutional, but suspend that declaration and give the legislature sufficient time to correct the defect*.[361] In particular words, the Constitution states that:

> When deciding a constitutional matter within its power, the Constitutional Court must decide that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, and (a) may make an order that is just and equitable, including (i) limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the deficit.[362]

This is reminiscent of the dialogue approach, in which the Constitutional Court announces standards which aid the legislature in its attempt to fix the constitutional defect.[363]

In the end, it is up to the Constitutional Court to give the Constitution full effect:

> Given the *historical context* in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it.[364]

Under-enforcement is contrary to the teleological constitution and it undermines the legitimacy of the constitution itself.[365]

XII. Constitutional Fidelity: Entrenching the Constitution in Society

The teleological constitution entrenches substantive policy preferences. However, this entrenchment is meaningless if the Constitution itself does not

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[360] S. v. Niemad, 2001 (11) BCLR 1181 (CC), para. 32. *See also* Du Toit v. Minister for Welfare, CCt 40/01, para. 39 ("This Court has recognized the remedy f reading into legislation wording that cures the constitutional defect as an appropriate form of relief"). This remedy is temporary while the legislature adopts a more permanent fix. *Id*. para. 41.

[361] Case and Another v. Ministry of Safety and Security, CCT 20/95, paras. 82-83; Executive Council of the Western Cape Legislature v. President of the Republic of South Africa, CCT 27/95, para. 103; Minister of Justice v. Ntuli, 1997 (6) BCLR 677 (CC), para. 2.

[362] *Ntuli*, at 24.

[363] Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC), para. 125.

[364] Ntandazeli Fose v. Minister of Safety and Security, 1997 (7) BCLR 851 (CC), para. 69 (emphasis added).

[365] Klug, *Enabling Democracy and Promoting Law in the Transition from Apartheid*, *supra* note 29, at 266.

entrench itself into society. Judicial enforcement of the teleological constitution in opposition to the preferences of the current legislature is only sustainable if the original constitutional project still commands popular support. The South African Constitutional Court is aware of this reality, and it seems that, in fact, the post-liberal teleological Constitution of South Africa has been wholly adopted by the social majority. Its judicial enforcement can still be characterized as a majoritarian action.

This state of affairs is reflected in the decisions of the Constitutional Court "[i] n order to have a factual legitimacy, and permanence, the Constitution must be perceived as a *permanent element of social life*."[366] According to Heinz Klug, the Constitution has succeeded in that regard and "has become a central pillar of South Africa."[367] In fact, *"[e]ven the opposition parties…claim the Constitution*."[368]

Adequate enforcement of the Constitution allows for the achievement of this social acceptance which, in turn, strengthens the Constitution and actually facilitates further enforcement of its provisions. This constitutes a virtuous cycle. The Constitution first garners legitimacy "by the character of the process that brought it into being."[369] Furthermore, it sustains that legitimacy by way of "normative acceptability."[370]

This issue goes to the heart to the distinction between ordinary and constitutional politics and the need for some sort of continued acceptance of the original constitutional project, which need not extend to each constitutional provision: "The validity of the normative principles underlying the Constitution is not important for day to day politics. *But a general belief that the Constitution has a legitimacy beyond the fact that historically it was enacted, is an important element of the authority of the Constitution, which is[,] in turn, crucial for constitutional stability*."[371] Once this is achieved, the teleological constitution endures and adequate judicial enforcement becomes imperative.

XIII. Some Final Thoughts

The early jurisprudence of the South African Constitutional Court is very illustrative, be it because it sheds light on the use of history as an interpretive tool, how the role of intent in constitutional adjudication is closely related to the process of constitutional creation and the potential uses of transformative text. But more

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366 GLOPPEN, *supra* note 16, at 38-39 (emphasis added).

367 KLUG, THE CONSTITUTION OF SOUTH AFRICA, *supra* note 10, at 6.

368 *Id.* at 7 (emphasis added).

369 GLOPPEN, *supra* note 16, at 247.

370 *Id.*

371 *Id.* at 39 (emphasis added).

importantly, it signals a break from mainstream views of how courts should go about enforcing their particular constitutions. The South Africa Constitutional Court has managed to develop adjudicative tools that allow it to successfully implement the substantive commands of the Constitution, while allowing the legislative and executive branches to carry out their functions effectively.

This experience should lead us to conclude that substantive constitutional provisions, such as socio-economic rights, are not aspirational or symbolic. On the contrary, they are wholly enforceable and operative. Hopefully, this will lead other courts that are tasked with implementing similar constitutions to put life back in to those text and articulate methods that allow them to fully realize the democratic will of constitutional framer.

FREEDOM OF SPEECH: ARE CHILD-LIKE SEX ROBOTS PROTECTED?

*Johdalys Quiñonez**

Abstract

The introduction of child-like sex robots to the market creates a new legal question: Can they be prohibited? The First Amendment could extend a form of protection for these robots, under the precedents established in *Ashcroft v. Free Speech Coalition* and *Williams v. United States*. The Supreme Court of the United States has protected material that depicted children but did not include minors and were not solicited under the belief that they did. This article evaluates these precedents and, specifically, the components of this new technology, as well as the requirements and limits that sexual speech is given under the First Amendment. It will also examine the obscenity standard established in *Miller v. California* to determine whether the robots are obscene material and, therefore, not protected. It will also examine the concept of low-value sexual speech. Lastly, it will examine the arguments against and in favor the use of the robots. Considering *Ashcroft* and *Williams*, and the other factors analyzed in this article, child-like sex robots could be protected under the First Amendment. However, this protection should be limited to medical and research uses under prescription.

Resumen

La reciente introducción de robots sexuales que asemejan niños en el mercado ha creado una nueva pregunta legal: ¿Pueden ser prohibidos? La Primera Enmienda

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podría extenderse para proteger estos robots, al amparo de los precedentes de *Ashcroft v. Free Speech Coalition* y *Williams v. United States*. El Tribunal Supremo de Estados Unidos determinó que no se clasifica como pornografía infantil lo que tenga imágenes que asemejen menores, si no incluye menores de edad o sea solicitado con la intención de que lo fuesen. Este articulo analiza esos precedentes, el estándar de obscenidad establecido por *Miller v. California* y la doctrina de *low-value sexual speech*. Por último, el artículo discute los puntos a favor y en contra de usar estos robots. Al considerar las decisiones del Tribunal Supremo de los Estados Unidos, y otros factores discutidos en el artículo, los robots sexuales que asemejan niños podrían ser protegidos bajo la Primera Enmienda. Sin embargo, esta protección debería ser limitada a investigaciones y objetivos médicos bajo receta.

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I. Introduction

In 2017, the House of Representatives introduced the *Curbing Realistic Exploitative Electronic Pedophilic Robots Act of 2017* [hereinafter *CREEPER Act*][1] to ban the importation of child-like sex robots into the United States[2] in response to an increase in the market for these.[3] The Bill was sent to the Senate and referred to the Committee on the Judiciary on June 14, 2018, but it did not go any further.[4] Even so, it has sparked the debate over child-like sex robots. The main issue is whether their use and/or possession would be considered protected speech under the First Amendment of the United States or considered obscene material.

Because it is protected by First Amendment Free Speech, sexually-oriented can be regulated by the government only to a certain extent.[5] For instance, pornography is generally protected speech, as long as it complies with the "obscenity standards" set forth in *Miller v. California*.[6] On the other hand, obscenity, which includes child pornography, is not protected speech.[7] However, in the case of *Ashcroft v. Free Speech Coalition,*[8] the Supreme Court determined that child-like images that were altered or created without the use of actual minors were not considered obscenity and were therefore protected speech, as long as the images met the *Miller* test standard.

After *Ashcroft,* Congress passed the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act* [hereafter *PROTECT Act*], which expanded the definition of child pornography to include some virtual depictions of child pornography.[9] Title V of the PROTECT Act explains how virtual child pornography can be manipulated to disguise real children as virtual reality. This Act was challenged in *United States v. Williams*; however, the Supreme Court held

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[1] CREEPER Act of 2017, H.R. 4655, 115th Cong. (2017). https://www.congress.gov/bill/115th-congress/house-bill/4655.

[2] *Id*. (In the bill, child-like sex doll is defined as "an anatomically-correct doll, mannequin, or robot, with the features of, or with features that resemble those of, a minor, intended for use in sexual acts.").

[3] Martin Evans, *Child-like sex dolls are being sold on websites such as eBay and Amazon, crime agency warns as churchwarden is convicted*, THE TELEGRAPH (July 31, 2017, 6:24 PM) https://www.telegraph.co.uk/news/2017/07/31/child-like-sex-dolls-sold-websites-ebay-amazon-crime-agency/ (last visited May 28, 2019).

[4] H.R. 4655.

[5] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1365 (Vicki Been, et al., eds., 4th ed. 2013).

[6] 413 U.S. 15, 24 (1973).

[7] *See* Roth v United States, 354 U.S. 476 (1957). *See also,* New York v. Ferber, 458 U.S. 747 (1982).

[8] 535 U.S. 234 (2002). In this case the Court decided whether the *federal Child Pornography Protection Act of 1996* (CPPA) which extended federal prohibition on against child pornography to sexually explicit images that appeared to be minors although their production did not involve minors.

[9] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, 108 P.L. 21, 2003 Enacted S.151.

that it was constitutional.[10] However, the Supreme Court reiterated that for the material to be considered child pornography, real children must have been used in its production, not just a digital alteration of consenting adults to appear like children. In addition, *Williams* expanded the requirements by establishing that if the person who solicited the material reasonably believed that the material involved real children, it will be punished as if it had, regardless of whether the material actually consisted of virtual reality or image alteration.[11]

Part II of this article will discuss how the Supreme Court has historically treated sexually-related topics regarding pornography under the Freedom of Speech doctrine. Part II will also discuss the standard for determining obscene material established in *Miller*, *Ashcroft,* and *Williams*. This standard considers that altered images of what appear to be minors, but do not involve the harming of minors, are protected speech. Part III will discuss what child-like sex robots are. This part will be divided into two sections. Section A will discuss the current research on the possibility that child-like sex robots can be harmful to children. Section B will examine the use of child-like sex robots for therapeutic purposes. Lastly, Part IV will analyze the obscenity doctrine with regards to the ban on child-like sex robots.

II. Freedom of Speech and treatment of Sexual and Obscene Speech

A. Historical Background

The First Amendment of the United States Constitution states that: "Congress shall make no law . . . abridging the freedom of speech . . . ."[12] Though at first read the Amendment is very broad. However, through many cases,[13] the Supreme Court has carefully limited the understanding of this amendment. However, to understand the limits and the importance of First Amendment Freedom of Speech, we must first understand why speech is protected. According to Chemerinsky, there are four major reasons as to why speech is a fundamental right and why it is protected: "freedom of speech is protected to further self-governance, to aid the discovery of truth via the marketplace of ideas, to promote autonomy, and to foster tolerance."[14]

The self-governance theory entrenches in our independence as a nation. Free speech is crucial in exercising our democratic rights and necessary for voters to

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[10] 553 U.S. 285 (2008).

[11] *Id.* at 307.

[12] U.S. CONST. amend. I.

[13] *See* City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986); Young v. Am. Mini Theaters, Inc., 427 U.S. 50 (1976).

[14] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 926 (Vicki Been, et al., eds., 3th ed. 2006).

make informed selections and influence government choices through speech.[15] The discovery of truth theory regards how freedom of speech is important for the discovery of truth through the market place of ideas. This theory has been criticized by scholars because it is wrong to assume every idea will enter the market place of ideas.[16] Despite this criticism, it is widely accepted that free speech protects the people from a government that determines what is true and what is false.[17] This prevents the government from censoring the ideas it does not favor. The third theory for the protection of free speech is for the advancement of autonomy. This theory sees free speech as intrinsically important and is tied to a person's way to express themselves in accordance with their views.[18] Lastly, the fourth theory as to why Freedom of Speech should be protected is for the promotion of tolerance. This means that the promotion of "unpopular or distasteful speech is itself an act of tolerance."[19] As Professor Lee Bollinger stated in respect to this theory, "[it] involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters."[20] This theory has also faced criticism, mainly that society need not be tolerant of intolerance.[21]

The aforementioned theories are not mutually exclusive, and their purposes can intertwine amongst each other.[22] Thus, "[they] are all important in understanding why freedom of speech is protected, in considering what expression should be safeguarded and what can be regulated."[23]

B. Protected Speech Versus Obscenity

The regulation of sexually oriented speech has been a major topic in free speech doctrine. Sexually oriented speech is divided into two categories. One category of sexually oriented speech is protected by the First Amendment. The second category is obscene speech, which is not protected by the First Amendment. To understand Freedom of Speech and the extent to which it applies to sexually oriented speech, first we need to analyze the Supreme Court decisions regarding obscene material as unprotected speech.

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[15] *Id.*
[16] *Id.* at 928.
[17] *Id.*
[18] *Id.* at 929.
[19] *Id.* at 930.
[20] LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 9-10 (1986).
[21] CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES, *supra* note 14, at 930.
[22] *Id.*
[23] *Id.*

In *Roth v. United States*, the Supreme Court held that obscenity is a category of speech that is not protected by the First Amendment.[24] In this case, the Court defined obscene material as "material which deals with sex in a manner appealing to prurient interest."[25] But it was not until *Miller* that the Court formulated the definition for obscene material that is still used today.[26] The standard established in *Miller* has three prongs. First, the material must appeal to the prurient interest under the community standard.[27] Second, whether it depicts or describes in an offensive way sexual conduct specifically defined by the applicable law.[28] Lastly, whether the work "taken as a whole lacks serious literary, artistic, political, or scientific value."[29] By this standard, the Supreme Court has determined that child pornography is not protected speech, because the production of such content produces physical and psychological harm to minors.[30]

i. Child Pornography

The use of child-like sex robots is related to virtual child pornography and the depiction of minors. However, they do not use real children in their production. Therefore, an in-depth analysis on whether child-like sex robots would be protected under the First Amendment must examine the applicable legal precedents of the Supreme Court on matters related to child pornography.

In 2006, the United States ratified the Convention on Cybercrime, Article 9 of the Convention specifically treats the offenses related to child pornography. This treaty establishes that:

> Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law when committed intentionally and without right, the following conduct:
> a. producing child pornography for the purpose of its distribution through a computer system;
> b. offering or making available child pornography through a computer system;

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[24] 354 U.S. 476, 485 (1957).

[25] *Id.* at 499. ("A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or exertion and if it goes substantially beyond customary limits of candor in description or representation of such matters." (footnotes omitted)).

[26] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1368.

[27] Miller v. California, 413 U.S. 15, 24 (1973).

[28] *Id.*

[29] *Id.*

[30] New York v. Ferber, 458 U.S. 747 (1982).

c. distributing or transmitting child pornography through a computer system;
d. procuring child pornography through a computer system for oneself or for another person;
e. possessing child pornography in a computer system or on a computer-data storage medium.[31]

Moreover, section 2 this article defines child pornography as one of the following: "[1] a minor engaged in sexually explicit conduct; [2] a person appearing to be a minor engaged in sexually explicit conduct; [3] realistic images representing a minor engaged in sexually explicit conduct." Upon ratifying this treaty, the United States had some reservations with regards to this definition. Specifically, the United States reserved the right to apply subsections (b) and (c) "to the extent consistent with the Constitution of the United States as interpreted by the United States and as provided for under its federal law, which includes, for example, crimes of distribution of material considered to be obscene under applicable United States standards."[32] Those two subjections regard a person who appears to be a minor and depiction of minors.

With this background, we examine the Supreme Court precedents. The first Supreme Court case that discussed the representation of what *appears* to be a minor engaging in sexually explicit conduct is *Ashcroft v. Free Speech Coalition*. Here, the Supreme Court determined that virtual child pornography was protected speech if it did not involve real children in its production.[33] The statute that was being questioned in this case expressed that virtual child pornography "whets the appetites of pedophiles and encourages them to engage in illegal conduct."[34] In response, the Court determined that this proposition could not be sustained and further commented that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."[35] Expanding on this, the Court stated that the government cannot "constitutionally premise legislation on the desirability of controlling a person's private thoughts."[36] In *Ashcroft,* the Court did not find this type of pornography harmful to the children, nor did it find that it encouraged sex offenders to abuse children.[37] The court found that the government did not show more than a remote connection between "speech that might encourage thoughts or

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[31] Convention on Cybercrime, art. 9, Nov. 23, 2001, ETS No. 185.
[32] *Id.*
[33] 535 U.S. 234 (2002).
[34] *Id.* at 253.
[35] *Id.*
[36] *Id.* (*quoting* Stanley v. Georgia, 394 U.S. 557 (1969)).
[37] *Id.* at 256.

impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct."[38]

In response to the decision in *Ashcroft*, Congress passed the PROTECT Act.[39] The PROTECT Act, as previously mentioned, expanded the definition of child pornography. Title V specifically refers to how virtual child pornography can be manipulated to disguise real children.[40] Although this Act was upheld in *United States v. Williams*,[41] the Supreme Court emphasized that to classify the material as child pornography the requirement was for real children to actually be involved in its production.[42] Nonetheless, the Court concluded that the law could punish those who solicit or offer material under a reasonable belief that the material was child pornography, as previously defined.[43] Therefore, this statute did not change the requirements set forth in *Ashcroft*. It only added that reasonable belief that the material contained actual children, was enough to punish a person under the statute for offering or soliciting material that would be classified as child pornography.

C. Low-Level Protection for "Low-Value" Sexual Speech

i. Doctrine of "Low-Value" Sexual Speech

According to Chemerinsky, the standard used for sexually related speech is far more than just a rational basis standard.[44] He says, "cases like *Erie*, *Barnes*, *Renton*, and *Young* raise the question of whether there should be a category of minimally protected sexually oriented speech."[45] This type of sexual speech has been identified as "low-value" sexual speech. The cases mentioned by Chemerinsky are about

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[38] *Id.* at 253-54.

[39] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, 108 P.L. 21, 2003 Enacted S.151.

[40] *Id.*

[41] 553 U.S. 285 (2008).

[42] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1386-87.

[43] *Williams,* 553 U.S. at 306.

[44] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1395-96.

[45] *Id.* Referring to the cases of: City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (discussing an ordinance that banned fully nude dance performance and holding that the ordinance did not violate any cognizable first amendment protections of expressive conduct); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (plurality opinion expressing that the statute prohibiting nude dancing that required that the dancers wear pasties and a G-string at a minimum); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (determined that a zoning ordinance by the City of Renton which limited where adult theaters could be established was constitutional); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (determined that a Detroit ordinance regulating where adult theaters could be placed was constitutional and that the State could regulate this sort of establishment).

sexually related speech such as nude dancing and adult theatres. Through these cases, the Court has held that the government could limit the manner in which some sexual speech is conducted. However, as Genevieve Laker states in her article, the doctrine of "low-value" sexual speech allows the government to:

> [R]emove ideas it dislikes from public circulation in the marketplace and potentially (though less easily) repress the speech of those who criticize it. It also, of course, allows the government to absolutely prohibit its citizens from expressing themselves in certain ways—by, for example, speaking of sex in a prurient manner, or using threatening speech.[46]

In this article, she also criticizes the way that the New Deal Court allowed the government to punish certain kinds of speech "not only when it threatened serious violence or disorder, but also when it violated dominant norms of civility, decency, and piety."[47] This permission paves the way for discrimination against forms of speech on the basis of content, when that content is considered the general moral precept at the moment it is being made. The standard used in this type of cases has not been specified by the Court. However, as Chemerinsky posits, it is less than a strict scrutiny standard and more than a rational basis standard.[48]

The Court has not defined what speech is included in this category of "low-value" sexual speech. Nonetheless, the cases indicate that sexually explicit material is clearly included.[49] The most important issue emerging from the creation of this category is the standard. What justification would be sufficient for "low-value" sexual speech to be regulated?[50] The decisions in some of these cases, like the plurality opinion in *City of Erie v. Pap's A.M.*,[51] "focus on the need to regulate speech to stop secondary effects. But almost all speech has some secondary effects . . . These cases also raise the question of whether a state's interest in advancing a certain moral vision is sufficient to warrant restrictions of speech."[52] This issue

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[46] Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2172 (2015).

[47] *Id.* at 2168. The New Deal period was when the courts "began to link constitutional protection to a judgement of the value of different kinds of speech." *Id.* at 2168. It was only in the New Deal period that courts began to link constitutional protection to a judgment of the value of different kinds of speech.

[48] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1396. As stated in the book by Chemerinsky, the cases such as *Erie*, *Barnes*, *Renton*, and *Young* do not specify the level of scrutiny that was used. It was "obviously far less than strict scrutiny and appears to be little more than a rational basis review" this is brought to show the tension that cases involving sexual speech. "Freedom of Speech is seen usually under strict scrutiny, but there appears to be an unspoken differentiation for sexual speech."

[49] *Id.* at 1387.

[50] *Id.* at 1396.

[51] 529 U.S. 277 (2000).

[52] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1396.

brings us back to Genevieve Lakier's argument. The "low-value" sexual speech category permits discrimination and the imposition of moral values to punish certain kinds of speech.[53]

With this "low-value" sexual speech doctrine, the Court is determining which speech warrants protection and which speech does not, based on which ones it finds more or less valuable. The Supreme Court would be making a value judgment to decide what speech is worthy of First Amendment protection. This sentiment was expressed by Justice Powell in his concurring opinion in *FCC v. Pacifica*,[54] where he objected to the low-value speech theory by stating:

> I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection.[55]

ii. What is "low-value" sexual speech?

There is no clear-cut definition of what is considered "low-value" sexual speech. Thus far, the Supreme Court cases have dealt mostly with adult entertainment establishments, such as Adult Theaters and whether zoning ordinances on their locations could be constitutionally valid.[56] However, the restrictions for "low-value" sexual are not just limited to establishments which sell adult content material. A sexual expression such as nude dancing has also been found to be of "low-value" sexual speech.[57] In the case of *Barnes v. Glen Theatre Inc.*, the Court discussed a ban on nude dancing but justified its decision by saying that the ban was not directed at the message conveyed by the nude dancing but at the secondary effect of it.[58]

The plurality opinion in *Barnes* noted that the kind of dancing in question was "expressive conduct within the outer perimeters of the First Amendment, though we view it as marginally so."[59] The Court viewed nude dancing as symbolic speech and implemented the test used for this kind of speech.[60] The ordinance prohibiting

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[53] Lakier, *supra* note 46.

[54] FCC v. Pacifica Found., 438 U.S. 726 (1978).

[55] *Id.* at 761 (Powell, J. concurring).

[56] *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976).

[57] Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

[58] *Id.* at 582-86 (Scouter J., concurring).

[59] *Id.* at 566.

[60] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1391. The test used for regulating symbolic speech was determined in the case of *United States v. O'Brien*, 391 U.S. 367, 378 (1968)("government

nude dancing was upheld because it served the goal of "protecting societal order and morality."[61] The dissenting opinion of Justice White, in this case, he stated that the ban was suppressing a message.[62]

As shown, the biggest problem with the "low-value" sexual speech categorization is that the Court has not established what type of speech would specifically fall under this, or what standard should be followed to determine whether a form of speech should be considered "low-value". However, sexually explicit speech has been determined to fall under this category. This is problematic. Upon studying the cases decided by the Court on this subject, it becomes clear that such a categorization would necessarily lead to more judgments based solely on moral precepts, which exclude speech from First Amendment protection without balancing other sources of value the speech that is seeking protection may have. This would lead to censorship by the government in matters related to sexual speech or conduct based on a correlation of facts and moral judgments, instead of abundant research or empirical studies on the matter.[63]

III. Child-like sex robots

There is a recent concern brewing in response to the introduction of child-like sex robots into the market. Anatomically, child-like sex robots are made to assimilate a real child. They can be acquired through online retailers, such as Amazon and eBay.[64] These child-like sex robots have sparked a series of legal, ethical and scientific debates worldwide.[65] Across the globe, the ease with which

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regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

[61] *Id. See also,* Barnes v. Glen Theater, 501 U.S. 560, 568 (1991).

[62] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1391.

[63] *See* Lakier, *supra* note 46.

[64] Ciaran Varley, *Is Japan turning a blind eye to paedophilia?*, BBC UK (March 07, 2018), https://www.bbc.co.uk/bbcthree/article/57eaaf23-0cef-48c8-961f-41f2563b38aa (last visited May 28, 2019). Martin Evans, *Child-like sex dolls are being sold on websites such as eBay and Amazon, crime agency warns as churchwarden is convicted*, THE TELEGRAPH (July 31, 2017, 6:24 PM), https://www.telegraph.co.uk/news/2017/07/31/child-like-sex-dolls-sold-websites-ebay-amazon-crime-agency/ (last visited May 28, 2019). A spokesman for Amazon stated that "[a]ll Marketplace sellers must follow our selling guidelines and those who don't will be subject to action, including potential removal of their account." *Id*. However, law enforcement officials in the United Kingdom said that stopping the trade and sale of these robots will be like "turning around a tanker." *Id*.

[65] Mandy Stadtmiller, *Child Sex Robots are Coming to America. Can We Stop Them Before Its Too Late?*, THE DAILY BEAST (Feb. 12, 2018), https://www.thedailybeast.com/child-sex-robots-are-coming-to-america-can-we-stop-them-before-its-too-late (last visited May 28, 2019).

these types of robots can be obtained has caused countries and law enforcement agencies great worry. Recently, Canada and the United Kingdom courts have begun to see cases regarding child-like sex robots.[66] In the United Kingdom, the first case of its kind was *R. v. Dobson*, which deals with the importation of a child-like sex doll the person had bought on eBay.[67] One of the aspects the case considered was the possession of a child-like sex doll. Regarding this possession the court stated:

> It is common ground before us that there is no offense of either manufacture or simple possession of such a doll, only an offense of importing it is indecent. There may possibly be an offense of sending an indecent or obscene item through the post, but otherwise, production, possession, or even a purely internal sale in the United Kingdom does not appear to have been the subject of legislation prohibiting it.[68]

This decision makes it clear that the importing of such dolls is obscene and thus illegal. However, owning and producing one in the United Kingdom is not illegal. It must be distinguished from the United States, the United Kingdom laws against child pornography and obscenity that are different and, in a way, stricter than the United States. These do not make a differentiation between virtual pornography and child pornography made in the United States.[69] On the other hand, the case presented in Canada had a different verdict. The case is the first case of child pornography in Canada involving a child sex doll. The child pornography laws in Canada define child pornography as "a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means."[70] The crown lawyers argued that the robot was a three-dimensional form of child pornography.[71] In the final verdict "Judge Mark Pike said he accepted expert testimony that the doll

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[66] *See* R. v. Dobson, 2017 WL 07736724 (case in the United Kingdom where a man was charged for importing an obscene object which was a child sex doll into the United Kingdom); Dorian Geiger, *Canada's Child Sex Doll Trial Raises Uncomfortable Questions About Pedophilia and the Law*, VICE (Feb. 25, 2016), https://www.vice.com/en_us/article/kwxj7w/newfoundlands-child-sex-doll-trial-raises-uncomfortable-questions-about-pedophilia-and-the-law (last visited May 28, 2019), (discussing the moral and legal challenges faced by the unprecedented case of the importation of a child sex doll into Canada.).

[67] *Dobson*, 2017 WL 07736724.

[68] *Id.*

[69] YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW 19 (2008).

[70] Holly McKenzie-Sutter, *Prosecutors in Kenneth Harrisson Trial Argue Child-Sized Sex Doll is 32 Child Porn*, HUFFPOST (May 8, 2019, 08:34am), https://www.huffingtonpost.ca/2019/05/07/prosecutors-kenneth-harrison-child-porn_a_23722967/?ncid=other_huffpostre_pqylmel2bk8&utm_campaign=related_articles (last visited May25, 2019).

[71] *Id.*

was child pornography,"[72] however, the crown did not meet the burden of proof necessary for a criminal conviction and the person was found not guilty.

The main issue with these robots is whether they are considered child pornography, and therefore obscene material. In the United Kingdom, a man was found guilty for the possession of such dolls, while in Canada the person was found not guilty although the judge accepted the testimony that the robots are a form of child pornography. The distinction we need to keep in mind in these cases is that both countries consider any type of material, whether digitally produced or not, that depicts a child is child pornography;[73] Whereas, in the United States, digitally produced material that is not requested under the belief that it involves real children is constitutional unless found to be obscene.[74] This portion of the article will discuss whether child-like sex robots are considered obscene material or not and whether they are a form of speech.

A. Child-like Sex Robots as Speech

Although it might be new and unconventional to associate this type of object with speech, when it comes to the extension of the right of Free Speech to other objects there has always been a debate. Initially, it was pondered whether it extended to art and other expressions such as sculptures. Later on, it was whether expressions or non-speech were also covered. Now, we face the new frontier of technology; one of the first cases we saw was *Ashcroft* which extended the right animated images.[75] The difference between animated image described in the case of *Ashcroft* and child sex robots is that these brings that which was initially in digital form out of the screen. In the case presented in Canada regarding a child sex robot, the crown (prosecution) argued that these were a form of three-dimensional pornography, and the court agreed to this argument.[76] Comparing this concept presented by the crown in Canada, we can see that it is a way to adapt those animations into the modern concepts, since modern technology consists on bringing images that were previously two dimensional into three-dimensional form, an example of this is materials created with 3D printers.

Provocative and controversial art and topics put freedom of speech to the test, especially when it consists of sexually related topics.[77] Earlier the main theories

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[72] The Canadian Press, *Newfoundland Man Found Not Guilty In Trial Over Child-Sized Sex Doll*, HUFFPOST (May 23, 2019, 10:54am) https://www.huffingtonpost.ca/entry/newfoundland-man-child-sized-sex-doll_ca_5ce6a2ade4b09b23e65ee764 (last visited May 25, 2019).

[73] *See* AKDENIZ, *supra* note 69.

[74] *See* United States v. Williams, 553 U.S. 285 (2008); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

[75] *See Ashcroft*, 535 U.S. at 234.

[76] McKenzie-Sutter, *supra* note 70.

[77] Freedom of Expression in the Arts and Entertainment, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/other/freedom-expression-arts-and-entertainment (last visited May 28, 2019).

as to why freedom of speech is important where discussed. The importance of safeguarding the expressions, as unconventional as they may seem, lies in the fact that:

> [A] free society is based on the principle that each and every individual has the right to decide what art or entertainment he or she wants -- or does not want -- to receive or create. Once you allow the government to censor someone else, you cede to it the power to censor you, or something you like. Censorship is like poison gas: a powerful weapon that can harm you when the wind shifts. Freedom of expression for ourselves requires freedom of expression for others. It is at the very heart of our democracy.[78]

Morally these robots would face strong rejection, but for it to be prohibited it would require more than just a moral rejection on the part of society.[79] As expressed by Tiehen in his article "[y]ou might have the initial gut reaction that something is morally wrong but decide after further reflection that your initial intuition is mistaken."[80] To determine whether they should be protected or not we must analyze whether they are considered obscene material or not. That requires analysis of the Miller standard, and the possible benefits to medicine and rehabilitation these products could bring. To determine this, we will be discussing what the possibilities of these robots to cause harm to children are and whether they can be used for therapeutic purposes. This will help develop the discussion on the purposes of these robots and how they can be protected, even if it is done with some limitations, such as providing them only with a prescription.

B. Research Regarding Possible Harm to Children

Last summer, the House of Representatives passed the CREEPER Act, which sought to ban the importation of child-like sex robots.[81] The Bill defines a child-like sex robot as "an anatomically-correct doll, mannequin, or robot, with the features of, or with features that resemble those of, a minor, intended for use in sexual acts."[82] Furthermore, the Bill is premised on the belief that the use of these robots will serve as a gateway for pedophiles to attack minors. The Bill did not pass; nonetheless, it is crucial in the analysis of this issue, as it is the first attempt to regulate the use

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[78] *Id.*

[79] *See* Miller v. California, 413 U.S. 15 (1973).

[80] Justin Tiehen, *Virtue Ethics and the CREEPER Act*, 41 SEATTLE U. L. REV. 1153, 1160 (2018).

[81] CREEPER Act of 2017, H.R. 4655, 115th Cong. (2017)). https://www.congress.gov/bill/115th-congress/house-bill/4655.

[82] *Id*.

of these robots and it brought the issue to public knowledge. The Act was based on a premise that these robots could be used as a gateway for pedophiles to attack children. However, this premise was highly criticized by professionals in the field of psychology. These professionals claim that there is room for broad study for the possible rehabilitative use of these robots.[83] In a similar manner, there is not enough research to demonstrate a link between their use and encouragement to act against a child.[84]

Due to the fact that the recent introduction of these robots in the market is unprecedented, no research is available regarding whether they conduce to harmful conduct towards children. However, some researchers have been studying the possible correlations between the use of child pornography and virtual child pornography and the attacking of a child. For instance, Marie-Helen Maras and Lauren R. Saphiro have discussed research studies that examined convicted child sex offenders and found that the use of child pornography is a strong indicator of pedophilia.[85] They concluded that:

> The consumption of child and virtual child pornography does not prevent pedophiles from future offending. Instead, viewing child pornography (actual and virtual) is considered to be a progressive addiction that serves as a gateway to child sexual abuse. Specifically, passive viewing of child pornography often becomes insufficient for the perpetrator as he or she becomes desensitized to it.[86]

This is one of the main worries presented by those who oppose the use of child-like sex robots. The United Kingdom's National Society for the Prevention of Cruelty to Children [hereafter *NSPCC*] has spoken regarding the possible harm that the use of these robots might cause to children has been. The NSPCC expressed that "there is a risk that those using these child[-like] sex [robots] or realistic props could become desensitized and their behavior becomes normalized to them so that they go on to harm children themselves, as is often the case with those who view indecent images."[87] The co-director of the Foundation for Responsible Robotics, who helped

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[83] Samantha Cole, *The House Unanimously Passed a Bill to Make Child Sex Robots Illegal*, MOTHERBOARD (Jun. 15, 2018, 9:00 AM), https://motherboard.vice.com/en_us/article/vbqjx4/a-new-bill-is-trying-to-make-child-sex-robots-illegal (last visited May 28, 2019).

[84] *Id.*

[85] Michael C. Seto, et al., *Child pornography offenses are a valid diagnostic indicator of pedo-philia*, 115 ABNORMAL PSYCH. J. 610 (2006).

[86] Marie-Helen Maras & Lauren R. Saphiro, *Child Sex Dolls and Robots: More Than Just an Uncanny Valley*, J. INTERNET L., Dec. 2017, at 7.

[87] Richard Wheatstone, *Outrage over push to give pedophiles 'child sex dolls'*, NEW YORK POST (Aug. 3, 2017, 1:15pm), https://nypost.com/2017/08/03/outrage-over-push-to-give-pedophiles-child-sex-dolls/1839320122967772/ (last visited May 25, 2019).

Congressman Donovan draft the CREEPER Act, stated that she believed in the need of a ban on child-like sex robots "because of the dangers that they may create. They could have a pernicious impact on society and potentially normalize sexual assault on minors. It would be relatively easy to make these as replicas of actual children from photographs. The way forward is to have international laws against them." [88]

This topic has created disagreement between researchers. As we have seen, some researchers stress that the use of child-like sex robots can desensitize a person and can cause them to molest children. On the other hand, others emphasize that there is a lack of research in the area. They also argue that studies have found that there is no causation link between pornography consumption and child molestation. Moreover, there is no research on whether the use of child-like sex robots directly results in harm to children.[89] A specialized researcher, Michael Seto denies the existence of definitive evidence on the possible therapeutic uses or the effect of those uses.[90] Seto, who conducts research on pedophilia and sexual offenders who target children, commented on the research used in the CREEPER Act in order to justify the ban. On the premise that the use of child-like sex robots is harmful to children, he stated: "The study that is cited in the article discusses factors that are important in the treatment of identified sex offenders to reduce offending. I know this research, and it does not address the impact of child-like sex dolls or robots, which are relatively new inventions."[91]

Due to ethical and legal prohibitions, scientific studies examining the effects of virtual child pornography on pedophiles is not likely.[92] However, studies on the effect of virtual child pornography could be helpful for the determination on the effect of the use of child-like sex robots on potential sex offenders and pedophiles. A study by Seto and Eke on the Criminal Histories and Later Offending of Child Pornography Offenders, analyzed and compared several types of focus groups and their reactions to pornographic material.[93] These studies showed "little demonstrable

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[88] Stadtmiller, *supra* note 65.

[89] *Id.* In an email to the Daily Beast Seto explained that he does not understand why despite the lack of research the authors of the act can be so confident in their opinions.

[90] *Id.* In the previously mentioned email Seto also explained that he conducts "research on pedophilia and sexual offending against children and [he] is not aware of any research on the impacts of access to child sex robots." *Id.*

[91] Stadtmiller, *supra* note 65.

[92] Neil Malamuth & Mark Huppin, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 790 (2006-2007).

[93] Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 201 (2005). The study made a differentiation between child molesters, which are the individuals who have committed sexual molestation against children, and the pedophiles, which are the individuals who are sexually aroused by children. The study found that the data suggests (on the self-reports) that many pedophiles use pornography of various types as masturbatory aid and "[s]ome individuals believe that such materials may have

risk for other individuals (including child pornography offenders without a history of contact sexual offending) to commit future molestation pursuant to pornography consumption, and the data, therefore, do not at present support a blanket prohibition against the use of virtual child pornography."[94]

Evidently, there two main opposing arguments by experts in the field in the topic of whether child-like sex robots could be a gateway to harming real children. Despite the difference in opinions, both sides point out the lack of research data on the matter. The closest thing to studies on this matter is those on the effects of virtual reality child pornography consumption and their correlation with violent behavior.[95] This study showed that individuals, particularly those who did not have a prior history of sexual offenses, posed "little demonstrable risk" to commit future offenses.[96]

C. The use of the robots as therapeutic

The goal of treatment for pedophilia is to keep the person from offending or acting out against children. This is done either by decreasing sexual arousal or by increasing the ability to manage the arousal. However, the most effective method is preventing access to children or providing close supervision to the individual.[97] No form of intervention is likely to work on its own. Therefore, a treatment that involves psychotherapy and medication is likely more efficient.[98] Currently, the research on pedophilia is limited, because most studies conducted have involved men convicted for sexually abusing minors.[99] This research may not be applicable to a non-offending pedophile.[100] In efforts to understand pedophilia and prevent

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actually reduced their tendencies to engage in molesting behaviors, although a minority reported that the materials caused increased tendencies." *Id*.

[94] Malamuth & Huppin, *supra* note 92, at 827.

[95] *See* Seto & Eke, *supra* note 93; Leonard Berkowitz, *The Contagion of Violence: An S-R Mediational Analysis of Some Effects of Observed Aggression,* 18 CURRENT THEORY & RES. MOTIVATION 95, 101-33 (1970); Martin Barron & Michael Kimmel, *Sexual Violence in Three Pornographic Media: Toward a Sociological Explanation*, 37 J. SEX. RES. 161, 164 (2000).

[96] *Id.*

[97] Harv. Health Publ'n, *Pessimism about pedophilia*, (July 2010), https://www.health.harvard.edu/newsletter_article/pessimism-about-pedophilia (last visited May 25, 2019), (Treatment is effective if the patient is committed to controlling the behavior. Psychotherapy treatment focuses on enabling the patient to recognize and overcome rationalizations about his behavior and empathy training and techniques in sexual impulse control. Drug treatment consists on a drug which suppresses production of testosterone to reduce the frequency or intensity of sexual desire. Physical castration is also another option).

[98] *Id.*

[99] *Id*. *See also,* TEDx Talks, *Let's be mature about pedophilia | Madeleine van der Bruggen | TEDxSittardGeleen*, YOUTUBE (Apr. 13, 2018), https://www.youtube.com/watch?v=egiBgmvv8wA (last visited May 28, 2019).

[100] *Id.*

pedophiles from acting on their urges, researchers are trying to broaden the studies to people who voluntarily seek treatment instead of just focusing on those who have already acted and been convicted.[101]

The use of child-like sex robots is a potential treatment for pedophilia. This has generated some debate. Similar to the previous debates, experts have differing opinions in this area. Some experts claim that the use of child-like sex robots would serve as a gateway and incite them to offend. Others believe it would serve as a release and stop them from acting against a child.[102]As part of this debate, the Chairwoman of the Specialist Treatment Organization for the Prevention of Sexual Offending [hereafter *StopSO*], Juliet Grayson commented that:

> If someone comes forward and says, "I am attracted to young children, and I want help to ensure that I never act on that attraction, so that I never harm a child," then maybe society should consider the use of dolls in a carefully regulated way. Perhaps a "prescription" for the use of a child sex doll could be given, alongside therapy, mentoring and supervision could help the individual remain law-abiding and fully accountable for their behavior. This carefully regulated use of child sex dolls might be one way to keep children safe. It feels like dangerous territory but is certainly worthy of consideration.[103]

This statement was met with a lot of criticism, including from the development head for the National Society for the prevention of Cruelty to Children [hereafter *NSPCC*]. John Brown commented that there was no evidence to support Grayson's comment and that there is "a risk that those using these child-like sex [robots] or realistic props could become desensitized and their behavior becomes normalised to them, so that they go on to harm children themselves, as is often the case with those who view indecent images."[104] Brown has further commented on the idea of child-like sex robots being used as therapeutic stating that: "There is no evidence to support the idea that the use of so-called child[-like] sex dolls helps prevent potential abusers from committing contact offenses against real children."[105]

Because research is so scarce, analysts use related research areas. One study led by Milton Dalton focused on pornography consumption and rates of sexual

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[101] *Id.*

[102] James McCarthy, *Welsh Charity Criticized after Suggesting Child Sex Dolls Should be made Available on Prescription*, WALESONLINE (Aug. 11, 2017, 5:15 PM), https://www.walesonline.co.uk/news/wales-news/welsh-charity-criticised-after-calling-13422072 (last visited May 28, 2019).

[103] *Id.*

[104] *Id.*

[105] Craig Harper, *Let 's Talk About Sex (dolls)*, MEDIUM (Feb. 10, 2018), https://medium.com/@CraigHarper19/lets-talk-about-sex-dolls-50f9be2e6198 (last visited May 25, 2019).

abuse.[106] This study found support for the cathartic effect of pornography. Specifically, it studied a period of Czech law where the ownership of pornography was legal.[107] The investigating team "reported a significant reduction in rates of sexual abuse during this time, which echoed similar trends in Denmark and Japan in relation to the sexual abuse of children."[108] Dalton and his team:

> [A]rgued that artificially produced material might serve as a useful preventative substitute for some people with sexual interests in children who are actively trying to not offend against real children. Child-like sex dolls clearly fulfill this brief of artificially produced material, and therefore the suggestion that these dolls might be a suitable 'prescription' option for some paedophiles does appear to have some empirical backing.[109]

Craig Harper remarks that it is not clear how to design a research study to determine whether the use of child-like sex robots has a cathartic effect or not. Nevertheless, Harper emphasizes the need to use studies on previously established models of sexual violence to understand people for whom the use of these child-like sex robots might be cathartic from those that it would be an instigator.[110] This argument has also been made by Michael Seto, who suggests that: "[f]or some paedophiles, access to artificial child pornography or to child[-like] sex dolls could be a safer outlet for their sexual urges, reducing the likelihood that they would seek out child pornography or sex with real children. For others, having these substitutes might only aggravate their sense of frustration."[111] Clearly, there is a need for models to identify individuals who could benefit from this type of treatment.

Seto's Motivation-Facilitation Model is an example of one that could help distinguish who these individuals might be.[112] With this model, one could classify people with a particular interest –such as pedophilia– and identify possible motivators and facilitators such as "antisocial tendencies, or substance misuse problems."[113] Another model is Griffith's Problematic Pornography Consumption

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[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] Michael C. Seto, *The Motivation-Facilitation Model of Sexual Offending*, RESEARCH GATE (Jul. 2017), https://www.researchgate.net/publication/318560689_The_Motivation-Facilitation_Model_of_Sexual_Offending (last visited May 25, 2019). This model "identifies the traits of paraphilia, high sex drive, and intense mating effort as primary motivations for sexual offenses, as well as trait (e.g., antisocial personality) and state (e.g., intoxication) factors that can facilitate acting on these motivations when opportunities exist."
[113] *Id.*

Scale.[114] This scale uses Griffith's six-component addiction model,[115] which can be used to distinguish between problematic and non-problematic pornography use.[116] Using one of these tests could determine whether child-like sex robots could serve a therapeutic purpose for the person or if it would encourage them into acting on the urges instead. This could answer the fears many people have. It would also allow for some control and study on those this would benefit without the risk of an unrestricted use that might cause harm.

IV. Child-like sex robots and the law

So far, this article's covered what child-like sex robots are; their possible use; the arguments for and against them; and some forms of protected speech. This section will examine how the law applies to child-like sex robots. Dr. Marty Klein, a certified sex therapist and a licensed psychotherapist, stated that the CREEPER Act is "part of a long series of attempts to corral our sexual imagination."[117] Further stating that: "Congress and other legislators may talk about the practical consequences of using various objects or perceiving various images (rape, child abuse, promiscuity, divorce, etc.), but they're really expressing their disapproval of our sexual imagination."[118]

As previously stated, child-like sex robots, are new in the market. This technology brings a new form of expression on sexual imagery to the market. However, the CREEPER Act seeks to eliminate them. Now, in order to determine whether that is unconstitutional under the First Amendment, the question is whether child-like sex robots are obscene. To determine that the *Miller* standard must be applied. The first prong of the standard is whether an average person would find that the child-like sex robot appeals to the prurient interest, applying contemporary community standards. This is the first challenge in the application of the *Miller* standard, precisely, because

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[114] Harper, *supra* note 105.

[115] Mark Griffiths, *A 'components' model of addiction within a biopsychosocial framework*, 10 SUBSTANCE USE J. 191 (2005). This model creates six characteristics that could indicate whether someone who is engaging in a particular behavior is addicted. The characteristics in this model are: salience, this happens when the activity becomes the most important thing in the persons life, mood modification, this is subjective experiences that are reported by the person engaged in the activity that could be sort of a coping strategy, tolerance, a gradual build of the amount spent on the activity, withdrawal symptoms, unpleasant feeling that occurs when the activity is reduced or stopped, conflict, conflict affecting the persons interpersonal relations, with oneself or in a work/school setting, and relapse, which is repeated reversions of the conduct.

[116] Mark D. Griffiths et al., *The development of the Problematic Pornography Consumption Scale (PPCS)*, 55 SEX RES. J. 395 (2018).

[117] Marty Klein, *Congress Criminalizes Sex Robots*, Sex & Politics, Sexual Intelligence Blog (Jun. 19, 2018), https://www.martyklein.com/congress-criminalizes-sex-robots/ (last visited May 25, 2019).

[118] *Id.*

there is not enough data on the broader public opinion on sex robots.[119] However, there is recent research attempting to measure public opinion regarding sex robots. The Scheutz study is the first systematic study valuing the use and opinions of the general public on sex robots.[120] This study found that a majority of those surveyed found the use of child-like sex robots to be inappropriate.[121] Based on the results of this study, child-like sex robots could meet the first prong of the *Miller* test which requires a community standard.

The second prong of the test requires the work to "depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law."[122] This means that the conduct tolerable in one state would not necessarily be tolerable in another one. This part of the test creates a category for what is acceptable where the conduct is being prohibited. However, this slightly changed when it comes to internet conduct as we saw in the case of *Ashcroft*. In this case, the Supreme Court determined that child pornography necessarily implies that a child or minor was used in the production of the material.[123] Subsequently, in *Williams* the Court determined that, in regards to virtual pornography, what was determinative was if the person had solicited or sent the material with a reasonable belief it was child pornography, meaning that real children were used in production, despite the material actually being virtual child pornography.[124]

Child-like sex robots are anatomically similar to children, but they are not real children, nor are real children in any way involved in their production.[125] There is, also, no likelihood that a person purchasing a child-like sex robot would reasonably believe they are purchasing a real child. Therefore, according to applicable law, these robots cannot be considered child pornography. Taking this into account, the use of child-like sex robots does not depict or describe the sexual conduct applicable in the law.

The third part of the test requires that the material lack serious literary, artistic, political or scientific value.[126] As previously discussed, there is an ongoing debate

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[119] Matthias Scheutz & Thomas Arnold, *Are We Ready for Sex Robots?*, TUFTS, https://hrilab.tufts.edu/publications/scheutzarnold16hri.pdf (last visited May 28, 2019). This study reports the outcome of the first systematic study asking about the appropriateness and value of sex robots, and whether their use can count as sex. To conduct this study an online questionnaire was created. Among the results listed it was also found that overall those interviewed view sex robots more like masturbation or using sex toys rather than having sex with a human.

[120] *Id.*

[121] *Id.* at 5.

[122] *See Miller*, 413 U.S. at 40.

[123] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

[124] *See* CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1391.

[125] *See* Varley, *supra* note 64.

[126] Miller v. California, 413 U.S. 15, 40 (1973).

on the value of child-like sex robots. However, there is a need for research on pedophilia, it's triggers and possible treatments. Researchers believe that these child-like sex robots could have important therapeutic purposes in this field.[127] Therefore, and due to the lack of research on the topic of pedophilia and treatments for preventing pedophiles from offending, the importance of studying child-like sex robots increases. This is especially true because most of the research done on pedophilia has used only people that have already offended and been convicted as test subjects. This means that little research has been done testing non-offenders and developing methods aimed at prevention.[128] There are currently efforts to reach people who suffer from pedophilia but have not offended so they may volunteer for these studies, and aid in the creation of real research on the topic.[129] Child-like sex robot, in this context, hold intrinsic scientific value. They could be central both in the research stage and the treatment of offenders and non-offenders alike. They have the potential to serve a therapeutic purpose and, furthermore, that research on them would also aid in the expansion of research on pedophilia. Therefore, the last prong of the *Miller* test does not exclude them from First Amendment protection.

Lastly, the category of low-value speech must be discussed in relation to child-like sex robots. As previously mentioned, the Supreme Court has not been very precise in defining what falls under the category of low-value speech. However, it has clearly determined that sexual speech falls under that heading.[130] Nonetheless, being "low-value" does not deprive the speech of protection. The standard of review used for sexually related speech is more than just a rational basis standard but less than a strict scrutiny standard.[131] In cases related to sexual speech, the Court has held that the government can *limit* the manner in which some sexual speech is conducted.[132] This allows for discrimination of certain kinds of sexual speech by the government, based on the content and the general moral precept.[133] Decisions like *Erie*[134] and *Barnes*[135] show that the Court has even permitted the government to regulate this kind of speech based on secondary effects. Although potentially problematic, this also does not dispose of First Amendment protection for child-like sex robots.

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[127] McCarthy, *supra* note 102.

[128] TEDx Talks, *supra* note 99.

[129] *Id.*

[130] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5.

[131] *Id.*

[132] *Id. See also,* City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976).

[133] Tiehen, *supra* note 80.

[134] 529 U.S. 277 (2000).

[135] 501 U.S. 560 (1991).

When applying this precept to child-like sex robots, the government may be able to *regulate* the speech. This based on its classification as a low-value speech and on the possible secondary effects of their use. However, the CREEPER Act is asking for a *complete ban* on these child-like sex robots.[136] Although with the low-value speech doctrine, the Court may determine which type of speech is less valuable requiring a less strict standard in judicial review, the State would still need to prove a compelling reason for banning any form of speech in its entirety. Child-like sex robots do not meet the obscenity standard; therefore, they are afforded some First Amendment protection. Though that protection may be less strict, due to its classification as low-value sexual speech, it is not left open to censorship on a whim.

V. Conclusion

An issue presented in regulating or researching child-like sex robots, as with sex robots in general, is that they have only been recently introduced in the market. Due to this, there is little information available regarding many of the factors necessary for proper classification. In the first place, there is little data in respects to how the general population perceives the use of sex robots.[137] That lack of data on public opinion is burdensome when applying the standard of obscenity because an understanding of the community perception of the material in question is a component of the test.[138] However, the little data available suggests that there may be enough to meet the first prong.[139]

The second prong of the obscenity standard requires the material to depict or describe conduct that is defined by the applicable state law.[140] As the law prohibits child pornography, which is defined as having to involve real children in its production, child-like sex robots do not fall under this category.[141]As it has been reiterated, child-like sex robots are anatomically similar to a real child. However, they do not constitute child pornography, because there is no use of children in their production and no reasonable person could believe that they were purchasing a real child as opposed to a robot. The last prong of the *Miller* test for obscenity requires that the work as a whole is lacking in serious literary, artistic, political or scientific

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[136] CREEPER Act of 2017, H.R. 4655, 115th Cong. (2017)). https://www.congress.gov/bill/115th-congress/house-bill/4655.

[137] Scheutz & Arnold, *supra* note 119.

[138] Miller v. California, 413 U.S. 15, 24 (1973).

[139] *Id.* (There is only one study that measures the public opinion on child sex robots done by Scheutz & Arnold, *supra* note 119).

[140] *Id.*

[141] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

value.[142] As stated, there is a lack of research on pedophilia, especially regarding nonoffenders. Researchers believe that these child-like sex robots could serve a therapeutic purpose to some individuals to deter them from ever offending a child.[143] Because of that value, and the other reasons argued above, child-like sex robots do not fall into the category of obscene speech and are therefore protected. Although child-like sex robots might fall under the category of less protected speech, the case law points to there being a category of low-value sexual speech.[144] As discussed in this article low-value sexual speech has a lesser degree of protection than the other types of speech protected under the First Amendment, but protection nonetheless.

The Supreme Court has previously found that animation and computer-generated images of virtual child pornography are indeed forms of speech. The difference between this speech and the ones the Court has previously discussed is that the animations are no longer projected on a screen. Technology has advanced in a way that, now, that which was projected in the screen now can be marketed and replicated in 3D form. These robots are merely a different form of the same material that has already been protected in pronouncements of the Supreme Court of sexual speech.[145]

It is for this reason that the author recommends that, even if the child-like sex robots are protected speech under the First Amendment, their use could only be limited and be made unavailable in the open market. Instead, these robots could be restricted, so they can be obtained only by prescription. This would entail that a psychologist determined that such person soliciting the product has undergone some psychological testing to determine their risk of offending and whether the use of the child-like sex robots would lead to sexual aggression in their case. Since there is little research on the topic of pedophilia the limitation could provide some aid to the scientist to have new tools for developing research and expanding the possibilities that the now have and are limited.[146] Although this could be a possibility to help both fields, we must take into account that the topic of pedophilia is still considered taboo and people that suffer from this and don't act may still hold back from seeking help due to the stereotypes. One of the reasons that safeguarding Freedom of Speech is important is to encourage tolerance.[147] By speaking of the topic and fomenting research and medical development on it, it may encourage

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[142] *See Miller*, 413 U.S. at 40.

[143] *See* Malamuth & Huppin, *supra* note 92.

[144] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5.

[145] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); United States v. Williams, 553 U.S. 285 (2008).

[146] Malamuth & Huppin, *supra* note 92.

[147] CHEMERINSKY *supra* note 14, at 930

these people to seek help. The value of this lies in the development of research, safe treatment methods and a way for it to safeguard children. The Supreme Court of the United States had previously determined that the material which did not contain real children is not considered as child pornography, as long as it is not solicited as such.[148] Child sex robots are a new form of technology that is, a modern take, on what used to be animation and have a scientific and medical value, that is why the should be protected under the First Amendment.

[148] 535 U.S. at 234.

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

*Roberto Ariel Fernández**

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

*B.S., University of Puerto Rico (1986); J.D., University of Puerto Rico (1989); LL.M., The George Washington University (2013).

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.

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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.

EMERGENCY REFINANCING: PUERTO RICO'S MUNICIPAL BONDS AND THE CONTRACT CLAUSE

*Emmett A. Egger**

Abstract

This Note examines whether Puerto Rico's Act 91 is constitutional under the Contract Clause. Puerto Rico passed Act 91 to address its massive debt crisis. Specifically, Act 91 established the COFINA corporation to issue COFINA backed bonds to refinance Puerto Rico's outstanding General Obligation bond debt. Initially, this refinancing strategy appeared to work. But then, Puerto Rico's economy further collapsed, which prompted a legal dispute between these two sets of bondholders. The General Obligation bondholders assert, among other things, that Puerto Rico violated the Contract Clause when Puerto Rico established COFINA. This is because Puerto Rico already contractually committed the funds that back the COFINA bonds to the General Obligation bondholders. With this background, this Note makes two modest contributions. First, it seeks to inform legal decisions as to the constitutionality, under the Contract Clause, of the COFINA bonds. Second, because other U.S. municipalities, including Chicago, have established similar legal structures to refinance their outstanding bond debt, this Note will aid professionals who may engage in a similar Contract Clause analysis for another U.S. municipality. In making these two contributions, this Note describes the historical events that led Puerto Rico to amass its current debt and provides an overview of the Supreme Courts' Contract Clause Jurisprudence.

Resumen

Este escrito examina si le Ley 91 de Puerto Rico es constitucional al amparo de la Cláusula de Menoscabo de Obligaciones Contractuales (Cláusula de Menoscabo). Puerto Rico aprobó la Ley 91 para atender su crisis financiera masi-

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va. Específicamente, la Ley 91 establece la corporación COFINA para emitir bonos COFINA para refinanciar la deuda de Puerto Rico con los bonistas de obligación general (GO). Inicialmente, esta estrategia de refinanciamiento pareció funcionar. Pero luego, la economía de Puerto Rico continuó colapsando, lo cual ocasionó una disputa legal entre estos dos tipos de bonista. Los bonistas GO alegan, entre otras cosas, que Puerto Rico violentó la Cláusula de Menoscabo cuando estableció COFINA. Esto porque Puerto Rico había comprometido contractualmente los fondos de COFINA a los bonistas GO. Con este trasfondo, este escrito hace dos contribuciones humildes. Primero, busca informar decisiones legales sobre la constitucionalidad, al amparo de la Cláusula de Menoscabo, de los bonos COFINA. Segundo, porque otras municipalidades de los EE.UU., incluyendo Chicago, han establecido estructuras legales similares para refinanciar sus deudas a bonistas, este escrito ayudará a profesionales que pueden encontrarse en un análisis similar en cuanto a la Cláusula de Menoscabo en otras municipalidades de EE.UU. En hacer estas dos contribuciones, este escrito describe los eventos históricos que llevan a Puerto Rico a acumular su deuda actual y provee un resumen de la jurisprudencia del Tribunal Supremo de Estados Unidos en materia de la Cláusula de Menoscabo.

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I. Introduction

Puerto Rico, an island of 3.5 million U.S. citizens, is nearing a humanitarian crisis.[1] This is in part due to its depressed economy and crippling debt,[2] which Hurricane Maria ("Maria") highlighted.[3] In the aftermath of Maria, Puerto Rico faced additional funding issues as the hurricane disrupted the economy, which is predicted to result in a $20- to $40-billion loss in economic output;[4] while "it could take $95 billion . . . to rebuild"[5] the island, as governor Ricardo Rosselló states.

Even before Maria, Puerto Rico's failing economy was evident.[6] Puerto Rico, before Maria, "had a failed economy, severe poverty, and massive debt crisis."[7] For example, Puerto Rico had a 45% poverty rate and an 11% unemployment rate.[8] In addition, more than 60% of its residents are on Medicaid.[9] This economic crisis, however, did not happen overnight.[10]

To meet its economic challenges, which started around 2000, Puerto Rico issued debt in the form of municipal bonds,[11] which led to more than $70 billion in outstanding debt.[12] Puerto Rico has amassed this staggering amount of debt in part

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[1] *See* James H. Carr, *Puerto Rico Deserves U.S. Assistance to Restructure Its Debt and Avoid a Humanitarian Crisis*, FORBES, (Oct. 27, 2017, 7:51 AM), https://www.forbes.com/sites/jameshcarr/2017/10/27/puerto-rico-deserves-u-s-assistance-to-restructure-its-debt-and-avoid-a-humanitarian-crisis/#715ba9441313.

[2] *See Id.*

[3] *See* Daniela Hernandez & Arian Campo-Flores, *Puerto Rican Business Struggle to Restart with Little Power After Hurricane Maria*, WALL ST. J., (Oct. 14, 2017, 7:00 AM), https://www.wsj.com/articles/puerto-rican-businesses-struggle-to-restart-with-little-power-after-hurricane-maria-1507978801.

[4] *See Id.*

[5] *Id.*

[6] *See* Carr, *supra* note 1.

[7] *Id*.

[8] *See* Daniel Bases, *Puerto Rico Creditors Are Open to Mediation in Bankruptcy Court: In re Commonwealth of Puerto Rico*, 14 NO. 2 WESTLAW J. BANKR. 4, 1-2 (2017).

[9] *See* Carr, *supra* note 1.

[10] *See generally* Christopher K Odinet, *Of Progressive Property and Public Debt*, 51 WAKE FOREST L. REV. 1101, 1110-18 (2016).

[11] *See* Scott M. Christman*, Puerto Rican Debt Legislation: Is the Territory Better Off Restructuring Municipal Debt Under PROMESA*, 8 UPR BUS. L.J. 87, 90-94 (2017) (explaining that from 2000 to 2015 Puerto Rico's Bond Debt went from $30 to 70 billion to meet the economic challenges caused by (1) the expiration of the IRC 936, which led many of Puerto Rico's largest employers to leave the island, (2) the significant amount of its citizen's moving to the mainland U.S., and (3) the Great Recession). *See also* Mary Williams Walsh, *How Puerto Rico is Grappling with a Debt Crisis*, N.Y. TIMES, (May 16, 2017), https://www.nytimes.com/interactive/2017/business/dealbook/puerto-rico-debt-bankruptcy.html ("In 1996, Washington started phasing out a tax break for American companies with subsidiaries on the island, removing a significant driver of economic growth.").

[12] *See* Heather Gillers, *Puerto Rico Bonds Slide as Trump Says 'Goodbye' to Territory's Debt*, WALL ST. J., (Oct. 4, 2017, 5:39 AM), https://www.wsj.com/articles/puerto-rico-bonds-slide-as-trump-says-goodbye-to-territorys-debt-1507126128. *See also* Christman, *supra* note 11, at 91.

because of its depressed economy, coupled by its government spending more than it had for many years.[13] The current state of Puerto Rico's municipal bond debt raises the following question: how did Puerto Rico obtain so much debt?

The answer to that question may be that investors, even after Puerto Rico's economy began to struggle, continued pouring money into Puerto Rico by purchasing its municipal bonds.[14] There are legal structures in place that have motivated investors to purchase these municipal bonds.[15] For example, Puerto Rico's municipal bonds receive a triple income tax exempt status, and Puerto Rico is unable to declare bankruptcy.[16]

In regards to the tax exemptions, Puerto Rico's municipal bonds, unlike other states that issue municipal bonds, are exempt from local, state, and federal tax even for investors that do not live in Puerto Rico.[17] To realize this triple tax exemption when purchasing other states' municipal bonds, an investor would have to live in the state that the municipal bond was issued in.[18] Moreover, Puerto Rico cannot declare bankruptcy because Congress passed a law denying Puerto Rico access to Chapter 9.[19] After Congress passed this law, "millions of individuals nationwide invested billions of dollars in reliance on that law."[20] Yet, Congress recently enacted the *Puerto Rico Oversight, Management, and Economic Stability Act* ("PROMESA").[21]

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[13] *See* Walsh, *supra* note 11. *See also* Carlos A. Rodriguez Vidal, *A Tale of Two "Municipalities" (Detroit and Puerto Rico): Legal and Practical Issues Facing a Financially distressed "Municipality*," AMERICAN BAR 12 (April 2016), https://www.americanbar.org/content/dam/aba/administrative/state_local_government/BinderTaleofTwoMunicipalities4116.authcheckdam.pdf ("Puerto Rico is currently facing a singularly debilitating fiscal crisis. This crisis is centered on a public debt of more than $70 billion, an amount that exceeds that of all but two States of the United States and almost equal to its Gross National Product."). *See also* Mary Williams Walsh, *The Bonds That Broke Puerto Rico*, N.Y. TIMES (June 30, 2015), https://www.nytimes.com/2015/07/01/business/dealbook/the-bonds-that-broke-puerto-rico.html ("Puerto Rico has about 15 times the median bond debt of the 50 states, according to Moody's Investors Service.").

[14] *See* Christman, *supra* note 11, at 91.

[15] *See Id.* at 91-92.

[16] *See Id.*

[17] *See Id.*

[18] *See Id.* at 91.

[19] 11 U.S.C.A. § 903 (West 2018); 11 U.S.C.A. § 101(West 2018) (stating that Puerto Rico is not a State for purposes of who can become a chapter 9 debtor). *See also* Christman, *supra* note 11, at 92.

[20] Christman, *supra* note 11, at 92 (quoting Puerto Rico Chapter 9 Uniformity Act of 2015: H.R. 870 Before the H. Comm. on the Judiciary, 114th Cong. 88 (2015) (written testimony of Thomas Moers Mayer, Esq., Partner and Co-Chair, Corporate Restructuring and Bankruptcy Group, Kramer Levin Naftalis and Frankel, LLP)).

[21] 48 U.S.C. § 2121 (2016). *See also* Martin Guzman, *Puerto Rico's Debt Crisis is a Wake-Up Call. It Could Be Crushed Like Greece*, THE GUARDIAN, (May 8, 2017), https://www.theguardian.com/commentisfree/2017/may/08/puerto-ricos-debt-crisis-greece (explaining that PROMESA is a federal law that Congress created to aid Puerto Rico with its debt crisis).

Currently, using PROMESA as the vehicle, Puerto Rico is in the midst of restructuring its municipal bond debt.[22] This restructuring has spurred a legal battle between the General Obligation bond holders and Puerto Rico's Sales and Use Tax Corporation ("COFINA") bond holders.[23] These two classes of bondholders are fighting over who will be entitled to the $400 million in funds held by the sales-tax bond trustee.[24] Already, more than 20 lawsuits have been filed.[25] And the U.S. Bankruptcy Court in San Juan will be involved in deciding who is entitled to these funds.[26]

This article will address the legal dispute between the General Obligation bondholders and the COFINA bondholders. Specifically, it will address whether Act 91, which established COFINA, unconstitutionally violated the Contract Clause. The answer to this inquiry is largely dependent on two factors: (1) the jurisprudence a court uses to determine if Act 91 violated the contract clause; and (2) whether COFINA is a separate entity from the Puerto Rico Common Wealth Fund. The analysis that follows, however, will focus on the Contract Clause jurisprudence and its application to the Act 91. Part II of this article will address the historical background leading up to this issue and the details regarding the General Obligation and COFINA bonds. Part III will illustrate the development of the Contract Clause jurisprudence and highlight the relevant tests and factors in deciding if a statute violates the Contract Clause. Part IV will analyze whether Act 91 impermissibly violates the Contract Clause, taking into consideration the circumstances surrounding Puerto Rico passing Act 91 and the specifics of Act 91. Part V will serve as this article's conclusion.

II. Background

A. Brief History Illustrating How Puerto Rico Amassed Its Debt

Congress, in 1917, passed the Jones-Shafroth Act. ("Jones Act").[27]Among other things, the Jones Act granted American citizenship to Puerto Ricans[28] and allowed

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[22] *See* Bases, *supra* note 8, at 1.

[23] *See* Cate Long, *Developing: Puerto Rico Enters Bankruptcy on May 3: Faithful to PROMESA and Congressional Intent?*, 36 AM. BANKR. INST. J. 12, 85-87 (2017). COFINA is short for *Corporación del Fondo de Interés Apremiante*.

[24] *See* Michelle Kaske & Steven Church, *Puerto Rico Warns It May Grab Sales-Taxes Claimed by Bondholders*, BLOOMBERG MARKETS, (June 10, 2017, 4:34 PM), https://www.bloomberg.com/news/articles/2017-06-10/puerto-rico-warns-it-may-grab-sales-taxes-claimed-by-bondholders.

[25] *See* Guzman, *supra* note 21.

[26] *See* Kaske & Church, *supra* note 24.

[27] MARC D. JOFFE & JESS MARTINEZ, ORIGINS OF THE PUERTO RICO FISCAL CRISIS 5 (2016).

[28] 64 Cong. Ch. 145 § 5 ("[A]ll citizens of [Puerto] Rico . . . are hereby declared, and shall be deemed and held to be, citizens of the United States . . . .").

Puerto Rican issued bonds to be exempt from local, state, and federal tax.[29] In effect, the Jones Act made Puerto Rican issued bonds attractive to investors around the country.[30] Although this act attracted investors to Puerto Rican issued municipal bonds, it provided mechanisms to limit the amount of debt Puerto Rico could incur: (1) Puerto Rico could borrow only up "to 7 percentum of the aggregate tax valuation of its property,"[31] and (2) the act contained a balanced budget clause.[32]

This limitation on borrowing, over time, eroded.[33] For instance, in 1961, Congress removed the percentage limitation on borrowing and Puerto Rico adopted its own,[34] which allowed Puerto Rican *municipalities* to "borrow between 5 percent and 10 percent of assessed value on their own, without including commonwealth debt in the calculation."[35] By not including debt in its calculation, it increased the assessed value, which in turn permitted Puerto Rico to issue more debt.[36]

Moreover, Puerto Rico eliminated the percentage-based assessed valuation limitation on the Puerto Rican *commonwealth*; instead, Puerto Rico limited the commonwealth's borrowing to 15% of its tax revenues.[37] Due to this, Puerto Rico could increase the amount it borrowed if it increased the amount of tax revenues, which was previously barred.[38] The borrowing limitation on the commonwealth,

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[29] *See Id.* at § 3 ("[A]ll bonds issued by the government of Porto Rico, or by its authority, shall be exempt from taxation by the Government of the United States, or by the government of Porto Rico or of any political or municipal subdivision thereof, or by any State, or by any county, municipality, or other municipal subdivision of any State or Territory of the United States, or by the District of Columbia.").

[30] *See* Joffe & Martinez, *supra* note 27, at 6.

[31] 64 Cong. Ch. 145 § 3.

[32] *Id.* ("In computing the indebtedness of the people of [Puerto Rico], bonds issued by the people of [Puerto] Rico secured by an equivalent amount of bonds of municipal corporations or school boards of [Puerto] Rico shall not be counted.").

[33] *See, generally,* Joffe & Martinez, *supra* note 27, at 9-16.

[34] PL 87-121.

[35] *See* Joffe & Martinez, *supra* note 27, at 13 (*citing* P.R. CONST. art. VI, § 2).

[36] *See Id.* at 12-13.

[37] P.R. CONST. art. VI, § 2:

> [B]onds or notes for the payment of which the full faith credit and taxing power of the Commonwealth shall be pledged shall be issued by the Commonwealth if the total of (i) the amount of principal of and interest on such bonds and notes, together with the amount of principal of and interest on all such bonds and notes theretofore issued by the Commonwealth and then outstanding, payable in any fiscal year and (ii) any amounts paid by the Commonwealth in the fiscal year next preceding the then current fiscal year for principal or interest on account of any outstanding obligations evidenced by bonds or notes guaranteed by the Commonwealth, shall exceed 15% of the average of the total amount of the annual revenues raised under the provisions of Commonwealth legislation and covered into the Treasury of Puerto Rico in the two fiscal years next preceding the then current fiscal year . . . . (official translation).

[38] *See* Joffe & Martinez, *supra* note 27, at 13.

however, "only applied to 'bonds or notes for the payment of which the full faith and credit and taxing power of the Commonwealth shall be pledged. . . '."[39] this language contributed to the issue at hand as Puerto Rico used this language to create COFINA.

Additionally, a step towards a looser limitation on borrowing involved the interpretation of the following language in the 1917 Jones Act: "[n]o appropriation shall be made, nor any expenditure authorized by the legislature, whereby the expenditure of the Government of Puerto Rico during any fiscal year shall exceed the *total revenue* then provided for by law and applicable for such appropriation or expenditure . . . ."[40] Specifically, the phrase "total revenue" is translated in Spanish as "total resources," which could—and did—lead to a broader interpretation.[41]

At the Puerto Rican Constitutional Convention, taking place from 1951 through 1952, delegates argued that the phrase "total resources" did not mean the same thing as it did when Congress passed the Jones Act, and the phrase should now include revenues from "funds obtained from the sale of bonds." [42] The broader interpretation prevailed, which effectively destroyed the balanced budget clause in the Jones Act, allowing the proceeds from Puerto Rico's municipal bonds to be considered when balancing Puerto Rico's budget,[43] and "opened the door to recurring operating deficits."[44]

B. Puerto Rico's General Obligation and COFINA Bonds

The General Obligation bonds are backed by the Puerto Rican Constitution.[45] Specifically, Article VI, Section 2 states that Puerto Rico has the power to issue municipal bond debt and that such debt will be backed by "the full faith and credit and taxing power of the Commonwealth . . . ."[46] Moreover, the Puerto Rican Constitution explains that to pay back the municipal debt issued, the Secretary of the Treasury may be required to use available revenues.[47]

But, as stated above, there is a limitation on the amount of debt Puerto Rico could issue; in 2007, Puerto Rico could not issue any more General Obligation bonds because it had reached its debt ceiling imposed by the borrowing

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[39] *See* P.R. CONST. art. VI, § 2. *See also* Joffe & Martinez, *supra* note 27, at 13.

[40] 64 Cong. Ch. 145 § 34 (emphasis added).

[41] *See* Joffe & Martinez, *supra* note 27, at 11.

[42] *See Id.*

[43] *See Id.*

[44] *Id.*

[45] *See* P.R. CONST. art. VI, § 2.

[46] *Id.*(official translation).

[47] *See Id.*

limitation.[48] Yet, Puerto Rico, to continue to borrow, found a way around its debt ceiling.[49] Specifically, Puerto Rico passed a law, Act 91, to create a sales and use tax corporation known as COFINA, which is a self-proclaimed separate entity.[50] The legislature created COFINA to issue sales and use tax backed bonds.[51] Initially, Puerto Rico issued these COFINA bonds at an A+ rating, "which was five levels higher than Puerto Rico's General Obligation bonds at the time."[52] Due to the better credit rating given to the COFINA bonds, Puerto Rico was able to borrow at a cheaper rate.

Puerto Rico was able to issue the COFINA bonds at significantly higher credit rating because the sales and use tax revenue that secured these bonds was claimed to be separate from the funds used to back the bonds issued to the General Obligation bondholders.[53] As briefly mentioned before, the General Obligation bondholders are to be paid, as stated by the Puerto Rican Constitution, from the "available resources" of Puerto Rico's Commonwealth; however, Act 91 deemed the sales and use tax revenues that secured the COFINA bonds to be separate from the available resources of the Commonwealth.[54] Act 91 specifically states that the sales and use tax resources dedicated to COFINA "shall not constitute available resources of the commonwealth of Puerto Rico for any purpose, including for the purpose of Section 8 of Article VI of the Constitution."[55]

i. COFINA Bonds in Detail.

COFINA creates a priority interest in the commonwealth's sales and use tax for COFINA bondholders.[56] Act 91, which creates this priority interest for COFINA bondholders, states that 5.5% of the commonwealth's sales and use tax will go directly to "COFINA until a guaranteed base amount of tax collections is met."[57]

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[48] *See* Christman, *supra* note 11, at 93. *See also* P.R. CONST. art. VI, § 2 (stating that Puerto Rico can issue bonds and notes if such issuances do not exceed 15% of Puerto Rico's average total tax revenues).

[49] *See* Christman, *supra* note 11, at 93.

[50] *See* Martin Z. Braun, *Bondholders Fret as Alchemy Turns Chicago's Junk to Gold*, BLOOMBERG MARKETS, (November 10, 2017, 7:30 AM), https://www.bloomberg.com/news/articles/2017-11-10/bondholders-fret-over-alchemy-that-turns-chicago-s-junk-to-gold.

[51] *See Id.*

[52] *Id.*

[53] *See* Odinet, *supra* note 10, at 1143.

[54] *See Id.*

[55] *Id.*

[56] *See* Horacio Aldrete-Sanchez, *Puerto Rico Sales Tax Financing Corp.: Sales Tax*, STANDARD & POORS, (June 28, 2007), http://www.gdb.pr.gov/investors_resources/documents/COFINA08x2007SP.pdf.

[57] *Id.*

Moreover, the bonds are security backed.[58] This is because the statute grants a statutory lien to bondholders on the commonwealth's sales and use tax revenues once any bonds are issued.[59] Due to this lien, the COFINA bonds are non-recourse and are payable only from the pledged property, 5.5% of the commonwealth's sales and use tax.[60]

Furthermore, similar to Puerto Rico's General Obligation bonds, COFINA cannot voluntarily file for or be involuntarily forced into bankruptcy.[61] And, particularly important to the analysis in this note, Act 91 sought to transfer the revenues of the sales and use tax to the separate entity called COFINA.[62] This separation was done to exclude the sales and use tax revenues from the constitutional provision of Puerto Rico that grants the General Obligation bondholders "first lien claim on all available" revenues.[63] This provision is otherwise known as the General Obligation bondholder's constitutionally backed claw-back provision.[64]

COFINA claims to be a separate and independent corporate and political entity from the commonwealth of Puerto Rico, which may allow it to take funds from the sales and use tax and use such funds to back COFINA bonds.[65] One reason Puerto Rico codified this separate entity was to refinance all or part of the extra-constitutional debt it had from issuing the General Obligation bonds.[66] Moreover, to be able to refinance the extra-constitutional debt, Act 91 established the Dedicated Sales Tax Fund, which is called the *Fondo de Interés Apremiante* ("FIA").[67] FIA is funded with the first 5.5% of revenue collected by the entire sales and use tax.[68] And these revenues are given to COFINA before any amount can be used to satisfy Puerto Rico's obligation to its General Obligation bondholders.[69]

ii. Who Holds the Bonds?

A diverse group holds the municipal bonds issued by Puerto Rico.[70] For instance, some bondholders consist of hedge funds, including vulture funds.[71] Vulture funds

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[58] *See Id.*
[59] *See Id.*
[60] *See Id. See also nonrecourse*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining non-recourse as "an obligation that can be satisfied only out of the collateral securing the obligation and not out of the debtor's other assets").
[61] *See* Adrete-Sanchez, *supra* note 56.
[62] *See Id.*
[63] *See Id.*
[64] *See Id.*
[65] *See Id.*
[66] *See Id.*
[67] *See Id.*
[68] *See Id.*
[69] *See Id.*
[70] *See* Odinet, *supra* note 10, at 1129-30.
[71] *See Id.* at 1130.

get their name from buying debt from struggling municipalities for deep discounts in the hopes of significant profits later on.[72] The vulture hedge funds own roughly 35% of all Puerto Rico's outstanding debt.[73] Additionally, mutual funds own a significant amount of the debt, 15%.[74] Also, unlike the vulture hedge funds that prey upon struggling municipalities for a big payday, the mutual funds, which have significant exposure in regards to owning Puerto Rico's outstanding debt, hold money for everyday Americans.[75] Notably, the mutual funds hold money for retirees, "seniors saving for retirement, working Americans, and for those saving for college . . . ."[76] Lastly, the remainder of the bondholders consist of individual investors, who reside across the United States, including Puerto Rico.[77]

III. Overview of the Contract Clause and its Cases

A. Overview of the Contract Clause

The Contract Clause states that "[n]o State . . . shall pass any . . . Law impairing the Obligation of Contracts . . . ."[78] Despite the facially absolute language in the Contract Clause, "its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'"[79] Because "literalism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection," the language is not interpreted as absolute.[80] Additionally, the police power is the "sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."[81]

Before the United States passed the 14th Amendment, the Contract Clause was arguably the strongest constitutional limitation on state law.[82] Yet, since those early years, the Contract Clause has "receded into comparative desuetude with the

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[72] *See Id.* at 1127.

[73] *See Id.* at 1128.

[74] *See Id.* at 1129.

[75] *See Id.*

[76] *Id.*

[77] *See Id.*

[78] U.S. CONST. art. 1, § 10, cl. 1.

[79] Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 410 (1983) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934)).

[80] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 240 (1978) (*citing* W.B. Worthen Co. v. Thomas, 292 U.S. 426, 433 (1934)).

[81] *Spannaus*, 438 U.S. at 241 (quoting Manigault v. Springs, 199 U.S. 473, 480 (1905)).

[82] *See Spannaus*, 438 U.S. at 241.

adoption of the Fourteenth Amendment, and particularly with the development of the large body of jurisprudence under the Due Process Clause of that Amendment in modern Constitutional history."[83] But even though the Contract Clause has diminished in importance under current constitutional jurisprudence, "it must be understood to impose some limits upon the police power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."[84] The Court outlined the limits the Contract Clause imposes on the police power where the Court presided over cases in which States passed laws to meet the challenges of economic emergencies.[85]

B. Blaisdell and its Progeny

"While emergency does not create power, emergency may furnish the occasion for the exercise of power."[86] In *Home Building & Loan Association v. Blaisdell* (1934), the court reviewed whether a mortgage moratorium law, which the Minnesota legislature passed, during a declared economic emergency, to provide relief for homeowners threatened with foreclosure, violated the Contract Clause.[87] Specifically, Minnesota's law stated that through an authorized judicial proceeding, the court could "extend the period of redemption from foreclosure sales 'for such additional time as the court may deem just and equitable . . . .'"[88] But the Minnesota law limited the court's discretion in regards to the extension period because the courts could only extend the period of the redemption for the duration of the emergency.[89] And during the court-granted extension, the mortgagor was to pay the mortgagee "the reasonable rental value of the property."[90]

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[83] *Id. See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 647 (4th Ed. 2013) (finding that because the Supreme Court, under the Fifth and Fourteenth Amendments, protects the freedom of contract under the Due Process Clause, the Contract Clause is significantly less important as a limitation on state law).

[84] *See Spannaus*, 438 U.S. at 241.

[85] *See Id.* at 242 ("The existence and nature of those limits were clearly indicated in a series of cases in this Court arising from the efforts of the States to deal with the unprecedented emergencies brought on by the severe economic depression of the early 1930's.").

[86] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).

[87] *See Id.* at 416. *See also* Samuel R. Olken, CHARLES EVANS HUGHES AND THE BLAISDELL DECISION: A HISTORICAL STUDY OF THE CONTRACT CLAUSE JURISPRUDENCE, 72 OR. L. REV. 513, 568-74 (1993) (explaining that Minnesota passed the moratorium law during the Great Depression, which caused "an exponential increase in the number of foreclosure sales," resulting in protests, riots, and civil unrest).

[88] *Blaisdell*, 290 U.S. at 426.

[89] *See Id.*

[90] *Id.* at 416-17. *See also* Olken, *supra* note 87, at 570 (stating that "[b]y 1933, most property mortgaged in Minnesota was worth only one quarter of its value before the advent of the Depression"). Given the sharp decline in property value, a reasonable rental value was materially more affordable for the mortgagor.

In addition, and notably, this law applied retrospectively.[91]

Due to the circumstances and the specifics of Minnesota's law, the Court held that the law did not violate the Contract Clause.[92] The Court came to this conclusion, despite Minnesota's law infringing upon the mortgagee's foreclosure and possession rights, "to safeguard the vital interests of the people."[93]

In short, the Court recognized the need for a balancing test between individual rights and public welfare.[94] With this balancing test, the Court found the following five factors significant to its decision: (1) there was an economic emergency in Minnesota, "which furnished the proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community"; (2) Minnesota enacted the law to protect the society at large, and not a favored group; (3) Minnesota tailored the law to the challenges of the emergency at hand; (4) the conditions of Minnesota's law were reasonable; and (5) Minnesota's law was temporary in operation as it was limited to the duration of the declared economic emergency.[95] Significantly, subsequent opinions from the Court have interpreted *Blaisdell* to imply that Minnesota's law would have violated the Contract Clause if one of these five characteristics did not exist.[96]

Dissimilar to *Blaisdell*, in *W.B. Worthen Company v. Thomas* (1934), the Court found that an Arkansas law violated the Contract Clause.[97] Applying retrospectively, the Arkansas law in *Thomas* barred creditors from collecting any amount given to the debtor from his life insurance policy.[98] The Arkansas legislature justified the law because of the economic emergency.[99] Yet, the Arkansas law did not have any conditions equitably related to the exigency nor did it limit the law to the duration of the emergency.[100] The Court, recognizing that it upheld the law at issue in *Blaisdell*

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[91] *See Blaisdell*, 290 U.S. at 416. *See* Olken, *supra* note 87, at 571-72 ("Though the United States Supreme Court had consistently invalidated retroactive mortgagor relief legislation under the Contract Clause, it had yet to assess the constitutionality of a moratorium law enacted during the Depression.").

[92] *See Blaisdell*, 290 U.S. at 448.

[93] *Id.* at 434. *See also* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978) (explaining that the States retain the residual authority to guard the vital interests of the people).

[94] *See Blaisdell*, 290 U.S. at 442.

[95] *Id.* at 444-48.

[96] *See, e.g.*, *Spannaus*, 438 U.S. at 242 ("The *Blaisdell* opinion thus clearly implied that if the Minnesota legislation had not possessed the characteristics attributed to it by the Court, it would have been invalid under the Contract Clause . . . .").

[97] *See* W.B. Worthen Co. v. Thomas, 292 U.S. 426, 434 (1934).

[98] *See Id.* at 430-31.

[99] *See Id.* at 432. *See also* MICHAEL E. PARISH, THE HUGHES COURT: JUSTICES, RULINGS, AND LEGACY 150 (2002) (explaining that Arkansas and its economy were suffering because of the collapse of the cotton economy and the Dust Bowl).

[100] *See Thomas*, 292 U.S. at 432.

because of the law's temporary and equitable conditional relief, found that the Arkansas law violated the Contract Clause because the Arkansas law was neither temporary nor conditional.[101] Specifically, the Court in *Thomas* stated that "[i]n placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need."[102]

Also, dissimilar to *Blaisdell*, in *W.B. Worthen Co. v. Kavanaugh* (1935), the Court found three of Arkansas' laws, which the Arkansas Legislature passed in 1933, in violation of the Contract Clause.[103] In *Kavanaugh*, Arkansas passed a law that allowed Arkansas' municipalities to issue bonds, which were secured by the mortgage benefit assessments.[104] Subsequently, in March 1933, Arkansas passed three laws, which applied retrospectively, that altered the terms of the bonds previously issued.[105] The changes that the March 1933 laws instituted resulted in the bondholders having to wait a minimum of six and a half years "without an effective remedy."[106] Importantly, as the Court recognizes, the changes made by the March 1933 laws were "an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security."[107] And the Court reasoned that even though there was an economic emergency at hand,[108] the March 1933 laws were not limited to the duration of the emergency and did not impose conditions equitably related to the exigency.[109] Thus, unlike the law *Blaisdell*, the March 1933 laws unconstitutionally impaired the obligation of the contract that the bondholders were party to.[110]

C. The Supreme Court's Modern Contract Clause Jurisprudence

Although the more modern Supreme Court Contract Clause cases still recognize the importance of *Blaisdell*,[111] the framework that guides the Contract Clause

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[101] *See Id.* at 434.

[102] *Id.*

[103] *See* W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 63 (1935).

[104] *See Id.* at 57 (explaining that Arkansas municipalities could issue bonds that would be funded by property owners' assessment payments to the municipality, and if the owner was delinquent in making such payments, then the bondholder could foreclose on a delinquent owner's property to satisfy the municipality's outstanding obligation to the bondholders).

[105] *See Id.* at 58-59.

[106] *See Id.* at 61.

[107] *Id.* at 62. *See* Parish, *supra* note 99, at 150 (explaining that Arkansas and its economy were suffering because of the collapse of the cotton economy and the Dust Bowl).

[108] *See Kavanaugh*, 295 U.S. at 60.

[109] *Id.* at 62–63.

[110] *See Id.* at 63.

[111] U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 15 (1977).

analysis has changed.[112] In *U.S. Trust Co. of New York* ("U.S. Trust"), for example, necessity and reasonableness of the law guided the Court's inquiry.[113] With this framework, the Court held, in *U.S. Trust*, that the retroactive application of the legislation violated the Contract Clause.[114]

Both New York and New Jersey, in *U.S. Trust*, through bi-state legislation, established the Port Authority to promote and coordinate transportation between the two states.[115] To finance the transportation infrastructure, the Port Authority, in 1952, issued bonds that were "secured by a pledge of the general reserve fund."[116] Thereafter, in 1962, through bi-state legislation, New York and New Jersey passed a covenant.[117] This covenant stated, in part, that New York and New Jersey cannot take any of the stated revenues pledged to the bondholders, except for the listed "permitted purposes."[118] Additionally, the covenant provided that these permitted purposes "would not produce deficits in excess of permitted deficits . . . ."[119] But, in 1974, New York and New Jersey retroactively appealed the covenant.[120] Yet the retroactive appeal occurred when "a national energy crisis was developing."[121] In fact, Congress found that the developing energy crisis threatened "the public health, safety, and welfare."[122]

To start, the Court first established that the 1962 covenant created an obligation and a contract between the states, New York and New Jersey, and the bondholders.[123] The Court found that there was a contract because the States received financing and the bondholders received "constitutional protection of the Contract Clause as security against repeal" of the covenant.[124] In addition, the Court found that the states impaired the contract because, although the effect on the value of the bonds was disputed, the states' "outright repeal totally eliminated an important security provision . . . ."[125] Once the Court established that the states impaired their contrac-

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[112] *See, e.g.*, *Id.* at 14-32. *See also* Robert A. Graham, *The Constitution, The Legislature, And Unfair Surprise: Toward A Reliance-Based Approach to the Contract Clause*, 92 MICH. L. REV. 398, 409-10 (1993).

[113] *See, generally, U.S. Trust Co. of N.Y.*, 431 U.S. at 14-32.

[114] *See Id.* at 32.

[115] *See Id.* at 4.

[116] *Id.* at 7.

[117] *See Id.* at 9-12.

[118] *See Id.* at 10.

[119] *Id.* at 10-11 (stating that the permitted deficit "could not exceed one-tenth of the general reserve fund, or 1% of the Port Authority's total bonded debt").

[120] *See Id.* at 13-14.

[121] *Id.*

[122] *Id.* at 14.

[123] *See Id.* at 17.

[124] *Id.* at 18 (finding that there was a contract because consideration was given).

[125] *Id.* at 19.

tual obligation, it considered whether the retroactive repeal of the covenant violated the Contract Clause.[126]

Having determined that this case did not fall under the reserved powers doctrine,[127] the Court applied the following standard to determine whether the retroactive repeal unconstitutionally impaired the obligation of the contract: "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."[128] The courts should analyze whether the impairment is necessary through two different lenses: (1) whether a less drastic modification could have achieved the same goals and (2) whether the state could achieve its goals through an alternative measure.[129] Importantly, when applying this standard, the Court noted that it would not give complete deference to the legislature because the states were a party to the contract and thus, self-interested.[130]

First, the Court determined that the law served an important public purpose.[131] Specifically, it recognized that the law sought to realize the states' goals of "mass transportation, energy conservation, and environmental protection," which are "important and of legitimate public concern."[132] But the Court found the law unnecessary.[133] In *U.S. Trust*, unlike *El Paso v. Simmons*, where the Court found the impairment "quite clearly necessary," the states failed to show that the impairment "was similarly necessary."[134] This is because a less drastic modification would have

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[126] *See Id.* at 21.

[127] Before determining whether the retroactive appeal was necessary and reasonable, the Court first considered this case under the reserved powers doctrine. *Id.* at 23. This doctrine states that a state cannot contract away its policy power. *Id.* at 24. Therefore, under the reserved powers doctrine, a state contract is invalid ab initio if it "bargains away the police power of [the] State." *Id.* at 24. (quoting Stone v. Mississippi, 101 U.S. 814, 817 (1880)) (holding that a law invalidating a lottery charter did not violate the contract clause because "the legislature cannot bargain away the police power of a State")). The Court found that this case did not fall under the reserved powers doctrine. *U.S. Trust Co. of N.Y.*, 431 U.S. at 24. This is because, in addition to the Court recognizing that states are generally held to their bond contracts, the covenant was a purely financial promise. *Id.* at 25. The covenant was characterized as a purely financial promise because "[t]he States promised that revenues and reserves securing the bonds would not be depleted by the Port Authority's operation of deficit-producing passenger railroads beyond the level of 'permitted deficits.'" *Id.*

[128] *Id.* at 25.

[129] *See Id.* at 29-30.

[130] *See Id.* at 25-26.

[131] *See Id.* at 28-29.

[132] *See Id.* at 28.

[133] *Id.* at 31.

[134] *Id.* (*citing Simmons*, 379 U.S. 497, 515-16 (1965)). In *Simmons*, the Texas legislature, in an effort to raise money for public schools, passed a law authorizing the sale of public lands. Simmons, 379 U.S. at 509-10. Further, this law allowed a delinquent purchaser of such land to redeem the land at any time if he repaid the amount due. *Id.* At the time purchasers bought such land, the land was believed to be worthless. Note, *Revival of the Contract Clause: Allied Structural Steel Co. v. Spannaus and*

achieved the same result, and the states, without modifying the covenant, could have used alternative measures to achieve the same ends.[135]

Lastly, the Court found the impairment unreasonable.[136] Again, to come to its conclusion, the Court distinguished *U.S. Trust* from *Simmons* and *Faitoute Iron & Steel Co. v. City of Asbury Park* ("Faitoute") (1942).[137] Specifically, the Court noted that, in *Simmons*, the statute at issue had "unforeseen and unintended" effects.[138] And, in *Faitoute*, which was "[t]he only time in this century that alteration of a municipal bond contract has been sustained by this Court,"[139] the impairment was necessary because the state experienced "unexpected financial conditions."[140] Conversely, the Court, in *U.S. Trust*, in coming to its conclusion, found that the concerns that led to the impairment were known at the time the states made a contract with the bondholders via the covenant, and the changes from the time the states enacted the covenant to the retroactive repeal of the covenant were changes "of degree and not of kind."[141] Thus, the retroactive impairment to address an emergency was unreasonable and unconstitutionally impaired the obligation of the contract.[142]

Unlike *U.S. Trust* where the court analyzed whether a law impaired the obligation of a state contract, *Spannaus* concerns Minnesota passing a law that unconstitutionally impaired the obligation of a private contract.[143] In *Spannaus*, Allied Structural Steel Company, in 1963, voluntarily created a pension plan.[144] Then, in April 1974, Minnesota passed the law at issue in *Spannaus*, which provided that if a

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United States Trust Co. v. New Jersey, 65 VA. L. REV. 377, 386 (1979). But, thereafter, oil and gas deposits were discovered, prompting delinquent purchasers to pay the amount they owed to the State and redeem their land. *See Simmons*, 379 U.S. at 510. This led to speculation, uncertainty in land titles, massive title litigation, and material costs on the school fund and development of land use. *Id.* at 512, 516. To prevent speculation and safeguard Texas' vital interest, Texas passed another law ("statue of repose"), which in effect stated that a purchaser can only exercise his right to redeem within 5 years of forfeiture. *Id.* at 511. The Court found, in its Contract Clause analysis, that given the aim of the statue of repose and the problems posed with a timeless redemption period, the "statute of repose was quite clearly necessary." *Id.* at 516.

[135] *See U.S. Trust Co. of N.Y.*, 431 U.S. at 30-31.

[136] *See Id.* at 31.

[137] *See Id.* at 27-32.

[138] *Id.* at 31 (*citing Simmons*, 397 U.S. at 515).

[139] U.S. Trust Co. of N.Y., 431 U.S. at 27 (*citing* Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 516 (1942)).

[140] *U.S. Trust Co. of N.Y.*, 431 U.S. at 28 (*citing* Faitoute Iron & Steel Co., 316 U.S. at 511).

[141] *See U.S. Trust Co. of N.Y.*, 431 U.S. at 32.

[142] *Id.* at 32.

[143] *See, generally,* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 236–40 (1978).

[144] *Id.* at 238. The details of the plan can be summarized as follows: "an employee who did not die, did not quit, and was not discharged before meeting one of the requirements of the plan would receive a fixed pension at age 65 if the company remained in business and elected to continue the pension plan in essentially its existing form." *Id.*

company terminated its pension plan or closed its offices in Minnesota, it would be subject to a "pension funding charge."[145] Allied Structural Steel Company, shortly thereafter, terminated an office it had in Minnesota, resulting in Allied Structural Steel Company paying a $185,000 pension funding charge pursuant to the retroactive law at issue.[146] But the Court found that Minnesota's law unconstitutionally impaired the obligation of the contract.[147]

With no presumption favoring the legislature's judgment,[148] the Court highlighted four factors in coming to its holding. One, the law did not address a broad or general economic or social problem.[149] Two, prior to the law at issue, the area that Minnesota's law addressed had never been subject to state regulation.[150] Three, similar to the reasoning in *Blaisdell*, the law, rather than being temporary, imposed a "severe, permanent, and immediate change . . . ."[151] Lastly, the aim of Minnesota's law was narrow as it only concerned employers who had voluntarily agreed to create pension plans for their employees.[152] Due to these factors, the Court held that Minnesota's law violated the Contract Clause.[153]

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[145] *Id.*

[146] *See Id.* at 239-40 ("During the summer of 1974 the company began closing its Minnesota office. On July 31, it discharged 11 of its 30 Minnesota employees, and the following month it notified the Minnesota Commissioner of Labor and Industry, as required by the Act, that it was terminating an office in the State.").

[147] *See Id.* at 250-51.

[148] Because *Spannaus* concerned a private contract, the Court would have analyzed this case with "the presumption favoring 'the legislative judgment as to the necessity and reasonable of a particular measure.'" *Id.* at 247 (quoting U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 23 (1977)). Yet the Court in *Spannaus* introduced a sliding scale to aid in its analysis: as the impairment of the obligation becomes more severe, the Court's level of scrutiny in regard to the nature and purpose of the law will increase. *See Spannaus*, 438 U.S. at 245. The Court found that the impairment of the obligation was severe because it retroactively impaired an obligation that Allied Structural Steel Company heavily and reasonably relied on, and its reliance was vital to funding the pension plan. *See Id.* at 245-46. Specifically, the retroactive law impaired the obligation because it nullified express terms of the pension contract as the law required Allied Structural Steel Company to modify the compensation that it agreed to pay its employees under the pension contract. *See Id.* 238-39, 246. Moreover, Allied Structural Steel Company's reliance on the impaired contractual obligation was vital to funding the pension plan because the unexpected $185,000 pension funding charge jeopardized the solvency of the pension plan. *Id.* at 244-46. Due to the severe impairment, the Court carefully examined the nature and purpose of Minnesota's law. *See Id.* Because the Court found that Minnesota's law required careful examination, it did not analyze the constitutionality of the law with a presumption favoring the legislative judgment. *See Id.* at 247.

[149] *See U.S. Trust Co. of N.Y.*, 431 U.S. at 22.

[150] *See Id.*

[151] *Spannaus*, 438 U.S. at 250.

[152] *See Id.*

[153] *See Id.* at 251.

The Court, in *Energy Reserves Group, Inc. v. Kansas Power and Light Co.* (1983), analyzed in depth whether an industry is heavily regulated or not.[154] Specifically, the Court used the fact of whether the parties' contracts at issue concerned a heavily regulated industry as a factor in its threshold inquiry. This inquiry concerned whether the law at issue substantially impaired the obligation of the contract.[155]

The Court determined that the contracts at issue, which concerned natural gas prices, fell within a heavily regulated industry.[156] This is because, although "Kansas did not regulate natural gas prices specifically" at the time the contracts were made, its supervision of the industry was extensive and intrusive.[157] Because the contracts concerned a heavily regulated industry, it was foreseeable that the state may alter the contract.[158] Thus, the parties could not have reasonably relied on the contract being protected from future changes in state law; and therefore, the Kansas law did not substantially impair Kansas Power and Light Company's contract rights.[159]

After the Court concluded that there was not a substantial impairment, it found that the Kansas law addressed a legitimate public purpose and was reasonable and necessary.[160] In finding that the Kansas law was reasonable and necessary, the Court found three factors significant.[161] First, Kansas tailored the law to address the issue at hand, price hikes in natural gas.[162] Second, the Kansas law was temporary in operation as the law "expire[d] when federal price regulation of certain categories of gas terminates."[163] Third, the Kansas law, unlike the

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[154] *See* Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 413–16 (1983). *See also* Graham, *supra* note 112, at 415-16 (explaining that *Energy Reserves Group* added to the heavily regulated industry doctrine initially enunciated in *Veix v. Sixth Ward Building & Loan Association*, 310 U.S. 32 (1940)).

[155] *See Energy Reserves Grp., Inc.*, 459 U.S. at 413-16.

[156] *See Id.* at 415.

[157] *Id.* at 413-14.

[158] *See Id.* at 416.

[159] *See Id.*

[160] *See Id.* at 416–19.

[161] *See Id.* at 418-19.

[162] *See Id.* at 418. "Only natural gas subject to indefinite price escalator clauses poses the danger of rapidly increasing prices in Kansas. Gas under contracts with fixed escalator clauses and interstate gas purchased by the utilities subject to § 109 would not escalate as would intrastate gas subject to indefinite price escalator clauses." *Id.* And "[t]he Kansas Act also rationally exempts the types of new gas the production of which Congress sought to encourage through the higher § 102 prices." *Id.*

[163] *Id.*

law at issue in *Spannaus*, imposed the legislative change gradually, rather than immediately.[164]

Yet these findings are notably different than *US Trust* and *Spannaus* because the Court deferred to the legislative judgment as Kansas was not a party to the contract and the Kansas law did not substantially impair the obligation of the contract.[165] Thus, the holding in *Energy Reserves Group, Incorporated* might have been different had the Court used the same standard of review employed in *US Trust* and *Spannaus*.[166]

D. The First Circuit Applying the Supreme Court's Contract Clause Jurisprudence

The First Circuit is the circuit in which the fate of the Puerto Rican bondholders may be decided.[167] In *United Automobile, Aerospace, Agriculture Implement Workers of America International Union v. Fortuño*, the First Circuit presided over a Contract Clause case arising out of a Puerto Rican collective bargaining agreement.[168] This case highlights the tests and factors that it deems important.[169] The test it adopts from the Supreme Court is two pronged: (1) whether the contract was substantially impaired and (2) whether the impairment was necessary and reasonable to realize an important public purpose.[170] In addition, the First Circuit recognized that a court will consider the five factors in *Blaisdell* when analyzing whether the impairment is necessary and reasonable.[171]

Utilizing this framework to guide its inquiry, the First Circuit held that the plaintiffs failed to plead sufficient facts to show that Puerto Rico violated the

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[164] *See Id.* at 418-19.

[165] *See Id.* at 412-13.

[166] *See* U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 25 (1977) ("[D]eference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."). *See also Spannaus*, 292 U.S. at 244–47 (explaining that the customary deference to a state legislature is not used when the state is a party to the contract, and because the impairment of the obligation in *Spannaus* is severe, the court will carefully scrutinize the law's nature and purpose).

[167] *See* Kaske & Church, *supra* note 24.

[168] *See, generally,* 633 F.3d 37, 37-49 (1st Cir. 2011).

[169] *See Id.* at 42-46.

[170] *See Id.* at 42-43.

[171] *Id.* at 46 (re-stating the five factors in *Blaisdell*: whether the law (1) addressed an emergency, (2) guards a broad societal interest, (3) "was tailored to its purpose; (4) imposed reasonable conditions, and (5) was limited to the duration of the emergency"). Notably, the five factors in *Blaisdell* are not necessary, but merely factors to guide the court's inquiry as to whether the law is necessary and reasonable. *Id.*

Contract Clause.[172] Specifically, plaintiff failed to plead sufficient facts that the law at issue was unreasonable in light of the circumstances[173] or drastically impaired the contract when a less drastic alternative was available.[174]

Importantly, the First Circuit, in *Fortuño*, considers Puerto Rico a state for Contract Clause purposes.[175] This is notable because the Contract Clause is only triggered when a state passes a law that violates the Contract Clause.[176]

IV. Applying the Contract Clause Jurisprudence to Act 91

This analysis will explore whether Puerto Rico unconstitutionally impaired the obligation of the contract, between Puerto Rico and the General Obligation bondholders, when it issued constitutionally backed bonds to General Obligation bondholders and then, subsequently, diverted taxing revenues to COFINA as a security for COFINA bondholders to aid Puerto Rico's debt crisis.

A. There is an Obligation Between Puerto Rico and the General Obligation Bondholders

The Supreme Court has consistently held that an obligation exists between a state and the bondholders that the state issued bonds to.[177] Moreover, the relationship between Puerto Rico and the General Obligation bondholders is analogous to *U.S. Trust*. The Court, in *U.S. Trust*, found that an obligation existed because New York and New Jersey received financing, and in exchange, the bondholders received a constitutional guarantee under the Contract Clause that those states would not repeal the covenant.[178] Similarly, the General Obligation bondholders helped finance

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[172] *See Id.* at 49.

[173] *Id.* at 46-47 ("[T]he plaintiffs failed to sufficiently describe the contractual provisions allegedly impaired by Act No. 7, and they therefore failed to demonstrate the extent of those impairments. . . . The plaintiffs also failed to plead any factual content to undermine the credibility of Act No. 7's statement that it was enacted to remedy a $3.2 billion deficit. The complaint alleges nothing, other than the conclusory statement that 'the averred purpose is neither significant nor legitimate,' to question the existence of the deficit or the 'basic societal interest' in eliminating it.").

[174] *Id.* at 47, 49 ("Nor does the complaint aver facts demonstrating that Act No. 7 was an excessively drastic means of tackling the deficit. In fact, almost everything in the complaint challenging Act No. 7's reasonableness and necessity is a conclusory statement. For instance, the complaint averred that 'there were other available alternatives with lesser impact to the paramount constitutional rights affected,' but failed to specify any such alternatives or plead any factual content suggesting such alternatives might exist.").

[175] *See, generally, Id.* at 40-49.

[176] U.S. CONST. art. 1, § 10, cl. 1.

[177] *See, e.g.*, U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 17 (1977).

[178] *See Id.* at 18.

Puerto Rico when they purchased the General Obligation bonds in exchange for protection not only under the Contract Clause, but also under the Puerto Rican Constitution.[179] Specifically, the Puerto Rican Constitution explains that the General Obligation bonds will be secured by "the full faith and credit and taxing power of the Commonwealth . . . ."[180]

B. A Court Would Not Give Deference to Puerto Rico's Legislature

A court will not analyze this case with a presumption favoring Puerto Rican legislature's judgment as to the necessity and reasonableness.[181] The Supreme Court has consistently held that no such presumption will be given if a state is a party to the contract at issue because a state, under such circumstances, is self-interested.[182] Puerto Rico is a party to the contract with the General Obligation bondholders.[183] Thus, a court would give no presumption in favor of Puerto Rico's legislative judgment in passing Act 91.[184]

C. Act 91 Does Not Falls Within the Reserved Powers Doctrine.

The last hurdle to clear before analyzing whether Act 91 unconstitutionally impaired the obligation of the contract is the reserved powers doctrine.[185] The contract between Puerto Rico and the General Obligation bondholders does not fall within the reserved powers doctrine; thus, the contract is not valid *ab initio*.[186] In *U.S. Trust*, the Court found that the bond contract did not fall within the reserved powers doctrine because the contract was a purely financial promise. In like manner, Puerto Rico's contract with the General Obligation bondholders is purely financial because Puerto Rico promised that the General Obligation bondholders would have first priority to all available resources of Puerto Rico as security.[187] Furthermore, the Supreme Court has recognized that a state is generally held to its bond contract.[188]

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[179] *See* P.R. CONST. art. VI, § 2.

[180] *Id.*

[181] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 247 (1978) (*citing U.S. Trust Co. of N.Y.*, 431 U.S. at 23).

[182] *See U.S. Trust Co. of N.Y.*, at 25-26.

[183] *See* P.R. CONST. art. VI, § 2.

[184] *See U.S. Trust Co. of N.Y.*, 431 U.S. at 25-26.

[185] *See Id.* at 23. The reserved powers doctrine, in sum, states that if a state bargains away its police powers in a contract, such contract falls under the reserved powers doctrine and is invalid from the beginning. *See Id.* at 23-34. *See also* Stone v. Mississippi, 101 U.S. 814, 817 (1880).

[186] *See U.S. Trust Co. of N.Y.*, 431 U.S. at 24 (*citing* Stone, 101 U.S. at 817) (finding that the contract was invalid ab initio because it fell within the reserve powers doctrine).

[187] *See U.S. Trust Co. of N.Y.*, 431 U.S. at 25.

[188] *See Id.*

Accordingly, Puerto Rico's contract with the General Obligation bondholders is valid.

D. Act 91 did not Unconstitutionally Impair the Obligation of the Contract[189]

i. Act 91 Impaired the Obligation of the Contract

Central to determining whether Act 91 impaired the obligation of the contract is the question of whether the revenues diverted to COFINA fall within the following language of the Puerto Rican Constitution: "available resources."[190] This is because the Puerto Rican Constitution states that the "available resources" are to fund General Obligation bonds.[191] As such, if "available resources" are used to fund COFINA Bonds, then it would impair the General Obligation bondholder's contract with Puerto Rico.[192] Yet Act 91, which established COFINA, states that the funds dedicated to COFINA do not fall within that language, but that may not be the accurate.[193]

To support the view that the diverted funds do fall within the "available resources" language, the legislative history is helpful. Puerto Rico, when adopting its own Constitution, considered the difference between revenues and resources.[194] The delegates of the Puerto Rican Constitutional Convention specifically drew a distinction between revenues and resources, finding that the term resources has a broader application than the word revenues.[195]

Due to this broad application, there is reason to support the claim that tax revenues generated by Puerto Rico's sales and use tax fall within the "available resources" language because the first 5.5% of the sales and use tax revenues is diverted to COFINA, rather than the general reserve funds.[196] In other words, with

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[189] There is a difference between a state law that merely impairs the obligation of a contract, and a state law that unconstitutionally impairs the obligation of the contract. *See Id.* at 21. "Although the Contract Clause appears literally to proscribe 'any' impairment, this Court observed in Blaisdell that 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.'" *Id.* (*citing* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934)). "Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution." *U.S. Trust Co. of N.Y.*, 431 U.S. at 21.

[190] *See* Odinet, *supra* note 10, at 1143.

[191] *See* P.R. CONST. art. VI, § 2 ("The Secretary of the Treasury may be required to apply the available revenues including surplus to the payment of interest on the public debt . . . .") (official translation).

[192] *See Id.*

[193] *See Id.*

[194] *See* Joffe & Martinez, *supra* note 27, at 22–25.

[195] *See Id.*

[196] *See* Aldrete-Sanchez, *supra* note 56.

a broad interpretation and application of the word revenues, it is reasonable that Puerto Rico's tax revenue is not separate and apart from Puerto Rico's available resources simply because the money generated is put in a corporation rather than the general reserve fund.[197]

Other commentators, however, have recognized that the revenues diverted to COFINA may be separate due to the legal framework of Act 91.[198] Specifically, Act 91 has a non-impairment provision and puts the diverted funds into a figurative "lock box."[199] Nevertheless, one legal commentator states that despite the legal framework of Act 91, "most trained lawyers would say that the constitutional provision trumps [Act 91's] firewall . . . ."[200] Although there are valid arguments on both sides, it is currently unclear whether the tax revenues diverted to COFINA fall within the "available resources" language.[201] To further the analysis, it will be assumed *arguendo* that it does fall within the constitutional language; as such, Act 91 is not separate.

Moving forward with this assumption, Supreme Court cases support the conclusion that Act 91 impaired the obligation of the contract.[202] The Court, in *U.S. Trust*, found that the law impaired the obligation because it "totally eliminated an important security provision . . . ."[203] In like manner, Act 91 affects an important provision as it diverts funds pledged as security to the General Obligation bondholders.[204] But Act 91 does not totally bar the General Obligation bondholders from seeking any of Puerto Rico's available resources for security.[205] Rather than a total elimination of an important security provision, Act 91 affects the General Obligation bondholders' security only to a degree.[206] Yet, despite this difference, the Supreme Court has found, on more than one occasion, that there can still be an impairment even when an important contractual provision is affected only to a degree.[207] Moreover, the degree at stake is significant.[208] The proposed funds, for

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[197] *See Id.*

[198] *See* Odinet, *supra* note 10, at 1143.

[199] *See Id.*

[200] *Id.*

[201] *See Id.*

[202] *See, e.g.*, U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 20 (1977).

[203] *Id.* at 19.

[204] *See* Odinet, *supra* note 10, at 1142-44.

[205] *See* Aldrete-Sanchez, *supra* note 56 (explaining that only 5.5% of the commonwealth's sales and use tax will go directly to "COFINA until a guaranteed base amount of tax collections is met").

[206] *See Id.*

[207] *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 441 (1934) (finding an impairment when a law affected a mortgagor's right to possession as the court could "extend the period of redemption from foreclosure sales 'for such additional time as the court may deem just and equitable'").

[208] *See* Aldrete-Sanchez, *supra* note 56.

instance, dedicated to COFINA from 2006 to April 2007 would have exceeded $500 million.[209]

ii. Act 91 did not Severely Impair the General Obligation Bondholders' Contract with Puerto Rico

The severity of the impairment inquiry can affect the level of scrutiny a court uses to analyze constitutionality of the law.[210] Specifically, a severe impairment will trigger "a careful examination of the nature and purpose of the state legislation."[211] The Court, in *Spannaus*, found that the law Minnesota passed severely impaired the obligation due to the following factors: (1) the law retroactively impaired the obligation; (2) the plaintiff heavily and reasonably relied on that obligation; and (3) the plaintiff's reliance on the obligation was vital in regards to funding.[212]

Although Act 91, similar to the first factor in *Spannaus*, retroactively impaired Puerto Rico's obligation to the General Obligation bondholders,[213] Act 91 likely did not severely impair the obligation of the contract. This is because the second and third factor, in *Spannaus*, applied to Act 91 indicate that the impairment was not severe.

As to the second factor in *Spannaus*, it is unclear whether the General Obligation bondholders heavily and reasonably relied on Puerto Rico giving priority to the General Obligation bondholders to all "available resources" in perpetuity. Although, before Act 91, Puerto Rico did not specifically pass legislation that altered the General Obligation bondholders priority to "available resources," that is not dispositive.[214] This is because the Court, in *Energy Reserves Group Incorporated*, found that the parties' could not reasonably rely on the law at issue because the "supervision of the industry was extensive and intrusive."[215] Analogously, history demonstrates that the United States Congress and Puerto Rico have for a long time had a heavy hand in passing laws regarding Puerto Rico's ability to issue bonds to raise money.[216]

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[209] *See Id.* ("Fiscal 2006 sales tax collections through April 2007 reached $95.2 million for the dedicated 1% sales tax and $428.3 million for the 4.5% general fund sales tax. Assuming that all these revenues would have been deposited in the FIA account, the base amount for fiscal 2008 ($185 million) would have been fully funded during the first two and a half months of collections.").

[210] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978).

[211] *See Id.*

[212] *See Id.* at 245-56.

[213] *See* Christman, *supra* note 11, at 93. *See also* Braun, *supra* note 50.

[214] *See* Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 413–14 (1983). Energy Reserves Grp., Inc., 459 U.S. at 413-14.

[215] *Id.*

[216] *See, generally,* Joffe & Martinez, *supra* note 27, at 25-26.

And as to the third factor in *Spannaus*, given Puerto Rico's economic crisis and the fact that COFINA would have diverted over $500 million from 2006 to April 2007 alone,[217] one, at first glance, may conclude that it is reasonable to infer that the General Obligation bondholders' reliance on having priority on all available resources was vital to re-paying the General Obligation bondholders. Yet this is not the case.

One of the primary reasons behind passing Act 91 and issuing COFINA bonds was to re-finance Puerto Rico's debt owed to the General Obligation bondholders.[218] Thus, it is equally inferable, if not more likely, that issuing COFINA bonds was vital to re-paying the General Obligation bondholders. Especially, in light of Puerto Rico's economic reality,[219] and because when Puerto Rico initially issued COFINA bonds, COFINA Bonds had a credit rating 5 levels higher than the General Obligation bonds.[220] Moreover, dissimilar to here where the impairment reasonably increases the chance of re-payment, the impairment in *Spannaus* potentially disabled the possibility of re-payment.[221]

In sum, dissimilar to *Spannaus*, the General Obligation bondholders may not be able to show that they reasonably relied on the laws in place when the bonds were issued, nor that their reliance on the obligation was vital to re-payment. As such, a court may not carefully examine the nature and purpose of Act 91.[222]

iii. Under the Lens of Blaisdell and its Progeny, Act 91 Unconstitutionally Impaired the Obligation of the Contract

Although the economic and social emergency that Puerto Rico faces does not create power, the emergency may furnish the occasion for the exercise of power.[223] Puerto Rico, similar to Minnesota in *Blaisdell*, is experiencing a humanitarian crisis and has therefore, adopted a law that retroactively impaired Puerto Rico's obligation to its General Obligation bondholders.[224] But Puerto Rico's Act 91 does not satisfy all five of the *Blaisdell* factors that subsequent Supreme Court opinions have interpreted as necessary to *Blaisdell*'s holding.[225]

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[217] *See* Aldrete-Sanchez, *supra* note 56.
[218] *Id.*
[219] *See* Bases, *supra* note 8 (stating that Puerto Rico has a 45% poverty rate). *See also* Carr, *supra* note 1 (explaining that Puerto Rico has more than $70 billion in debt, "a failed economy, severe poverty, and [a] massive debt crisis").
[220] *See* Odinet, *supra* note 10, at 1143.
[221] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 246 (1978) ("[T]he statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts.").
[222] *See Id.* at 245-46.
[223] *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).
[224] S*ee Id.* at 416. *See also* Carr, *supra* note 1.
[225] *See Blaisdell*, 290 U.S. at 444-48. *See also Spannaus*, 438 U.S. at 242.

Act 91, however, satisfies the first four of the *Blaisdell* factors.[226] As to the first and second factor, Puerto Rico passed Act 91 in the midst of an economic emergency to protect society at large. This is because Puerto Rico, experiencing the effects of crippling debt, passed Act 91 to refinance the extra constitutional debt and to borrow at a cheaper rate.[227] Further, Puerto Rico could not receive financing by issuing General Obligation bonds because, in 2007, it had reached its debt ceiling.[228] Additionally, in regards to the third factor, because Puerto Rico could not issue any more General Obligation bonds and the General Obligation bonds were more expensive to issue than the COFINA bonds, Puerto Rico tailored Act 91 to the emergency at hand.[229]

In addition, under the fourth *Blaisdell* factor, the conditions of Act 91 were reasonable.[230] Although Act 91 bars the funds diverted to COFINA from becoming collateral security for the General Obligation bondholders, the Minnesota law in *Blaisdell* barred mortgagees from exercising their possessory rights.[231] Also, as in *Blaisdell*, where the Minnesota law required mortgagor to pay the reasonable rental value of the property during the extended redemption period, Act 91 helped refinance the General Obligation bonds.[232] In short, Act 91's conditions are equitably related to the exigency.[233]

Although Act 91 satisfies the first four *Blaisdell* factors, it does not satisfy the fifth factor as it is not temporary in operation.[234] The temporary in operation factor is key in the underlying analysis in *Blaisdell* and its progeny.[235] Because Act 91 is permanent in application, it likely, under *Blaisdell*, unconstitutionally impairs the obligation of the contract.[236] Some of the more modern Supreme Court Contract

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[226] The following, which serves as a reminder, are the five *Blaisdell* factors: (1) whether there was an economic emergency that "furnished the proper occasion for the exercise of the reserved power of the stat to protect the vital interests of the community"; (2) whether the state enacted the law to protect the society at large or a favored group; (3) whether the law is tailored the challenges of the emergency at hand; (4) whether the conditions of the law are reasonable; and (5) whether the law is temporary in operation and limited to the duration of the declared economic emergency. *See* Blaisdell, 290 U.S. at 444-48.

[227] *See* Aldrete-Sanchez, *supra* note 56.

[228] *See* Christman, *supra* note 11, at 93.

[229] *See Blaisdell*, 290 U.S. at 444-48. *See also* Aldrete-Sanchez, *supra* note 56. *See* Christman, *supra* note 11, at 93.

[230] *See Blaisdell*, 290 U.S. at 444-48.

[231] *See Id.* at 416.

[232] *See Id.* at 416-17; *see also* Christman, *supra* note 11, at 93.

[233] *See* W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 63 (1935).

[234] *See Blaisdell*, 290 U.S. at 444-48. *See also* Aldrete-Sanchez, *supra* note 56.

[235] *See Blaisdell*, 290 U.S. at 444-48. *See also* W.B. Worthen Co. v. Thomas, 292 U.S. 426, 434 (1934) (explaining that the law was unconstitutional because it was neither temporary nor conditional); *Kavanaugh*, 295 U.S. at 62-63 (stating that the law was unconstitutional because it was not conditional nor limited to the duration of the emergency).

[236] *See Blaisdell*, U.S. 290 at 444-48.

Clause cases, however, allow for laws to satisfy the Contract Clause even if the law is not limited to the duration of the emergency.[237]

iv. Act 91, under US Trust and Faitoute Iron & Steel Company, does not Unconstitutionally Impair the Obligation of the Contract

Once it is established that the law in question serves an important public purpose, the inquiry into whether the law is reasonable and necessary begins.[238] Act 91, similar to the law at issue in *U.S. Trust*, retroactively and permanently impaired the obligation of the bond contract.[239] Despite the law at issue, in *U.S. Trust*, not being temporary in nature, the Court did not find that the permanent effect of the law was the reason the law unconstitutionally impaired the obligation of the contract.[240] Rather, the Court found the law unnecessary because it completely repealed the covenant the bondholders relied on for collateral and a less drastic modification or alternative measure could have achieved the same goals.[241] This is not the case with Act 91. First, Act 91 does not completely repeal the General Obligation bondholders' priority to all available resources.[242] In fact, Act 91 merely gave COFINA bondholders first priority on the first 5.5% of the revenues collected from Puerto Rico's sales and use tax.[243]

Second, unlike *U.S. Trust* where the Court found that the law was unnecessary because a less drastic modification could have achieved the same result, Act 91 was the alternative. This is because at the time Puerto Rico passed Act 91 Puerto Rico reached its debt ceiling and appeared to be unable to re-pay its General Obligation bondholders.[244] Moreover, Puerto Rico's ability to generate money through taxing is not a viable alternative because the General Obligation bondholders' priority to all of the available resources, which included tax revenues, was insufficient, and Puerto Rico's tax base has dramatically diminished.[245] In sum, Act 91 was Puerto

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[237] *See, e.g.*, U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 22 n.19 (1977) (stating that the later decision abandoned *Blaisdell*'s absolute requirement that the law be temporary) (*citing* Viex v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 39-40 (1940); East N.Y. Sav. Bank v. Hahn, 326 U.S. 230 (1940)).

[238] *See Id.* at 25-28.

[239] *See* Aldrete-Sanchez, *supra* note 56. *See also U.S. Trust Co. of N.Y.*, 431 U.S. at 13-14.

[240] *See, generally, U.S. Trust Co. of N.Y.*, 431 U.S. at 30-32.

[241] *See Id.* at 29-30.

[242] *See* Aldrete-Sanchez, *supra* note 56.

[243] *See Id.*

[244] *See Id. See, generally,* Christman, *supra* note 11, at 91-94.

[245] *See* Peter Whoriskey, *Shrinking, Shrinking, Shrinking: Puerto Rico Faces a Demographic Disaster*, WASH. POST, (Oct. 18, 2017), https://www.washingtonpost.com/business/economy/shrinking-shrinking-shrinking-puerto-rico-faces-a-demographic-disaster/2017/10/17/21141334-aac2-11e7-850e-2bdd1236be5d_story.html?utm_term=.46179297ea79. *See also* Aldrete-Sanchez, *supra* note 56.

Rico's alternative and necessary plan to satisfy its debt to the General Obligation bondholders.

And importantly, the Court, in *U.S. Trust*, recognized factors in *Faitoute*, which made the impairments to the bond contract in *Faitoute* necessary, to guide the Court's inquiry as to whether a law is necessary. The *Faitoute* factors recognized by *U.S. Trust* are analogous to the situation in Puerto Rico.[246] Specifically, the essential factor in *Faitoute* is that the bondholders had only theoretical rights.[247] This is because the city could not raise enough through tax revenue to satisfy the debt owed to the bondholders under the old terms; thus, the law at issue helped the municipality pay back the bonds it issued more effectively.[248] Similarly, evidence supports that Puerto Rico could not raise the needed money through taxes to meet its obligation to the General Obligation bondholders,[249] Moreover, Puerto Rico faces a humanitarian crisis that affects more than its economy.[250] Thus, the General Obligation bondholder had merely a theoretical right to payment.

Furthermore, Puerto Rico passed Act 91, in part, to re-finance its extra-constitutional debt, arising from its General Obligation bonds.[251] Due to this, Act 91 helps Puerto Rico, analogous to *Faitoute*, repay the General Obligation bonds more effectively. Therefore, as in *Faitoute*, which is the only case in the 20th century where the Court upheld a law impairing a bond contract, Act 91 is necessary to serve an important public purpose.[252]

Act 91 is reasonable in serving an important public purpose.[253] The dispositive fact, in *U.S. Trust*, was that the changes in the circumstances, which led the states to repeal the covenant, were "of degree and not of kind."[254] In other words, the concerns at the time the states repealed the covenant, which impaired the

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[246] *See U.S. Trust Co. of N.Y.*, 431 U.S. at 27-28 (*citing* Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 511 (1942)).

[247] *See U.S. Trust Co. of N.Y.*, 431 U.S. at 27-28 (*citing Faitoute Iron & Steel Co.*, 316 U.S. at 511).

[248] *See U.S. Trust Co. of N.Y.*, 431 U.S. at 27-28 (*citing Faitoute Iron & Steel Co.*, 316 U.S. at 511).

[249] *See, e.g.*, Odinet, *supra* note 10, at 1115 ("[I]n July 2015, the Commonwealth's governor declared on live television that the island could not pay its $72 billion in debt--there simply was 'no more cash.'").

[250] *See* Aldrete-Sanchez, *supra* note 56. Puerto Rico faces a number of issues including the following: (1) an increasing unemployment rate that triples that of the United States average; (2) a rising crime rate which is triggered by economic unrest and trained professionals leaving Puerto Rico; and (3) a staggering poverty rate that is double "the most impoverished state in the United states." Odinet, *supra* note 10, at 1114-15. *See also* Carr, *supra* note 1 (finding that Puerto Rico is on the brink of a humanitarian crisis due to Puerto Rico's economic difficulties and Hurricane Maria's impact on Puerto Rico).

[251] *See* Aldrete-Sanchez, *supra* note 56.

[252] *See U.S. Trust Co. of N.Y.*, 431 U.S. at 27 (*citing Faitoute Iron & Steel Co.*, 316 U.S. at 502).

[253] *See U.S. Trust Co. of N.Y.*, 431 U.S. at 25.

[254] *See Id.* at 32.

obligation of the contract, were the same concerns at the time the states created the covenant.[255]

Dissimilarly, after Puerto Rico enacted its constitution, which created the contract between Puerto Rico and its General Obligation bondholders, unexpected changes occurred. Specifically, Puerto Rico, in 1961, increased the amount of General Obligation bond debt that it could issue,[256] allowing Puerto Rico to issue the staggering amount of debt it currently has. Moreover, in 1996, Congress passed a law that eliminated section 936 in chapter 26 of the United States Code, causing Puerto Rico's largest employers and many of its residents to leave the island.[257] This not only negatively affected Puerto Rico's economy, but it greatly diminished its tax base and as a result, materially reduced Puerto Rico's tax revenues. Importantly, Puerto Rico's tax revenue is what funds the repayment of the General Obligation bonds.

Moreover, Act 91, similar to *Faitoute*, reasonably impaired the bond contract because Puerto Rico experienced "unexpected financial conditions."[258] The Great Depression, in *Faitoute*, was the un-expected financial condition.[259] Puerto Rico's economic condition is analogous to the Great Depression in that it has put Puerto Rico on the brink of a humanitarian crisis.[260] Thus, Act 91 does not violate the Contract Clause.

v. Act 91, under Spannaus, Does Violate the Contract Clause

Although Act 91 does not violate the Contract Clause under *U.S. Trust* and *Faitoute*, it does violate the Contract Clause under other modern Supreme Court

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[255] *See Id.* at 31-32 (finding that (1) the need for mass transportation, (2) "the likelihood that publicly owned commuter railroads would produce a substantial deficit," and (3) the public's concern with the environment and energy conservation were known at the time the covenant was created). Not only were the same concerns present at the time the covenant was created, but the covenant was also designed to address such concerns.

[256] *See* Joffe & Martinez, *supra* note 27, at 13.

[257] *See* Chistman, *supra* note 11, at 90-91 ("Section 936 gave manufacturers a federal income tax credit for (1) producing products within Puerto Rico and selling them abroad, and (2) for investing their profits in Puerto Rico. This led Puerto Rico to accumulate large amounts of U.S. investment capital . . . ."). In sum, section 936 caused major manufacturers to move to Puerto Rico, creating a significant economic benefit. Congress, however, enacted Section 936 during the Cold War to enhance the Puerto Rican economy and "establish Puerto Rico as 'a free-market, democratic alternative to Cuba.'" *See Id.* The elimination of Section 936 triggered a recession, which Puerto Rico has yet to recover from. *See* Odinet, *supra* note 10, at 1113-14 ("After the repeal, manufacturers closed up shop almost immediately—nearly sixty-one companies shut down. By November 1996, the manufacturing sector lost a net of 17,720 jobs, bringing the total number of jobs to the lowest in two decades.").

[258] *See U.S. Trust Co. of N.Y.*, 431 U.S. at 28 (*citing Faitoute Iron & Steel Co.*, 316 U.S. at 511).

[259] *Faitoute Iron & Steel Co.*, 316 U.S. at 503, 509-12.

[260] *See* Carr, *supra* note 1.

cases.[261] This is because the Court, in *Spannaus*, reiterates the importance of the temporary in operation factor listed in *Blaisdell*.[262] In addition, the Court highlights that the permanent change was severe and immediate.[263] Although Act 91 did not severely impair the obligation as previously noted, Act 91, similar to the Minnesota law in *Spannaus*, had a permanent effect and was not implemented gradually.[264] Therefore, Puerto Rico's Act 91 violates the Contract Clause under *Spannaus*.[265]

E. A court should use US Trust and Faitoute when determining whether Act 91 violates the Contract Clause

US Trust and *Faitoute* are the appropriate precedent because they concern municipal bond contracts. Moreover, the court, in *US Trust*, indicates that when a court presides over a Contract Clause case regarding a municipal bond contract, a court should use precedent where courts determined whether a law unconstitutionally impaired the obligation of a municipal bond contract.[266] Also, municipal bond Contract Clause cases have unique inquiries. Specifically, in *US Trust* and *Faitoute*, the Court focused on whether the bondholders had theoretical rights to re-payment and whether the law, which impaired the obligation, was aimed at re-financing the debt owed under the municipal bond contract.[267] As such, because the determination as to whether Act 91 violates the contract clause concerns municipal bonds, *US Trust* and *Faitoute* provide the appropriate precedent.

Moreover, the Court's decision in *Spannaus* and *Energy Reserves Group Inc.* are less appropriate for several reasons. First, the laws at issue in *Spannaus* and *Energy Reserves Group Inc.*, notably, did not impair a state's municipal bond contract.[268] Second, the Court's Contract Clause inquiry, in *Energy Reserves Group Inc.*,

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[261] *See, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 234 (1978).

[262] *See Id.* at 250.

[263] *See Id.*

[264] *See* Aldrete-Sanchez, *supra* note 56 (explaining that Act 91, which Puerto Rico passed in 2006, established COFINA, and "COFINA's sole legal purpose is to issue bonds and use other financing mechanisms to pay or refinance (directly or indirectly) all or part of the extra-constitutional debt of the Commonwealth of Puerto Rico as of June 30, 2006, and the accrued interest thereon, using as a source of repayment the portion of the tax deposited in the Dedicated Sales Tax Fund").

[265] *See Spannaus*, 438 U.S. at 49-51.

[266] *See* U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 28 (1977) ("We therefore conclude that repeal of the 1962 covenant cannot be sustained on the basis of this Court's prior decisions in Faitoute and other municipal bond cases.").

[267] *See, e.g.*, *Id.* at 27-28 ("No one has suggested here that the States acted for the purpose of benefiting the bondholders, and there is no serious contention that the value of the bonds was enhanced by repeal of the 1962 covenant.").

[268] *See, generally, Spannaus*, 438 U.S. at 236-40. *See also Energy Reserves Grp. Inc.*, 459 U.S. at 403-09.

was focused on the Heavily Regulated Industry doctrine. Whereas, the Supreme Court Contract Clause cases analyzing municipal bonds have not even conducted a Heavily Regulated Industry doctrine analysis.[269] Third, in *Spannaus*, the court placed emphasis on the temporary operation of the law that impaired the obligation of the contract, and this emphasis contrasts the inquiry *US Trust* and *Faitoute*. For example, there is no indication that the law at issue in *Faitoute* was temporary in operation—in fact, it is still good law today.[270]

Lastly, *Blaisdell* and its progeny are the least appropriate Supreme Court precedent even though *Kavanaugh* concerns municipal bonds.[271] The modern Contract Clause jurisprudence has notably shifted from the rigid application of the five *Blaisdell* factors to balancing factors to make determinations as to a law's necessity and reasonableness as in *US Trust* and *Spannaus*. Not only is this shift apparent from the cases, but commentators on Contract Clause jurisprudence have stated so as well.[272] Thus, because the underlying framework that guides a court's Contract Clause has changed, *Blaisdell* and its progeny are not appropriate.

V. Conclusion

In conclusion, Act 91 does not unconstitutionally violate the Contract Clause. This conclusion hinges on what precedent a court applies. A court should use *US Trust* and *Faitoute* to guide its inquiry, which supports the constitutionality of Act 91 under the Contract Clause.

The Contract Clause provides a balancing test, allowing struggling states to safeguard the interests of their citizens. This is especially so in the context of an economic emergency. Unfortunately, not only is Puerto Rico suffering from harsh economic realities, but it could face a humanitarian crisis. As such, Puerto Rico has the opportunity to aid its citizens even if it comes at the expense of upholding contractual rights.

But given Puerto Rico's economic reality, the General Obligation bondholders merely had a theoretical right to payment. And because the General Obligation bondholder's contractual right to repayment is a right only in theory, it is ambiguous

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[269] *See, generally, Energy Reserves Grp. Inc.*, 459 U.S. at 403-09. This note does use the Heavily Regulated Industry Doctrine precedent in the analysis as to whether Act 91 severely impaired the obligation of the contract, but it merely uses this doctrine as to whether the General Obligation Bondholder heavily and reasonably relied on the obligation, not whether the municipal bonds fall within this doctrine. *Supra* section IV. D. ii.

[270] *See* N.J.S.A. § 52:27-65; *see also* N.J.S.A. § 52:27-39.

[271] *See, generally,* W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 56–63 (1935).

[272] *See, e.g.*, Graham, *supra* note 112, at 409-10 (finding that the framework that guides a court's Contract Clause analysis has changed under the Supreme Court's modern Contract Clause Jurisprudence).

[273] *See* Braun, *supra* note 50.

if upholding the constitutionality of Act 91, under the Contract Clause, comes at the expense of contractual rights. Moreover, Act 91, at the time it was passed, arguably made the General Obligation bondholder's right to repayment more of a realistic reality. This is because Puerto Rico passed Act 91 to re-finance the General Obligation bonds, thereby increasing the likelihood that Puerto Rico would satisfy its outstanding debt to the General Obligation bondholders. Similarly, in *Faitoute*, the state legislature passed a law, which was constitutional under the Contract Clause, to re-finance the state's outstanding debt to its bondholders, who at the time merely had a theoretical right to repayment. Thus, similar to the Supreme Court in *Faitoute* a court should find that Act 91 does not unconstitutionally impair the obligation of the contract.

A court's decision as to the Constitutionality of Act 91 under the Contact Clause will not only significantly impact Puerto Rico, but will also have a meaningful impact on struggling municipalities across the United States. This is because municipalities have passed laws similar to Act 91 to help meet their economic challenges. Notably, these municipalities include some of the United States' biggest cities. For example, Chicago and other municipalities have passed laws to establish corporations similar to COFINA to issue municipal bonds.[273] With major U.S. cities establishing their own Act 91, courts around the country could soon be utilizing the Contract Clause to weigh rights between those that are party to a municipal bond contract and the well-being of the citizens within that state.

As such, it will be important for courts to be familiar not only with the Court's Contract Clause jurisprudence, but also with the different approaches the Court has taken when deciding cases under the Contract Clause. Moreover, courts may have the opportunity to expressly hold what is implicit in the Court's jurisprudence, which is that municipal bond contracts are different than other contracts for purposes of the Contract Clause. Specifically, a state law that impairs the obligation of bond contract does not violate the Contract Clause when the bondholder merely has a theoretical contract right to repayment and the state law's aim is to make said theoretical right into a reality. This is true even when the state law permanently and retroactively impairs the obligation of the contract. As such, Puerto Rico's Act 91 should pass constitutional scrutiny.

TALKING POINTS SOBRE EL P. DE LA C. 1018: HISTORIA RECIENTE DE UN ENDOSO AL DISCRIMEN POR VÍA DEL DERECHO A LA LIBERTAD DE CULTO

*Krenly Cruz Ramírez de Arellano**

Resumen

El artículo analiza los traslapos entre el ejercicio del derecho a la libertad de culto y el discrimen contra minorías sexuales y religiosas a la luz del Proyecto de la Cámara 1018, que buscó establecer la "Ley de Restauración de la Libertad Religiosa de Puerto Rico". Argumenta que la ley propuesta es una medida vaciada de las funciones socio-históricas inherentes a la religión en la civilización Occidental. Concluye, además, que la función de la pieza propuesta era utilizar el derecho a la libertad religiosa como subterfugio para investir de juridicidad el interés de discriminar por razones constitucionalmente vedadas. Finalmente, propone la revisión del estándar judicial para escudriñar normas sobre asuntos neutrales y de aplicación uniforme, pero que inciden adversamente sobre los derechos de conciencia.

Abstract

The article analyzes the overlap between the exercise of the right to freedom of worship and discrimination against sexual and religious minorities in the light of the House Bill 1018, which sought to establish the "Puerto Rico Religious Freedom Restoration Act". It argues that the proposed statute is a measure emptied of the socio-historical functions inherent to religion in Western civilization. In addition, it concludes that the function of the proposed piece was to use the right to religious freedom as a subterfuge to legalize the interest of discriminating for constitutionally prohibited reasons. Finally, this article proposes the revision of the judicial standard used to scrutinize norms on neutral issues and of uniform application, but that adversely affect the rights of conscience.

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I. Introducción

En el capítulo dos del Evangelio de Marcos, los líderes religiosos de la época confrontaron a Jesús de Nazaret y le recriminaron que sus seguidores no seguían al pie de la letra uno de los preceptos bíblicos más importantes de la tradición judía: guardar el sábado.[1] Conforme a la tradición, El Maestro contestó: "El sábado fue hecho para el ser humano, y no el ser humano para el sábado".[2] Con esto, Jesús sentenció que el ser humano *no* había sido hecho para subordinar su dignidad a los preceptos bíblicos, sino que los preceptos bíblicos debían servir a la dignidad humana.[3] Sin embargo, el 8 de mayo de 2017 sus alegados seguidores radicaron un proyecto de ley cuyo efecto podría implicar la subordinación de la dignidad humana a los preceptos o creencias religiosas.[4] Este recuento y análisis somero contienden

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[1] Joel Marcus. *Mark 1–8*, 239-254 (The Anchor Bible Doubleday, USA 2000). "*Theoretically, deliberate transgression of the Sabbath law carried the death penalty (Exod 31:14-15; Núm 15:32-36); the Mishnah specifies that the transgressor must be warned by two witnesses, and only executed if he persists (m. Sanh. 7:8)*". *Id*. en la pág. 248.

[2] *Marcos* 2:27; A pesar de que la mayoría de las traducciones bíblicas al castellano presentan el término "hombre" como correspondiente del vocablo griego "ἄνθρωπος", su mejor traducción es "ser humano". *Id*. en la pág. 242. *Véase* BEN WITHERINGTON III, THE GOSPEL OF MARK: A SOCIO-RHETORICAL COMMENTARY 113 (2001); Debemos recordar que la controversia sobre el "sábado" surge en un contexto histórico en el que el Estado y la Religión eran indivisibles e interdependientes, por lo cual las implicaciones del pronunciamiento de Jesús incluyen connotaciones aplicables a cualquier sistema normativo.

[3] *Id*.

[4] Los vínculos de los autores del Proyecto de la Cámara número 1018 [en adelante, "*P. de la C. 1018*"] con ciertas comunidades y líderes eclesiásticos son materia de récord público. Carlos J. Méndez Núñez, por ejemplo, firmó un decreto en calidad de presidente de la Cámara de Representantes de Puerto Rico el 16 de febrero de 2017 en el que ordenó la celebración de "[c]uarenta (40) días de ayuno y oración fervientes para la purificación espiritual, material y social de nuestra población en todo el archipiélago de Puerto Rico" que resultó impugnado en los tribunales. *Véase Demandan a representantes que firmaron decreto de 40 días de ayuno,* MICROJURIS (23 de febrero de 2017), https://aldia.microjuris.com/2017/02/23/demandan-a-representantes-que-firmaron-decreto-de-40-dias-de-ayuno/. La representante María M. Charbonier Laureano, que se identifica a sí misma como "Creyente en Dios" en su portal de Twitter, ha buscado consistentemente la inclusión de principios religiosos en el establecimiento de política pública y la protección especial del sector religioso mediante legislación; *véase también* Rebecca Banuchi, *Comienza la nueva revisión del Código*

que a pesar del objetivo invocado en ella, cuyo lenguaje categórico es cuestionable,[5] esta es una medida vaciada de las funciones socio-históricas inherentes a la religión en la civilización Occidental. Se concluye, además, que, en su fondo, la función de la pieza propuesta era utilizar el derecho a la libertad religiosa como subterfugio para investir de juridicidad el interés de discriminar por razones constitucionales y/o jurídicamente vedadas. Finalmente, propone la revisión del estándar judicial para escudriñar normas sobre asuntos neutrales y de aplicación uniforme, pero que inciden adversamente sobre los derechos de conciencia.

II. Absurdo Religioso

La Constitución de Puerto Rico dispone en la sección 3 de su artículo II que "[n]o se aprobará ley alguna relativa al establecimiento de cualquier religión *ni se prohibirá el libre ejercicio del culto religioso*. Habrá completa separación de la iglesia y el estado".[6] La doctrina acogida actualmente por el Tribunal Supremo de Puerto Rico para evaluar la Cláusula de Libertad de Culto quedó resumida en una opinión disidente de la juez Rodríguez Rodríguez:

> Principalmente, la cláusula de libertad de culto se ha invocado: (1) cuando el gobierno prohíbe una conducta que determinada religión exige; (2) cuando el gobierno exige una conducta que determinada religión impide; o (3) cuando una legislación vulnera o dificulta la posibilidad de cumplir con exigencias religiosas. En caso de que el Estado promueva algún fin estatal legítimo pero en tal acción se afecte adversamente la práctica de una religión, la garantía constitucional requiere que, en algunas situaciones, se hagan concesiones para permitir el libre ejercicio de tales creencias religiosas. No obstante, no todas las acciones del Estado que inciden sobre la práctica de una religión requieren que el Estado acomode las creencias religiosas. La cláusula de libertad de culto exige un

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Civil, EL NUEVO DÍA (21 de enero de 2017), https://www.elnuevodia.com/noticias/politica/nota/comienzalanuevarevisiondelcodigocivil-2283175/; *Victoria de los religiosos en la nueva Ley laboral*, PRIMERA HORA (14 de enero de 2017), http://www.primerahora.com/noticias/gobierno-politica/nota/victoriadelosreligiososenlanuevaleylaboral-1200161/; *Pa' lante legisladora PNP con proyecto rechazadoporelgobernador*, PRIMERA HORA (15 demayode2017), http://www.primerahora.com/noticias/gobierno-politica/nota/palantelegisladorapnpconproyectorechazadoporelgobernador-1224180/. Igualmente, Guillermo Miranda Rivera, autor principal de la medida en controversia, se identifica en su portal de Facebook como "hijo de Dios". *Véase* FACEBOOK, https://www.facebook.com/profile.php?id=100006842506118 (última visita 22 de mayo de 2019).

[5] "*The free exercise principle should be dominant in any conflict with the anti-establishment principle*". II LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1201 (1978) (*citado en* la Exposición de motivos, P. de la C. 1018 de 8 de mayo de 2017, 1era Ses. Ord., 18va Asam. Leg., en la pág. 2).

[6] CONST. PR, art. II, § 3 (énfasis suplido).

> balance de intereses entre el interés del Estado y el efecto de la acción estatal sobre la práctica religiosa. En particular, para determinar si una actuación del Estado que impone una carga sobre una práctica religiosa es válida y se requiere un acomodo, es necesario evaluar: (1) la acción estatal; (2) el interés o propósito de la acción; y (3) el efecto que tiene sobre determinada práctica religiosa. Así, al adoptar el estándar adjudicativo desarrollado por la jurisprudencia del Tribunal Supremo de Estados Unidos, hemos sostenido que si la acción estatal es neutral y de aplicación general, aun cuando tenga el efecto incidental de imponer una carga sobre una práctica religiosa, no tiene que estar justificada por un interés apremiante del Estado. En cambio, si la actuación del Estado no cumple con los requisitos de neutralidad y generalidad, el Estado debe demostrar que la acción o medida responde a un interés estatal apremiante y que se ajusta rigurosamente al interés apremiante que se pretende adelantar, esto es, que no existe un medio menos oneroso para adelantar ese interés. De lo contrario, el Estado deberá permitir un acomodo a la práctica religiosa. Adviértase que la parte que alega que se le ha violado su libertad de culto es quien tiene el peso de la prueba de demostrar cómo la acción estatal viola sustancialmente el libre ejercicio de su religión. De ordinario, una carga mínima impuesta por el Estado no será suficiente para invocar exitosamente la garantía sobre la libertad de culto.[7]

La Cámara de Representantes interesaba modificar esta normativa. En su sentido más llano, el Proyecto de la Cámara 1018 fue diseñado para que una persona ostentara la facultad de invocar su libertad religiosa como prerrogativa para violar la ley.[8] Específicamente, esta medida eximía a la gente de cumplir con normas de aplicación general que impusieran una carga *sustancial* incidental, *no intencional*, al ejercicio de un *acto religioso*, a menos que concurriera un interés apremiante.[9] Sin embargo, su texto definía lo que es un "acto religioso" de una manera que va-

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[7] Diócesis de Arecibo v. Srio. Justicia, 191 DPR 292, 366-67 (2014) (Rodríguez Rodríguez, opinión disidente) (citas omitidas).

[8] El P. de la C. 1018 fue radicado el 8 de mayo de 2017 por los representantes Miranda Rivera, Méndez Núñez y Charbonier Laureano. La Cámara de Representantes lo aprobó el 25 de junio de 2017 con 36 votos a favor, 9 votos en contra y 6 representantes ausentes. En adelante, la medida fue descargada y aprobada en el Senado el día 10 de diciembre de 2017 tras sufrir enmiendas efectuadas en sala con 16 votos a favor, 11 votos en contra, 2 senadores abstenidos y una senadora ausente. Ya que el cuerpo de origen no concurrió con las enmiendas realizadas por el Senado, que se circunscribieron a eliminar algunos párrafos de su Exposición de Motivos, se convocó un comité de conferencia el 15 de diciembre de 2017 para dirimir el lenguaje final a acogerse. El informe final producido por el comité de conferencia se aprobó en ambas cámaras legislativas el 29 de enero de 2018. Su aprobación en el Senado, nuevamente, se logró con el mínimo requerido de 16 votos. Finalmente, el 7 de febrero de 2018, el gobernador emitió un veto expreso en contra de la medida, que reseñaremos más adelante.

[9] P. de la C. 1018 de 8 de mayo de 2017, 1era Ses. Ord., 18va Asam. Leg., arts. 4 y 5.

ciaba esta frase de su contenido histórico.

Según el gramático latino *Servio*, la raíz etimológica de la palabra "religión" proviene del término latino *religare* que significa volver a ligar, o vincular.[10] En ese sentido, la religión se concibe como un elemento que liga, o vincula, a unos seres humanos con otros y que, por tanto, le da cohesión a un determinado grupo de personas. Por esta razón, es un contrasentido que se definiera lo que es un "acto o ejercicio religioso" como un asunto aislado, que no guarda relación con un sistema mayor de creencias religiosas, como lo hizo el artículo 3 de este proyecto:

> [E]jercicio religioso – significa impedir [*sic*] un acto que es sustancialmente motivado por una creencia religiosa, *sin importar que el mismo sea o no obligatorio, o medular a un sistema de creencias religiosas*. El uso, construcción o conversión de bienes inmuebles con fines religiosos se considerarán como un "ejercicio religioso" de la persona o entidad que utilice o tenga la intención de utilizar la propiedad para ese fin.[11]

Como axioma básico debemos apreciar que este estatuto no se concibió con el fin de proteger los derechos de conciencia en su acepción más abarcadora, sino que su propósito era proteger exclusivamente el ejercicio religioso.[12] Habida cuenta de

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[10] Sarah F. Hoyt, *The Etymology of Religion, en* 32-2 JOURNAL OF THE AMERICAN ORIENTAL SOCIETY 126-29 (1912).

[11] P. de la C. 1018 de 8 de mayo de 2017, 1era Ses. Ord., 18va Asam. Leg., art. 3 (énfasis suplido).

[12] Con relación a los derechos de conciencia, el artículo 18 de la Declaración Universal de Derechos Humanos de las Naciones Unidas lee:

> Toda persona tiene derecho a la libertad de pensamiento, de conciencia y de religión; este derecho incluye la libertad de cambiar de religión o de creencia, así como la libertad de manifestar su religión o su creencia, individual y colectivamente, tanto en público como en privado, por la enseñanza, la práctica, el culto y la observancia.

A.G. Res. 217 (III) A, Declaración Universal de Derechos Humanos, art. 18 (10 de diciembre de 1948). Portal de la Organización de Naciones Unidas http://www.un.org/es/documents/udhr/ (última visita 22 de mayo de 2019).

Jefferson contempla los derechos de conciencia como subsumidos en la Primera Enmienda:

> *Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.*

Thomas Jefferson, Jefferson's Letter to the Danbury Baptists: The Final Letter, as Sent 1 January 1802. http://www.loc.gov/loc/lcib/9806/danpre.html (última visita 22 de mayo de 2019).

El Tribunal Supremo de los Estados Unidos los resume con el siguiente lenguaje:

> *Neither [a state nor the Federal Government] can force nor influence a person to go to or*

la definición citada, el peligro que surgía del artículo 6 de este proyecto radicaba en la probabilidad de que sus disposiciones se prestasen para que cualquier persona incumpliera sus responsabilidades legales caprichosamente. La norma, según concebida, limitaba la discreción de los tribunales para ponderar si el ejercicio invocado para justificar el incumplimiento se encontraba, al menos, vinculado a una religión, de forma que se reconociera la aplicación del estatuto como causa eximente de responsabilidad legal. Bajo ese marco quedaría muy poco espacio para que prevaleciera una persona que intentara hacer valer algún reclamo frente a una parte que se amparara en la prerrogativa de actuar, o no actuar, por motivos religiosos. Pues, según rezaba la medida, "[u]na persona cuyo ejercicio religioso le ha sido violentado en virtud de lo establecido en esta Ley, podrá alegar tal violación ya sea como parte demandante o como una defensa en un procedimiento judicial o administrativo y obtener la indemnización o reparación adecuada".[13] El riesgo de que proyectos como este otorguen espacio a reclamos frívolos, caprichosos y aleatorios no es irreal. Consideremos que la mayoría de las personas que profesan el cristianismo –religión mayoritaria en Puerto Rico– no leen regularmente ni conocen los preceptos bíblicos en que muchas veces alegan sustentarse, y que otrora servirían para motivar determinadas creencias que anularían sus responsabilidades jurídicas. Una encuesta realizada por la empresa cristiana *LifeWay Research* concluyó que solo cerca del 40% de las personas que asisten a la iglesia leen alguna porción bíblica una o dos veces por mes.[14] Mientras que un estudio realizado por la compañía *Barna Group* encontró que el 80% de las personas adultas nunca han leído la Biblia completa.[15]

Por otra parte, para que una persona quedara exenta de cumplir con alguna ley que confligiera con un acto sustancialmente motivado por una creencia religiosa, el artículo 4 del P. de la C. 1018 requería que la carga impuesta por el estatuto al libre ejercicio religioso fuera *sustancial*.[16] ¿Cómo puede considerarse sustancial la

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to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

Everson v. Bd. of Ed. of Ewing Tp., 330 U.S. 1, 15-16 (1947).

[13] P. de la C. 1018 de 8 de mayo de 2017, 1era Ses. Ord., 18va Asam. Leg., art. 6.

[14] Ed Stetzer, *The Epidemic of Bible Illiteracy in Our Churches*, CHRISTIANITY TODAY (6 de julio de 2015), http://www.christianitytoday.com/edstetzer/2015/july/epidemic-of-bible-illiteracy-in-our-churches.html. *Véase también Nueva investigación revela que menos del 50% de los cristianos leen la Biblia*, DIARIO CRISTIANO, HTTP://WWW.DIARIOCRISTIANOWEB.COM/2016/11/11/NUEVA-INVESTIGACION-REVELA-QUE-MENOS-DEL-50-DE-LOS-CRISTIANOS-LEEN-LA-BIBLIA/ (**ÚLTIMA VISITA 22 DE MAYO DE 2019**).

[15] Jeremy Weber, *Surprising Stats on Who Reads the Bible from Start to Finish*, CHRISTIANITY TODAY (2 de junio de 2013), https://www.christianitytoday.com/news/2013/june/surprising-stats-on-who-reads-bible-from-start-to-finish.html.

[16] P. de la C. 1018 de 8 de mayo de 2017, 1era Ses. Ord., 18va Asam. Leg., art. 4. ("El gobierno no podrá imponer una carga sustancial al libre ejercicio religioso de una persona, aun cuando la carga resulte de la aplicación de una acción estatal de aplicación general, a menos que cumpla con la excepción dispuesta en el Artículo 5 de esta Ley").

carga que un estatuto impone al libre ejercicio de la religión si, la acción u omisión requerida por la ley, ni siquiera conflige con un principio obligatorio ni medular al sistema de creencias invocado? Si la carga que impone el estatuto no trastoca un principio religioso obligatorio ni medular, esta, por definición, no es sustancial. Este vicio lingüístico demuestra que el proyecto sufría de una insubsanable incongruencia interna.

No obstante, del texto de este proyecto sí florecía un elemento meridianamente claro. Su lenguaje intimaba que una persona podría levantar las disposiciones del estatuto propuesto como eximentes de responsabilidad penal. De hecho, eso fue exactamente lo que ocurrió en los tribunales federales a base de una Ley cuyo lenguaje es prácticamente idéntico. La *Religious Freedom Restoration Act* del Congreso [en adelante, "*RFRA*"], citada en la Exposición de Motivos, dispone:

> (a) *In general*
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, *except as provided in subsection (b) of this section.*
>
> *(b) Exception*
>
> *Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—*
>
> *(1) is in furtherance of a compelling governmental interest; and*
>
> *(2) is the least restrictive means of furthering that compelling governmental interest.*
>
> *(c) Judicial relief*
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. *Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.*[17]

El Tribunal Supremo de los Estados Unidos le aplicó esta disposición –homóloga a los artículos 4 y 5 del proyecto aquí discutido– a una comunidad de fe de origen brasileño cuyos feligreses comulgaban mediante la ingesta de té de *hoasca*, una planta alucinógena prohibida por la ley federal de sustancias controladas. El grupo sostuvo que dicha ley de sustancias controladas imponía una carga a su derecho a la libertad de culto bajo la RFRA. El Tribunal falló a su favor.[18] De manera que, por insólito que pueda parecer, no resulta ilógico concluir que una versión criolla de esta

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[17] 42 U.S.C. § 2000bb–1 (2012 & Supl. 2016) (énfasis suplido).

[18] Gonzales v. Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006).

norma podía abrir la puerta para que se revisasen estatutos neutrales de aplicación general, o principios equitativos, que prohíben prácticas directa o indirectamente vinculadas a determinadas religiones y que atentan contra la dignidad humana, como lo son: la poligamia patriarcal,[19] la subordinación y el discrimen contra la mujer,[20] la violencia de género,[21] el discrimen racial y xenofóbico,[22] la persecución religiosa,[23] los linchamientos comunitarios,[24] la trata humana,[25] el trato desigual a hijos no-matrimoniales,[26] el maltrato de menores[27] o negarle los alimentos a un familiar,[28] la mutilación genital femenina,[29] entre muchas otras posibilidades.

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[19] Éxodo 21:10; *Deuteronomio* 21:15-17; 1 *Reyes* 11:1-3; *Génesis* 25:6 y 30:1-4; *Jueces* 8:30-31; *Isaías* 4:1; *El Corán* 4:3. En *Reynolds v. U.S.*, 98 U.S. 145 (1878), el Tribunal Supremo de los Estados Unidos rechazó que la poligamia patriarcal amparada en principios religiosos quedara bajo el ámbito de protección de la libertad de culto consagrado en la Primera Enmienda. No obstante, este es un caso del siglo XIX que no contempla la protección más abarcadora establecida en la RFRA de finales del siglo XX. Una cita particular de esta opinión resulta pertinente a este análisis: "*Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?" Id*. en la pág. 166.

[20] *Efesios* 5:24; *Colosenses* 3:18; 1 *Corintios* 14:34-35; *Esdras* 10; *Deuteronomio* 24:1, 25:5-10; *Génesis* 38:8, *El Corán* 4:11, 34; 2:226-242, 282; etc.

[21] *Véase Deuteronomio* 22:28; *Génesis* 16 y 38; *Números* 31:1-18; Éxodo 21:1-11; *El Corán* 4:34 y 38:44, etc.

[22] *Véase Deuteronomio* 7:1-9; *Josué* 10:40; *Esdras* 10; 1 *Reyes* 9:20–21, *Levítico* 25:44; etc.

[23] *Véase Levítico* 20:6, 27; *Deuteronomio* 7:9.

[24] *Véase Levítico* 20.

[25] *Véase Números* 31:1-18; Éxodo 21:1-11 y 20:17; *Levítico* 25:44-46; *Proverbios* 19:10; *Efesios* 6:5; *Colosenses* 3:22; *Tito* 2:9.

[26] *Véase Deuteronomio* 21:15-17.

[27] *Véase Proverbios* 22:15, 23:13-14, 29:15 y 13:24; 2 *Samuel* 7:14.

[28] *Véase* 2 *Tesalonicenses* 3:10.

[29] "La circuncisión es ley para los hombres y la preservación de la honra para las mujeres . . .", apunta la tradición islámica. Ahmad Ibn Hanbal 5:75; Abu Dawud, Adab 167. *Véase* HAMDUN DAGHER, THE POSITION OF WOMEN IN ISLAM (1997) http://www.light-of-life.com/eng/reveal/r5405efc.htm (última visita 22 de mayo de 2019). La mutilación genital femenina se practica en comunidades cristianas, judías y musulmanas en diversas regiones del planeta. José Alberto Escobar Marín, *El derecho de libertad religiosa y sus límites jurídicos,* 83 (Anuario Jurídico y Económico Escurialense, XXXIX (2006)). "*FGC is most widely associated with Muslims because the African communities in which it is most practiced are "predominantly Islamic". However, female circumcision has been practiced by Jews, Christians, and other African religious groups as well . . . Female circumcision is prevalent in twenty-eight African, Asian, and Arab countries*". Kathleen Bradshaw, *A Discursive Approach to Female Circumcision: Why the United Nations Should Drop the One-Sided Conversation in Favor of the Vagina Dialogues*, 38 N.C. J. Intl. L. & Com. Reg. 601, 609-10, 616 (2013). En Sierra Leona, por ejemplo, el 56% de las mujeres y el 47% de los hombres afirman que la mutilación genital femenina es un requisito de su religión. UNICEF Division of Data, Research and Policy, *Sierra Leone: Statistical Profile on Female Genital Mutilation/Cutting* https://data.unicef.org/topic/child-protection/female-genital-mutilation/ (última visita 22 de mayo de 2019).

III. Discrimen disimulado

Desde su radicación, las expresiones públicas de sus coautores parecían indicar que este proyecto de ley tenía el triste propósito de usar el brazo legislativo del Estado para, so color de derecho a la libertad religiosa, permitir que algunos fundamentalistas ostentaran la prerrogativa legal de degradar la dignidad de otros seres humanos, particularmente de la comunidad LGBTTIQ. En entrevista con El Nuevo Día, la Licenciada Charbonier –coautora del proyecto– reconoció que, de convertirse en ley, la pieza sería motivo suficiente para que una persona rechazara cumplir estatutos como el que estableció que no se puede discriminar en la esfera laboral contra una persona por su orientación sexual o identidad de género.[30] La representante admitió igualmente que un empleado del Registro Demográfico podría negarse a emitir un certificado de matrimonio a una pareja del mismo sexo.[31] La misma línea siguió el representante Miranda Rivera:

> En el aspecto laboral, por ejemplo, Miranda Rivera dijo que el proyecto reforzaría la protección constitucional contra el discrimen por religión, garantizando que un empleador no puede utilizar como criterio la creencia o práctica religiosa de un individuo. "Está garantizada la libertad religiosa, que eso no puede estar dentro de las evaluaciones que te hagan como empleado, cuando a ti te contrata una compañía te contrata por tu eficiencia o por tu dominio del área, no te contrata por tu creencia religiosa", explicó Miranda Rivera. "El empleador en este punto tiene que suscribirse a los parámetros de la ley", apuntó el representante.
>
> Sin embargo, los parámetros son distintos cuando el proyecto se aplica a un empleador que reclame protección por "libertad religiosa". En este caso, el empleador podría discriminar al candidato a empleo, si las creencias del individuo son contrarias a las del dueño de la empresa o la empresa misma. "Por otro lado el gobierno le tiene que garantizar también, porque hay muchos empleadores que son de creencia religiosa, hay compañías que son de grupos religiosos, para no mencionar ninguno, y esta ley estaría protegiendo el interés de estas personas en este negocio y su protección religiosa en cuanto a la libertad religiosa que tienen al crear la compañía", expresó Miranda Rivera.[32]

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[30] Rebecca Banuchi, *Presentan un proyecto para la "restauración de la libertad religiosa"*, EL NUEVO DÍA (12 de mayo de 2017) https://www.elnuevodia.com/noticias/politica/nota/presentanunproyectoparalarestauraciondelalibertadreligiosa-2320179/.

[31] Maricarmen Rivera Sánchez, *Critican medida por abrir las puertas al discrimen*, EL VOCERO (11 de mayo de 2017) http://www.elvocero.com/gobierno/legislatura/critican-medida-por-abrir-las-puertas-al-discrimen/article_a06ad5b3-7366-5d3a-b776-cc4fc9d835f3.html.

[32] David Cordero Mercado, *Así es como el honorable legislador Miranda Rivera defiende medida de "libertad religiosa"*, EL CALCE (16 de mayo de 2017) http://elcalce.com/pr/contexto/asi-es-como-el-

Este, a su vez, también reconoció el efecto perjudicial que el proyecto podría tener sobre la comunidad LGBTTIQ. Afirmó que el estatuto podría servir como fundamento para que un juez se rehusara a casar a una pareja del mismo sexo,[33] en contravención directa con la doctrina establecida en *Obergefell v. Hodges*.[34]

El presidente cameral fue mucho más parco en sus expresiones con relación a sus motivaciones para impulsar el P. de la C. 1018. No obstante, su comedimiento no necesariamente implicaba un desfase entre su posición y la de sus correligionarios. Este parecía responder más a la probabilidad de que la medida resultara impugnada en los tribunales y que sus expresiones fueran objeto de prueba. "No hace mucho pasé por la experiencia de hacer una expresión libre y voluntaria, fuera del contexto legislativo, y fui llevado a los tribunales", afirmó el representante Carlos J. Méndez Núñez en una vista pública convocada por la Comisión de lo Jurídico para evaluar el proyecto el 13 de junio de 2017.[35] Sin embargo, el germen del discrimen ilícito inherente al estatuto no pasó por desapercibido en ese foro. Independientemente de la intención de sus coautores, el récord refleja que este muy probablemente sería su efecto.

En su ponencia oponiéndose al P. de la C. 1018 el Departamento de Justicia señala, "[e]l señor Gobernador ha expresado que como parte de la política pública de esta Administración, no se van a limitar los derechos otorgados a los distintos sectores de nuestra sociedad, ni se aprobarán medidas que impidan que un ciudadano reciba servicios gubernamentales".[36] A pesar de que las expresiones atribuidas al gobernador por el Departamento de Justicia aluden solo indirectamente al elemento ilícito de discrimen inherente al proyecto, cuando las vemos en el contexto de su locución vertida mediante comunicado de prensa, se hace evidente que su objeción surgía de ese convencimiento:

> Rechazamos cualquier legislación, como el P. de la C. 1018, que impida que un ciudadano reciba servicios gubernamentales por la religión que practique o por su orientación sexual. Este tipo de medidas no tiene paso en esta Administración. El Gobierno continuará procurando brindar

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honorable-legislador-miranda-rivera-defiende-medida-de-libertad-religiosa/. *V*éase David Cordero, *Autor de proyecto de "libertad religiosa" asegura no retirará la medida*, METRO (15 de mayo de 2017) https://www.metro.pr/pr/noticias/2017/05/15/autor-proyecto-libertad-religiosa-asegura-no-retirara-medida.html.

[33] *Id*.

[34] *Véase* Obergefell v. Hodges, 576 U.S. ___ (2015).

[35] Comunicado de Prensa, *Rechazan que propuesta "Ley de Restauración Religiosa" promueva el discrimen y la negación de servicios*, Cámara de Representantes de Puerto Rico (13 de junio de 2017) http://www.tucamarapr.org/dnncamara/web/ActividadLegislativa/Noticias/TabId/361/ArtMID/1432/ArticleID/1004/Rechazan-que-propuesta-Ley-de-Restauraci243n-Religiosa-promueva-el-discrimen-y-la-negaci243n-de-servicios.aspx.

[36] Wanda Vázquez Garced, P. de la C. 1018 de 8 de mayo de 2017, 1era Ses. Ord., 18va Asam. Leg., Com. De lo Jurídico, Cámara de Representantes, 25 de mayo de 2017, en la pág. 4.

> servicios de calidad y de forma eficiente a todos los sectores de nuestra población.[37]

El Colegio de Abogados de Puerto Rico se opuso a la medida por consideraciones similares.[38] En lo pertinente, el Colegio sostuvo que "[r]esulta innecesario y a la vez peligroso aprobar una Ley de Restauración de la Libertad Religiosa por las implicaciones que puede tener en los derechos de todas las personas que residen en Puerto Rico e incluso en quienes vienen de visita o con fines turísticos".[39] La ponencia alude especialmente a los derechos de la comunidad LGBTTIQ y de las mujeres, en cuanto a sus derechos sexuales y reproductivos. "Las cláusulas de libertad religiosa pueden requerir ciertos acomodos, pero no son absolutas ni pueden infringir en los derechos constitucionales de otras personas y mucho menos discriminar por razones proscritas por la constitución [y las leyes], entre ellas por razón de sexo, orientación sexual y relacionadas", afirmó el Colegio.[40]

No es sorprendente, por tanto, que el foco principal del debate en el Senado fuera una enmienda introducida al texto del proyecto por la Comisión de lo Jurídico de la Cámara, precisamente para intentar subsanar el germen de discrimen ilícito inherente a esta propuesta legislativa. El nuevo artículo 8 leía, "[n]ada de lo dispuesto en la presente Ley podrá ser utilizado para que el Estado niegue o deje de proveer servicio alguno a toda persona que así lo solicite, requiera o necesite".[41] El presidente del cuerpo, senador Rivera Schatz, contendió que tras la enmienda sometida no se privaría a nadie de los servicios del gobierno.[42] Sin embargo, el debate conducido en el hemiciclo dejó varias preguntas medulares sobre el tapete. Particularmente,

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[37] Oficina del Gobernador, *Declaraciones autorizadas del Gobernador Ricardo Rosselló Nevares sobre el P. de la C. 1018,* Comunicado de Prensa (12 de mayo de 2017) https://puntodevistapr.com/declaraciones-autorizadas-del-gobernador-ricardo-rossello-nevares-sobre-el-p-de-la-c-1018/.

[38] Lcda. Mariana Nogales Molinelli (Presidenta de la Comisión de la Mujer) y Lcdo. Osvaldo Toledo García (Comisión para el Estudio del Desarrollo Constitucional de Puerto Rico), Ponencia del Colegio de Abogados y Abogadas en relación con el Proyecto de la Cámara, Com. de lo Jurídico, Cámara de Representantes, 1era Ses. Ord., 18va Asam. Leg., 13 de junio de 2017.

[39] *Id*. en la pág. 2.

[40] *Id*. en la pág. 5. Entre otros comparecientes que se opusieron a la aprobación del proyecto estuvieron presentes los representantes del Comité Amplio para la Búsqueda de Equidad (CABE). Para favorecer la medida comparecieron las siguientes organizaciones religiosas: Puerto Rico por la Familia, Fieles a la Verdad, Mujeres por Puerto Rico, Inc., Iglesia AMEC – Casa de Alabanza, el bufete Del Toro & Santana, la firma GP Legal Consulting P.S.C. y el Lcdo. Víctor A. Vázquez González. Ningún grupo religioso no-cristiano compareció para apoyar la iniciativa.

[41] Entirillado electrónico del 1er Informe positivo sobre el P. de la C. 1018, Com. de lo Jurídico, Cámara de Representantes de Puerto Rico, 23 de junio de 2017, 1era Ses. Ord., 18va Asam. Leg., en la pág 6.

[42] *Véase Legislatura aprueba proyecto de libertad religiosa*, NOTICEL (29 de enero de 2018) http://www.noticel.com/ahora/legislatura-aprueba-proyecto-de-libertad-religiosa/693509257.

nunca se aclaró bajo qué condiciones recibirían los servicios las minorías sexuales y religiosas que acudieran a alguna agencia pública y se confrontaran con algún funcionario que objetara atenderles o servirles a raíz de sus convicciones religiosas. ¿Tendrían estas personas que hacer una fila separada? ¿Tendrían que acudir a alguna otra instalación u oficina homóloga? ¿Qué ocurriría en aquellas ocasiones en que no existiera una oficina o funcionario alterno al que pudieran recurrir? ¿Tendrían los ciudadanos que dirimir públicamente su confesión religiosa o su orientación sexual como prerrequisito para recibir servicios públicos en determinadas oficinas? ¿Qué implicaciones tendrían estos escenarios sobre el derecho constitucional a la intimidad? ¿Acaso es deseable instituir un sistema de segregación sexual y religiosa a la usanza de los "separados pero iguales"?[43] A modo de ejemplo concreto, el senador Juan Dalmau Ramírez esgrimió en su turno que, a base de su análisis, un policía que atendiera una denuncia de violencia doméstica, y que tras acudir al lugar se encontrase con una pareja del mismo sexo, podría rehusarse a atender la situación bajo el fundamento de que su religión le impide fomentar la unidad familiar en esas circunstancias.[44] ¿Qué ocurriría con la persona abusada mientras espera el advenimiento de un segundo policía? Consiguientemente, esta es otra de las preguntas que permaneció desatendida.

El libreto permanece inalterado: la esclavitud y la segregación racial se instituyeron a base de todo tipo de justificaciones bíblicas.[45] Se arguyó que Abraham y otros patriarcas tuvieron esclavos,[46] y se aludió a la subordinación de los cananeos por parte de los israelitas.[47] Finalmente, se identificó el esquema de segregación racial constituido en los Estados Unidos como una consecuencia natural del diseño divino. Bob Jones Sr., fundador de la Universidad de Bob Jones en Carolina del Sur, lo expuso de la siguiente forma: "*White folks and colored folks, you listen to me. You cannot run over God's plan and God's established order without having trouble. God never meant to have one race. It was not His purpose at all. God has a purpose for each race*".[48] Afortunadamente, la doctrina actual concibe la segregación, según empleada como mecanismo para organizar los servicios públicos, como una abominación constitucional.[49] Empero, el potencial del P. de

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[43] *Véase* Plessy v. Ferguson, 163 U.S. 537 (1896) (revocado).

[44] *Véase* Juan Dalmau Ramírez, Turno en Contra al #PC1018 "Ley para la Protección de la Libertad Religiosa", FACEBOOK (29 de enero de 2018) https://www.facebook.com/juandalmau/videos/1654892921270868/?hc_ref=ARSgD2pC3KI_j7EbHsFGIXc4361-NVSiTAfenoKGdBgw5Cm9sUxl8fvL8Ah990D7Al0.

[45] HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED SATES 34 (1994).

[46] *Véase Génesis*, capítulos 16–21.

[47] *Véase Levítico* 25:44-46; 1 Reyes 9:20.

[48] Karl. W. Giberson, **The Biblical Roots of Racism, HUFFINGTON POST (6 de diciembre de 2017)** http://www.huffingtonpost.com/karl-giberson-phd/the-biblical-roots-of-racism_b_7649390.html**.**

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

la C. 1018 para viabilizar el discrimen ilícito a base de este tipo de discurso no se limitaba a los ejemplos referidos.

El estatuto colocaba las convicciones de las personas creyentes bajo un ámbito de protección mayor al de las personas no creyentes, a no ser que el Tribunal Supremo de Puerto Rico hubiera entendido subsumida en esta Ley toda la jurisprudencia interpretativa del artículo II, sección 3 de la Constitución de Puerto Rico, así como la de la Primera Enmienda de la Constitución de Estados Unidos. De lo contrario, la ley ideada se encontraba viciada de insuperables visos de inconstitucionalidad.[50] Habida cuenta de que las disposiciones constitucionales referidas protegen en igualdad de condiciones a creyentes y a no-creyentes,[51] el proyecto igualmente abría la puerta a que las personas ateas discriminaran contra personas religiosas. Esto, en la eventualidad de que alguna ley les requiera realizar un acto que impusiera una carga sustancial incidental a su convicción secularista. Después de todo, la creencia en controversia no tenía por qué guardar relación con un sistema mayor de creencias religiosas.[52] Esta confluencia de discrímenes revestidos de juridicidad postulaba un grave peligro para la democracia, según la conciben el Tribunal Supremo de los Estados Unidos y los constituyentes puertorriqueños. Unos y otros ya han definido lo que, constitucionalmente, debe ser la relación entre iglesia y Estado al amparo de los límites que las Cláusulas de Establecimiento imponen a las Cláusulas del libre ejercicio de la religión.

El Tribunal Supremo de los Estados Unidos se ha expresado en los siguientes términos:

> *The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups*

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[50] *Cf.* Everson v. Bd. of Ed. of Ewing Tp., 330 U.S. 1, 15-16 (1947).

[51] "*No person can be punished for entertaining or professing religious beliefs or disbeliefs*". *Id.* "*[O]ne of the mandates of the First Amendment is to promote a viable, pluralistic society and to keep government neutral, not only between sects, but also between believers and nonbelievers*". Walz v. Tax Commn. of City of New York, 397 U.S. 664, 716 (1970) (Douglas, disidente).

[52] P. de la C. 1018 de 8 de mayo de 2017, 1era Ses. Ord., 18va Asam. Leg., art. 3. (énfasis suplido).

> *and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State*.[53]

Mientras que, en Puerto Rico, el Informe de la Comisión de Carta de Derechos de la Convención Constituyente señaló:

> [La sección 3 de la Carta de Derechos] recoge lo dispuesto en la primera enmienda de la Constitución federal *sobre libertad de cultos y prohibición de establecer religión oficial alguna*. *Añade además el principio de que habrá completa separación de la Iglesia y el Estado.* Estas tres disposiciones tienen un vasto contenido histórico. Por sí solas servirían tal vez para orientar el desarrollo constitucional en lo que se refiere a las demarcaciones fijadas para la convivencia en paz, tolerancia, respeto recíproco y autonomía espiritual en un terreno en donde por muchos siglos han germinado los mayores conflictos y las más vehementes recriminaciones. Esto es así porque las convicciones religiosas tocan a lo más íntimo de la conciencia humana y la interferencia del poder político en este campo provoca legítimas y hondas reacciones. *De igual manera la intervención religiosa en la política inyecta en las lides ciudadanas ingredientes de grave riesgo para la democracia liberal. Entiende la comisión, en consecuencia, que debe quedar perfectamente claro el derecho a la libertad de culto, a la ausencia de intervención en favor o en contra de religión alguna, y el principio de que el culto religioso es privativo del individuo mientras el poder político es representativo de la comunidad*.[54]

Como vemos, la Constitución de Puerto Rico garantiza la libertad de culto, pero también proscribe el endoso gubernamental de la actividad religiosa. Esta es una de las funciones básicas de la Cláusula de Establecimiento, ideada como contraparte constitucional a la Cláusula sobre libertad religiosa.

El juez Negrón García, según citado en la Exposición de Motivos de la medida aquí discutida, argumenta que:

> [l]as cláusulas religiosas de la Primera Enmienda –Libre Ejercicio y Establecimiento– fijan de forma complementaria un balance sabio entre el Estado y el ciudadano con el fin de garantizar la libertad de conciencia *de todos*. La separación entre Iglesia-Estado no es un fin en sí mismo. La

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[53] *Everson,* 330 U.S. en las págs. 15-16.

[54] 4 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE DE PUERTO RICO 3177-78 (1952) (énfasis suplido).

> Cláusula de Establecimiento, lejos de encarnar una visión hostil hacia la religión, está diseñada para preservar a largo plazo la libertad de culto.[55]

Coincidimos con el profesor Negrón García en cuanto a un asunto fundamental. Las cláusulas religiosas fijan un balance con el fin de garantizar la libertad de conciencia de todos: creyentes, agnósticos y aquellos no creyentes. Precisamente por eso es que es imperativo mantener el ánimo prevenido cuando se presentan proyectos de esta naturaleza. El P. de la C. 1018 constituyó un claro endoso a la religión que hubiera provocado una patente desestabilización en el balance que ordenan las cláusulas constitucionales sobre religión. Trastocar ese sabio balance es impermisible: "*State power is no more to be used so as to* handicap *religions, than it is to* favor *them*."[56] "*[The statute's] principal or primary effect must be one that neither* advances *nor* inhibits *religion*".[57] En ese sentido, el pleno del Tribunal Supremo de Puerto Rico ha determinado que:

> [a]l ejercer nuestra tarea judicial de adjudicar una alegación sobre violación del derecho de una persona o de una institución con vínculos religiosos a practicar su culto debido a una intervención gubernamental, "debemos ser particularmente cuidadosos. . . para evitar malograr el delicado equilibrio *entre los dos mandatos absolutos conflictivos: el de no establecer religión alguna y el de no inhibir el libre ejercicio del culto religioso*.[58]

Todo creyente y no creyente merece la mayor protección posible. Pero es cuestionable, cuanto menos, la alternativa que sugería el P. de la C. 1018: facultar a individuos que actúan so color de autoridad estatal para que pudieran ampararse en principios religiosos no obligatorios y desligados de *un sistema de creencias religiosas,* o en un sentimiento de persecución sin referente en la realidad,[59] para

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[55] Asoc. Maestros P.R. v. Srio. Educación*,* 137 DPR 528, 600 (1994) (Negrón García, opinión disidente) (*citado en* la Exposición de motivos, P. de la C. 1018 de 8 de mayo de 2017, 1era Ses. Ord., 18va Asam. Leg., en las págs. 1-2) (énfasis suplido).

[56] *Everson*, 330 U.S. en la pág. 18. (énfasis suplido).

[57] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (énfasis suplido).

[58] Mercado, Quilichini v. UCPR, 143 DPR 610, 636-38 (1997) (citas omitidas) (énfasis suplido).

[59] La Exposición de Motivos del P. de la C. 1018 afirma que el Tribunal Supremo de Puerto Rico no ha reconocido la aplicabilidad de la RFRA en nuestra jurisdicción y que esto –consecuentemente– "[h]a llevado en los últimos años a *atropellos significativos a la libertad religiosa* de ciudadanos que han supuesto una carga substancial al ejercicio de la misma". (énfasis suplido). Para sustentar esta alegación, los coautores hacen referencia a un solo caso del Tribunal de Primera Instancia: Colegio Bautista de Levittown vs. Consejo de Educación de Puerto Rico, Secretario de Justicia, Civil. Núm. SJ2015CV00049 (2105) (TPI, San Juan, 17 de noviembre de 2016). Aunque ese caso no se resolvió en los méritos (al amparo de la doctrina de academicidad) el Tribunal de Primera Instancia sí reconoció

atentar contra la dignidad humana y discriminar contra sectores minoritarios. "[H]ay áreas en las cuales, *por su tangencia con la dignidad humana* y con el principio de que todo el mundo es igual ante la ley, toda clasificación es inherentemente sospechosa y está sujeta al más minucioso examen judicial. Estas áreas incluyen las clasificaciones o discrímenes por motivo de raza, color, sexo, nacimiento, origen o condición social, ideas políticas o religiosas y nacionalidad",[60] no solo las ideas religiosas. En lo correspondiente al balance de intereses que debe observarse entre el acceso a bienes y servicios que merece la comunidad LGBTTIQ y el ejercicio del derecho a la libertad religiosa, en particular, el Tribunal Supremo de los Estados Unidos expresó recientemente:

> *As this Court observed in Obergefell v. Hodges, 576 U. S. ___ (2015), "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths."* Nevertheless, while those religious and philosophical objections are protected, it is a general

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indirectamente la aplicabilidad de la RFRA a Puerto Rico, según interpretada por una resolución de la Cámara de Representantes, y ordenó que el requisito de licenciamiento impuesto a todas las escuelas privadas por el Consejo de Educación de Puerto Rico para reestablecer su certificación no procediera con relación a las escuelas-iglesias:

> Puntualizamos que la Resolución con Enmiendas dejó establecido prístinamente que *las iglesias escuelas no serán licenciadas por CEPR*, en virtud de nuestra Constitución y de la aplicación de RFRA en Puerto Rico. *Por lo cual, resolvemos que en virtud de la expresión legislativa, el CEPR no deberá continuar el registro de Iglesias-Escuelas*.

Id. en la pág. 25 (énfasis suplido).

De manera que la institución religiosa resultó airosa en sus planteamientos sobre RFRA. Los efectos de la sentencia emitida en el caso citado quedaron transversalmente codificados por la Ley Núm. 33-2017 que, sustentándose en RFRA, amplía la protección a la libertad de culto en el contexto de las Iglesias-Escuelas. Es menester sostener que el hecho de que una escuela religiosa haya tenido que recurrir a los tribunales para hacer valer su posición muy difícilmente demuestra la existencia de un patrón de persecución sistemática o de "atropellos significativos" que justifique la legislación propuesta.

La Exposición de Motivos, además, alude a supuestos "casos concretos" en que los "[m]unicipios han creado obstáculos arbitrarios para el libre ejercicio de la libertad religiosa negando permisos de construcción para iglesias evangélicas, prohibiendo manifestaciones religiosas protestantes en plazas públicas, o negando en foros públicos tradicionales la posibilidad de que una creyente pueda distribuir libremente literatura religiosa porque no ha obtenido un "permiso"". *Id*. en las págs. 4-5. A pesar de categorizarlos como "casos concretos", la medida no relata ni ofrece ninguno con especificidad. No obstante, aún si esto fuera cierto, las acciones estatales así descritas podrían impugnarse bajo el ordenamiento vigente que protege la libertad de expresión y la libertad de culto, y que prohíbe el establecimiento de religión. *Véase* Watchtower Bible v. Village of Stratton, 536 U.S. 150 (2002); U.S. v. Grace, 103 S.Ct. 1702 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S.Ct. 948 (1983); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[60] Zachry International v. Tribunal Superior, 104 D.P.R. 267, 279 (1975) (*citando a* Wackenhut Corp. V. Rodríguez Aponte, 100 DPR 518, 531 (1972) (énfasis suplido).

> rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.[61]

Por lo pronto, salvo que la legislatura consiga imponerse sobre la objeción del gobernador,[62] el veto expreso emitido por él en contra de este proyecto protege el balance existente entre las cláusulas constitucionales sobre religión. Además, minimiza la probabilidad de que los funcionarios del Estado utilicen sus convicciones religiosas como fundamento para discriminar ilícitamente contra minorías sexuales y religiosas en la esfera pública. Se ha expresado al respecto que:

> [y]a nuestro ordenamiento jurídico contiene, por vía de legislación federal y local, de la Constitución local y de la jurisprudencia aplicable, salvaguardas suficientes para garantizar el derecho de toda persona a libertad religiosa y es el compromiso de la presente Administración proteger tan fundamental derecho. La discusión de la presente medida ha levantado serias preocupaciones y distracciones que pudieran provocar la violación de los derechos de sectores de nuestra sociedad e incluso limitar el servicio público a nuestra población. Prometimos un Gobierno que le sirva a todos los ciudadanos de esta Tierra y así lo haremos. En virtud de lo anterior, hemos impartido un veto expreso a esta medida legislativa.[63]

En adelante discutimos la legislación federal a la que alude el gobernador en su veto.

IV. ¿Campo Ocupado?

Según hemos reseñado indirectamente hasta ahora, había otra buena razón para oponerse al P. de la C. 1018: aprobar una medida como esa era totalmente superfluo. Existe una ley equivalente en el ámbito federal que comparte todas las deficiencias que hemos discutido. Esta es de aplicación específica a Puerto Rico. La *Religious Freedom Restoration Act* del Congreso dispone:

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[61] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 584 U.S. __, 9 (2018) (slip op.) (citas omitidas) (énfasis suplido).

[62] *Véase* CONST. PR, art. III, § 19.

[63] Oficina del Gobernador, Veto expreso al P. de la C. 1018 de 8 de mayo de 2017, 1era Ses. Ord., 18va Asam. Leg. (7 de febrero de 2018) http://www.oslpr.org/2017-2020/%7BCAAC593D-453D-48F9-921D-57B738ED268C%7D.pdf.

> *As used in this chapter—*
>
> *(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;*
>
> (2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;
>
> *(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and*
>
> *(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc–5 of this title*.[64]

En todo lo correspondiente al escrutinio a emplearse cuando se impugna una norma neutral de aplicación general que tiene un efecto incidental sobre una práctica religiosa –y en cuanto a los remedios judiciales establecidos– las disposiciones sustantivas de esta Ley son fundamentalmente idénticas al proyecto propuesto en Puerto Rico.[65] Esto nos lleva a percibir que el proyecto intenta incidir sobre un campo atendido por el Congreso de manera expresa con relación a Puerto Rico, lo cual podría colocar el estatuto propuesto en tensión con la doctrina de campo ocupado. *A groso modo*, la doctrina constitucional de campo ocupado restringe la legislación local en tres escenarios principales. Primero, desplazamiento por conflicto. Esta situación ocurre cuando resulta imposible cumplir con una ley federal vigente y con el estatuto local simultáneamente.[66] En estos casos opera la Cláusula de Supremacía de la Constitución de Estados Unidos y se sostiene la norma federal sobre la local.[67] Segundo, campo ocupado de forma expresa. Esto surge cuando el Congreso determina expresamente ocupar la totalidad del campo y restringe de manera específica la capacidad de los estados para reglamentar sobre determinado asunto.[68] Y tercero, campo ocupado de forma implícita. El Congreso ocupa el campo de forma implícita cuando su reglamentación sobre cierto tema es abrumadoramente abarcadora y se puede inferir razonablemente que este no dejó espacio para la legislación local.[69] Nos referimos específicamente al tercero de los escenarios.

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[64] 42 U.S.C. § 2000bb–2 (2012 & Supl. 2016) (énfasis suplido).

[65] *Id*.

[66] *Véase* Arizona v. U.S., 567 U.S. 387 (2012); Mutual Pharm. Co. v. Bartlett, 570 U.S. 472 (2013); Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591 (2015).

[67] CONST. EE.UU. art. VI.

[68] *Cf.* Fidelity v. de la Cuesta, 458 U.S. 141 (1982); Cotto Morales v. Ríos, 140 DPR 604 (1996).

[69] *Véase* Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); *Cotto Morales*, 140 DPR; Hernández Villanueva v. Hernández, 150 DPR 171 (2000); *Arizona*, 567 U.S. 387.

Es ineludible recordar que esta Ley fue enmendada en el año 2000.[70] En aquella ocasión el Congreso rediseñó el ámbito de aplicación del estatuto para excluir a los estados y atemperarlo a la opinión emitida en *City of Boerne v. Flores*.[71] Sin embargo, el Congreso insistió en incluir a Puerto Rico bajo su espacio jurisdiccional. A raíz de esto, podemos concluir que, en lo que corresponde a estos elementos en particular, –el escrutinio a emplearse cuando se impugna una norma neutral de aplicación general que tiene un efecto incidental sobre una práctica religiosa, y los remedios judiciales disponibles en Puerto Rico– el Congreso ya ha ocupado el campo. Ciertamente, en la medida en que *RFRA* no restringió de manera específica la capacidad de los estados para reglamentar sobre este asunto, la legislatura local podría acoger legislación complementaria y no contradictoria.[72] No obstante, el escrutinio y los remedios han sido determinados por el Congreso en virtud de sus poderes plenarios para legislar sobre Puerto Rico bajo la Cláusula Territorial de la Constitución de los Estados Unidos.[73]

Existe, sin embargo, una diferencia importante que debemos enfatizar entre el P. de la C. 1018 y la RFRA. Esta última contiene una sección dedicada a reconocer y salvaguardar el balance entre las cláusulas sobre religión que no tiene equivalente en el proyecto local. "*Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause")*", reza.[74] Esto, en sí mismo, no subsana las contradicciones internas que refleja el estatuto federal que ya hemos comentado. Pero desde un punto de vista constitucional, lo hace ligeramente menos ofensivo que la norma propuesta localmente. Aunque no tenemos forma de corroborar si esta omisión fue intencional o accidental, ciertamente opera en beneficio de quienes pudieran desear una libertad religiosa absolutamente desinhibida.

V. Conclusión

El P. de la C. 1018 nos ofreció un atisbo de una política pública que, en distintos escenarios, hubiera permitido subyugar la dignidad humana a la pobre apreciación que algunos legisladores sumidos en el oscurantismo teológico tienen sobre las tradiciones bíblicas.[75] Además, es importante destacar que, en su fondo, el

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[70] Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106–274, 114 STAT. 806 § 7(a), 42 U.S.C. §§ 2000cc-2000cc-5 (2012 & Supl. 2016).

[71] *Véase* Boerne v. Flores, 521 U.S. 507 (1997).

[72] *Véase* R.J. Reynolds v. Durham, 479 U.S. 130 (1986); California Federal Savings v. Guerra, 479 U.S. 272 (1987); Hernández Villanueva v. Hernández, 150 DPR 171 (2000).

[73] CONST. EE.UU. art. IV § 3.

[74] 42 U.S.C. § 2000bb–4 (2012).

[75] LA BIBLIA & EL CORÁN, *supra* notas 19-29; BANUCHI, PRESENTAN UN PROYECTO PARA LA "RESTAURACIÓN

escrutinio estricto propuesto en esta pieza para atender normas de aplicación general que impliquen una intromisión del Estado *sustancial* incidental en el fuero interno del ser humano no es el problema fundamental. Coincidimos con Hostos y con la comunidad internacional cuando estos plantean que los derechos de conciencia deben ostentar la mayor protección posible, una protección que ciertamente incluye el derecho a profesar una religión determinada, pero abarca mucho más que eso. En sus Lecciones sobre Derecho Constitucional, Hostos puntualiza la necesidad de adoptar una disposición que consagre "[e]l derecho de creer y profesar una creencia religiosa, científica o política; y el derecho de expresar por medio de la palabra hablada o escrita nuestros juicios, opiniones, condenaciones y censuras acerca de instituciones, cosas y hombres".[76] Y en adelante añade:

> Así, en el orden moral o psicológico, la Sociedad no debe consentir que el gobierno le dé *un dogma, una Iglesia, una disciplina, una ley moral*. Así, en el orden intelectual o cultural, la Sociedad no debe consentir que el gobierno le dé *una ciencia, un arte, un régimen de su razón y de su sensibilidad*.[77]

La Comunidad Internacional se ha expresado en términos congruentes con los principios elaborados por Hostos. La Declaración Universal de Derechos Humanos, por ejemplo, afirma lo siguiente en su artículo 18:

> Toda persona tiene derecho a la *libertad de pensamiento, de conciencia y de religión*; este derecho incluye la libertad de cambiar de religión o de creencia, así como la libertad de manifestar su religión o su creencia, individual y colectivamente, tanto en público como en privado, por la enseñanza, la práctica, el culto y la observancia.[78]

Consecuentemente, estaríamos dispuestos a estipular con los coautores del P. de la C. 1018 que el escrutinio judicial acogido en la actualidad para evaluar acciones estatales sobre asuntos neutrales y de aplicación uniforme, pero que inciden adversamente sobre los derechos de conciencia, sí es excesivamente deferencial,

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DE LA LIBERTAD RELIGIOSA, *supra* nota 30; RIVERA SÁNCHEZ, *supra* nota 31; CORDERO MERCADO, *supra* nota 32; VÁZQUEZ GARCED, *supra* nota 36; OFICINA DEL GOBERNADOR, *supra* nota 37; NOGALES MOLINELLI & TOLEDO GARCÍA *supra* nota 38.

[76] WILKINS ROMÁN SAMOT, TEORÍA HOSTOSIANA DEL PODER CONSTITUYENTE 121 (2013).

[77] Eugenio María de Hostos, *Lecciones de derecho constitucional*, en LECCIÓN XIV 72-73 (1887) (25 de septiembre de 2011) http://constitucionweb.blogspot.com/2011/09/lecciones-de-derecho-constitucional.html (énfasis suplido).

[78] A.G. Res. 217 (III) A, Declaración Universal de Derechos Humanos, art. 18 (Dic. 10, 1948) http://www.un.org/es/documents/udhr / (última visita 2 de mayo de 2019).

por lo que amerita ser revisado.[79] Pero no comulgamos con la idea de que calcar un estatuto federal carente de congruencia interna, como lo hace el P. de la C. 1018, constituya una respuesta adecuada a la intervención del Estado en la conciencia humana. Máxime cuando la Constitución de Puerto Rico ofrece un camino más acorde con el ordenamiento internacional.[80]

La Carta de Derechos de la Constitución de Puerto Rico, que sigue el modelo de la Declaración Universal de Derechos Humanos, establece en sus disposiciones iniciales una correlación directa entre la inviolabilidad de la dignidad del ser humano, el principio de igualdad y el repudio al discrimen.[81] Por lo cual, comprendemos que el único límite a la libertad de culto, más allá de los que impone la Cláusula de Establecimiento, debe radicar en la inviolabilidad de la dignidad humana. Este es el vector hermenéutico que gobierna toda la Carta de Derechos de la Constitución.[82] Evidentemente, no es un accidente que la Constitución de Puerto Rico haya correlacionado la inviolabilidad de la dignidad humana directamente con la prohibición de ciertos tipos de discrimen:

> Tengo el honor de concurrir, a nombre de la Comisión de Carta de Derechos para informar brevemente sobre el sentido, el propósito y la orientación básica que estructura esta proposición nuestra. El informe que la acompaña—y que ha sido suministrado a todos ustedes desde el viernes pasado—explica en su detalle el alcance de cada una de las proposiciones, y en su oportunidad habremos de solicitar que se dé lectura al mismo, *para que sirva de explicación y quede incorporado en lo que respecta a los propósitos que motivan esta Carta de Derechos*. *Quiero ahora, brevemente, señalar la arquitectura ideológica dentro de la cual se monta esta proposición*. *Tal vez toda ella está resumida en la primera oración de su primer postulado: la dignidad del ser humano es inviolable. Esta es la piedra angular y básica de la democracia. En ella radica su profunda fuerza y vitalidad moral. Porque antes que ninguna otra cosa, es la democracia una fuerza moral, y su moral radica*

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[79] En esos casos "[e]l Estado no tendrá que justificar un interés apremiante y prevalecerá éste siempre y cuando su efecto sobre la práctica religiosa sea incidental". Mercado, Quilichini v. UCPR, 143 DPR 610, 636-38 (1997).

[80] *Cf.* 3 JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 174 (1982). Véase la expresión del Tribunal en *Rivera Schatz v. ELA y C. Abo. PR II*, 191 DPR 791, 811 (2014). "[N]o podemos abstraer de nuestro análisis el hecho de que la Declaración Universal de Derechos Humanos de las Naciones Unidas fue eje de inspiración en la redacción de nuestra Carta de Derechos". *Id*.

[81] CONST. PR, Art. II; A.G. Res. 217 (III) A, Declaración Universal de Derechos Humanos, arts. 1 y 2 (Dic. 10, 1948); MARÍA DE HOSTOS, *supra* nota 77.

[82] *Id*.

> *precisamente en el reconocimiento que hace de la dignidad del ser humano, del alto respeto que esa dignidad merita y la responsabilidad en consecuencia que tiene todo el orden constitucional de descansar en ella, protegerla y defenderla. Por eso en nuestra primera disposición además de sentar inicialmente esta base de la igualdad profunda del ser humano—igualdad que trasciende cualquier diferencia, bien sea diferencia biológica, bien sea diferencia ideológica, religiosa, política o cultural—por encima de tales diferencias está el ser humano en su profunda dignidad trascendente. Y por eso decimos que el sistema de leyes y el sistema de instrucción pública habrán ambos de encarnar estos principios válidos y eternos.*[83]

Un escrutinio sano del texto constitucional como un todo requiere que el derecho a la libertad de culto –y de conciencia– se interprete en la forma más abarcadora posible, siempre que esto no vulnere la dignidad de ningún ser humano. De manera que la libertad de culto –incluida la prohibición del establecimiento– quede exclusivamente subordinada a la dignidad humana. Esto, para beneficio indirecto de los coautores de la medida objeto de este análisis, sería mucho más congruente con la prédica de Jesús de Nazaret que el proyecto mismo.[84]

El escrutinio estricto podría representar una vía adecuada para lograr eso, siempre que salvaguardar la dignidad humana represente un interés apremiante del Estado.[85] Así no se daría paso a que se invoque el derecho a la libertad religiosa como causa eximente de responsabilidad legal cuando quede la dignidad de algún ser humano en entredicho.[86] Casos de esta naturaleza, incluso, podrían dirimirse a la sazón de un escrutinio intermedio, si es que el Tribunal Supremo de Puerto Rico entendiera que un escrutinio estricto es improcedente. Ambos crisoles hermenéuticos (el estricto y el intermedio) serían consistentes con la intención de los redactores constitucionales.[87] Lamentablemente, el desarrollo constitucional autónomo que

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[83] 1 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE DE PUERTO RICO 1342 (1952) (*disponible en* http://www.oslpr.org/v2/PDFS/DiarioConvencionConstituyente.pdf.) (última visita 2 de mayo de 2019) (énfasis suplido).

[84] MARCUS, *supra* nota 1.

[85] *Véase*, *e.g.*, la opinión emitida en *Roberts v. Jaycees*, 468 U.S. 609 (1984), en la que el Tribunal Supremo de los Estados Unidos determina que prohibir el discrimen ejercido por asociaciones privadas contra las mujeres constituye un *interés apremiante* en la consecución de eliminar toda forma de discrimen por género. "*We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms*". *Id*. en la pág. 623.

[86] "*Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments*". Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 584 U.S. __, 9 (slip op).

[87] 4 DIARIO DE SESIONES, *supra* nota 83, en las págs. 3177-78.

los padres y madres de la Constitución de Puerto Rico visualizaron con relación a sus tres cláusulas religiosas no se ha materializado:

> Estas tres disposiciones tienen un vasto contenido histórico. *Por sí solas servirían tal vez para orientar el desarrollo constitucional en lo que se refiere a las demarcaciones fijadas para la convivencia en paz, tolerancia, respeto recíproco y autonomía espiritual en un terreno en donde por muchos siglos han germinado los mayores conflictos y las más vehementes recriminaciones*.[88]

De manera que, la propuesta de un escrutinio elevado para atender las controversias que surjan de normas sobre asuntos neutrales y de aplicación uniforme, pero que inciden adversamente sobre los derechos de conciencia, no precisamente es lo que vició el P. de la C. 1018 desde su concepción.

La ilicitud de esa medida más bien radicó en su endoso a la religión, en lugar de proteger de forma integral todos los derechos de conciencia (de creer y no creer) en igualdad de condiciones, lo que incluye el interdicto constitucional contra el auspicio gubernamental a la religión.[89] También radicó en su definición impermisiblemente laxa de lo que constituye un "ejercicio religioso". Lo que abría la puerta para convertir arbitrariamente la devoción religiosa en subterfugio para no reconocer los derechos constitucionales y estatutarios de las minorías religiosas y sexuales,[90] y para excusar conducta delictiva que violenta la dignidad ajena.[91] La Legislatura no debe fomentar un ambiente de intolerancia a la diversidad civil y religiosa, aun cuando las legislaturas de veintiún estados interesen hacerlo.[92] Por tanto, con la esperanza de que esta pieza legislativa –o algún facsímil razonable–

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[88] *Id*. (énfasis suplido) (El Tribunal Supremo de Puerto Rico ha insistido en regirse estrictamente por la jurisprudencia estadounidense con relación a este tema. Por tanto, ha hecho caso omiso al documento de factura más ancha que nos ha sido legado. *Cf. Díaz v. Colegio Nuestra Sra. Del Pilar*, 123 DPR 765, 776 (1989)).

[89] "*Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion*'". Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (énfasis suplido).

[90] BANUCHI, PRESENTAN UN PROYECTO PARA LA "RESTAURACIÓN DE LA LIBERTAD RELIGIOSA, *supra* nota 30; RIVERA SÁNCHEZ, *supra* nota 31; CORDERO MERCADO, *supra* nota 32; VÁZQUEZ GARCED, *supra* nota 36; OFICINA DEL GOBERNADOR, *supra* nota 37; NOGALES MOLINELLI & TOLEDO GARCÍA, *supra* nota 38.

[91] LA BIBLIA & EL CORÁN, *supra* notas 19-29.

[92] "Hoy día, según los datos recopilados por el *National Conference of State Legislatures*, se han aprobado leyes estatales de restauración de la libertad religiosa en veintiún (21) estados de la nación americana". Exposición de motivos, P. de la C. 1018 de 8 de mayo de 2017, 1era Ses. Ord., 18va Asam. Leg., en la pág. 3.

jamás resucite,[93] consigno mi posición en contra de sus postulados al suscribir las palabras de Juan Jacobo Rousseau en su Contrato Social:

> Los que distinguen la intolerancia civil y la intolerancia teológica se equivocan, a mi juicio. Estas dos intolerancias son inseparables. Es imposible vivir en paz con gentes a las que se cree condenadas; amarlas sería odiar a Dios que las castiga: es
> absolutamente necesario o convertirlas o atormentarlas. Dondequiera que la intolerancia teológica es admitida, es imposible que no tenga algún efecto civil, y desde el momento en que lo tiene, el soberano no es ya soberano, ni siquiera en lo temporal: desde este momento, los sacerdotes son los verdaderos dueños; los reyes no son más que mandatarios suyos.[94]

Quienes a causa de convicciones religiosas judeocristianas no hallen una voz persuasiva en el planteamiento de Rousseau, siempre podrán remitirse a las palabras del apóstol Santiago: "Hermanos míos, que vuestra fe . . . sea *sin acepción de personas*".[95]

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[93] *Véase Piden ir por encima de veto de Rosselló proyecto Libertad Religiosa*, METRO PUERTO RICO (8 DE FEBRERO DE 2018) HTTPS://WWW.METRO.PR/PR/NOTICIAS/2018/02/08/PIDEN-IR-VETO-ROSSELLO-PROYECTO-LIBERTAD-RELIGIOSA.HTML; *véase también* Leysa Caro González, *El proyecto de libertad religiosa pudiera resurgir*, EL NUEVO DÍA (5 de junio de 2018) HTTPS://WWW.ELNUEVODIA.COM/NOTICIAS/POLITICA/NOTA/ELPROYECTODELIBERTADRELIGIOSAPUDIERARESURGIR-2426517/?UTM_TERM=AUTOFEED&UTM_CAMPAIGN=ECHOBOX&UTM_MEDIUM=SOCIAL&UTM_SOURCE=TWITTER#ECHOBOX=1528229216; *véase también* P. de la C. número 2069 de 24 de abril de 2019, 5ta Ses. Ord., 18va Asam. Leg. (para establecer las "Guías para la Protección de la Libertad Religiosa", a los fines de clarificar ciertos principios de libertad religiosa, fundamentados en los parámetros constitucionales y estatutarios, tanto federales como locales, aplicables a Puerto Rico; y para otros fines relacionados).

[94] JEAN-JACQUES ROUSSEAU, EL CONTRATO SOCIAL 234-35 (7ma ed. 1965).

[95] *Santiago* 2:1 (énfasis suplido).

LA EXPEDICIÓN DE INGRESO INVOLUNTARIO: ¿FACTOR QUE INFLUYE EN LA CRISIS DE SALUD MENTAL DE PUERTO RICO?

*Patricia Torres Castellano**

Resumen

En su artículo, Patricia Torres Castellano expone los factores que inciden en las altas cifras de ingreso involuntario que expide el Tribunal de Primera Instancia, conforme con la *Ley de salud mental de Puerto Rico*. Para ello, analiza el desarrollo legislativo con relación a los ingresos involuntarios para identificar aquellos componentes del proceso judicial que provocaron la inefectividad de dichos ingresos involuntarios. Según la autora, la escasez de recursos médicos y la disparidad en el proceso judicial llevado a cabo por las diferentes regiones constituyen un impedimento para lograr la rehabilitación, prevención, tratamiento y mayor autonomía de las personas ingresadas. En miras de lograr la efectividad de los ingresos involuntarios, la autora muestra la pertinencia de atender los casos de salud mental mediante salas especializadas. Es por ello que ilustra la necesidad de implementar el *Proyecto para la atención de asuntos de salud mental* en las demás regiones judiciales.

Abstract

In this article, Patricia Torres Castellano explains the factors that contribute to a high number of involuntary admission processes issued by the Municipals Courts, according to *Mental Health Law*. The article analyzes the legislative evolution concerning mental health in Puerto Rico to identify the issues on the judicial procedure that provoked the involuntary admission process to be unsuccessful. The author identifies two major elements that contribute to have an ineffective involuntary admission process issued by the Court: the lack of medical services and the different treatments in the judicial procedure by the Municipals Courts. To have an effective involuntary admission process issued by the Court, the au-

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thor states that it is necessary to have specialized courts that can manage mental health cases in Puerto Rico. Mental health cases require a special treatment to accomplish the rehabilitation of the patient. With that in mind, the author emphasizes on the expansion of the mental health specialized court called *Proyecto para la atención de asuntos de salud mental* in the courts of Puerto Rico.

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I. Introducción

Un conglomerado de factores ha contribuido al cuadro crítico de la salud mental en Puerto Rico. Entre ellos está: la crisis económica del País, la falta de recursos básicos para vivir, el auge en el desempleo, la pérdida de bienes, la condición mental de las personas y la depresión. Ante ello, muchos puertorriqueños optan por tocar las puertas de los tribunales para solicitar el ingreso involuntario de un pariente o persona. Mientras otros, deciden recurrir a diferentes hospitales psiquiátricos. Es inevitable resaltar que la llegada del huracán María en el año 2017 agravó la condición actual en cuanto a la salud mental.

A raíz de los estragos del huracán, hubo un aumento significativo en los suicidios. Según muestra el informe que publicó la *Comisión para la prevención del suicidio,* el año 2017 terminó con un aumento de 26% en los casos de suicidios comparado con el año 2016.[1] Los medios noticiosos aluden al mencionado informe y destacan que la tasa de suicidios del 2017 ha sido la más alta desde el 2013 con 7.6 suicidios por cada 100,000 habitantes.[2] De igual forma, la línea telefónica de Primera Ayuda

[1] COMISIÓN PARA LA PREVENCIÓN DEL SUICIDIO, ESTADÍSTICAS PRELIMINARES DE CASOS DE SUICIDIO PUERTO RICO ENERO- DICIEMBRE 2017 (2018), disponible en http://www.salud.gov.pr/Estadisticas-Registros-y-Publicaciones/Estadisticas%20Suicidio/Diciembre%202017.pdf.

[2] Alex Figueroa Cancel*, Aumentan los suicidios en 2017*, EL NUEVO DÍA (20 de febrero de 2018) https://www.elnuevodia.com/noticias/seguridad/nota/aumentanlossuicidiosenel2017-2400243/;

Sicosocial —conocida como PAS— recibió 1,075 llamadas durante el mes de enero de 2018 de personas con intentos de suicidios. Esta cifra muestra un aumento de 696 más que los 379 de enero del año 2017.[3] Después del fenómeno atmosférico "en los meses de noviembre de 2017 a enero de 2018, PAS atendió 3,050 llamadas de personas con pensamientos suicidas, 2,168 más que las 882 registradas en todo 2016".[4]

El Estado interviene de diferentes maneras para atender esta problemática, pues reconoce que la salud pública está revestida de un alto interés público. Considera el Estado que la salud mental es el "elemento matriz de la sana convivencia y una buena calidad de vida".[5] Una de las formas en que interviene es mediante la *Ley de salud mental de Puerto Rico* [en adelante, "*Ley de salud mental*"], en la cual autoriza la expedición de órdenes para el ingreso involuntario de aquel que está en riesgo de hacerse daño a sí mismo, a otros o a la propiedad.[6] Por tanto, el presente artículo tiene como propósito ilustrar cómo las órdenes expedidas para el ingreso involuntario podrían resultar inefectivas ante la escasez de recursos para rehabilitar a las personas ingresadas y la disparidad existente en el proceso judicial llevado a cabo por los tribunales de primera instancia. Con ello en mente, se mostrará primero el desarrollo histórico legislativo en relación con los ingresos involuntarios con el propósito de identificar los factores que incidieron en la inefectividad de la misma y cómo han repercutido en la crisis de salud mental que vivimos hoy día. Se observará cómo el proceso judicial influyó a que las expediciones de ingresos involuntarios se tornaran ineficaces. Más adelante, estudiaremos a fondo la *Ley de salud mental* —vigente hoy día— con la finalidad de evaluar la efectividad de la misma a la hora de expedir una orden de ingreso involuntario. Finalmente, expondremos la pertinencia de la expansión del *Proyecto para la atención de asuntos de salud mental* para lograr la rehabilitación y mayor autonomía de la persona ingresada involuntariamente.

II. Las medidas legislativas llevadas a cabo para regular la expedición del ingreso involuntario

Desde el 1907 hasta el presente, la Asamblea Legislativa ha aprobado múltiples estatutos para regular el procedimiento judicial con relación al ingreso involuntario

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Alexia Fernández Campbell, *Calls to Puerto Rico's suicide hotline have skyrocketed since Hurricane Maria*, VOX (Feb. 21, 2018), https://www.vox.com/policy-and-politics/2018/2/21/17032168/puerto-rico-suicide-hotline-hurricane-maria.

[3] *Id*.

[4] FIGUEROA CANCEL, *supra* nota 2.

[5] Exposición de motivos, Ley de salud mental de Puerto Rico, Ley Núm. 408-2000, 2000 LPR 2664-65.

[6] Ley de salud mental de Puerto Rico, Ley Núm. 408-2000, 24 LPRA §§ 6152-6166g (2011 & Supl. 2018).

de los que sufren algún padecimiento de salud mental. No obstante, la forma y manera de regulación ha variado a través de los años. Veremos a continuación cómo dicha regulación se tornó ineficiente y contraproducente para lograr la rehabilitación, prevención y el tratamiento de las personas ingresadas. Sin embargo, a partir del 1980 la Asamblea Legislativa cambió el método de regulación para que esta cumpliera con los estándares constitucionales —así como el debido proceso de ley— y estableció que los tribunales deben garantizarle el acceso a los servicios médicos a las personas ingresadas involuntariamente. A pesar de estos esfuerzos, factores externos inciden en su inefectividad, así como la falta de servicios médicos para atender a las personas ingresadas y el proceso judicial que se lleva a cabo en los tribunales. Veamos.

A. El desarrollo histórico legislativo del ingreso involuntario

La alta incidencia de trastorno mental no es un asunto novel del siglo 21 en Puerto Rico. Ha sido una problemática que ha arropado al País desde mucho antes del siglo 18. Debido a las altas incidencias de salud mental, la Asamblea Legislativa se vio forzada en crear un procedimiento judicial para atender los casos que requerían el ingreso involuntario de las personas con problemas de salud mental. Para el año 1907, la Asamblea Legislativa creó la *Ley fijando los procedimientos judiciales en casos de demencia y proveyendo para las altas y bajas de pacientes en el manicomio* [en adelante, "*Ley fijando los procedimientos judiciales"*] en la que tenía como propósito regular el procedimiento para determinar si era meritorio el ingreso involuntario de la persona que, alegadamente, sufría algún trastorno mental.[7] Los casos de esta índole eran de naturaleza civil, pues se reconocía que estos eran incapaces de cometer un delito por carecer de capacidad para conocer el acto antijurídico.[8] No obstante, la sociedad criminalizaba a la persona que padecía de enajenación mental por considerar sus actos abominables y reprochables.[9] A esto se le añade que eran igualmente criminalizados por el Estado mediante el procedimiento judicial, a pesar de estos casos ser de índole civil. Esto se debe a que el procedimiento judicial creado por la legislatura fue diseñado para que los tribunales trataran estos casos como si fueran de índole criminal. Ciertamente, esto se puede vislumbrar en los siguientes aspectos de la Ley: las partes del caso, la composición de un jurado como sentenciador y la identificación del demandado

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[7] Ley fijando los procedimientos judiciales en casos de demencia y proveyendo para las altas y bajas de pacientes en el manicomio, 1907 LPR 217.

[8] CARLOS GIL, DEL TRATAMIENTO JURÍDICO DE LA LOCURA: PROYECTO PSIQUIÁTRICO Y GOBERNABILIDAD EN PUERTO RICO 17 (2009).

[9] Véase *Id.* en la pág. 16, donde ilustra que la razón por la recluyeron a María Antonia Vidal era para que fuera 'alejada de la mirada pública' debido a sus actos.

como *acusado* tan pronto era declarado demente. Veamos detalladamente cómo era el procedimiento judicial.

i. Procedimiento Judicial

El reflejo del proceso criminal en los casos de salud mental se muestra desde las partes del caso. El Pueblo de Puerto Rico —representado por un fiscal— era considerado como la parte demandante y la persona que padecía de alguna condición mental era considerada como la parte demandada. Por lo tanto, quien radicaba la demanda y solicitaba el ingreso involuntario del demandado era una tercera persona para todos los efectos, pues *El Pueblo de Puerto Rico* era la parte que comparecía como demandante.[10] Se consideraba al Estado como el demandante debido a que los actos y conductas de la persona mentalmente enajenada constituían un agravio a la sociedad. Por consiguiente, cuando los actos y conductas de las personas con enajenación mental producían —o podrían producir— daños a terceros se entendía que era contra la sociedad y es por ello que comparecía como parte demandante el Estado y no la persona que radicaba la demanda. La razón por la cual la Ley no dispone explícitamente que los daños ocurridos eran de causa criminal era porque dichos daños producidos no fueron cometidos a propósito y con conocimiento, sino que fueron producto de una *enajenación mental*.

La determinación de la reclusión del demandado estaba en las manos de un Jurado. Después que se radicaba la demanda, el Juez de Distrito designaba "un jurado de seis *hombres*, los cuales [eran] *propietarios* por concepto de bienes raíces y residentes en el distrito, y [tenían que] tener todos los requisitos legales para [ser] jurados en causas criminales. . .".[11] Cabe resaltar que el perfil del Jurado era uno compuesto por hombres de clase pudientes, mientras que el perfil de los demandados era usualmente de hombres de clase baja, mujeres y menores. Ciertamente, hubo un desequilibrio entre la clase social del juzgador y la del demandado. Este mismo desequilibrio abrió la puerta para discriminar y estigmatizar aún más a este mismo demandado durante el proceso judicial.

En la etapa de descubrimiento de prueba se palpaba con mayor fuerza el prejuicio, la discriminación y estigmatización hacia esta población, al no reconocerle derechos al demandado durante el proceso e identificarlo como *acusado*. Se desprende de la sección 6 de la Ley que el veredicto del Jurado se basaba en la declaración de uno o más médicos, en unión con otra prueba, para identificar: (1) si era el *acusado* demente, y (2) de ser el *acusado* declarado demente, se determinaba si era necesaria su reclusión.[12] Si el médico, bajo juramento, declaraba que el

[10] Ley fijando los procedimientos judiciales en casos de demencia y proveyendo para las altas y bajas de pacientes en el manicomio, 1907 LPR 217, 218.

[11] *Id*. en las págs. 218-19 (énfasis suplido).

[12] *Id.* en la pág. 219.

demandado era demente y que era meritoria su reclusión, se procedía entonces a contestar otras interrogantes al Jurado. Estas interrogantes constituían en: "¿qué edad tiene el demandado y de dónde es natural? ¿Cuántos accesos de locura ha tenido él, y cuánto tiempo ha existido el presente ataque? ¿*Es hereditaria [o] no la locura en la familia del demandado*? ¿Posee el demandado alguna propiedad, y en tal caso, de qu[é] se compone y [a] cuánto asciende su valor?"[13] La razón por la cual el Doctor contestaba bajo juramento si el demandado tenía propiedad era para que así pudiera pagarle al lugar donde era ingresada la persona, llamado *Asilo de locos* [en adelante, "Asilo"], la suma debida para el sustento y la manutención del mismo.[14] Si este no tuviere ningún bien mueble o inmueble, el juez de distrito citaba al tutor del demandado u otra persona que estuviere obligada a mantenerle con el fin de que pagase por el sustento y manutención del demandado mientras estuviese ingresado.[15] Pudiese darse el caso en que el demandado tuvo un pariente que padecía de algún trastorno mental y era por esa simple razón que lo ingresaba. Ello respondía a que se consideraba que la *locura* era hereditaria.[16]

Una vez el médico bajo juramento afirmaba que el demandado era *demente* y que ameritaba su reclusión, el Jurado procedía a emitir una sentencia declarándole como *loco* y disponiendo su traslado al Asilo para su reclusión y 'tratamiento'.[17] El Juez de Distrito le notificaba al Superintendente del Asilo para procurar que el demandado tuviese una vacante en el instituto de Asilo de Beneficencia en San Juan creada en el año 1844.[18] Resulta un poco irónica la disparidad entre lo que establece la Ley en cuanto al tratamiento del recluido *vis a vis* la situación real del demandado en el Asilo. En este Asilo el tratamiento adecuado no era el enfoque, más bien lo que gobernaba allí era la falta de higiene y el maltrato hacia los recluidos. El licenciado Gil muestra en su libro, *Del tratamiento jurídico de la locura,* las críticas que le hicieron al Asilo al ocurrir allí:

> [A]mputaciones debidas al uso indiscriminado de la camisa de fuerza, hacinamiento, la masa de autopsias convertida en mesa de costura, inimputables cumpliendo penas por responsabilidad criminal, negligencia de los oficiales de guarda del asilo, tuberculosos recluidos junto

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[13] *Id*. (énfasis suplido).

[14] *Id*. en las págs. 220-21.

[15] *Id*.

[16] *Id.* en la pág. 219.

[17] *Id*. en la pág. 220. Expone la Ley que la única manera en que la persona sentenciada al Asilo no fuera recluida al mismo era cuando algún pariente o amigo se comprometiera ante el Juez a cuidarle, pero era necesario entregar una fianza ante 'El Pueblo de Puerto Rico' para así procurar que cuidara a la persona mientras estuviere en el estado de enajenación mental.

[18] *Id*. en la pág. 221.

> con los demás enfermos mentales, [y] salones que en realidad [eran] calabozos. . . .[19]

La única forma en que el demandado podía salir de aquel Asilo era mediante recomendación del Superintendente y la aprobación del Director de Sanidad, Beneficencia y Correcciones o por una orden del Tribunal.[20]

El propósito de la Ley iba dirigido a lograr proveer el ingreso involuntario para aquellos que sufrían de trastorno mental de tal magnitud que se causaban daño a sí mismos o a otros. Sin embargo, el proceso que elaboró el legislador para cumplir con dicho propósito estaba ceñido con un alto nivel de discrimen contra las personas que padecían de trastorno mental. Esto tuvo el efecto de crear mayores prejuicios y estigmas contras estas personas en la sociedad. El propio Estado —mediante legislación— provocó que hubiera mayores prejuicios y estigmas contra esta población al identificarlos como *locos*, *dementes* y *acusados* durante el proceso judicial. A ello se le añade que en la ley no se le reconocían derechos a la personas ingresadas, con excepción del derecho a asistencia de un abogado.[21] Por otra parte, debido a que la Ley no estipuló la pertinencia de un plan de rehabilitación para las personas que fuesen ingresadas, esto provocó un cúmulo de pacientes en el Hospital de Asilo. Ello logró que el ingreso involuntario se tornara contraproducente para el propio Estado, pues cuando el tribunal ordenaba el ingreso involuntario, el hospital no tenía cabida y recursos médicos para recibir al demandado.

Ante tal situación, se creó la Ley Núm. 32 de 13 de marzo de 1913, la cual habilitó programas en los municipios para que atendieran casos apremiantes de salud mental hasta que hubiese cabida en el Asilo de Beneficencia de San Juan.[22] La creación de esta Ley no solo mostró la inefectividad de la *Ley fijando los procedimiento judiciales*, sino que reveló que el cuadro de salud mental en Puerto Rico era cada vez más serio.

En el año 1945, la *Ley fijando los procedimientos judiciales* sufrió una enmendada por la *Ley para reglamentar el ingreso de pacientes a hospitales o establecimientos para enfermedades mentales y para otros fines*.[23] Según la exposición de motivos de dicha ley enmendada, el propósito consistía en asegurar el acceso a los servicios médicos de aquellos ingresados en un hospital a pesar de que no contaran con

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[19] CARLOS GIL, DEL TRATAMIENTO JURÍDICO DE LA LOCURA, *supra* nota 8, en la pág. 41.

[20] Ley Fijando los procedimientos judiciales en casos de demencia y proveyendo para las altas y bajas de pacientes en el manicomio, 1907 LPR 217, 225.

[21] *Id*. en la pág. 218.

[22] Ley para enmendar las secciones 1ª y 5ª del capítulo I de la "Ley fijando los procedimiento judiciales en casos de demencia y proveyendo para las altas y bajas de pacientes en el manicomio", Ley Núm. 32 de 13 de marzo de 1913, 1913 LPR 74-75.

[23] Exposición de motivos, Ley para reglamentar el ingreso de pacientes a hospitales o establecimientos para enfermedades metales y para otros fines, Ley Núm. 235 de 12 de mayo de 1945, 1945 LPR 795.

fondos suficientes para dichos servicios.[24] Dispuso, a su vez, la necesidad que había de establecer "salvaguardias para la libertad individual de dichas personas".[25] Con el fin de hacer valer el propósito de la Ley, estableció que ninguna persona podía ser recluida sin previa orden del tribunal. De haber sido ingresada sin esta orden judicial, el Director del hospital tenía la obligación de notificar al fiscal de distrito sobre los motivos de tal reclusión.

Es sorprendente que la Ley contemple la necesidad de garantizar el acceso a los servicios médicos sin contemplar el pobre tratamiento que se les daba a los recluidos en el Asilo y cómo eran tratados en dicho lugar. A su vez, llama la atención que no se enmendó el proceso judicial en el cual se determinaba si era necesario el ingreso involuntario. Por tanto, a pesar de estos esfuerzos legislativos para el *acceso* a los servicios médicos, lo que realmente se logró fue que los recluidos tuvieran 'servicios' en condiciones infrahumanas. Esto tuvo como resultado la disminución en la recuperación, el tratamiento y la rehabilitación del recluido. De igual forma, se continuó con los prejuicios y estigmas en los procesos judiciales al no enmendarse el proceso que pautó el legislador en la *Ley fijando los procedimientos judiciales*.

Otro de los esfuerzos que intentó la Ley fue *salvaguardar la libertad individual* dándole poder al fiscal para investigar las causas que dio ha lugar el ingreso de la persona y solicitarle al tribunal —mediante petición— la liberación de la persona recluida si entendía que su reclusión era injustificada. Entendemos que el intento de la Asamblea Legislativa en salvaguardar la libertad individual fue uno vago y escueto. Esto, pues no se dispuso un término máximo bajo el cual una persona pudiera estar ingresada ni tampoco le concedió derechos al recluido para que radicara —por derecho propio— ante el tribunal una petición con el fin de que se le diese de alta.[26] Por ende, los derechos que intentaron salvaguardar no fueron suficientes para la lograr la libertad individual de los ingresados involuntariamente. Finalmente, se continuó dejando al arbitrio del Estado y del Director del Hospital la libertad de la persona recluida.

Hasta ese entonces se observa que el interés del Estado radicaba en el ingreso involuntario si se llegase a probar que ameritaba su reclusión. Ello tuvo como resultado la inefectividad en la expedición de dicha orden debido a que no se logró velar por el tratamiento, la prevención y la rehabilitación del recluido.

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[24] *Id.*

[25] *Id*.

[26] *Véase Id.* en las págs. 795-99.

B. El deber de cumplir con los estándares constitucionales en los procedimientos judiciales

Posteriormente, se deroga la *Ley para fijar procedimientos judiciales* y se deroga la sección 7 de la *Ley para reglamentar el ingreso de Pacientes a Hospitales o establecimientos para enfermedades mentales y para otros fines* mediante la aprobación de la Ley Núm. 105 de 26 de junio de 1962.[27] A pesar de dichas derogaciones, su vigencia se muestra latente mediante la Ley Núm. 105 de 26 de junio de 1962.[28] Ello se debe a que no hubo ningún cambio en el proceso judicial para ordenar el ingreso involuntario del demandado. La única diferencia estriba en la opción de presentar un recurso apelativo si el demandado —o el representante legal— no estuviere conforme con la sentencia emitida por el Tribunal de Distrito.[29]

El objetivo principal de la Ley era regular lo siguiente: (1) la admisión de los pacientes a hospitales y establecer tratamientos necesarios; (2) los procedimientos judiciales para ordenar el ingreso involuntario, y (3) las formas para la alta y baja de pacientes en el hospital psiquiátrico.[30] No se puede perder de perspectiva que cuando se creó la Ley Núm. 105 de 26 de junio de 1962 ya estaba vigente la Constitución de Puerto Rico. Por consiguiente, surge la interrogante de si esta Ley cumple con los estándares constitucionales de no discriminar por condición social y si esta cumple con el debido proceso de ley en su vertiente procesal y sustantiva.[31] En particular, la primera sección del artículo II de la Constitución de Puerto Rico dispone que:

> La dignidad del ser humano es inviolable. Todos los hombres son iguales ante la Ley. No podrá establecerse discrimen alguno por motivo de raza, color, sexo, nacimiento, origen o condición social, ni ideas políticas o religiosas. Tanto las leyes como el sistema de instrucción pública encarnarán estos principios de esencial igualdad humana.[32]

Además, la sección 6 del artículo II de la Constitución de Puerto Rico dispone que "[n]inguna persona será privada de su libertad o propiedad sin un debido proceso de ley, ni se negará a persona alguna en Puerto Rico la igual protección

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[27] Ley para enmendar el título y la sección 4, y derogar la sección 7 de la Ley Núm. 235 aprobada el 12 de mayo de 1945; para añadir las secciones 10 al 34 a la Ley Núm. 235 de 12 de mayo de 1945; para derogar la Ley fijando los procedimientos judiciales en casos de demencia y proveyendo para las altas y bajas de pacientes en el manicomio aprobada el 14 de marzo de 1907, Ley Núm. 105 de 26 de junio de 1962, 1962 LPR 287.

[28] *Id*. en las págs. 287-95.

[29] *Id*. en la pág. 289.

[30] *Id*. en las págs. 287-95.

[31] CONST. P.R. art. II, §§ 1, 7.

[32] *Id.* § 1.

de las leyes".[33] Al estudiar dichas disposiciones constitucionales resulta forzoso concluir que la Ley es inconstitucional de su faz por no cumplir con las salvaguardias constitucionales de un debido proceso de ley y al discriminar contra las personas ingresadas por su condición social. Tan es así que el juez superior Abner Limardo declaró inconstitucional el procedimiento judicial llevado a cabo para el ingreso involuntario del demandado en el caso de *Carmen Santiago v. Dr. Carlos Aviles y otros*.[34]

El proceso judicial violó las garantías constitucionales del demandado al discriminar contra este tras establecer un procedimiento de naturaleza criminal en lugar de ser uno de naturaleza civil. De igual forma, se violentó el debido proceso de ley en su vertiente procesal tras no ofrecer una debida notificación sobre el proceso del ingreso involuntario y el término por el cual estaría recluido. La persona ingresada podía salir del hospital psiquiátrico en cuatro instancias:

1. Cuando el superintendente o director certifique su sanidad mental.
2. Cuando su condición mental no lo constituyere en un peligro para la comunidad.
3. Si lo solicitaren los familiares y su condición mental no lo constituyere peligro para la comunidad.
4. Cuando aún siendo enfermo mental lo solicitaren sus familiares y se constituyese una fianza. . . .[35]

Se puede apreciar que solamente el Tribunal, el Director del hospital o un familiar eran quienes tenían la llave para sacar a la persona ingresada del hospital psiquiátrico. Se podía dar el caso en que la persona estaba recuperada o rehabilitada, pero al no tener la orden del Tribunal, la certificación del Director del hospital o la solicitud de un familiar permanecía ingresada injustificadamente.

La única diferencia entre la Ley Núm. 105 de 26 de junio de 1962 y aquellas derogadas estriba en la posible presentación del recurso de apelación sobre la sentencia emitida por el Juez de Distrito.[36] Si el familiar o el demandado entendía

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[33] *Id*. § 7.

[34] Véase Exposición de motivos, Código de salud mental, Ley Núm. 112 de 12 de junio de 1980, 1980 LPR 419, donde hace referencia al Tribunal Superior de Puerto Rico sobre la inconstitucionalidad del procedimiento judicial llevado a cabo en el caso de *Carmen v. Dr. Carlos Avilés y otros* (San Juan, 9 de marzo de 1979) (citas omitidas).

[35] Ley para enmendar el título y la sección 4, y derogar la sección 7 de la Ley Núm. 235 aprobada el 12 de mayo de 1945; para añadir las secciones 10 al 34 a la Ley Núm. 235 de 12 de mayo de 1945; para derogar la Ley fijando los procedimientos judiciales en casos de demencia y proveyendo para las altas y bajas de pacientes en el manicomio aprobada el 14 de marzo de 1907, Ley Núm. 105 de 26 de junio de 1962, 1962 LPR 287, 293-94.

[36] *Id*. en la pág. 289.

que erró el Juez de Distrito, este tenía un término jurisdiccional de quince días para apelar dicha sentencia.[37] Según dispone la Ley, "[e]l juicio de esas apelaciones [tenían] preferencia sobres [los] casos civiles y criminales que estuviesen pendientes ante el Tribunal Superior".[38]

Eventualmente, la Ley Núm. 105 de 26 de junio de 1962 fue derogada en el año 1980 por el *Código de Salud Mental de Puerto Rico* [en adelante, "*Código de salud mental*"]. Pretendía el *Código de salud mental* hacer valer las garantías constitucionales —así como el debido proceso de ley y el derecho a la dignidad del ser humano— pero dicho propósito quedó frustrado ante la falta de recursos y servicios médicos para atender a las personas ingresadas.[39] Al tener como base la protección de las garantías constitucionales, se contempla un cambio drástico en el proceso judicial para el ingreso involuntario y en el servicio dado a las personas ingresadas. Este cambio es producto de dos problemas que había con los ingresos involuntarios: la inconstitucionalidad del proceso judicial llevado a cabo y el servicio inadecuado dado a las personas ingresadas.

El procedimiento judicial era mediante una petición que realizaba un familiar, amigo o persona que entendía que la persona que sufría de algún trastorno mental se hacía daño a sí mismo, a otros o a la propiedad. Se exigía que, en los casos de emergencia, la petición fuese radicada con una declaración del peticionario, en la que mostrara la necesidad del ingreso involuntario del peticionado, junto con una certificación de un psiquiatra que estableciera la necesidad de ingresar al peticionario.[40] Dicha certificación no era aceptada por el tribunal si había sido emitida más de setenta y dos horas previas a la petición.[41] Por otra parte, el tribunal estaba facultado para expedir órdenes de detención temporera. Ello ocurría después que el tribunal evaluaba el certificado emitido por el psiquiatra y la juramentación ofrecida por el peticionario. Es importante descartar que no podía exceder la examinación temporera por más de veinticuatro horas a menos que el psiquiatra determinara que era necesario. Si el psiquiatra determinaba que era meritorio que la persona continuara ingresada, no podía excederse de setenta y dos horas la extensión de dicho ingreso.[42] De ser ingresado temporeramente, el Tribunal establecía una vista formal de seguimiento dentro de cinco días, después de las veinticuatro horas de haber sido ingresado el peticionado. En la mencionada vista de seguimiento se

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[37] *Id.*

[38] *Id*.

[39] CARLOS GIL, LA LEY DE SALUD MENTAL DE PUERTO RICO: MANUAL DE MANEJO 19 (2010).

[40] Código de salud mental de Puerto Rico, Ley Núm. 116 de 12 de junio de 1980, 1980 LPR 418, 440-41.

[41] *Id*. en la pág. 441.

[42] *Id*. en la pág. 442.

mostraba el certificado realizado por el psiquiatra con el fin de evaluar el progreso del demandado.[43]

Según se desprende del procedimiento para el ingreso involuntario, se muestra que era de naturaleza civil distanciándose del proceso implementado en las leyes derogadas mencionadas anteriormente. Ciertamente, esta Ley vela por el cumplimiento del debido proceso de ley al estipular términos cortos de veinticuatro horas y hasta un máximo de setenta y dos horas para la detención del peticionado, si se llegase a probar que era meritorio su ingreso. Solo se extendía de setenta y dos horas cuando se probaba ante el Tribunal la necesidad y pertinencia de que la persona permaneciera recluida. De igual forma, se muestra el intento de erradicar los prejuicios y estigmas en cuanto no identificaba al peticionado como *demente*, *loco* y, mucho menos, *acusado* al emitir su ingreso involuntario. No obstante, lo preocupante del proceso judicial que implementó esta Ley es la vaguedad en la aplicación de dicho procedimiento a adultos mayores de dieciochos años, menores y a los acusados de delito menos grave. Esta trata de establecer una distinción en el procedimiento que se debería dar al depender de si el peticionado era adulto, menor o acusado, pero falló en distinguir la aplicación para estos. La labor judicial —a diferencia de las leyes derogadas— no culminaba con la expedición o no del ingreso involuntario, ya que esta Ley exigió que el tribunal velara por los derechos y la garantía de los servicios a las personas ingresadas por orden judicial mediante una vista formal de seguimiento.

Una vez se radica la petición para ordenar el ingreso involuntario del peticionado, se activan todas aquellas protecciones que consagra la Constitución de Puerto Rico y los derechos que pauta la propia Ley. Explícitamente dispone que el peticionado será protegido por los derechos que dispone la Ley y la Constitución "[m]ientras esté recibiendo tratamiento, cuido y custodia o habilitación, así como durante el proceso de admisión y de dar de alta de una facilidad de salud mental".[44] En el momento en que el tribunal ordenaba la reclusión, la restricción de la persona ingresada en el hospital tenía que ser como medida terapéutica con la finalidad de no causar daño a sí mismo ni a otros. Por tanto, el psiquiatra no podía limitar la restricción al peticionado de poseer y usar sus efectos personales a menos que este entendiera que de no restringirle se podría causar daño a sí mismo o a otros.[45] Bajo la creencia de que la restricción debía ser terapéutica era que se le concedía al peticionado el uso de su dinero según tenga a bien. Además, podía realizar trabajos en la facilidad e incluso podía negarse a recibir cualquier tipo de servicio. Solo se limitaban esos derechos si el psiquiatra entendía que de no restringírseles se podía causar daño a sí mismo o a otros.

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[43] *Id*. en la pág. 443.

[44] *Id*. en la pág. 423.

[45] *Id*. en la pág. 426.

Sin embargo, el licenciado Gil establece que "[n]o empece recoger la preocupación social de la violación de los derechos al debido proceso de ley y la intimidad, la falta de recursos para la implementación y la ambigüedad de muchas disposiciones hicieron impracticable los propósitos de la Ley".[46] Por ende, en muchas instancias se tornó inefectiva y fútil el ingreso involuntario de las personas recluidas. Dicha inefectividad ha tenido unas consecuencias que hasta el día de hoy acarreamos. Sus resultados estriban en el cúmulo de personas ingresadas sin recibir un debido tratamiento, el aumento de casos de esta índole y la necesidad de programas educativos que promuevan la prevención y tratamiento. Debido a la falta de recursos y a las implicaciones que esto derivó, se creó la Administración de Servicios de Salud Mental y contra la Adicción, y se unió, así, la Secretaria Auxiliar de Salud Mental y la Administración de servicios contra la Adicción. De igual forma, para el año 1992 se promulgó una Reforma de Salud, la cual tuvo un impacto en los recursos ofrecidos en el campo de la salud de la siguiente manera:

> Por virtud de Ley 72 del 7 de septiembre de 1993, se creó la Administración de Seguros de Salud de Puerto Rico (ASES) para establecer el Seguro de Salud del Gobierno de Puerto Rico y para asignar los fondos para su implantación. La Reforma se basó en la idea del *cuidado dirigido*: un sistema de salud costoefectivo, basado en un modelo orgánico, no psíquico, de la enfermedad mental. Chocan así dos modelos de prestaciones de servicios: el del cuido continuo de los centros comunitarios, y el del Manage Care de la Reforma. La consideración de los servicios a prestarse pasaba ahora por la determinación administrativa costoefectiva, no necesariamente médica. La Reforma, entonces, produjo un progresivo desmantelamiento de los Centros de Salud Mental de la Comunidad.[47]

La composición del sistema de salud en Puerto Rico es uno dual por ser público-privado. Esto es así, pues convergen los proyectos de seguros de salud público y privado para atender a las personas que necesiten servicios médicos de esta índole. Esto trae como consecuencia la derogación del *Código de Salud Mental* mediante la aprobación de la *Ley de salud mental*—vigente hoy día— para atemperar el interés público con la prestación privada de servicios de salud mental.[48]

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[46] CARLOS GIL, LA LEY DE SALUD MENTAL DE PUERTO RICO, *supra* nota 41, en la pág. 19.

[47] *Id*. en la pág. 19.

[48] *Id*. en la pág. 20.

III. ¿Inefectiva la orden de ingreso involuntario mediante Ley de salud mental en Puerto Rico?

A diferencia de las leyes derogadas mencionadas anteriormente, se desprende de la exposición de motivos de la *Ley de salud mental* el interés del Estado en velar y proteger la salud mental de los puertorriqueños.[49] Ello se debe a que considera que está revestido de un alto interés público por ser el "elemento matriz de la sana convivencia y de una buena calidad de vida".[50] Más allá del alto interés público, consideramos que lo más importante es el reconocimiento y la protección de las garantías constitucionales que cobija a todo puertorriqueño cuando el Estado interviene para ingresarlo de forma involuntaria a un hospital psiquiátrico. Es por esto que la Rama Legislativa mediante la *Ley de salud mental* le impone dos obligaciones a la Rama Judicial cuando tenga ante sí casos de esta índole: garantizar el debido proceso de ley durante el procedimiento judicial y garantizar el acceso a los servicios médicos mediante un sistema de servicios de tratamiento, recuperación y rehabilitación para el peticionado que sufra de trastorno mental. Es por ello que dicha ley tiene como propósito lo siguiente:

> Actualizar las necesidades de tratamiento, recuperación y rehabilitación; proteger a las poblaciones afectadas por trastorno mentales con unos servicios adecuados a la persona; consignar de manera inequívoca sus derechos a recibir los servicios de salud mental, incluyendo los de menores de edad; *promover la erradicación de los perjuicios y estigmas contra la persona que padece de trastorno mentales*; proveer unas guías precisas a los profesionales de la salud mental sobre los derechos de las personas que reciben servicios de salud mental; determinar los procesos necesarios para salvaguardar los derechos [de los pacientes]; armonizar los cambios que han experimentado las instituciones que proveen servicios con el establecimiento de la Reforma de Salud; resaltar y establecer los principios básicos y los niveles de cuidado en los servicios prestados; y destacar los aspectos de recuperación y rehabilitación como parte integrante del tratamiento así como la prevención.[51]

Veremos que dicho propósito podría quedar frustrado ante la falta de recursos médicos existentes hoy día. No obstante, consideramos importante exponer primero la aplicabilidad de la Ley y cuál es el procedimiento judicial creado para atender los casos de esta índole.

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[49] Exposición de motivos, Ley de salud mental de Puerto Rico, Ley Núm. 408-2000, 2000 LPR 2675.

[50] *Id*.

[51] *Id.* en la pág. 2675 (énfasis suplido).

A. Procedimiento Judicial

Las disposiciones de la Ley son de aplicación a menores, adultos de dieciochos años en adelante y a las personas diagnosticadas con uso y abuso de drogas y alcohol.[52] El procedimiento judicial establecido para determinar si la persona necesita hospitalización o tratamiento compulsorio no se distancia mucho del establecido en el *Código de Salud Mental*. La diferencia estriba en que la *Ley de salud mental* expone a mayor profundidad cómo esta se aplicaría si fuese necesaria la hospitalización o el tratamiento compulsorio a un menor o adulto.[53] Sin embargo, a pesar que expone en secciones diferentes la aplicación de la ley para estos, al momento de ordenar el ingreso involuntario esta los trata a ambos "parcialmente" iguales. Es decir, a pesar de que sus procedimientos son parecidos, estos se distancian en el término en que el peticionado estará ingresado. Veamos.

Cualquier individuo puede solicitarle al tribunal una petición de ingreso involuntario por un término máximo de quince días o el tratamiento compulsorio cuando tenga razones suficientes para pensar que la persona —ya sea menor o adulto— padece de trastorno mental severo, bajo el cual pueda causarse daño a sí mismo, a otros o a la propiedad. A su vez, es posible la detención temporera de veinticuatro horas, pero este escenario solo está disponible para adultos. Su procedimiento judicial consiste en que el tribunal determine su ingreso a base de las razones y fundamentos que el peticionario realizó mediante juramento.[54] Si llegase a expedir la orden, "se le dará el tratamiento, según la severidad de los síntomas y signos en el momento por un periodo que no excederá las 24 horas".[55] A pesar de no existir una detención temporera de veinticuatro horas para menores, sí está disponible el ingreso de emergencia. El ingreso de emergencia del menor se llevará a cabo cuando un psiquiatra en conjunto con un equipo inter o multidisciplinario de la institución determinen que es meritorio su ingreso.[56] La diferencia entre la detención temporera de veinticuatro horas para adultos y el ingreso de emergencia para menores consiste en el término del ingreso. Ello, pues para el adulto solo durará veinticuatro horas dicho ingreso,[57] mientras que el menor puede estar hospitalizado

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[52] Para efectos de la ley, se considera la persona adulta si esta tiene 18 años o más.

[53] *Véase* Ley de salud mental de Puerto Rico, Ley Núm. 408-2000, 24 LPRA §§ 6154-6157 , 6158-6162e (2011).

[54] Dicha orden se dejará sin efecto dentro de tres días después de su expedición.

[55] 24 LPRA § 6155*l*.

[56] *Id*. § 6159*l*. El equipo multidisciplinario significa un grupo de tres o más profesionales de la salud mental con capacidad, facultad profesional y legal para diagnosticar y prescribe tratamiento en las diferentes áreas del funcionamiento y las capacidades del ser humano, y por aquellos otros profesionales pertinentes a la condición de la persona, relacionados en un mismo escenario. *Id.* § 6152b.

[57] Cabe la posibilidad que al adulto se le extienda el término de ingreso involuntario. Esto tendrá lugar solo cuando el psiquiatra y el tribunal lo estimen necesario.

hasta que el tribunal lo entienda necesario. Ciertamente, es peligroso que la Ley no le otorgue un término fijo al menor —así como lo hace con un adulto— pues se le concede cierta arbitrariedad al tribunal para disponer el momento en que pueda ser dado de alta.

Por otra parte, la petición para el ingreso involuntario por quince días de un menor o adulto son similares. La petición al solicitar el ingreso involuntario por el término máximo de quince días a un menor debe ir acompañada por un certificado de un psiquiatra que lo haya evaluado. Si el tribunal expidiese la orden, se establecerá una vista de seguimiento dentro de los próximos siete días para evaluar la continuación o cese del ingreso involuntario.[58] En dicha vista se evalúa si el peticionado está recibiendo un adecuado servicio y, también, se determina si procede extender el término por quince días adicionales si llegase a ser meritorio.[59] A nuestro juicio, las vistas de seguimiento juegan un papel importante, ya que allí el tribunal puede contemplar si se le ofrece al peticionado los servicios médicos requeridos para su rehabilitación, prevención y el logro de mayor autonomía. El tribunal, en la vista de seguimiento, se enfoca en los siguientes factores para determinar si se le está ofreciendo un adecuado servicio al peticionado: (1) acceso a los servicios sujeto a la condición del peticionado; (2) un sistema de cuidado continuado que promueva el debido tratamiento, recuperación y rehabilitación; (3) un sistema de cuidado comprensivo basado en la planificación y el cuidado que necesite; (4) un nivel de cuidado según la necesidad identificada en la evaluación; (5) programas de prevención y capacitación para la intervención temprana de la conducta antisocial de menores, e (6) intervenciones colaborativas multi-estratégicas en comunidades vulnerables y de alta incidencia.[60] Se contempla en la vista de seguimiento si es meritorio extender el término del ingreso involuntario. Si el menor desea que sea dado de alta antes de la vista de seguimiento, solo lo podrá hacer mediante la persona que ostente patria potestad, quien sea el tutor legal o el doctor del hospital.[61]

El ingreso involuntario por el término máximo de quince días es parecido al procedimiento utilizado para un adulto. Sin embargo, el proceso adjudicado al menor se distancia del que se adjudica a un adulto en tres aspectos importantes: el periodo de tiempo de evaluación del psiquiatra previo a la presentación de la petición, el término concedido para la vista de seguimiento y quiénes pueden solicitar que se dé de alta al peticionado. Mientras que en el proceso judicial del menor se exige que la certificación del psiquiatra haya sido dentro de dos días previos a la presentación,[62] para la certificación de un adulto debe ser dentro de veinticuatro horas previo a la

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[58] 24 LPRA § 6159p.

[59] *Id*.

[60] *Id*. §§ 6155-6162e.

[61] *Id*. § 6159r.

[62] *Id.* § 6159p.

presentación de la petición.[63] En el caso de un menor, la vista de seguimiento se debe dar dentro de los próximo siete días,[64] mientras que dicha vista se debe dar dentro de los cinco días próximos si fuese el caso de un adulto.[65] Finalmente, un menor ingresado no tiene posibilidad de solicitarle al tribunal que lo dé de alta, mientras que un adulto ingresado sí lo puede hacer. El legislador es silente ante la razón por la cual se observan estas diferencias en el ingreso involuntario entre un menor y un adulto. Ante tal silencio, es preocupante desconocer estas diferencias, pues se muestra en el proceso judicial un desequilibro y desigualdad en el trato de un menor y adulto al momento de ser ingreso.

i. Cantidad de órdenes expedidas

Además de la preocupación que genera dicha disparidad entre un menor y un adulto en el proceso judicial, más preocupante aun es la cantidad de órdenes de ingresos involuntarios que expide el Tribunal de Primera Instancia anualmente. Esto se refleja en los datos estadísticos que emite la Rama Judicial en sus informes estadísticos anuales sobre las órdenes expedidas por los tribunales de Puerto Rico. A continuación, se muestran los datos estadísticos de las órdenes expedidas desde el año fiscal 2009-2010 hasta 2016-2017:[66]

TABLA 1. ÓRDENES EXPEDIDAS EN LAS SALAS MUNICIPALES

Año Fiscal	Órdenes expedidas
2009-2010	13, 283
2010-2011	12, 066
2011-2012	11, 794
2012-2013	12, 513
2013-2014	11, 893
2014-2015	12, 428
2015-2016	11, 214
2016-2017	10, 455

[63] *Id.* § 6155m.
[64] *Id.* § 6159p.
[65] *Id.* § 6155m.
[66] INFORME ANUAL DE LA RAMA JUDICIAL: ANUARIO ESTADÍSTICO 2009-2010, 207 (2011); INFORME ANUAL DE LA RAMA JUDICIAL: ANUARIO ESTADÍSTICO 2010-2011, 195 (2012); INFORME ANUAL DE LA RAMA JUDICIAL: ANUARIO ESTADÍSTICO 2011-2012, 185 (2013); INFORME ANUAL DE LA RAMA JUDICIAL: ANUARIO ESTADÍSTICO 2012-2013, 185 (2014); INFORME ANUAL DE LA RAMA JUDICIAL: ANUARIO ESTADÍSTICO 2013-2014, 187 (2016); INFORME ANUAL DE LA RAMA JUDICIAL: ANUARIO ESTADÍSTICO 2014-2015, 156 (2017); INFORME ANUAL DE LA RAMA JUDICIAL: ANUARIO ESTADÍSTICO 2015-2016, 151 (2018); INFORME ANUAL DE LA RAMA JUDICIAL: ANUARIO ESTADÍSTICO 2016-2017, 141 (2019). Al momento de redactar el presente artículo, estos son los datos más recientes que publicó la Administración de los Tribunales en Puerto Rico.

Las altas cifras de las órdenes expedidas anualmente confirman el cuadro crítico existente en Puerto Rico.[67] Estas altas cifras de expedición de órdenes para ingreso involuntario traen consigo la preocupación de que estén disponibles los recursos y servicios médicos necesarios con miras a rehabilitar a las personas ingresadas.[68] De igual forma, surge la interrogante sobre cómo los tribunales municipales o superiores atienden estos casos, ya que amerita que se les brinde un procedimiento judicial terapéutico distinto al procedimiento judicial que ofrecen los tribunales de Puerto Rico al resto de los casos. Ello se debe, principalmente, a que la *Ley de salud mental* busca la mayor autonomía, rehabilitación, tratamiento y prevención de las personas ingresadas.[69] Para ello es pertinente y necesario que el Juez o la Jueza que presida la sala no se limite a expedir una orden de ingreso involuntario cuando tenga ante sí todos los requisitos para su expedición; más bien, es necesario que el Juez o la Jueza ofrezca vistas de seguimiento para evaluar si la persona ingresada está rehabilitándose. Ante ello, uno de los factores que ayudará a que las vistas de seguimiento sean efectivas estriba en que el Juez o la Jueza tenga un conocimiento básico sobre el campo de la salud mental. Es decir, no se debe limitar al conocimiento de la ley y de la ley especial de salud mental, sino, también, a los aspectos de la salud mental que atiende la *Ley de salud mental*. Ello será de gran utilidad para el manejo de los casos y el proceso de rehabilitación de las personas ingresadas.

Tomar lo anterior en consideración, a raíz de las altas cifras expedidas, amerita que miremos más de cerca la cantidad de órdenes expedidas por cada región durante el año fiscal de 2016-2017. Es por ello que a continuación se ilustra una tabla donde se muestra la cantidad de órdenes expedidas por los centro judiciales del Tribunal de Primer Instancia durante el año fiscal más reciente, 2016-2017:[70]

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[67] Valga resaltar que dichos datos son aquellos casos que se presentan en el tribunal bajo la *Ley de Salud Mental*. Esto no refleja todos los casos de salud mental, pues la persona puede acudir directamente al hospital psiquiátrico sin la intervención del tribunal.

[68] Agencia EFE, *Psiquiatra alertan de la falta de especialistas para menores,* PRIMERA HORA (22 de octubre de 2018), https://www.primerahora.com/noticias/puerto-rico/nota/psiquiatrasalertandelafaltadeespecialistasparamenores-1308224/.

[69] *Véase* Exposición de motivos, Ley de salud mental de Puerto Rico, Ley Núm. 408-2000, 2000 LPR 2665-67.

[70] INFORME ANUAL DE LA RAMA JUDICIAL: ANUARIO ESTADÍSTICO 2016-2017, *supra* nota 69. "El Tribunal de Primera Instancia se divide en trece regiones judiciales. Cada región está compuesta por un centro judicial y sus respectivas salas superiores y municipales". *Id.* en la pág. 2. *Valga puntualizar que el número de órdenes expedidas de los trece centros judiciales mencionados en la tabla responden a la sumatoria total que expidieron sus respectivas salas superiores y municipales*.

TABLA 2. ÓRDENES EXPEDIDAS DURANTE EL AÑO FISCAL 2016-2017

Centro Judicial	Órdenes expedidas
Aguadilla	406
Aibonito	289
Arecibo	598
Bayamón	2, 473
Caguas	707
Carolina	548
Fajardo	603
Guayama	399
Humacao	308
Mayagüez	519
Ponce	872
San Juan	2, 554
Utuado	179
Total	**10, 455**

Cabe notar que, del total de órdenes expedidas durante dicho año fiscal, no se muestran cuáles son, específicamente, aquellas expedidas para menores o adultos. Tampoco se muestra si las órdenes expedidas son temporeras o por el término máximo de quince días. No obstante, sí se puede observar que las cinco regiones con más órdenes expedidas son Bayamón, Caguas, Fajardo, Ponce y San Juan, mientras que las dos regiones con menos órdenes expedidas son Aibonito y Utuado. Una de las razones por la cual es importante conocer las cifras de las órdenes expedidas consiste en vislumbrar los efectos, en cuanto al aumento en los casos pendientes por adjudicar en los tribunales, debido a los altos números de casos presentados sobre la *Ley de salud mental*. Otra de las razones estriba en la posibilidad de reincidencia por falta de recursos para atender a las personas ingresadas. Ello podría tener como resultado el cúmulo de casos de esta índole en los tribunales municipales y superiores.

En el año 2014, la Directoría de Programas Judiciales de la Oficina de Administración de los Tribunales decidió llevar a cabo un proyecto piloto, conocido como *Proyecto para la atención de asuntos de salud mental* [en adelante, "*PAAS*"], para que los tribunales atendieran de forma especializada estos casos. Ello responde a que se atendían estos mismos casos de forma especializada para cumplir con la política pública de una sana convivencia en nuestra sociedad, la rehabilitación de las personas que sufran de algún padecimiento mental y la

implementación de un procedimiento judicial terapéutico. Por tanto, discutiremos a continuación la pertinencia de la expansión del proyecto PAAS en las regiones judiciales en Puerto Rico.

IV. La pertinencia de la implementación del proyecto PAAS en las regiones judiciales

La *Ley de la Judicatura de Puerto Rico* le concede a la Jueza Presidenta las facultades y prerrogativas para administrar el Tribunal General de Justicia. Entre ellas está la asignación de jueces a salas especializadas, mientras toma en cuenta la adjudicación de los casos y controversias de manera justa, rápida y eficiente.[71] Por tanto, la Jueza Presidenta podrá crear una sala especializada cuando entienda que es necesaria para atender los casos que por su naturaleza ameriten atención particular debido a la complejidad que el mismo deriva.[72] De esta manera se le asegura al ciudadano la accesibilidad de horarios flexibles y se evita la congestión en el tráfico de casos.[73] Con la implementación de las salas especializadas en Puerto Rico se concretizan los siguientes objetivos y principios fundamentales de la Rama Judicial: (1) ofrecer accesibilidad a la ciudadanía; (2) suministrar servicios de manera equitativa; (3) operar de forma sensible con un enfoque humanista; y (4) resolver de forma efectiva y rápida los casos.[74] Por consiguiente, las salas especializadas no son iguales a las cortes tradicionales, ya que la corte especializada además de interpretar y aplicar la ley, el rol del juez constituye un ente activo que da importancia al individuo y enfoca su intervención en forma *terapéutica*.[75]

Ante la complejidad de los casos de salud mental y el alto número de órdenes expedidas, nace en el 2014 el proyecto PAAS, adscrito a la Directoría de Programa Judiciales, el cual reconoce que los ingresados bajo la *Ley de salud mental* merecen ser atendidos de manera justa, sensible e integral.[76] Este proyecto se inició en la región de San Juan con la misión de "garantizar el derecho de los pacientes y sus familiares, a obtener los servicios que les permitan gozar del mejor estado de salud posible, a la vez que le provee a los miembros de la Judicatura la estructura de apoyo necesaria para la consecución de este fin".[77] Su propósito gira en torno a garantizar la rehabilitación, prevención y tratamiento al peticionado mediante el acceso a los

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[71] Ley de la Judicatura de Puerto Rico, Ley Núm. 201-2003, 4 LPRA § 24*l* (2018).

[72] *Id.*

[73] *Id*.

[74] *Id*. § 24a.

[75] *Id*.

[76] INFORME ANUAL 2013-2014: RAMA JUDICIAL DE PUERTO RICO 14-16 (2014); INFORME ANUAL 2014-2015: RAMA JUDICIAL DE PUERTO RICO 56-59 (2015).

[77] INFORME ANUAL 2014-2015, *supra* nota 81, en la pág. 56.

servicios con el fin de lograr la mayor autonomía de este.[78] Posteriormente, en el 2015, el proyecto PAAS se expandió a la región de Mayagüez.[79]

La estructura y composición del proyecto PAAS consiste en la designación de un Juez con conocimiento especializado en el campo de la salud mental.[80] Este recibe taller de capacitación ofrecido por la Directoría de Programas Judiciales y le asiste un Coordinador que brinda apoyo a la gestión judicial. Dicho coordinador funge una labor importante, pues calendariza los días y horarios específicos para las vistas de ingreso o tratamiento compulsorio y las vistas de seguimientos dentro del corto tiempo pautado en la ley.[81] De igual forma, es quien tiene estrecha relación con las organizaciones, agencias y sectores multisectoriales para garantizar que el peticionado tenga acceso a los servicios médicos y a una debida representación legal.[82] Según el informe anual 2014-2015 de la Rama Judicial, las agencias y los sectores multisectoriales que colaboran con la sala del PAAS son: la Administración de Servicios de Salud Mental y Contra la Adicción, la Administración de Seguros de Salud, *APS Healthcare* Puerto Rico y el municipio de San Juan.[83]

El proyecto PAAS canaliza los casos con un enfoque terapéutico, ya que responde a uno de los objetivos principales de la Rama Judicial en presentar "servicios de manera equitativa, sensible y con un enfoque humanista. . .".[84] Es por esto que los jueces y juezas que presiden estas salas tienen un perfil activo, dinámico y con conocimiento especializado en la materia. Se puede apreciar el enfoque terapéutico en sala mediante las vistas de seguimiento y la supervisión intensiva que exige la *Ley de salud mental*. Allí se discuten los informes o certificaciones de los doctores para evaluar el progreso o los ajustes necesarios para el peticionado. A su vez, desarrolla un plan individualizado de tratamiento que integra los servicios esenciales con el fin de lograr la rehabilitación del peticionado.

Según el informe anual 2014-2015 de la Rama Judicial, el proyecto PAAS ha tenido resultados positivos al disponer que:

> Las estrategias empleadas a través del PAAS han mejorado los procedimientos internos, promoviendo una atención multidisciplinaria de los asuntos característicos de la población con trastornos mentales cuando ha requerido la intervención del Tribunal, para asegurar el bienestar y la protección de la persona afectada. Del mismo modo, han aportado al

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[78] *Id*.

[79] *Id*. en la pág. 57.

[80] INFORME ANUAL 2013-2014, *supra* nota 81, en las págs. 14-15.

[81] *Id.* en la pág. 15.

[82] INFORME ANUAL 2014-2015, *supra* nota 81, en la pág. 56.

[83] *Id*.

[84] Ley de la Judicatura de Puerto Rico, Ley Núm. 201-2003, 4 LPRA § 24a (2018).

> mejoramiento de los procesos de comunicación entre la Rama Judicial, las instituciones hospitalarias y otros proveedores de servicios de salud. Ello ha agilizado el intercambio de información requerida para el trámite de los casos en los que se ha solicitado un remedio al amparo de la Ley Núm. 408-2000, conocida como la Ley de Salud Mental.[85]

El proyecto PAAS de San Juan atendió más de 1,400 casos en el año fiscal 2014-2015.[86] Estos datos estadísticos representaron un aumento en la presentación de casos en comparación con los presentados entre enero a junio del 2014.[87] Se dieron más de 3,500 vistas de seguimientos en las cuales se "[r]equirió la canalización y coordinación de servicios para contribuir a garantizar la protección de los [peticionados]". [88]

Según refleja dicho informe, se valida la pertinencia de tener el proyecto PAAS en las diferentes regiones debido a que responde a los dos objetivos principales de la *Ley de salud mental*: asegurar las protecciones constitucionales en el proceso judicial y garantizar que el peticionado reciba los servicios médicos necesarios. Sin embargo, surge la preocupación en cuanto al trato desigual entre regiones que atienden estos casos. Esto, pues el proyecto PAAS provee herramientas para el manejo de los procedimientos de ingreso involuntario que no tienen una sala tradicional. El proyecto PAAS cumple con las exigencias de la *Ley de salud mental* en cuanto al tratamiento, rehabilitación y prevención de las personas ingresadas. A su vez, como se indicó anteriormente, amerita que los jueces o juezas que atiendan estos casos tengan un conocimiento —aunque sea básico— sobre el campo de la salud mental. Ello ayudaría en el proceso de rehabilitación, prevención y tratamiento de la persona ingresada.

La pertinencia de crear las salas especializadas en las diferentes regiones e instruir a los jueces y juezas que atiendan dichos casos proviene implícitamente de la *Ley de salud mental*. La forma en que el legislador redactó la ley hace que sea necesaria una sala especializada para atender dichos casos. Esto lo vemos en la exposición de motivos de la Ley,[89] el proceso riguroso de las vistas de seguimientos,[90] y en la finalidad de la Ley en cuanto a la rehabilitación, prevención y tratamiento de la persona ingresada.[91] Se torna aún más pertinente la expansión del proyecto PAAS

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[85] INFORME ANUAL 2014-2015, *supra* nota 81, en la pág. 56.

[86] *Id*.

[87] *Id*.

[88] *Id*.

[89] *Véase* Exposición de motivos, Ley de salud mental de Puerto Rico, Ley Núm. 408-2000, 2000 LPR 2665-67.

[90] Ley de salud mental de Puerto Rico, Ley Núm. 408-2000, 24 LPRA §§ 6152-6166g (2011 & Supl. 2018).

[91] *Id.*

tras el paso del huracán María, a través del cual se pudo palpar un aumento en la atención de la salud mental de los puertorriqueños.[92] Esto llevó a la promulgación de la *Ley para la prevención del suicidio en todas las facilidades y edificios del Gobierno de Puerto Rico* [en adelante, "*Ley para la prevención del suicidio*"].[93]

El fin de la *Ley para la prevención del suicidio* consiste en crear un programa de orientación y difusión para la prevención del suicidio en todas las dependencias del Gobierno de Puerto Rico, adscrito a la Administración de Servicios de Salud Mental y Contra la Adicción [en adelante, "ASSMCA"].[94] Consideramos que la implementación de estos programas podría ser de utilidad para disminuir la expedición de órdenes para el ingreso involuntario de personas que desean hacerse daño a sí mismas. No obstante, la Ley es vaga y escueta en cuanto a cómo se debe implementar dicho programa. Más bien, le impone la responsabilidad a ASSMCA para que realice todo trámite, reglamento y proyecto necesario para un programa de educación y difusión sobre la prevención del suicidio.[95] Ante ello, al ser ASSMCA la única administración pública existente en el País que atiende asuntos de esta índole, amerita evaluar si la misma cuenta con los recursos necesarios para llevar a cabo lo dispuesto en la *Ley para la prevención de suicidio*. De no obtener los recursos, frustraría el propósito de la ley y la ayuda para disminuir la expedición de órdenes mediante la *Ley de salud mental*.

V. Conclusión

Ante la realidad y seriedad sobre la problemática de salud mental en Puerto Rico, es meritorio que se fortalezca la efectividad del ingreso involuntario promulgada en la *Ley de salud mental* mediante la implementación de salas especializadas, capacitación a los jueces y las juezas sobre el campo de la salud y la disponibilidad de recursos para atender a las personas ingresadas. Consideramos que ello ayudaría a disminuir las altas cifras de órdenes expedidas anualmente. Más importante aún, se lograría obtener la mayor autonomía de las personas ingresadas.

Además de fortalecer la efectividad en la expedición de órdenes para el ingreso involuntario, es de vital importancia velar por el cumplimiento del debido proceso de ley consagrado en nuestra Constitución contra las personas ingresadas. De esta forma se logra evadir el trato inadecuado dado contra las personas ingresadas entre

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[92] Lyannne Meléndez García, *Aniversario de María trae nuevas preocupaciones sobre salud mental,* METRO (19 de septiembre de 2018), https://www.metro.pr/pr/noticias/2018/09/19/aniversario-maria-trae-nuevas-preocupaciones-salud-mental.html.

[93] Ley para la prevención del suicidio en todas las facilidades y edificios del Gobierno de Puerto Rico, Ley Núm. 260-2018, http://www.oslpr.org/2017-2020/leyes/pdf/ley-260-14-Dic-2018.pdf.

[94] *Id.*

[95] *Id.* en la pág. 2.

los años 1907 a 1980. Las personas que sufren de alguna enajenación mental son vulnerables a que se les violenten sus derechos, ya que han sido estigmatizados, expuestos a prejuicios y, hasta cierto punto, criminalizados por la sociedad y el Estado en un momento dado en nuestra historia. Cuando el Estado comenzó a intervenir en los casos de esta índole, su enfoque se limitaba a la mera reclusión de la persona y dejaba en el olvido los servicios médicos adecuados para su rehabilitación, y un trato justo e imparcial en el proceso judicial. Por más de setenta y cinco años, esta fue la vivencia de esta población. Nació la esperanza de un trato más digno cuando entró en vigor nuestra Constitución en el 1959. No obstante, no fue hasta el año 1980 que el *Código de Salud Mental* exigió un debido proceso de ley y la garantía de acceso a los servicios médicos para las personas ingresadas. Desde entonces, el reto y la lucha ha consistido en velar que se le brinde un trato justo e imparcial en los procedimientos judiciales a las personas que sufren de trastorno mental y se les garantice un adecuado servicio médico para que así logren mayor autonomía.

Con la intención de mejorar el procedimiento judicial, la Directoría de Programas Judiciales creó el proyecto PAAS en la región judicial de San Juan y Mayagüez. Este proyecto provee un ambiente terapéutico para las personas ingresadas, logrando así que estos tengan un trato terapéutico durante el proceso judicial. A su vez, es un mecanismo ágil a la ciudadanía que auxilia en situaciones de crisis. Este proyecto no se ha expandido a las demás regiones que atienden casos bajo la *Ley de salud mental* por varios factores, entre ellos la falta de recursos económicos para su implementación. A esto se le añade que las infraestructuras de algunos tribunales sufrieron muchos daños luego del paso del huracán María.[96] Como consecuencia de lo anterior, surge la preocupación del estancamiento en la expansión del proyecto PAAS a las demás regiones, especialmente en la región de Bayamón. Es por ello que exhortamos a la Directoría de Programas Judiciales a continuar expandiendo el proyecto PAAS, debido a lo beneficioso que resulta para el propio Estado el promover y garantizar un plan de rehabilitación. Así se logra una disminución en la reincidencia de estos casos. Otras de las luchas consisten en el ofrecimiento de servicios médicos.

Antes del paso del huracán María se observaba una limitación en los servicios médicos. Ciertamente, la limitación de estos mismos servicios médicos se empeoró tras la llegada del huracán, abriendo la puerta al debilitamiento del propósito de la *Ley de salud mental*, pues la escasez de servicios repercute en la falta de rehabilitación.[97] Ello podría provocar la reincidencia de la persona que sufre de trastorno mental tras

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[96] INFORME A LA COMUNIDAD: LA RAMA JUDICIAL DE PUERTO RICO ANTE EL PASO DE LOS HURACANES IRMA Y MARÍA 4 (2018).

[97] Elwood Cruz, *Coexisten la salud mental y el consumismo*, PRIMERA HORA (7 de abril de 2018), https://www.primerahora.com/noticias/puerto-rico/blog/elwood-cruz/posts/coexistenlasaludmentalyelconsumismo-1291040/.

no recibir los servicios adecuados. Precisamente, la reincidencia incita a que existan altas cifras de órdenes expedidas anualmente por el Tribunal de Primera Instancia.

El cúmulo de diversos padecimientos de salud mental "demuestra que estamos ante una 'bomba atómica' social" que es necesaria atender.[98] De acuerdo con el señor López Arrieta, la erradicación de este mal social no se puede lograr de un día para otro.[99] Por razón de su complejidad tomará años disminuir la cantidad de casos. Sin embargo, ello no es óbice para atender el problema de la salud mental en Puerto Rico, ya que de no hacerlo se quebrantaría el acceso a la justicia. López Arrieta resalta en su reportaje que "aunque por décadas nos hemos acostumbrado a que 'el cemento y la varilla' es el indicador por excelencia para aumentar el desarrollo económico en Puerto Rico con las grandes obras, de qué nos sirve aumentar solo en riqueza, si como resultado tenemos una sociedad convulsa y enferma".[100] Una sociedad con una salud mental estable y sana será de ayuda para mejorar la condición económica del País. Es por ello que "atender la crisis en la salud mental no es una obra majestuosa ni ostentosa en infraestructura y mucho menos tangible, es la mejor obra social y económica que podemos hacer en el país".[101] Ante ello, lo esencial consiste en que: la sana convivencia y el bienestar de la salud mental de los puertorriqueños no pueden tornarse invisibles ante el Estado, sino que, por el contrario, deben ser la prioridad.

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[98] Gabriel J. López Arrieta, *La salud mental no puede quedar relegada*, EL NUEVO DÍA (9 de noviembre de 2017), https://www.elnuevodia.com/opinion/columnas/lasaludmentalnopuedequedarrelegada-columna-2373125/.

[99] *Id*.

[100] *Id*.

[101] *Id*.

JURISPRUDENCIA RECIENTE SOBRE RESPONSABILIDAD CIVIL EXTRACONTRACTUAL: PRODUCTOS DEFECTUOSOS*

*Roberto Abesada-Agüet***

Resumen

Luego de permanecer en silencio durante casi dos décadas, el Tribunal Supremo de Puerto Rico emitió dos decisiones concernientes al estado de Derecho sobre la Responsabilidad de Productos: *Rodríguez Méndez v. Laser Eye Surgery Management de PR*, 195 DPR 769 (2016) y *González Cabán v. JR Seafood*, 199 DPR 234 (2017). Después de resumir la historia cronológica de la jurisprudencia sobre la responsabilidad de productos defectuosos en Puerto Rico, el artículo se centra en analizar estos dos casos, con énfasis en los fundamentos esbozados por el Tribunal Supremo y destacando los puntos legales y de práctica más importantes que pueden afectar a los abogados que se enfocan en casos sobre lesiones personales en su práctica privada.

Abstract

After remaining silent for almost two decades, the Supreme Court of Puerto Rico issued two decisions on Products Liability Law: *Rodríguez Méndez v. Laser Eye Surgery Management of PR*, 195 DPR 769 (2016) and *González Cabán v. JR Seafood*, 199 DPR 234 (2017). After summarizing the chronological history of products liability case law in Puerto Rico, the article focuses on discussing these two cases, with emphasis on the Supreme Court's rationale and highlighting those paramount practice and legal points that may affect personal injury lawyers in their private practice.

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* Ponencia del autor en ocasión a la "5ª Conferencia de Daños y Perjuicios" celebrada el 2 y 3 de mayo de 2019 en la Facultad de Derecho de la Universidad Interamericana de Puerto Rico. El autor agradece la colaboración de Stephanie León, estudiante de tercer año de la Facultad, en la investigación jurídica de este escrito.

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I. Introducción

Luego de casi dos décadas de espera,[1] el Tribunal Supremo de Puerto Rico tuvo la oportunidad de expresarse nuevamente sobre la responsabilidad civil extracontractual que generan los productos defectuosos. Las dos opiniones, emitidas respectivamente en 2016 y 2017, son *Rodríguez Méndez v. Laser Eye Surgery Management of PR*[2] y *González Cabán v. JR Seafood.*[3]

La primera decisión se da en el contexto de una moción de sentencia sumaria, bajo la modalidad de insuficiencia de la prueba presentada por el manufacturero de un equipo médico que oftalmólogos utilizan en cirugías de corrección visual. La decisión aborda la responsabilidad de un manufacturero de equipo médico en relación con las instrucciones y advertencias necesarias de limpieza y mantenimiento de este, aun cuando el médico que usó el equipo no adquirió el equipo directamente del manufacturero.

La segunda opinión trata sobre la responsabilidad que tienen los restaurantes, distribuidores e importadores de alimentos por la venta de camarones que, desde su pesca y estado natural, están contaminados con una toxina. La opinión alcanza la

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[1] Antes de 2016, el Tribunal Supremo decidió *Aponte Rivera v. Sears, Roebuck de PR, Inc*., 144 DPR 830 (1998), que es un caso de defectos en las advertencias de una batería de automóviles.

[2] Opinión unánime publicada en 195 DPR 769 (2016) por voz del juez asociado Martínez Torres. La juez asociada Rodríguez Rodríguez concurrió sin opinión escrita.

[3] La primera decisión publicada se encuentra en 132 F. Supp.3d 274 (D. P. R. 2015). En esta, luego de realizar un análisis de Derecho comparado, el Hon. Gustavo A. Gelpí, juez federal del Tribunal Federal de Distrito de Puerto Rico, dirigió la controversia al Tribunal Supremo de Puerto Rico mediante solicitud de certificación interjurisdiccional. El Tribunal Supremo expidió el auto y emitió eventualmente una opinión publicada en 199 DPR 234 (2017), por voz de la jueza presidenta Oronoz Rodríguez y la opinión disidente de cuatro jueces, por voz del juez asociado Rivera García. Acto seguido, el juez federal Gelpí desestimó formalmente la reclamación de responsabilidad estricta y desestimó finalmente la reclamación extracontractual por insuficiente prueba admisible de causalidad adecuada, o sea, ausencia de conexión entre los actos u omisiones de los demandados con la saxitoxina alegada por el demandante luego de consumir el camarón. *Véase* 2019 WL 1399315, (Mar. 25, 2019) (CIVIL NO. CV 14-1507 (GAG), ECF No. 426). El juez Gelpí tiene pendiente adjudicar una moción de reconsideración de la parte demandante.

responsabilidad de demandados por productos comestibles cuando los productos no pasan por un proceso artificial de manufactura.

Estas dos decisiones son objeto de estudio en este escrito. Antes, sin embargo, es menester repasar el historial de la doctrina para comprender el efecto e impacto de estas dos opiniones del Tribunal Supremo.

II. Doctrina de Productos Defectuosos

Como es sabido, la responsabilidad civil ocasionada por productos defectuosos comenzó en Puerto Rico con casos de naturaleza contractual entre consumidores y concesionarios de venta de automóviles nuevos y usados. El Tribunal Supremo atendió estos litigios al amparo de las disposiciones de la figura de la compraventa en el Código Civil. Estas disposiciones responsabilizan al vendedor de un bien mueble por saneamiento y sus remedios estatutarios están limitados a la acción redhibitoria (devolución de la cosa vendida) o estimatoria (reducción del precio de la cosa vendida), el reembolso de gastos y, en algunos casos, la indemnización en daños cuando el vendedor ha actuado dolosamente o de mala fe.[4]

Pero estos remedios del Código Civil están basados en una relación contractual previa,[5] por lo que no existía en aquel entonces un remedio plausible para

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[4] *Véase* COD. CIV. PR arts. 1350, 1363, 1373-1375, 31 LPRA §§ 3801, 3831, 3841-3843 (2015); Ford Motor Co. v. Benet, 106 DPR 232 (1977) (defecto en sistema eléctrico y frenos del coche constituyó incumplimiento con garantía contractual expresa del vendedor y manufacturero); DACO v. Marcelino Mercury, Inc., 105 DPR 80 (1976) (oxidación de automóvil vendido constituye un vicio oculto que permite acción redhibitoria en vez de la estimatoria adjudicada por el foro de instancia); Maldonado v. Hull Dobbs, 102 DPR 608 (1974) (saneamiento por evicción en caso de vehículo de motor usado vendido por concesionario); Berríos v. Courtesy Motors Corp., 91 DPR 441 (1964) (defecto en transmisión semi-automática del coche y acción redhibitoria aplicable aunque el coche vendido fuese usado); Fuentes v. Hull Dobbs Co., 88 DPR 562 (1963) (compraventa rescindida debido a defectos en gomas de camión nuevo vendido e indemnización al consumidor en daños en atención al conocimiento del vendedor de dicho defecto); Marrero v. Garage Mayagüez, Inc., 31 DPR 908 (1923) (acción redhibitoria por vicios ocultos debido a camión nuevo vendido con defectos). Véase, también, el caso normativo *Ferrer v. General Motors Corp*., 100 DPR 246 (1971) en que un consumidor que adquirió un coche nuevo alegó que el coche tenía defectos en el tren delantero y ello resultaba en que las gomas delanteras se gastaran rápidamente. El Tribunal Supremo determinó, por primera vez, que el demandante tenía derecho a que el fabricante, el distribuidor y vendedor, no solo le devolvieran el precio pagado por el automóvil, según permite la acción redhibitoria, sino la indemnización solidaria de todos ellos por los daños. *Id*. en las págs. 249, 257. Véase, sin embargo, *García Viera v. Ciudad Chevrolet*, 110 DPR 158 (1980) que revoca la doctrina de obligación de reparaciones menores expuesta en *Fuentes v. Hull Dobbs* y establece que, aunque el comprador acuda al vendedor para realizar múltiples reparaciones, las mismas no necesariamente están sujetas a la acción redhibitoria de saneamiento por vicios ocultos. *Véase, además,* Márques v. Torres Campos, 111 DPR 854 (1982) (sobre acción redhibitoria de saneamiento por vicios ocultos de venta de animales que prescribe a los 40 días y que el comprador tiene remedios alternos de anulación o incumplimiento contractual cuando media una acción dolosa del vendedor).

[5] Se debe recordar, por supuesto, que los contratos solo surten efecto entre las partes que lo otorgan y sus herederos. CÓD. CIV. PR art. 1209, 31 LPRA §3374 (2015). En el Derecho común anglosajón,

aquellas víctimas de daños causados por productos defectuosos ajenas a una relación contractual. Por supuesto, los remedios legales precedentes, como la acción redhibitoria, no tenían cabida en casos de alimentos adulterados por el fabricante debido a la imposibilidad física de la devolución del producto. Por ello, el Tribunal Supremo analizó el Derecho común estadounidense vigente e incorporó la doctrina de garantía implícita.[6] Asimismo, el Tribunal Supremo sustentó la doctrina de garantía implícita a base de una ley especial de 1940 que aún exige que los fabricantes confeccionen alimentos seguros.[7] Los hechos de esos dos casos, sin embargo, continuaban predicados en una relación contractual previa entre el consumidor y el fabricante del producto.

No fue hasta el 1969 que el Tribunal Supremo de Puerto Rico, por voz del juez asociado Dávila, en *Mendoza v. Cervecería Corona*, transformó radicalmente la doctrina de productos defectuosos al incorporar la doctrina de la "responsabilidad absoluta" del fabricante, proveniente de California.[8] Esto lo hizo luego de analizar

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una acción en daños por un producto defectuoso estaba limitada a que el demandante estableciera una relación contractual previa con el demandado. HERMINIO M. BRAU DEL TORO, DAÑOS Y PERJUICIOS EXTRACONTRACTUALES 883-84 (2da ed. 1986) (*citando a* Winterbottom v. Wright, 152 Eng. Rep. 402 (1842) y su progenie). Todo esto cambió cuando el juez Cardozo, en *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (N.Y. App. 1916), concluyó que el demandado Buick era responsable por las serias lesiones corporales ocasionadas a un consumidor, porque podía prever que las gomas de madera fabricadas por su subcontratista pudiesen ser un riesgo, aunque ese consumidor no tuviese un contrato con ese suplidor o con Buick. El juez Cardozo explicó que la regla del daño inminente no se debía limitar a productos inherentemente peligrosos sino a todo aquel producto que pueda colocar razonablemente en peligro de muerte o lesión corporal al consumidor, cuando es fabricado negligentemente. Fue la primera vez que se incorporó una teoría de riesgo y negligencia en acciones por productos defectuosos. BRAU DEL TORO, *supra* nota 5, en las págs. 885-86. *Véase, además*, Glorimar Irene Abel, *La doctrina in solidum y su aplicación a casos de responsabilidad objetiva por productos defectuosos*, 51 REV. JUR. UIPR 625, 638 (2017).

[6] El Tribunal Supremo de New Jersey expandió la doctrina de *MacPherson* en *Henningser v. Bloomfield Motors, Inc*., 32 N.J. 358, 161 A.2d 69 (N.J. 1960) y resolvió que la garantía implícita de productos no se limita a drogas y alimentos, sino a otros productos como los automóviles. Por ello, un fabricante puede ser responsable, aunque el demandante no tenga una relación contractual previa con este. En ese caso, la víctima del daño lo fue la esposa del comprador del auto, por defectos en la varilla del guía, que ocasionó que esta chocara y sufriera lesiones físicas. BRAU DEL TORO, *supra* nota 5, en las págs. 891-95; Abel, *supra* nota 5, en la pág. 639.

[7] Martínez v. Gabino Dávila, 78 DPR 235 (1955) (dulces contaminados); Castro v. Payco, 75 DPR 63 (1953) (helado contaminado). Estos casos se decidieron conforme la doctrina de garantía implícita y la *Ley de Alimentos, Drogas y Cosméticos de Puerto Rico*, Ley Núm. 72 de 26 de abril de 1940, 24 LPRA §§ 711-732 (2011), la cual prohíbe que se fabrique, venda, entregue u ofrezca en venta un alimento, droga, artefacto o cosmético que esté adulterado. Esta ley aclara que "adulterado" implica que el fabricante añada una sustancia venenosa o deletérea al alimento. Creemos, sin embargo, que no era necesario incorporar esta doctrina anglosajona a la luz del artículo 1210 del Código Civil. 31 LPRA § 3375 (2015). Esto, ya que la aplicación y cumplimiento de la ley, como esta *Ley de Alimentos*, estaba implícito en el contrato verbal de compraventa del alimento adquirido en estos dos casos.

[8] Mendoza v. Cervecería Corona, Inc., 97 DPR 499, 509-11 (1969) (*citando* a Greenman v. Yuba Power Products, Inc., 27 Cal. Rptr. 697, 59 Cal. 2d 57, 377 P.2d 897 (Cal. 1963)). "Respondiendo a las

la doctrina científica española y las sentencias del Tribunal Supremo de España. En ese momento, el Tribunal Supremo español coincidió en que se debe responsabilizar al fabricante del producto, al amparo de la doctrina de responsabilidad sin culpa. Este proceder está justificado al amparo del artículo 1902 del Código Civil de España, homólogo del artículo 1802 del Código Civil de Puerto Rico.[9]

En *Mendoza v. Cervecería Corona*, el demandante compró dos cajas de malta de un intermediario del manufacturero para revender en su negocio. Decidió ingerir una de las botellas que lo intoxicó y estuvo hospitalizado dos días. El demandante notó, al ingerir el producto, que tenía un mal sabor y una borra en el fondo de la botella. El foro de instancia denegó la demanda por no haberse establecido la negligencia del fabricante y porque la doctrina de garantía implícita era inaplicable debido a la ausencia de una relación contractual previa entre el demandante y el manufacturero. El Tribunal Supremo revocó y extendió la responsabilidad de un fabricante a cualquier usuario o consumidor de un producto sin que fuese indispensable que lo adquiriera directamente del fabricante o que mediara un contrato previo entre las partes.[10] Esto, porque la responsabilidad estaba predicada

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necesidades sociales de Puerto Rico, por vía judicial y como cuestión de política pública, establecimos y adoptamos en nuestra jurisdicción la norma de responsabilidad absoluta del fabricante de productos defectuosos". Rivera v. Superior Pkg., Inc, 132 DPR 115, 125 (1992). *Véase, además,* Montero Saldaña v. Amer. Motors Corp., 107 DPR 452, 461 (1978).

[9] *Véase Mendoza*, 97 DPR en las págs. 510-11. El Tribunal Supremo también identificó que, desde 1958 el Tribunal Federal de Apelaciones para el Primer Circuito, en un caso de diversidad de ciudadanía en que se aplica la ley de Puerto Rico, conforme *Castro v. Payco* se podía responsabilizar a un fabricante de un producto defectuoso "sin necesidad de que mediara nexo contractual de clase alguna". *Id*. en la pág. 513 n. 1.

[10] En *Mendoza v. Cervecería Corona*, el Tribunal Supremo, luego de explicar el desarrollo histórico en Estados Unidos y en España de casos de productos defectuosos, adoptó la decisión del Tribunal Supremo de California en *Greenman v. Yuba Power Products, Inc*., 27 Cal. Rptr. 697, 59 Cal.2d 57, 377 P.2d 897 (Cal. 1963), la cual rompió finalmente las barreras de los casos de negligencia y garantía implícita con la norma de responsabilidad estricta del fabricante. *Mendoza*, 97 DPR en la pág. 511. La *American Law Institute* incorporó en 1965 la norma de *Greenman* en el *Restatement of the Law (Second) Torts* §402A. Esta sección establece:

> *One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller engaged in the business of selling such product and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. [This rule] applies although (a) the seller has exercised all possible care in the preparation and sale of the product, and (b) the user or consumer has not brought the product or entered into any contractual relation with the seller.*
>
> Ahora bien, el Tribunal Supremo de Puerto Rico, si bien adoptó igualmente esta sección del *Restatement*, dispuso que el producto no tiene que ser uno "irrazonablemente peligroso" al consumidor o comprador como se expresa en la §402A. *Rivera v. Superior Packaging*, 132 DPR en la pág. 128, n. 6 (*citando a Montero Saldaña*, 107 DPR en la pág. 461; BRAU DEL TORO, *supra* nota 5, en la pág. 916).

en el concepto de garantía implícita, razones sociales y de política pública. Además, estableció que la doctrina no le requiere al demandante probar la negligencia del fabricante, sino el defecto del producto, el daño y la causa adecuada de ambos hechos.[11] El defecto, por supuesto, no se extiende a todo riesgo imaginable, ya que el fabricante no es asegurador absoluto de todas las lesiones que pueda producir su producto. Solo se extiende a aquellas relacionadas previsiblemente con el defecto y el uso del producto.[12]

Según la doctrina adoptada en *Mendoza*, proveniente del Tribunal Supremo de California, sería oneroso para un demandante probar culpa o negligencia dentro de la compleja operación de fabricación, distribución y venta del producto que el ciudadano común desconoce, particularmente cuando es el fabricante quien induce al consumidor a comprar el producto con promociones y mercadeo.[13] Asimismo, la imposición de la responsabilidad sin culpa[14] contra todos los responsables de la cadena de manufactura, distribución y venta tendrían el incentivo de, no tan solo crear productos de calidad, sino preservarlos en buen estado hasta llegar a manos

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[11] *Mendoza*, 99 DPR en la pág. 512.

[12] *Id*. Por ello, el Tribunal Supremo hace la distinción de responsabilidad del fabricante si en el refresco se encontrara un ratón descompuesto. En ese caso sí habría responsabilidad de existir un daño, en contraste con el daño ocasionado por las caries que el azúcar del refresco pueda ocasionar al consumidor. Es decir, en el primer caso existiría responsabilidad mientras que en el segundo caso sería así.

[13] *Mendoza*, 99 DPR en la pág. 509.

[14] La doctrina científica ha diferenciado la responsabilidad subjetiva fundada en la culpa y negligencia extracontractual del demandado con la responsabilidad sin culpa u objetiva fundada en la teoría del riesgo. *Véase* Gierbolini v. Employer Fire Ins. Co., 104 DPR 853, 857 (1976); González Cabán v. JR Seafood, 199 DPR 234, 250-52 (2017) (Rivera García, opinión disidente). De igual manera lo ha hecho la ley como, por ejemplo, la responsabilidad del artículo 1805 del Código Civil y el artículo 404 del Código Político. Sin embargo, Brau del Toro entiende que el Tribunal Supremo también ha extendido en sus decisiones esa responsabilidad objetiva en otros escenarios y no solo a casos de productos defectuosos. *Véase* BRAU DEL TORO, *supra* nota 5 en la pág. 881 (*citando a* Canales v. Rosario, 107 DPR 757 (1978) (presunción de negligencia contra conductor de vehículos con neumáticos desgastados); Rivera v. Rivera Rodríguez, 98 DPR 940 (1972) (imputación de conocimiento de defectos de conductor que no inspecciona y se percata de fallas mecánicas del vehículo); Barrientos v. Gobierno de la Capital, 97 DPR 552 (1969) (responsabilidad del propietario de una obra de construcción inherentemente peligrosa y de riesgos previsibles aunque la responsabilidad de construcción sea de un contratista independiente)). Estos casos, sin embargo, no adoptan expresamente una norma de responsabilidad objetiva, sino que se decidieron a base del artículo 1802 del Código Civil mediante el uso de jurisprudencia norteamericana y el elemento de previsibilidad que permea en todo caso de responsabilidad subjetiva. Estamos, por tanto, en desacuerdo con la óptica del doctor Brau del Toro. De todas maneras, si bien es cierto que la responsabilidad estricta u objetiva exime al demandante de probar negligencia, la realidad en la práctica es que probar el defecto del producto resulta tan difícil como probar el elemento de culpa, por lo que no es ilógico concluir que la prueba de culpa o defecto sean, a fin de cuentas, igual reto para el demandante y sus abogados. Este comentario lo hacemos ante la realidad de que, por ejemplo, en casos de defectos de diseño y de advertencias e instrucciones adecuadas, el elemento de la previsibilidad continúa siendo indispensable, al igual que en los casos de responsabilidad subjetiva extracontractual.

del consumidor.[15] Los fabricantes pueden, ciertamente, adquirir pólizas de seguros que cubran reclamaciones por productos defectuosos y añadir el gasto de la prima del seguro en el costo del producto vendido.[16]

En *Montero Saldaña v. American Motor Co*., opinión nuevamente del juez asociado Dávila, la política pública en protección del consumidor se extendió hasta en casos en que una corporación demandada adquirió los activos de un fabricante, con posterioridad al hecho productor de los daños causados por el producto defectuoso.[17] Esto es un caso en que los frenos del vehículo del demandante fallaron; se le responsabilizó por conocer el defecto y de todas maneras usar el vehículo. También se responsabilizó a *American Motors*, la cual no manufacturó el vehículo, pero adquirió la corporación que lo fabricó después de vendido el producto. Con este caso se mantuvo la definición de "producto defectuoso" como el que falla en igualar la calidad promedio de productos similares.[18] Se aclaró, sin embargo, que si el consumidor tenía conocimiento previo del defecto se reduciría su indemnización al amparo de la defensa de negligencia comparada.[19]

En 1992 y 1998, respectivamente, el Tribunal Supremo reiteró la norma de *Mendoza* y *Montero Saldaña* en *Rivera v. Superior Packaging*[20] y en *Aponte v. Sears*.[21] En estas dos decisiones, sin embargo, el Tribunal Supremo expandió sus expresiones en torno a los elementos probatorios requeridos en casos de productos defectuosos, particularmente en casos de defectos en diseño y en las instrucciones o advertencias del fabricante.

Rivera v. Superior Packaging trata del defecto de un uniforme, tipo mameluco, y sus advertencias, porque el uniforme contenía un material químico extremadamente flamable que, luego de incendiarse a raíz de un accidente laboral, se adhirió al cuerpo de un empleado. El material del uniforme agravó las quemaduras del empleado quien falleció posteriormente. Aunque el Tribunal Supremo, por voz del juez asociado Rebollo López, solo resolvió que el fabricante estaba impedido de prevalecer mediante el mecanismo de sentencia sumaria, por existir prueba pericial que engendraba controversias materiales de hechos respecto a si el uniforme se fabricó defectuosamente o no y si las advertencias fueron adecuadas, el Tribunal se expresó sobre los tres tipos de defecto de productos: defecto en la manufactura,

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[15] *Mendoza*, 99 DPR en la pág. 509.

[16] *Id*.

[17] Montero Saldaña v. Amer. Motors Corp., 107 DPR 452, 459 (1978).

[18] *Id*. en la pág. 461 (rechazando definición que el producto tiene que ser irrazonablemente peligroso según el *Restatement (Second) of Torts* §402A). *Véase supra* nota 12.

[19] *Montero Saldaña*, 107 DPR en las págs. 463-64.

[20] 97 DPR 499 (1969).

[21] 144 DPR 830 (1998)

diseño y en las instrucciones o advertencias del producto.[22] Asimismo, mediante *dictum* el Tribunal expresó que era necesaria legislación especial sobre el tema, pero luego concluyó contradictoriamente en una nota al calce que los requisitos para probar el defecto y su causalidad estaban subsumidos dentro del artículo 1802 y que, por ello, la norma actual estaba justificada dentro de dicha disposición.[23]

De otra parte, en *Aponte v. Sears*,[24] se responsabilizó a Sears por no tener instrucciones claras en castellano que advirtieran al consumidor que mover los polos de una batería de un vehículo de motor pudiese ocasionar una explosión si se encendía el automóvil. En ese caso, las advertencias no incluían información sobre el peligro de mover los conectores de los polos justo antes de encender el vehículo. Por voz de la juez asociada Naveira de Rodón, el Tribunal reiteró lo expuesto en *Rivera v. Superior Packaging*[25] y estableció, además, cuatro elementos básicos para determinar si el fabricante cumplió o no con el deber de ofrecer advertencias o instrucciones apropiadas: (1) el fabricante sabía o debió haber sabido del peligro inherente del producto; (2) no incluyó advertencias o instrucciones o estas no fueron

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[22] Rivera v. Superior Packaging, 132 DPR 115, 128-30 (1992). Sobre el defecto de manufactura, el Tribunal mantuvo la definición previa de *Mendoza* y *Montero*. Sobre el defecto de diseño, el demandante tiene dos alternativas en su carga probatoria:

> (1) el producto falló en comportarse en forma tan segura como un usuario ordinario habría esperado al usar el producto para el uso para el cual fue destinado o para el cual previsiblemente podría ser usado, o si demuestra que, (2) ... el diseño del producto fue la causa próxima de los daños y el demandado no probó que en el balance de intereses, los beneficios del diseño en cuestión sobrepasan los riesgos de peligro inherentes en el diseño.

Id. en la pág. 129. "Bajo esta segunda alternativa, se traslada al fabricante la carga de la prueba de que los beneficios del diseño utilizado sobrepasan los riesgos inherentes al mismo". *Id*. En relación con el defecto en las advertencias o instrucciones del producto, el Tribunal expresó que el producto es:

> [C]onsiderado defectuoso si el fabricante o vendedor no le ofrece al usuario o consumidor aquellas advertencias o instrucciones que sean adecuadas en torno a los peligros o riesgos inherentes en el manejo o uso del producto. Dicho deber se extiende a todos los usos del producto que sean razonablemente previsibles para el fabricante. La omisión de no dar las advertencias expone al fabricante a responsabilidad, si éste sabía, o debió haber sabido del peligro o riesgo envuelto, y la necesidad de dar la advertencia para garantizar el uso más seguro del producto.

Id. en la pág. 130.

[23] *Id*. en las págs. 125-26 n. 4 y 5. Véase, también, crítica y propuesta doctrinal del profesor Rubén Nigaglioni en *Products Liability-crítica y propuesta doctrinal*, 54 REV. D. P. 7 (2014). El Tribunal Supremo en *Rivera v. Superior Packaging*, por voz del juez asociado, Rebollo López, explicó en la nota 5 que, en España, por razones de política pública, se ha exceptuado igualmente el requisito de culpa y negligencia del artículo 1902 del Código Civil español, en casos de productos defectuosos. En España, sin embargo, desde 1994, existe legislación especial que gobierna las acciones de productos defectuosos. González Cabán v. JR Seafood, 199 DPR 234, 266-68 (2017) (Rivera García, opinión disidente).

[24] *Véase supra* nota 3.

[25] Aponte Rivera v. Sears, Roebuck de PR, Inc., 144 DPR 830, 840 (1998).

adecuadas; (3) la falta de advertencias convirtió el producto en uno inherentemente peligroso; y (4) la falta de instrucciones o advertencias apropiadas fue la causa adecuada de las lesiones del demandante.[26] Para esto, se debe examinar el tamaño, lugar e intensidad del lenguaje, símbolos utilizados, carga económica al fabricante y el uso de un lenguaje directo que pueda impresionar a un usuario prudente y razonable, alertándolo sobre la naturaleza y amplitud del peligro involucrado.[27] Claro está, esta responsabilidad objetiva depende de que el demandante haya brindado un uso razonablemente previsible al producto.[28]

III. Rodríguez Malavé v. Laser Eye Surgery

Dieciocho años después,[29] el Tribunal Supremo resolvió el primer caso objeto de análisis de este escrito: *Rodríguez Malavé v. Laser Eye Surgery*.[30] Este

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[26] *Id*. en las págs. 841-42.

[27] *Id*. en la pág. 842.

[28] *Id*. en la pág. 839. Ante esta expresión doctrinal, el profesor Álvarez González opina que era innecesario que, en *Rodríguez Méndez v. Laser eye*, el Tribunal Supremo incorporara la defensa de modificación sustancial. José J. Álvarez González y José J. Colón García, *Responsabilidad civil extracontractual*, 87 REV. JUR. UPR 601, 606-07 (2018). Pero luego de diecicho años de silencio jurisprudencial desde *Aponte v. Sears*, resulta práctico y para beneficio de abogados y fabricantes la aclaración de esta defensa.

[29] Resulta pertinente resaltar que las decisiones en *Rivera v. Superior Packaging* y *Aponte v. Sears* generaron bastante litigación en la corte federal respecto al alcance de la norma de defecto de diseño. El Primer Circuito interpretó estas dos decisiones, y la jurisprudencia de California citada en las mismas, para establecer que una vez el demandante prueba que el producto ocasionó sus daños, el peso de la prueba pasa al demandado para establecer que la utilidad del producto sobrepasa sus riesgos. Quilez-Velar v. Ox Bodies, Inc., 823 F.3d 712, 718-20 (1er Cir. 2016). Y en casos complejos, el demandante no podía utilizar el *Consumer Expectations Test*, solo el *Risk Utility Test*. Quintana-Ruiz v. Hyundai Motor Corp., 303 F.3d 62, 69-72 (1er Cir. 2002). En *Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23, 26 (1er Cir. 1998), el Primer Circuito expresó que el tribunal federal de distrito actuó correctamente al prohibir al demandante pasar prueba sobre el *Consumer Expectations Test* en un caso de bolsas de aire defectuosas. *Id*. en la pág. 26 (confirmando la decisión del juez federal Daniel R. Domínguez publicada en 937 F. Supp. 134 (D. P. R. 1996)). De este modo, el Primer Circuito resumió el *Risk Utility Test* como sigue, a la página 26 de la opinión:

> *In its application of the two-part test for a design defect, the district court required the plaintiff to prove that she was injured and that the design was the proximate cause of her injuries. At this point, the burden shifted to the defendant to establish that the benefits of the design outweighed its risks. As identified in* Barker*, factors to be considered by the jury in conducting this evaluation are the gravity of the danger posed by the challenged design, the likelihood that such a danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.*

[30] *Véase supra* nota 4. El Primer Circuito discutió *Rodríguez Méndez* en *Santos v. Sea-Star*, 858 F.3d 695 (1er Cir. 2018) y determinó igualmente que un demandante necesita prueba admisible en el contexto de una moción de sentencia sumaria para establecer una controversia genuina y material de hecho en torno al defecto de diseño o en las advertencias del producto.

litigio trata de un paciente que demandó por impericia médica a un oftalmólogo que realizó un procedimiento de corrección visual que le ocasionó que partículas microscópicas de metales permanecieran en sus ojos y padeciera de *Diffuse Lamellar Keratitis*. El paciente enmendó posteriormente su demanda e incluyó como demandado al fabricante del equipo médico de corrección visual que utilizó el oftalmólogo. Alegó que el fabricante era responsable al no proveer suficientes instrucciones y advertencias sobre mantenimiento y limpieza a la facilidad médica que adquirió el producto para su posterior uso por el oftalmólogo.

Según el descubrimiento de prueba, que increíblemente perduró diez años, esta condición médica es una que se desarrolla en intervenciones con láser y puede ocurrir, aunque no se haya utilizado el equipo del fabricante. El perito del fabricante rindió un informe en que expuso que, durante sus veinte años de experiencia en que ha utilizado el mismo equipo médico, nunca supo de algún caso en el que se produjeran residuos de partículas o fragmentos metálicos en los ojos que causaran la condición del demandante. Por otro lado, el demandante no tenía evidencia de que el equipo estuviese defectuoso en cualquiera de las modalidades que generan una responsabilidad objetiva por productos defectuosos. De hecho, el perito del paciente declaró que no tenía una base razonable para sospechar que la condición médica se debió a un problema con el equipo médico que el oftalmólogo utilizó. Con estos hechos materiales, el Tribunal Supremo revocó las decisiones recurridas y decidió que, en efecto, procedía desestimar sumariamente la demanda enmendada en contra del fabricante del equipo médico bajo la modalidad de insuficiencia de la prueba. Al llegar a la referida conclusión, el Tribunal aclaró varios asuntos.

En primer lugar, en una nota al calce, el Tribunal clarificó que se debe referir a la doctrina como "responsabilidad estricta" del fabricante, en vez de "responsabilidad absoluta".[31] En segundo lugar, el Tribunal hizo referencia, por primera vez, a la

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[31] En *Rodríguez Méndez v. Laser Eye*, 195 DPR 769, 779 n.3 (2016), el Tribunal rechazó correctamente el concepto de "responsabilidad absoluta" y lo sustituyó por "responsabilidad estricta", debido a que el concepto "absoluta" era contradictorio ante la necesidad probatoria del demandante de tener que establecer inicialmente el defecto del producto. Pero este error conceptual no es nuevo. Desde 1986, Brau del Toro había advertido que "no es en rigor una norma de responsabilidad absoluta, sino de responsabilidad casi absoluta, en tanto que el demandante tiene que probar la existencia de un defecto en el producto, que el mismo es atribuible al fabricante, y que el defecto fue el causante de la lesión". BRAU DEL TORO, *supra* nota 5, en las págs. 895-96. El profesor José J. Álvarez González está de acuerdo con este cambio conceptual, pero critica el uso del concepto "responsabilidad estricta" derivado del Derecho común anglosajón en vez del concepto civilista de "responsabilidad objetiva" a raíz de lo resuelto en *Valle v. American International Insurance*, 108 DPR 692 (1979) de que en Puerto Rico la responsabilidad civil extracontractual está regida por el Derecho civil. Álvarez González, *supra* nota 28, en la pág. 602. Pero esta crítica es desacertada en atención a la incorporación de la doctrina de California en vez de la doctrina española, la cual evolucionó casual y eventualmente a una norma similar a la de Estados Unidos, por ser la jurisdicción que más jurisprudencia había desarrollado sobre el tema. De todas formas, el Tribunal, en la nota al calce 4 de *Rodríguez Méndez*, citando al tratadista español Rodríguez Montero, explica que en España se ha avanzado a adoptar la

versión actualizada del *Restatement* publicada por el *American Law Institute* en materia de responsabilidad civil extracontractual, el *Restatement of the Law (Third) of Torts (Prod. Liab) §1*, para definir los elementos jurídicos de la causa de acción.[32] El Tribunal, no obstante, al reafirmarse en la definición de defecto del diseño conforme las alternativas del *Risk Utility Test* o el *Consumer Expectation Test* según lo expuesto en *Rivera v. Superior Packing*[33] y *Aponte v. Sears*,[34] cometió dos errores involuntarios.

El primer error fue que el Tribunal dio la impresión incorrecta, citando una opinión de 2014 del foro de mayor jerarquía de Nueva York, en vez de la jurisprudencia de California adoptada y utilizada previamente[35] que un demandante

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doctrina moderna estadounidense y se utiliza el concepto de "responsabilidad estricta" en vez del concepto "responsabilidad objetiva". En España, desde 1994, existe legislación especial que gobierna las acciones de productos defectuosos. González Cabán v. JR Seafood, 199 DPR 234, 266-68 (2017) (Rivera García, opinión disidente).

[32] *Rodríguez Méndez*, 195 DPR en la pág. 781. La §1 del *Restatement* dispone: *"One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." Véase* ELLEN M. BUBLICK, A CONCISE RESTATEMENT OF TORTS 294-95 (3ra ed. 2013).

[33] *Rodríguez Méndez*, 195 DPR en las págs. 781-82 (*citando* Rivera v. Superior Pkg., Inc, 132 DPR 115, 129 (1992)). En *Rivera v. Superior Pkg., Inc.*, el Tribunal Supremo utilizó la conjunción disyuntiva "o" en relación con las alternativas que tiene un demandante para probar un defecto de diseño, sea al amparo del *Risk Utility Test* o el *Consumer Expectations Test*.

[34] Aponte Rivera v. Sears, Roebuck de PR, Inc., 144 DPR 830, 839 n. 9 (1998) (el Tribunal vuelve a utilizar la conjunción disyuntiva "o" en relación con las alternativas probatorias del demandante en un caso de defecto de diseño).

[35] *Rivera v. Superior Packaging*, 132 DPR pág.129 ("Para determinar si hay un defecto de diseño, el Tribunal Supremo de California elaboró un análisis, o **test**, de dos (2) alternativas".) (*citando a* Barker v. Lull Engineering, 20 Cal.3d 413, 573 P.2d 443 (Cal. 1978)). Por tanto, no había justificación para acudir a la jurisprudencia de Nueva York, particularmente porque California y Puerto Rico comparten la visión minoritaria de la doctrina del peso de la prueba al fabricante en casos de defectos de diseño. Quintana-Ruiz v. Hyundai Motor Corp., 303 F.3d 62, 69 (1er Cir. 2002); DAVID G. OWEN Y MARY J. DAVIS, PRODUCTS LIABILITY AND SAFETY, CASES AND MATERIALS 245 (7ma ed. 2015). De hecho, Nueva York no comparte esta visión minoritaria, sino un estándar diferente. Halloran v. Virginia Chemicals Inc., 41 N.Y.2d 386, 361 N.E.2d 991, 993 (1977):

> *In a products liability case it is now established that, if plaintiff has proven that the product has not performed as intended and excluded all causes of the accident not attributable to defendant, the fact finder may, even if the particular defect has not been proven, infer that the accident could only have occurred due to some defect in the product or its packaging.*

Además, Nueva York es la única jurisdicción que ha concluido que una acción de incumplimiento de garantía implícita y una acción de responsabilidad estricta no constituye una duplicidad y se pueden presentar de manera simultánea en un mismo caso. Denny v. Ford Motor Co., 87 N.Y.2d 248, 639 N.Y.S. 2d 250, 662 N.E. 2d 730 (NY App. 1995). Uno de los fundamentos para mantener ambas causas de acción es porque el *Consumer Expectations Test* se puede utilizar en casos de garantía implícita contrario a casos de responsabilidad estricta. Es interesante, sin embargo, que el Tribunal Supremo en *Rodríguez Méndez*, 195 DPR pág. 781, citó a *Denny*, pero ignoró involuntariamente la distinción de ambas causas y que en Nueva York el *Consumer Expectations Test* se permite en casos de garantía implícita.

debe probar tanto el *Risk Utility Test* como el *Consumer Expectations Test*, en vez del demandante seleccionar uno o el otro según expuesto en *Rivera v. Superior Packaging* y *Aponte v. Sears* y dependiendo de los hechos del caso.[36] Y es que no hay otra manera de concluirlo, puesto que estos escrutinios son mecanismos de prueba que el demandante tiene derecho a seleccionar como parte de su peso inicial de establecer el defecto del producto.[37] Por ello, este error involuntario definitivamente debe ser considerado un *obiter dictum* de la opinión.

El segundo error fue que el Tribunal Supremo pasó por alto la §2(b) del nuevo *Restatement*, que contiene la definición actualizada de defecto de diseño. Esta definición solo incorpora el *Risk Utility Test* y no el *Consumer Expectation Test*,[38]

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[36] *Rodríguez Méndez*, 195 DPR en la pág. 782 (*citando a* Hoover v. New Holland North America, Inc., 11 N.E.3d 693, 701 (N.Y. 2014) ("[E]l concepto de defecto de diseño se moldeó con el tiempo hasta componerse de un análisis bipartito constituido por los escrutinios conocidos como el *Consumer Expectations* y el *Risk Utility*".)). El Tribunal Supremo utilizó la siguiente expresión de Hoover:

> *[A] defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use, [and] whose utility does not outweigh the danger inherent in its introduction into the stream of commerce*.

El profesor Álvarez González coincide en que el Tribunal Supremo, distinto a *Rivera v. Superior Packaging*, utilizó la conjunción copulativa "y" en vez de la disyuntiva "o", lo que resulta que el demandante tiene el peso de establecer ambos escrutinios. Álvarez González, *supra* nota 28, en la pág. 609. Esto, sin embargo, no tiene sentido, habida cuenta de que *Rodríguez Méndez* no ofrece mayor elaboración para el uso del "y", cuando en *Rivera v. Superior Packaging*, 132 DPR pág. 129, se utilizó la conjunción disyuntiva "o", por lo que se puede inferir razonablemente que se trata de un error involuntario en la opinión. Además, según la jurisprudencia de California, según analizada por el Primer Circuito, el *Consumer Expectations Test* no está disponible en todo caso de defecto de diseño, siendo el más utilizado el *Risk Utility Test*. *Véase Quintana-Ruiz*, 303 F.3d en la pág. 77 (*citando a* Soule v. Gen. Motors Corp., 8 Cal.4th 548, 34 Cal. Rptr.2d 607, 882 P.2d 298, 305 (Cal. 1994) ("Barker. . . *made clear that when the ultimate issue of design defect calls for a careful assessment of feasibility, practicality, risk and benefit, the case should not be resolved simply on the basis of ordinary consumer expectations*.")). En *Soule*, el Tribunal Supremo de California resolvió que el *Consumer Expectations Test* no es apropiado en una reclamación de defecto en el ensamblaje de neumáticos que de repente se salieron del vehículo. *Véase, además,* Bouret Echevarria v. Caribbean Aviation Maint. Corp., 845 F. Supp. 2d 467, 468 (D. P. R. 2012) ("*Robinson is correct in stating only the risk/utility test is available to Plaintiffs in this case because the consumer expectations test is not available when the underlying matter involves complex technical matters such as the present case*.").

[37] VICTOR E. SCHWARTZ, ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS, CASES AND MATERIALS 804 (13ra ed. 2015) ("*[T]he two tests are not theories of liability but methods of proof by which a plaintiff may show that the element of unreasonable dangerous is met*".). La mayoría de las jurisdicciones utiliza el *Risk Utility Test* o permiten el uso de ambas dependiendo de los hechos y la complejidad del caso. *Id*. Una minoría de jurisdicciones solamente utiliza el *Consumer Expectations Test*. *Id*. (*citando a* Godoy v. E.I. Du Pont de Nemours and Co., 319 Wis.2d 91, 768 N.W.2d 674, 697 n. 5 (Wis. 2009)(Prosser, opinión concurrente)) (Wisconsin, Alaska, Arkansas, Hawái, Nebraska y Oklahoma solamente utilizan el *Consumer Expectations Test*).

[38] Kenneth Ross y Ted Dorenkamp, *Product Liability and Safety in the United States: Overview*, PRACTICAL LAW COUNTRY Q&A (w-012-8129) (Westlaw 2018) (*disponible en* https://uk.practicallaw.

por lo que hubiese sido importante que el Tribunal abundara sobre este cambio del *American Law Institute*.[39] De hecho, no es sorprendente que el *American Law Institute* haya eliminado del *Restatement* el *Consumer Expectations Test*, ya que ha caído en desuso a través de los años. Según explicó, desde 1994, un abogado experimentado, en Luisiana, en casos de productos defectuosos:

> *The consumer expectation test can work in manufacturing defect cases, in cases involving inherently dangerous design characteristics when the product or characteristic of the product at issue is simple and sufficiently familiar to the average consumer to enable him to have reasonable expectations about the product, and in breach of express warranty cases when the manufacturer's express warranty serves as a point of reference for what a consumer would reasonably think about the product. The consumer expectation test also is appropriate in failure to warn cases as an expression of the well-settled principle of law that a manufacturer need not warn about and is not responsible for obvious dangers of his product, absent unusual circumstances. This is how the LPLA [Louisiana Products Liability Act] employs the test.*
>
> *Except in these circumstances (and, of course, others this author may not have considered), the consumer expectation test is of only marginal use. The world has changed dramatically in the past thirty years in ways none of us could have imagined at the time the consumer expectation test was fashioned in 1965. The issues arising in many products liability*

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thomsonreuters.com/w-012-8129?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1):

> *The risk-utility test, which originally applied to strict liability, is very close to negligence as it allows a manufacturer's conduct or fault to be considered. As a result, in the states that have adopted risk-utility, there has arguably been a merging of the concepts of strict liability and negligence.*
>
> *Today, [most] states use the risk-utility test. The Restatement adopted risk-utility and rejected consumer expectations. However, there are some states that still use the consumer expectations test. In those states, they still talk about negligence and strict liability as separate theories of liability*.

[39] Bublick, *supra* nota 32, en la pág. 296 (*citando* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §2(b) (AM. LAW INST. 2012)):

> *A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.*

Para una explicación del *American Law Institute* de por qué descartó el *Consumer Expectations Test*, véase Bublick, *supra* nota 32, en la pág. 306.

[40] John Neely Kennedy, *The Role of the Consumer Expectation Test Under Louisiana's Products Liability Tort Doctrine*, 69 TUL. L. REV. 117, 153-54 (1994).

> *disputes today—especially design and warning cases, but also in others—are considerably more complex because of the increased complexity of so many of the modern products used and relied on today by consumers to enhance their quality of life. Society has changed as well, along with the values that lend it order and stability. The fact is that the consumer expectation test now contributes much less to a reasoned analysis of what constitutes an unreasonably dangerous product in 1994.*[40]

El tercer punto notable de *Rodríguez Méndez* es que el Tribunal Supremo se reafirmó en los postulados jurídicos de la doctrina, según esbozados desde *Mendoza* y su progenie. Esto incluye que todos los actores que intervienen en la cadena de fabricación, distribución y venta de un producto defectuoso responden solidariamente, sin necesidad de que el demandante demuestre negligencia. También incluye que el fabricante no es asegurador absoluto de la seguridad de los consumidores, sino del uso previsible del producto y que no se haya alterado sustancialmente.[41] Con esta última expresión, el Tribunal reafirmó la defensa del fabricante cuando su producto se modifica o utiliza de forma imprevisible, según se expuso en *Aponte v. Sears*, pero la elaboró y etiquetó con el nombre de "modificación sustancial".[42]

En cuarto lugar, rechazó el argumento del fabricante del equipo médico a los efectos de que no procedía imponerle responsabilidad cuando un tercero, en este caso el oftalmólogo demandado, no adquirió el equipo, sino la instalación médica donde se realizan las cirugías de corrección visual. De este modo, del paciente haber probado que el fabricante omitió instrucciones materiales sobre el uso y mantenimiento del equipo médico, hubiese derrotado la moción de sentencia sumaria del fabricante al nacer la responsabilidad, no del galeno demandado, sino de la insuficiencia en las instrucciones y advertencias del equipo.[43] Como comenta correctamente el profesor José J. Álvarez González:

> El hecho de que el médico que realizó la operación no formase parte de la cadena de fabricación o distribución del producto nada abona a este análisis, pues no exime a[l] [fabricante] del deber de proveer las

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[41] Rodríguez Méndez v. Laser Eye, 195 DPR 769, 779-84 (2016). Sobre la solidaridad, creemos que lo resuelto en *Fraguada Bonilla v. Hospital Auxilio Mutuo*, 186 DPR 365 (2012) (que exige al demandante interrumpir el término prescriptivo contra cada cocausante, so pena de asumir, para beneficio de los demás demandados, el porciento de responsabilidad del cocausante favorecido por la defensa de prescripción) es inaplicable en casos de productos defectuosos. Permitir lo contrario socavaría la razón social y de política pública que el Tribunal Supremo encaminó con la doctrina. Además, en casos de productos defectuosos, los demandados que participan en la cadena de fabricación, distribución y venta tienen un interés común que se traduce en beneficios económicos. Abel, *supra* nota 5, en las págs. 642-45.

[42] *Véase supra* nota 30.

[43] *Rodríguez Méndez*, 195 DPR en la pág. 788.

> advertencias necesarias sobre los peligros, usos o alteraciones previsibles al producto. De aceptar la teoría de[l] [fabricante], solo procedería imputarle responsabilidad a un fabricante cuando la ocurrencia o comisión del daño intervenga alguien que haya servido de eslabón en la cadena de venta o distribución.[44]
>
> Por tanto, la responsabilidad del fabricante o vendedor no nace a partir de los actos negligentes de quien compra o adquiere el producto, sino del acto del fabricante o vendedor de hacerlo disponible en el mercado en condiciones en que – bien sea por su diseño, fabricación o instrucciones insuficientes – era razonablemente previsible que pudiera ocasionar un daño.[45]

En fin, *Rodríguez Méndez v. Laser Eye*, fuera de ser una excelente decisión desde la perspectiva procesal cuando un demandado presenta una moción de sentencia sumaria bajo la modalidad de insuficiencia de la prueba, pauta la norma que un manufacturero de equipo médico no puede escudar su responsabilidad cuando el médico que atiende finalmente al paciente no fue quien adquirió el equipo médico. De igual manera, esta jurisprudencia revela que, de ahora en adelante, los demandantes deben cumplir con los siguientes requisitos en toda acción de daños por productos defectuosos:

> (1) la existencia de un defecto en el producto, ya sea de fabricación, de diseño, por la insuficiencia de advertencias o instrucciones; (2) el defecto existía cuando el producto salió del control del demandado; (3) el demandado debe estar en el negocio de vender o distribuir el producto; . . .(4) el defecto es la causa adecuada de los daños del demandante; y (5) el producto fue utilizado para un uso razonable y de manera previsible por el demandado.[46]

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[44] Álvarez González, *supra* nota 28, en la pág. 605. Aunque esto es correcto, es importante destacar que bajo la defensa anglosajona del *Learned Intermediary Rule* le corresponde al médico, y no al fabricante, realizar las advertencias debidas del riesgo del equipo médico en cuestión. SCHWARTZ, *supra* nota 37, en las págs. 813-14. Esta defensa no ha sido adoptada en Puerto Rico, pero sí la ha aplicado el Primer Circuito y el tribunal federal en Puerto Rico. *Véase* Diego A. Ramos y Roberto A. Cámara-Fuertes, *Puerto Rico, in* DRI PRODUCTS LIABILITY DEFENSES: A STATE-BY-STATE COMPENDIUM (2013) (*citando a Knowlton v. Deseret Medical, Inc*., 930 F.2d 116 (1er Cir. 1991) y su progenie). Por consiguiente, un manufacturero no puede escudar su responsabilidad debido a la falta de relación contractual con el médico y, al mismo tiempo, alegar como defensa que el médico tiene la responsabilidad de proveer las debidas advertencias al paciente.

[45] *Id*. en la pág. 606.

[46] González Cabán v. JR Seafood, 199 DPR 234, 241 n. 13 (2017)(*citando a Rodríguez Méndez*, 195 DPR en las págs. 780-81). Sobre la moción de sentencia sumaria bajo la modalidad de insuficiencia de la prueba, véase: *Rodríguez Méndez*, 195 DPR en la pág. 786 (*citando* a *Medina v. M.S. & D. Química P.R., Inc*., 135 DPR 716 (1994) y su progenie).

IV. González Cabán v. JR Seafood

La decisión más reciente del Tribunal Supremo de Puerto Rico en un caso de producto defectuoso ocurrió en *González Cabán v. JR Seafood*.[47] La genésis del litigio ocurre cuando un cliente de un restaurante en Coamo se intoxicó al comerse un camarón. El restaurante adquirió los camarones de un suplidor quien, a su vez, lo adquirió de una cadena de otros distribuidores demandados en el caso. El camarón se pescó en Calcutta, India y, según la prueba, estaba contaminado con "saxitoxina" la cual ocasionó graves daños al demandante, al grado que lo dejó cuadraplégico.[48]

Por estos hechos, se presentó una demanda (y posteriormente demanda enmendada) en la corte federal, ya que existía jurisdicción federal por diversidad de ciudadanía según 28 USC §1332(a)(1). Los demandados solicitaron la desestimación parcial de la demanda enmendada, ya que, de ser ciertas las alegaciones bien hechas, no existía una causa de acción plausible de responsabilidad estricta. Argumentaron que el camarón no fue objeto de un proceso artificial de manufactura o fabricación y, por consguiente, procedía la desestimación según pautó en su opinión concurrente el juez asociado Negrón García, en una resolución del Tribunal Supremo que denegó expedir en *Méndez v. Ladi's Place*, un caso sobre contaminación de un cliente quien consumió un pescado que contenía ciguatera.[49] Los demandantes, por su parte, argumentaron que, a la luz de prueba pericial, distinto al caso de *Méndez v. Ladi's Place*, un camarón con saxitonina puede ser detectado mediante pruebas e incluso se puede limpiar sus vísceras e intestinos antes del consumo humano.

El juez federal Gustavo A. Gelpí, luego de estudiar el asunto y realizar un análisis de Derecho comparado, decidió que esa controversia era novel y, por tanto,

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[47] *Véase supra* nota 5. En casos federales por diversidad de ciudadanía, se aplica el Derecho sustantivo del lugar donde esté localizado el tribunal de distrito. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

[48] La saxitoxina es una "neurotoxina potente que se encuentra en los moluscos bivalvos, por ejemplo, mejillones, almejas y vieiras. La producen ciertas especies de dinoflagelados, que son consumidos por los moluscos. La saxitoxina puede causar una grave intoxicación alimentaria en los seres humanos que comen marisco contaminado". *González Cabán*, 199 DPR en la pág. 237 n. 6 (*citando a* DICCIONARIO MOSBY: MEDICINA, ENFERMERÍA Y CIENCIAS DE LA SALUD 1417 (6ta ed. 2003).

[49] 127 DPR 568 (1990). En *Méndez v. Ladi's Place*, el foro de instancia denegó una demanda de daños y perjuicios ocasionada por el envenenamiento de un comensal al ingerir un pescado contaminado con ciguatera. El Tribunal Supremo denegó el auto de revisión. El juez asociado Negrón García, en voto concurrente, opinó que coincidía con el resultado porque la intoxicación con ciguatera no fue a consecuencia de un proceso de fabricación o manufactura. Además, resaltó que la doctrina de productos defectuosos persigue castigar el descuido del fabricante y, debido a que la ciguatera es una contaminación que ocurre naturalmente en el pescado, sin la intervención humana, no hay manera que el vendedor pueda prevenirla, pues la toxina no se destruye por los métodos convencionales de cocina, no se elimina con métodos convencionales de manejo y procesamiento y no se puede detectar por el olor o apariencia del pescado. *Id*. en las págs. 569-70. Estas últimas expresiones sobre previsibilidad ciertamente son impertinentes a la doctrina de responsabilidad sin culpa y parecen estar encajadas más bien en la defensa de caso fortuito del artículo 1058 del Código Civil, 31 LPRA § 3022 (2015).

ameritaba abstenerse y certificar la cuestión al Tribunal Supremo de Puerto Rico. Dicho foro expidió el auto de certificación y emitió opinión, mediante votación 5-4, en que contestó que la causa de acción era improcedente como cuestión de Derecho, porque el camarón contaminado no pasó por un proceso de fabricación o manufactura. Al así hacerlo, el Tribunal fundamentó su dictamen en la opinión concurrente del juez asociado Negrón García en *Méndez Corrada v. Ladi's Place*.

Como podrá notarse, los únicos casos de alimentos contaminados que el Tribunal Supremo atendió en el pasado son distinguibles a *González Cabán*, porque fueron casos de un helado, un dulce y un refresco que estaban contaminados como consecuencia de la intervención humana.[50] El Tribunal nunca se había pronunciado sobre si un producto comestible, en el cual no interviene el fabricante, cuyo defecto surge naturalmente, puede estar sujeto a una acción de responsabilidad sin culpa.

Pero ante lo novel de la controversia y el conflicto doctrinal en Estados Unidos, según analizó en su opinión el juez Gelpí, era de superlativa importancia que el Tribunal Supremo profundizara sobre el tema, particularmente para alinearse a la evolución y cambios vanguardistas de la norma desde 1990, cuando se decidió, sin opinión, *Méndez v. Ladi's Place*. El juez asociado Rivera García, en su opinión disidente, realizó un ejercicio loable de Derecho comparado, así como el juez federal Gelpí en su opinión y solicitud de certificación.[51]

De un estudio relámpago sobre el tema, parece ser que la norma existente en Estados Unidos diferencia entre productos comestibles que han sido contaminados durante su confección o elaboración, cuando son bacterias o toxinas comunes que no ocasionan lesiones a gran parte de la ciudadanía[52] y aquellas bacterias o toxinas

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[50] *Véase* jurisprudencia citada en *supra* notas 9 y 10.

[51] *González Cabán*, 199 DPR en las págs. 261-68 (Rivera García, opinión disidente) (*citando* RESTATEMENT (THIRD) TORTS: PROD. LIAB. §7 (AM. LAW INST. 1998), que define la responsabilidad estricta del vendedor de alimentos). *Id*. en las págs. 258-59 n. 64. Véase, además, *González Cabán v. JR Seafood*, 132 F. Supp.3d 274, 286-88 (D. P. R. 2015), en que el juez federal Gelpí discute el *Foreign/ Natural Test* y el *Reasonable Expectation Test* y comenta que existe división en las jurisdicciones en cuanto a cuál escrutinio aplicar. La mayoría de las jurisdicciones, al igual que el *Restatement*, aplican el último escrutinio. OWEN, *supra* nota 35, en la pág. 206 ("*Regardless of the theory of liability, almost all recent decisions follow [the] replacement of the foreign/natural test with a consumers expectations standard*".). La §7 del *Restatement* dispone:

> *One engaged in the business of selling or otherwise distributing food products who sells or distributes a food product that is defective under § 2, § 3, or § 4 is subject to liability for harm to persons or property caused by the defect. Under § 2(a), a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.*

Véase RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 7 (1998).

[52] Cuando el alimento crudo tiene bacterias que de ordinario no lesionan al ciudadano común, no existe responsabilidad. *Véase, e.g.,* Horan v. Dilbet, Inc., 2015 WL 5054856, pág. *8 (D.N.J. Aug. 26, 2015) ("*[O]ther jurisdictions that have considered this issue have generally held that a seller is not liable for selling shellfish containing Vibrio because it is a naturally-occurring bacteria that is*

que afectan adversamente a toda la ciudadanía.[53] Comentaristas sobre el tema lo explican de la siguiente manera:

> *If the injury-producing substance is natural to the preparation of the food served, it is fair to conclude that the consumer had reasonably expected its presence in his meal and the food cannot be deemed to be unfit for human consumption or defective. Thus, that plaintiff would not have a viable cause of action in implied warranty or strict liability. These expectations of the consumer do not, however, negate a defendant's duty to exercise reasonable care in the preparation and service of food. Therefore, if the presence of the natural substance is due to a defendant's failure to exercise due care in the preparation of the food, an injured plaintiff may have a cause of action in negligence. By contrast, if the substance is foreign to the food, then a trier of fact must decide (i) whether its presence could reasonably be expected by the average consumer and (ii) whether its presence rendered the food either unfit for human consumption or defective under the theories of the implied warranty of merchantability or strict liability. However, whether the foreign substance is "natural" to the food consumed would be immaterial if the food had been so processed, or the foreign substance was of such size, quality or quantity, that the substance's presence should not have been reasonably anticipated by the customer. Therefore, it has been held that, where the consumer cannot identify the substance that caused him injury, the action will be dismissed*

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harmless to most consumers.")(*citando a* Simeon v. Doe, 618 So.2d 848, 851 (La.1993); Woeste v. Washington Platform Saloon & Restaurant, 163 Ohio App.3d 70, 836 N.E.2d 52 (Ohio Ct. App. 2005); Bergeron v. Pacific Food, Inc., 2011 WL 1017872 (Conn. Super. Ct. Feb. 14, 2011). *Véase, además,* **Edwards v. Hop Sin, Inc.,** 140 S.W.3d 13, 16 (Ky.App.2003):

> *We agree with the trial court that the presence of Vibrio bacteria in raw oysters does not constitute either a manufacturing or a design defect. The record indicates that there are no reasonably available alternatives to bacteria-laced oysters. The bacterial presence occurs naturally under commonly occurring conditions and screening is not feasible because current methods of testing for the bacterium destroy the oyster. Furthermore, the bacterium poses little threat of harm to healthy persons. . . We agree with the trial court that, Vibrio notwithstanding, it is not per se unreasonable to market raw oysters.*
>
> *Cf*. OWEN, *supra* nota 35, en la pág. 208 ("*The courts impose at least a duty to warn of the risk of serious, possibly deadly, infection of contaminated oysters, even though the risk normally is only to persons with [medical conditions that] diminish the ability of the body to destroy the bacteria*.").

[53] Pero cuando la bacteria llega al producto en su estado natural y ocasiona graves lesiones corporales y neurológicas, como la saxitoxina, al menos un tribunal en Connecticut se ha negado a desestimar sumariamente una demanda y no descartar una causa de responsabilidad sin culpa o de negligencia. Collier v. Bloom, 2016 WL 6078748, págs. *5-7 (Conn. Super. Ct. Sept. 12, 2016). *Véase, además*, CHARLES J. NAGY, JR., AM. L. PROD. LIAB. 3d § 81:12, Westlaw (database updated May 2019).

> *since the trier of fact would be unable to apply this reasonable expectation standard in order to evaluate the merits of the claim.*
>
> *Certain food products, such as raw oysters and clams, may contain naturally-occurring bacteria that are generally harmless but that could injure some consumers. Most courts seem to hold that both the foreign/ natural test, and the reasonable expectation test would immunize the seller from implied warranty liability because these food items are reasonably fit, suitable or safe for human consumption. However, if the injured plaintiff can establish that her injury was caused by unsanitary handling procedures by the vendor, or if the naturally-occurring bacteria were harmful to all who consumed the food product, a different result might occur*.[54]

De la exposición precedente surge que en Estados Unidos se reconoce generalmente la existencia de causas de acción de responsabilidad estricta y subjetiva extracontractual en casos de productos comestibles que ocasionan daños al consumidor.[55] Pero debido a que el auto de certificación se dio en el contexto de las alegaciones bien hechas de la demanda presentada en la corte federal, el Tribunal Supremo no tuvo el beneficio de hechos adicionales, luego de concluido el descubrimiento de prueba, particularmente hechos germanos a si la saxitoxina era detectable, si existían protocolos de inspección, detección y eliminación de saxitoxina en los camarones, si existía reglamentación federal o estatal que requiriesen dicha inspección y si los costos sobrepasaban o no el riesgo involucrado.[56]

El conocer estos hechos hubiese sido importante porque, según *Rodríguez Méndez v. Laser Eye*, del suplidor conocer de la probabilidad que los camarones estuviesen contaminados con saxitoxina, hubiese realizado las pruebas necesarias. Si no, al menos, hubiese ofrecido las advertencias a la cadena de distribuidores para que estuviese alerta y ejerciera los protocolos de limpieza y mantenimiento de los camarones, antes de la venta final al consumidor.[57]

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[54] JOHN L. AMABILE Y JOHN C. AMABILE, IS THERE AN IMPLIED WARRANTY OF MERCHANTABILITY IN YOUR CASE? —TO WHAT EXTENT DOES THE WARRANTY APPLY TO FOOD?, 11 BUS. & COM. LITIG. FED. CTS. § 117:40, Westlaw (4ta ed. 2018)

[55] *Véase* fuentes citadas en *supra* notas 54-57.

[56] González Cabán v. JR Seafood, 132 F. Supp.3d 274, 283 (D. P. R. 2015):

In fact, whether the presence of saxitoxin was detectable at the time of the events is currently subject of the ongoing discovery process taking place in this litigation. Nevertheless, considering that this issue will very likely be proven based on expert scientific testimony, its determination is one that goes to the weight of the evidence and, thus, is one for the fact-finder to determine, in this case the jury.

[57] Rodríguez Méndez v. Laser Eye, 195 DPR 769, 788 (2016*). Véase, además, supra* notas 43 y 44. Cabe señalar, sin embargo, que en la corte federal los demandados alegaron que, si bien existen métodos para asegurarse de la seguridad del producto, no existe obligación legal de detectar bacterias que crecen naturalmente en los productos comestibles que importan del exterior. *González Cabán*, 132 F. Supp. 3d en la pág. 283.

El problema de no haber esperado a que culminara el descubrimiento de prueba y que se desarrollaran mejor los hechos es, entre otras cosas, que el Tribunal Supremo realizó expresiones innecesarias que, a nuestro juicio, constituyen la crónica de una muerte anunciada para futuros casos similares presentados al amparo de una teoría ordinaria de responsabilidad subjetiva extracontractual.[58] Estas expresiones se encuentran en la nota al calce 17 de la opinión. Allí el Tribunal concluyó, sin tener prueba al respecto, que la saxitoxina en el camarón, al igual que la ciguatera: "(1) se acumula en la víscera del camarón cuando éste consume ciertos dinoflagelados venenosos que producen la toxina; (2) no se elimina por los métodos convencionales de manejo y procesamiento, y (3) no se detecta por el olor o la apariencia del camarón."[59]

V. Conclusión

Como puede apreciarse, con este comentario pasajero, el Tribunal Supremo encajó perfectamente la situación de la saxitoxina en el camarón bajo la defensa de caso fortuito según el artículo 1058 del Código Civil que dispone que nadie será responsable de situaciones imprevisibles o, de ser previsibles, inevitables.[60]

En fin, la eliminación de la causa de responsabilidad estricta en casos de productos comestibles de esta naturaleza no nos parece tan oneroso como las expresiones del Tribunal en la nota al calce 17. Lo resuelto en *González Cabán v. JR Seafood* cierra definitivamente las puertas a una acción de responsabilidad estricta en Puerto Rico y, peor aún, establece las bases para rehusar *a priori* causas de acción extracontractual bajo una teoría de responsabilidad subjetiva. Víctimas futuras de daños similares tendrán que puntualizar y profundizar en la evolución del tema en Estados Unidos o esperar a legislación o reglamentación especial que les ofrezca mayor protección. De esto último ocurrir, existirá entonces un nuevo deber jurídico que los fabricantes, distribuidores y vendedores de productos

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[58] González Cabán v. JR Seafood, 199 DPR 234, 245 n. 18 (2017) ("Claro está, lo aquí resuelto no implica que, de cumplir con los estándares aplicables, los peticionarios estén impedidos de recobrar al amparo de otros preceptos de nuestro ordenamiento jurídico".). Sobre estos extremos, el juez federal Gelpí, al aprobar la certificación al Tribunal Supremo de Puerto Rico, comentó lo siguiente: "*If the strict liability principle is not applicable to the instant case, Plantiffs would proceed with their other claims, including the general negligence claim under Article 1802*." *González Cabán*, 132 F. Supp.3d en la pág. 289. Pero como se dijera en *supra* nota 5, el juez Gelpí, el 25 de marzo de 2019, desestimó eventualmente esta reclamación por la vía sumaria por ausencia de prueba de causalidad adecuada.

[59] *González Cabán*, 199 DPR en la pág. 244 n. 17.

[60] 31 LPRA § 3022 (2015). Pero no todo evento natural resulta en un caso fortuito según *Rivera v. Caribbean Home Const. Corp.*, 100 DPR 106, 118-19 (1971). Por otro lado, la doctrina de garantía implícita tampoco estaría disponible cuando el alimento está contaminado en su estado natural y no es adulterado por el fabricante ya que la *Ley de Alimentos* de 1940 sería inaplicable. *Véase supra* nota 9.

comestibles deberán cumplir y cuyo incumplimiento podría acarrear responsabilidad civil extracontractual al amparo de una teoría ordinaria de negligencia por omisión.[61]

[61] Para que un tribunal pueda imputar responsabilidad por omisión deben considerarse los siguientes factores: (1) la existencia de un deber jurídico de actuar por parte del alegado causante del daño; y (2) si de haberse realizado el acto omitido, se hubiera evitado el daño. Soc. Gananciales v. González Padín, 117 DPR 94, 106 (1986).


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