

***The Citizenship Dialectic***

Ediberto Román\*

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\* Associate Dean for Academic Affairs & Professor of Law, Florida International University College of Law. This is a footnoted version of presentations I have made at the 2004 Law & Society Conference and the 2005 People of Color Scholarship Conference at George Washington University. I would like to thank Professors Richard Delgado, Jean Stefancic, Gerald Torres, Ian Haney Lopez, Michael Olivas, Kevin Johnson, Mary Romero, Joe Thome, Linda Greene, Thomas Baker, Jorge Esquirol, Carlton Waterhouse, and Hannibal Travis for their comments on this article. I would also like to thank reference librarian Ms. Jan Stone for her invaluable investigative assistance.

## *I. Introduction*

Imagine that you reside in a country not unlike the United States, with a similar cultural, economic, racial, and ethnic mix. As in many other countries, the events of September 11, 2001 dramatically changed the lives of the inhabitants of your land. Your country passed a series of Special Laws specifically designed to enhance national security, and has joined the United States in its efforts in Afghanistan and Iraq. Your country's law enforcement and military officials, in several high-profile arrests that captured the attention of the populace, took three suspects into custody who allegedly were involved in terrorist related activities. While these high-profile arrests occurred at slightly different times and in different places, the commonality is that the alleged wrongdoers were citizens of your country. However, the commonalities end there. As events have unfolded, your country's treatment of these individuals varied greatly.

The first stemmed from the capture of a young national actually fighting for the Taliban regime in Afghanistan. As a teenager, he discovered Islam and came to adopt Taliban and Al Qaeda beliefs. He traveled to Egypt and Yemen to learn Arabic, trained for jihad in several training camps, and was said to have interacted with Osama Bin Laden. After his arrest, this individual was not treated pursuant to the Special Laws as an "enemy combatant," a status which would have severely limited his constitutional rights, but proceeded through your country's traditional criminal system. The official spokesman for your president declared that, "the great strength of this country is he will now have his day in court." He had his family with him throughout the initial process, had a bail hearing, was provided the right to counsel, eventually entered a plea agreement, and has begun to serve a twenty year prison sentence, instead of indefinite confinement as an enemy combatant or execution for treason. The deferential treatment was largely due to his status as a citizen of your land.

The second individual was similarly born in your country and was captured in Afghanistan allegedly fighting with Taliban forces. Unlike the first individual, this accused was treated as an “enemy combatant” and was immediately sent to a military jail. Your government argued that as an enemy combatant, it could detain him indefinitely without formal charges or proceedings, and would allow him due process and access to counsel only when it deemed it necessary. After a lengthy confinement in a military jail without any hearing or even charges leveled against him, the Supreme Court ordered that he was entitled to a meaningful hearing and ordered your government to either produce evidence of his crimes or to release him. Your government never used the citizenship exception, as it did with the previous individual, to subject him to your land’s traditional criminal procedures. Instead, it treated him as one of the scores of foreigners captured in Afghanistan. Ultimately, your government declared that this second individual no longer posed a threat to your country and entered into an agreement whereby this individual, without ever being convicted of any crime, would have his citizenship stripped, would be deported to his parent’s native land, and would be required to pledge never to return to your country.

The third individual was arrested in your land because he was suspected of preparing a terrorist attack. This individual, despite being a citizen of your land by virtue of being born there, was immediately held in indefinite detention as a material witness, and later as an “enemy combatant.” Although he has been jailed for several years without trial, he faces indefinite confinement, and only recently has been given the chance to meet with counsel. Even after one of your federal judges ordered that this individual either be charged with a crime or released, your government and its attorney general have declared that it will continue to detain him indefinitely, without trial, for the duration of hostilities in the war on terror.

Arguably the three accused were alleged to have waged war against your land, yet they faced dramatically disparate treatment. Now consider this. The first individual, who was afforded your

country's traditional criminal process and had his day in court with its right to counsel and other fundamental rights, is Caucasian. The second, who was subject to potentially indefinite confinement, ultimately was convicted of no crime, and was effectively forced to agree to be expatriated from his land and have his citizenship dissolved, is of Arab decent. The third, who remains in jail to this day and has yet to face a trial, is an ethnic minority descendant from one of your country's overseas territories and, as such, is an excellent example of the subordinate citizenship status given to those islanders.

As is evident to any newspaper reader, the above depiction is not based on a fictional portrayal, but on the actual events related to the arrests of John Walker Lindh,<sup>1</sup> Yaser Esam Hamdi,<sup>2</sup> and Jose Padilla.<sup>3</sup> While the cases of these individuals may be more complex than the above suggests, the disparate treatment of three similarly-situated individuals allows critics of the judicial system to raise questions concerning the motivations behind and basis for the disparate treatment.<sup>4</sup> Though many believe that the United States Government's vastly different treatment of these three individuals was largely due to racial and class constructions,<sup>5</sup> few, if any, scholars have fully explored

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<sup>1</sup> Ellen S. Podger, *Jose Padilla and Martha Stewart: Who Shall be Charged with Criminal Conduct?*, 109 Penn. St. L. Rev. 1059 (2005); Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 Mich. L. Rev. 1595 (2005).

<sup>2</sup> *Hamdi v. Rumsfeld*, 316 F. 3d 450 (4th Cir. 2002).

<sup>3</sup> *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y., 2002), rev'd, *Padilla ex rel. Newman v. Rumsfeld*, 352 F. 3d 695 (2d Cir. 2003), rev'd, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

<sup>4</sup> See e.g., David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953 (2002); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference and the Construction of Race Before and After September 11*, 34 Colum. Hum. Rts. L. Rev. 1 (2002). See also "Rights and the New Reality; Self-Inflicted Wounds; Secret Deportation Hearings, U.S. Citizens Denied Due Process While in Custody. These Evoke Memories of Dictatorships and Undermine the Health of Our Democracy," Los Angeles Times, Sep. 10, 2002 at pg. B. 12 (Disparate treatment of Hamdi, Lindh, and Padilla drew questions from Senator McCain and other leaders, including at least one federal judge).

<sup>5</sup> Natsu Taylor Saito, *Interning the "Non-Alien" Other: The Illusory Protections Of Citizenship*, 68 Law & Contemp. Probs 173, 208-10 (2005) (Padilla is both an internal Other by virtue of his race and ethnicity, and perceived as an external Other as a result of his conversion to Islam and the political associations attributed to him.); Joanna Woolman, *The Legal Origins Of The Term "Enemy Combatant" Do Not Support Its Present Day Use*, 7 J. L. & Soc. Challenges 145, 159-60 (2005); Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 Law & Contemp. Probs. 285, 313-14 (2005) (Lindh, a white American from a middle class family in California, fit the description for enemy combatant, but the government declined to label him as such; Hamdi, a U.S. citizen of Arab descent, and Padilla, a Puerto Rican, did not fit the description, but were labeled enemy combatants.)

the subject.<sup>6</sup> Those scholars who have addressed these events have limited their analysis to the declared American enemy combatants—Jose Padilla and Yaser Esam Hamdi.<sup>7</sup> Nonetheless, the public criticisms of their treatment do not stem from *de jure* citizenship distinctions established for different groups. Instead, the public criticism, to the extent there has been any, largely focuses on applying legal constructs to ethnically diverse groups.<sup>8</sup>

The post-September 11 events relating to the above well-known cases are recounted here not to raise questions concerning the application of criminal laws,<sup>9</sup> but to demonstrate that the fundamental legal and societal construct known as citizenship, arguably the most important identity marker in both its legal construction and application, has always included gradations or levels of membership.<sup>10</sup> In other words, differences in the legal treatment of those within a society who are supposed to be equal are not only not a new phenomenon, but are consistent with the citizenship

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<sup>6</sup> While not the focus of this project, a brief discussion of pertinent law relating to the treatment of citizens suspected of disloyalty is perhaps in order. The leading case on the subject is *Ex Parte Milligan*, 71 U.S. 2 (1866), where the Court addressed the propriety of a military court's jurisdiction over a citizen who was not a member of a military force. The Court held that the military court had no jurisdiction over such a person, and rejected the government's argument that the Bill of Rights did not apply during war. *Id.* at 118-30. The Court concluded that the military trial violated Milligan's Sixth Amendment right to a trial before and impartial jury and his Fifth Amendment's right to a grand jury. *Id.* The second leading case on the subject is *Ex Parte Quirin*, 317 U.S. 1 (1942). In that case, departing from *Milligan*, the Court refused to find that either the Fifth or Sixth Amendments prevented a naturalized U.S. citizen accused of conspiring with a foreign wartime enemy to be tried by a military tribunal. The Court found no distinction between citizen and foreign belligerents. *Id.* at 37-38. The *Quirin* Court distinguished the *Milligan* decision by noting that "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war..." *Id.* at 45.

<sup>7</sup> See, e.g., Juliet Stumpt, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. Davis L. Rev. 79 (2004). Much thanks are in order to Professor Charles Pouncy for raising the lack the failure of pundits to include John Walker Lindh in the enemy combatants debates at a Post-9/11 civil rights conference at Florida International University.

<sup>8</sup> At least one other person has recently argued that the "enemy-combatant" cases of *Hamdi* and *Padilla* have blurred citizenship constructions. See Stumpt, *supra* note 7.

<sup>9</sup> For a brilliant analysis of the civil rights versus national security debate post 9/11, read: THOMAS E. BAKER & JOHN F. STACK, *AT WAR WITH CIVIL RIGHTS & CIVIL LIBERTIES* (Rowan & Littlefield, 2005).

<sup>10</sup> Well known is the ongoing struggle with the caste system of India, a phenomena acknowledged even in election laws that prevent inciting hatred between the classes of citizens. Brenda Cossman and Ratna Kapur, *Secularism's Last Sigh: The Hindu Right, the Courts, and India's Struggle for Democracy*, 38 Harv. Int'l L.J. 113, 120. Another obvious example is the treatment of Jews in Europe, who have a long history of being accorded less than full citizenship rights. This treatment, dating to early in the Common Era, was memorialized by the Romans in the Theodosian Code of 425 C.E. and Justinian Code of 529 C.E., prohibiting participation in government, and restricting life, livelihood, and property ownership. NORMAN F. CANTOR, *THE SACRED CHAIN: THE HISTORY OF THE JEWS* 110 (HarperCollins 1994). Indeed, Justinian's Code prescribed death for those who broke provisions requiring particular religious affiliations for all citizens. Thomas M. Franck, *Is Personal Freedom A Western Value?*, 91 A.J.I.L. 593, 609 n.100 (1997).

construct's dark little secret. That secret is the largely unexplored fact that the citizenship construct, although widely accepted as requiring equality among those with the status of citizen, also contains a lesser known aspect that fosters differences in the treatment of the inhabitants within a society. These differences typically are both more vivid and capture greater attention during times of crises.<sup>11</sup> In fact, during the recent debates revolving around the appropriate level of civil rights protections available to accused terrorists after September 11, some writers have questioned the propriety of the treatment of Arab-Americans and Muslim-Americans, while others have championed differences in citizenship, effectively arguing that "some Americans are more equal than others."<sup>12</sup> In discussing the post-September 11 civil rights debate, one author observed that "[t]he pertinent question is not one of balancing, but one of determining which segments of American society deserve less constitutional protection than others in national crises."<sup>13</sup> Thus, the concept of citizenship implies a dialectic,<sup>14</sup> or a process of intellectual evolution and self-definition by means of the negation and transcendence of opposing ideas, between inclusion within a membership group and exclusion of nonmembers of the group that also defines the contours and meaning of the group itself.<sup>15</sup>

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<sup>11</sup> See, e.g., Seditio Act of 1798, ch. 73, 1 stat. 596 (expired 1891) (making it a federal offense to make false criticisms of the government or its officials, or to excite hatred of the people of the United States); *Ex parte Milligan*, 71 U.S. 2 (1866) (invalidating President Lincoln's Suspension of the Writ of habeas corpus); *Schenck v. United States*, 249 U.S. 42 (1919) (the World War I era prosecution of war critics); *Korematsu v. United States*, 323 U.S. 214 (1944) (the Japanese Internment case); *Dennis v. United States* 341 U.S. 494 (1951) (the McCarthy era 20 year imprisonment of individuals for teaching the works of Marx and Lenin).

<sup>12</sup> See, e.g., Arvin Lugay, "In Defense of Internment": Why Some Americans Are More "Equal" Than Others, 12 Asian L.J. 209 (2005) (book review of MICHELLE MALKIN, *IN DEFENSE OF INTERNMENT: THE CASE FOR RACIAL PROFILING IN WORLD WAR TWO AND THE WAR ON TERROR* (2004)). See also Jack Utter, The Discovery Doctrine, the Tribes, and the Truth, Indian Country Today, June 7, 2000 available at <http://www.indiancountry.com/content.cfm?id=2541>.

<sup>13</sup> Lugay, *supra* note 12, at 209.

<sup>14</sup> Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 15 Berkeley J. Intl'l L. 159, 187-190 (1997) (describing Hegelian dialectic); Michel Rosenfeld, *Comment: Spinoza's Dialectic and the Paradoxes of Tolerance: A foundation for Pluralism?*, 25 Cardozo L. Rev. 759, 767-770 (2003) (contrasting approaches to dialectic of Benedict de Spinoza and G.W.F. Hegel).

<sup>15</sup> ETIENNE BALIBAR, *WE, THE PEOPLE OF EUROPE?: REFLECTIONS ON TRANSNATIONAL CITIZENSHIP* 1, 50, 57 (Princeton University Press, 2004) (describing citizenship as a "dialectic of conflicts and solidarities," and specifically as a dialectic between "confrontation with the foreigner" and "communication between civilizations."); WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP* 1 (2001) (describing citizenship and naturalization laws as playing out a "dialectic of nation-building and minority rights").

The tension in the application of the citizenship construct is not limited to times of crises,<sup>16</sup> but, at least in the domestic sense, has repeatedly arisen when disfavored groups sought full membership.<sup>17</sup> In other words, the current criticisms of this government's treatment of Arab and Muslim citizens after September 11 are not only reminiscent of the World War II Japanese internment cases, which are widely discussed in legal literature,<sup>18</sup> but also the exclusion of disfavored groups from the definition of social and political citizenship prevalent throughout several thousand years of recorded history.<sup>19</sup> Specifically, this article intends to demonstrate how the concept of citizenship in Western democracies<sup>20</sup> has resulted in effects that are wholly inconsistent with the purportedly liberal ethos constructing citizenship itself.

Indeed, this duality appears in the first writings on the subject, made over two thousand years ago, where philosophers and politicians focused on equality for the members of a society, and in the same breath advocated the exclusion of many desirous of the status and, arguably, eligible to obtain it.<sup>21</sup> Thus from its very genesis, the construct exhibits exclusionary as well as inclusive aspects, yet the vast majority of the general literature on the subject, and virtually all of the legal juridical and scholarly pontifications, focus on the more appealing inclusive component of the construct. Citizenship's egalitarian aspects will be compared here with the lesser-known, or at least

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<sup>16</sup> See Milligan, 71 U.S. at 2; Quirin, 317 U.S. at 1.

<sup>17</sup> The central thesis here is to expose the fact that the gradations of membership have not merely arisen during the exigencies of war or political crises, but have always been part of the obstacles faced by disfavored groups seeking full membership.

<sup>18</sup> See, e.g., Aya Gruber, *Raising the Red Flag: The Continued Relevance of The Japanese Internment in the Post-Hamdi World*, 54 Kan. L. Rev. \_\_\_\_ (2006); See, e.g., Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 Asian L.J. 195 (2002); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"*, 8 Asian L.J. 1 (2001); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575 (2002); See also Erwin Chermersky, *Civil Liberties And the War on Terrorism*, 45 Washburn L.J. 1 (2005); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. Rev. 847 (2005); Lee Epstein, Daniel E.Ho, Gary Fing, Jeddrey A. Segal, *The Supreme Court During Crises: How War Affects Only Non-War Cases*, 80 N.Y.U. L. rev. 1 (2005); Earl M. Maltz, *The Exigencies of War*, 36 Rutgers L.J. 861 (2005).

<sup>19</sup> Recent scholarship on the war on terror has raised the questions of whether the concept of citizenship is itself a limit on executive power. See, e.g., Jerome A. Barron, *Citizenship Matters: The Enemy Combatant Cases*, 19 Notre Dame J. L. Ethics & Pub. Pol'y 33 (2005). See also Utter, *supra* note 12 (tracing the role of the state as "institutionalized superiority of one people over another, found in the Discovery Doctrine" back to Aristotle.)

<sup>20</sup> See MALKIN, *supra* note 12.

<sup>21</sup> ARISTOTLE, POLITICS BOOK III, Chapter 5.

lesser-acknowledged, theoretical aspects, as well as its more recent domestic applications, which have repeatedly evidenced selective membership and exclusion.<sup>22</sup> Part One explores various components of both ancient and contemporary citizenship theory. This part demonstrates that citizenship theory has always extolled the virtues of equality, but has also supported the exclusion of less favored groups from the status. Part Two explores the concept's domestic development and demonstrates that the American experience of citizenship fits squarely within this article's central thesis, namely citizenship rhetoric repeatedly champions a model of equality and inclusion, but in practice disfavored groups suffer repeated denial of full social, civil, and political citizenship rights. Part Three demonstrates that American constitutional history evinces the creation and maintenance of formal or *de jure* subordinate citizens, which include this country's indigenous peoples and inhabitants of this country's territorial island dependencies. Part Four questions whether this country has also established *de facto* subordinate citizens.<sup>23</sup> Specifically, this section posits that certain groups, such as African-Americans, were and perhaps still are less than full citizens despite attaining such status after the passage of the Fourteenth and Fifteenth Amendments to the United States Constitution. Unquestionably, the 1954 *Brown v. Board of Education* decision effectively confirmed *Plessy's* "separate but equal" paradox that created *de facto* subordinates until the 1950's. Part Five explores the related *de jure* subordination of groups that should have been eligible for citizenship but were denied access to it because of the country's exclusionary naturalization laws. Finally, Part Six proposes an inclusive model for citizenship based on rights as well as status.

## **II. The Classic Construction of Citizenship**

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<sup>22</sup> See Barron, *supra* note 19, at 34.

<sup>23</sup> The once *de jure* and arguably still *de facto* subordinate citizenship status of women may be further explored in the following articles. See, e.g., Gretchen Ritter, *Women's Citizenship and the Problem of Legal Parenthood in the United States in the 1960's and 1970's*, 13 *Tex. J. Women & L.J.* 1 (2003); Catherine L. Fisk, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in the 20<sup>th</sup> Century America*, 51 *Buff. L. Rev.* 409 (2003); Christine Chinkin & Kate Paradine, *Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords*, 26 *Yale J. Int'l L.* 103 (2001).

Although over thirty years ago a leading constitutionalist declared that the concept of citizenship is of little significance in American constitutional law,<sup>24</sup> the last two decades have witnessed what several writers have declared “an explosion of interest in the concept of citizenship.”<sup>25</sup> The renewed theoretical focus was sparked by recent world-wide political events and trends including, but not limited to, increasing voter apathy and long-term welfare dependency in the United States, the resurgence of nationalists movements in Eastern Europe, and the stresses created by increasingly multicultural and multiracial populations in Western Europe.<sup>26</sup> More recent events such as the September 11, 2001 terrorist attacks on the United States, and the United States’ ensuing domestic and global war on terrorism with its consequences to Arabs and Muslims both at home and abroad; the United States government’s ineffective efforts at rescuing the largely poor and African-American victims of the Gulf Coast of Louisiana after Hurricane Katrina along with the widespread characterization of those citizens as refugees; and the recent and ongoing ethnic uprisings in France suggest that scholarly interest will continue to focus on the subject of citizenship. While these events have led to a significant amount of public and media attention, they have not led to much scholarly debate concerning their implications on democratic and citizenship theories.

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<sup>24</sup> Alexander M. Bickel, *Citizenship In American Constitution*, 15 Ariz. L. Rev. 369 (1973). In his book, Bickel argued that the Constitution’s Preamble speaks of “We the People,” not “We the Citizens.” As such, the Bill of Rights applies to all people, irregardless of citizenship. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 36 (1975). He argued that the concept of citizenship was not important to the framers and that “the original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen.”

<sup>25</sup> Will Kymlicka and Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 *Ethics* 352 (1994) (further noting that the concept of citizenship had been out of fashion since the late 1970’s).

<sup>26</sup> *Id.* The authors suggest that the academic debate is seen as a “natural evolution in the political discourse because the concept of citizenship seems to integrate the demand of justice and community membership, the central concepts of political philosophy in the 1970’s and 1980’s respectively. Citizenship is intimately linked to the ideas of individual entitlements, on the one hand, and of attachment to a particular community, on the other. Thus it may help to clarify what is really at stake in the debate between liberals and communitarians.” *Id.*

Nevertheless, citizenship is the most basic of all rights, “the right to have rights.”<sup>27</sup> Accordingly, citizenship is a broadly conceived concept typically deemed a central component of Western civilization. It is the adhesive that joins the Constitution,<sup>28</sup> and binds the people to the republic. It also embodies the strongest link between the individual and the government.<sup>29</sup>

### *A. Citizenship’s Equality Component*

With roots dating back to Athenian political leaders and philosophers such as Solon and Aristotle, the concept of citizenship served a pivotal role in the development of democratic order. Over 2500 years old, the concept remains to this day indispensable for the conceptual construction and understanding of basic elements of political and legal order.<sup>30</sup> This term’s modern description varies little from the classic vision’s concept.

In Book III of his *Politics*, Aristotle set forth the foundational statement concerning the concept’s roots. He asserted that “a state is composite, like any other whole made up of many parts; these are the citizens, who compose it.”<sup>31</sup> Equality among the citizenry is not only a timeless

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<sup>27</sup> HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (Harcourt Brace Jovanovich, 1979). Arendt was one of the first to recognize that Nazi Germany and the Soviet Union were two sides of the same coin rather than opposing philosophies of Right and Left.

<sup>28</sup> Johnny Parker, *Johnny Came Home Again, A Critical Review of Contemporary Equal Protection Interpretation*, 37 How. L. J. 393, 396 (1994). Parker wrote that “[t]he concept of citizenship is fundamental to constitutionally interpretation.” *Id.*

<sup>29</sup> Yaffa Zilbershats, *Reconsidering the Concept of Citizenship*, 36 Tex. Int’l L. J. 689, 690 (2001). Zilbershats, in noting that nationality is the manifestation between an individual and the State, writes that there is no clear international criteria for defining this connection. *Id.* at 691. “There is no clear international law stating in which circumstances a State must confer nationality upon a person and when a person has the right to become a citizen. The uncertainty and lack of definition in international law ensue from the fact that international law has sanctified the principle of State sovereignty and non-intervention on the part of one State in the affairs of another.” *Id.* As such, he says that “State sovereignty has primarily been reflected in the power of the State to determine who will be its permanent and preferred members, i.e., who will be its citizens. Indeed, every State has established its own rules regarding when, how, and upon whom nationality will be conferred.” *Id.*

<sup>30</sup> ULRICH K. PREUSS, *THE AMBIGUOUS MEANING OF CITIZENSHIP* (2003).

<sup>31</sup> ARISTOTLE, *POLITICS* Book III 126 (Chapter 1: “The State then is composite, and, like any other whole, made up of many parts, which are the citizens who compose it.”)

component of citizenship literature,<sup>32</sup> but also a basis for the citizenship ideal,<sup>33</sup> which is also the classic or dominant construction of the concept. For instance, Aristotle likened political and social citizenship to the communitarian structure aboard a sailing vessel—although all sailors (or citizens) are specialized in their tasks aboard ship, all are indispensable members of a whole, without which the community cannot function.<sup>34</sup> The classical construction also deeply influenced contemporary philosophers, such as John Locke, Alexis De Toqueville, and John Stuart Mill, who all recognized the significance of equality among the participants within a society. John Locke is often cited as a primary influence on the founding fathers because Thomas Jefferson, in drafting the Declaration of Independence, admitted to drawing liberally from Locke’s *Two Treatises on Government*.<sup>35</sup> In particular, the famous assertion that all men are “endowed by their Creator with certain unalienable rights, that among these are life liberty and the pursuit of happiness,”<sup>36</sup> was drawn from Locke’s work almost verbatim.<sup>37</sup> Mill found equality a central component of citizenship and democracy. He used equality to advocate for granting citizenship status to women.<sup>38</sup> De Toqueville in a similar vein declared “the more I advance in the study of American society, the more I perceive that the equality of condition is the fundamental fact from which all others seem to derive.”<sup>39</sup>

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<sup>32</sup> Erwin Chemerinsky, *Articles and Commentary on Equality: In Defense of Equality: A Reply to Professor Western*, 81 Mich. L. Rev. 575 (1983) (“No value is more thoroughly entrenched in Western culture than is the notion of equality”).

<sup>33</sup> Kenneth L. Karst, *Why Equality Matters*, 17 Ga. L. Rev. 245 (1983) (“[I]mplicit in the values of citizenship . . . is the notion of equal membership in the community.”).

<sup>34</sup> ARISTOTLE, *supra* note 31 chapter 4.

<sup>35</sup> David L. Wardle, *Reason to Ratify: The Influence of John Locke’s Religious Beliefs on the Creation and Adoption of the United States Constitution*, 26 Seattle U. L. Rev. 291, 297 (2002).

<sup>36</sup> The Declaration of Independence Para. 2 (U.S. 1776)

<sup>37</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 168-69 (The Classics of Liberty Library, Special Edition, 1992). Locke writes that men are born free and equal in rights. While, all men are equal in the state of nature, civil society originates when men agree to delegate the function of punishing transgressors. As such, the government is instituted by a “social contract,” with limited powers involving the reciprocity of obligations.

<sup>38</sup> JOHN STUART MILL, THE SUBJECTION OF WOMEN 99 (MIT Press, 1970) . “That the principle which regulates the existing social relations between the two sexes — the legal subordination of one sex to the other — is wrong itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.” *Id.*

<sup>39</sup> ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 22 (1992). After visiting America, Frenchman De Toqueville wrote this treatise about what America was like.

In turn, the founding fathers of this country focused on equality of citizenship prior to the drafting of the Constitution. For instance, the authors of the Federalist Papers addressed a form of citizenship endowed with equal rights. John Jay in Federalist No. 2 observed that "to all general purposes we have uniformly been one people—each individual citizen everywhere enjoying the same national rights, privileges and protection."<sup>40</sup> Madison in Federalist No. 57 observed:

Who are to be the electors of the Representatives [in Congress]. Not the rich more than the poor; not the learned more than the ignorant; not the naughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. No qualifications of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.<sup>41</sup>

With respect to the need to protect the citizenry, in Federalist No. 51 Madison notes:

Is it of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority, that is, of the society itself; the other by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole improbable, if not impracticable.<sup>42</sup>

This egalitarian vision was eventually, though not initially, tracked in the supreme legal document of this country. The United States Constitution's central citizenship provision is contained in the Fourteenth Amendment, which provides: "All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and the state

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<sup>40</sup> THE FEDERALIST NO. 2 at 10 (JOHN JAY). *But see also*, JOHN P. ROCHE, THE EARLY DEVELOPMENT OF UNITED STATES CITIZENSHIP (Cornell University Press, 1949). Prior to the American Revolution, citizenship was a right granted by states and provided that "[a]n Englishman moving from one colony to another automatically attained citizenship in the latter." *Id.* at 2.

<sup>41</sup> THE FEDERALIST NO. 57 (JAMES MADISON).

<sup>42</sup> James Madison writings 1772-1836, 297 (Library of America, 2006).

wherein they reside.”<sup>43</sup> John Bingham, the primary drafter of the Fourteenth Amendment, envisioned a concept centered on equality.<sup>44</sup> He described the rights of citizens as:

[T]he equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil . . . the charm of that Constitution lies in the great democratic ideals which it embodies, that all men, before the law, are equal in respect of those rights of person which God gives and no man or state may rightfully take away.<sup>45</sup>

The United States Supreme Court repeatedly used similar declarations concerning citizenship.<sup>46</sup> For instance, in *Afroyim v. Rusk*,<sup>47</sup> Justice Black, following Aristotle’s language written over two thousand years earlier, declared “the citizenry is the country and the country is the citizenry.”<sup>48</sup> Justice Brandeis declared in *Ng Fung Ho v. White*,<sup>49</sup> that the “loss of citizenship was equivalent to the loss of everything that makes life worth living.”<sup>50</sup> Over time, both jurists and scholars have shed considerable light on the importance of the term. Chief Justice Rehnquist wrote in *Sugarman v. Dougall*<sup>51</sup> that “citizenship is supposed to mean something, and something important.”<sup>52</sup> Indeed, it has evolved to become something more than just being born or naturalized

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<sup>43</sup> U.S. Const. Art. XIV, Sec. 2.

<sup>44</sup> See, e.g., Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 Akron L. Rev. 717, 719 (2003) (arguing that the Fourteenth Amendment’s Citizenship Clause envisioned a broad concept of citizenship).

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Ng Fung Ho v. White*, 259 U.S. 276 (1922)

<sup>47</sup> *Afroyim*, 387 U.S. 253.

<sup>48</sup> *Afroyim*, 387 U.S. at 257.

<sup>49</sup> *Supra* note 43.

<sup>50</sup> *Ng Fung Ho*, 259 U.S. at 284. Similar assessments in *Vance v. Terrazas*, 444 U.S. 252, 270-75 (1980) (spawned strong dissents from Justices Marshall, Stevens, and Brennan, who demanded a high standard of evidence when determining the intent of a citizen to voluntarily renounce those rights he acquired at birth).

<sup>51</sup> 413 U.S. 634, 652 (1972) (Rehnquist, J. dissenting).

<sup>52</sup> *Id.* “In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important. Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence. The language of that Amendment carefully distinguishes between ‘persons’ who, whether by birth or naturalization, had achieved a certain status, and ‘persons’ in general. That a ‘citizen’ was considered by Congress to be a rationally distinct subclass of all ‘persons’ is obvious from the language of the Amendment.” *Id.* at 652.

within the United States.<sup>53</sup> The grant of citizenship is the formal recognition of these concepts and guarantees certain rights and duties, including the right to suffrage<sup>54</sup> and service on juries,<sup>55</sup> as well as other important constitutional rights.<sup>56</sup> Its importance, however, does not merely lie with the delineated rights identified by the courts and legislatures.<sup>57</sup> Citizenship has become recognized as a core concept in a liberal democratic state and has become a central component of individual identity in this society.<sup>58</sup> It is by virtue of an individual's citizenship status that the individual is an equal member of the political community.<sup>59</sup> The Fourteenth Amendment's Citizenship Clause is to theoretically prevent the states from treating disfavored groups as outsiders or from denying them "full inclusion in public life of the community."<sup>60</sup> It thus includes a sense of permanent inclusion in the American political community in a non-subordinate condition.<sup>61</sup> Many believe that because equality and belonging are inseparably linked,<sup>62</sup> acknowledging citizenship status confers full, complete, and equal belonging to the United States.<sup>63</sup>

The above construction of citizenship suggests that all of the individuals born or naturalized in the society should be endowed with the right to be equals within that society.<sup>64</sup> In fact, Madison's

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<sup>53</sup> Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 San Diego L. Rev. 681, 691 (1997)

<sup>54</sup> See, e. g., William N. Eskridge, Jr., *The Relationship Between Obligations And Rights of Citizens*, 69 Fordham L. Rev. 1721 (2001).

<sup>55</sup> *Hernandez v. Texas*, 347 U.S. 475 (1954); See also Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 Chicano-Latino L. Rev. 153 (2005); But see *Hernandez v. New York*, 500 U.S. 352 (1991).

<sup>56</sup> Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193, 1262-84 (1992).

<sup>57</sup> Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 Geo. Immigr. L.J. 667 (1995).

<sup>58</sup> T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 Fordham L. Rev. 1689, 1690 (2001).

<sup>59</sup> Ruth E Gordon, *Some Legal Problems With Trusteeship*, 28 Cornell Int'l L. J. 301, 320-23 (1995).

<sup>60</sup> Eskridge, *supra* note 54, at 1721 (quoting KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* (1993)).

<sup>61</sup> *Id.* But see, Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797 (2005) (arguing that, in reading the Insular Cases, the Supreme Court crafted a new kind of American territory, one who's citizens could be governed temporarily and later be relinquished).

<sup>62</sup> Kenneth L. Karst, *Citizenship, Race And Marginality*, 30 Wm. & Mary L. Rev. 1, 3 (1988)

<sup>63</sup> Drimmer, *supra* note 57, at 667.

<sup>64</sup> In a similar vein, President Clinton recently asked "[c]an we fulfill the promise of America by embracing all our citizens of all races...can we define what it means to be an American, not just in terms of the hyphen showing our ethnic origins but in terms of our primary allegiance to values America stands for." Remarks by President Clinton at University of California at San Diego commencement, *available at* <http://www.whitehouse.gov/initiatives/onamerica/1997061611894.htm>

construction suggests that there should be no differences among the citizenry's rights, despite differences in class or education.<sup>65</sup> Recent declarations share those sentiments: "[i]n claiming citizenship, an individual - is first and foremost - asserting the existence of a social relationship between himself and others. Specifically, a citizen is (by definition) someone who can properly claim the right to be treated as a fellow member of the political community."<sup>66</sup> Thus, the Citizenship Clause of the Fourteenth Amendment contemplates only one class of United States citizen.<sup>67</sup> Madison and the other authors of the Federalist Papers largely agreed.<sup>68</sup> Accordingly, the term "American Citizen" is an expression of general principle that ought to govern membership in a free society and ought to confer equal rights.<sup>69</sup>

### ***B. The Exclusionary Aspect***

Despite this focus on equality, both United States federal courts and Congress have either created or upheld levels or gradations of membership. In addressing the concept's classic constructions, historian J.G.A. Pocock observes that "[t]his account of human equality excludes the greater part of the human species from access to it."<sup>70</sup> Citizenship's exclusionary aspect, though

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<sup>65</sup> Madison, *supra* note 41.

<sup>66</sup> BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 74 (Yale University, 1980). *See also*, Zietlow, *supra* note 44 at 731-32.

<sup>67</sup> Zietlow, *supra* note 44, at 731-32.

<sup>68</sup> James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 U. Pitt. L. Rev. 421, 439 (1999). *See also*, THE FEDERALIST NO. 52 (James Madison) ("the door of this part of the Federal Government, is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith").

<sup>69</sup> JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP: 1608-1870* 10 (1978).

<sup>70</sup> J.G.A. Pocock, *The Ideal of Citizenship Since Classical Times*, 99 *Queens Quarterly* 1 (1992) (discussing the Greek origin of "classical" liberalism).

containing substantial historical support, is largely unexplored in legal literature and decisions.<sup>71</sup> Yet, the roots of citizenship's dual nature are well established.

For example, in Aristotle's *Politics*, though in a passage he championed equality among members, the philosopher also observed:

Is he only a true citizen who has a share of office, or is the mechanic to be included? If they who hold no office are to be deemed citizen, not every citizen can have this virtue of ruling and obeying; for this man is a citizen. And if none of the lower class is citizens, in which part of the state are they to be placed?

He later declares:

For [if these individuals] are not resident aliens, and they are not foreigners . . . may we not so reply, that as far as this objection goes these in not more absurdity in excluding them than in excluding slaves and freedmen from any of the above-mentioned classes? It must be admitted that we cannot consider all those to be citizens who are necessary to the existence of the state.

Since there are many forms of government there must be many varieties of citizens and especially of citizens who are subjects.<sup>72</sup>

Citizenship's classical construction, as evinced in Aristotle's works, equated the ideal of citizenship with virtue, in that "the good man and the good citizen are the same . . ."<sup>73</sup> Virtue, in this case, was strictly reserved for those members of society who participated in the polity as "statesmen," i.e., persons fit to hold political office. Since polity participation was not a virtue present in all Athenian community members, not everyone was entitled to full citizenship.

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<sup>71</sup> Saito, *supra* note 18 (arguing that the World War II Japanese internment was not aberrational, and that the United States is presently repeating the same mistake by "racing" Arab Americans as "terrorists"); Volpp, *supra* note 1 (arguing that post-9/11 United States culture treats individuals of Middle Eastern, Arab, or Muslim descent as racial minorities and accords them reduced respect and protection).

<sup>72</sup> ARISTOTLE, *supra* note 31

<sup>73</sup> *Id.* Aristotle concedes this ideal is not possible, i.e., that every member of society be a virtuous person—the state is therefore imperfect, in that not every member can be a citizen. He writes, "If the state cannot be entirely composed of good men, and yet each citizen is expected to do his own business well, and must therefore have virtue, still inasmuch as all the citizens cannot be alike, the virtue of the citizen and of the good man cannot coincide. All must have the virtue of the good citizen—thus, and thus only, can the state be perfect; but they will not have the virtue of a good man, unless we assume that in the good state all the citizens must be good."

Even the actions of ancient Greek political leader Solon, who is attributed with creating Greek citizenship, created levels of participants in society in order to appease the wealthy. Despite dramatically increasing the number of society members able to participate in political order, Solon maintained the dominance of large landholders by dividing the citizenry into four classes on the basis of wealth.<sup>74</sup> In arguably the very first use of what was to be known as citizenship, Solon used differences based on land holdings to establish gradations of rights for the members of society, in this case, based on wealth.<sup>75</sup> Thus, in ancient citizenship constructions, the capacity to rule was more a matter of status than of ability.<sup>76</sup>

Even Aristotle who at first presupposed a society of homogeneous free men, ultimately developed a theory based on hierarchy,<sup>77</sup> in which a mechanic, for example, would be excluded from the ranks of citizens, in large part because such an individual typically has little interest in developing his mind.<sup>78</sup> What results is that although the classic vision recognized that the state was a composite of its citizenship and that all citizens were equal, not all within a society were deserving of the status of citizen.

The Roman Empire was the other civilization instrumental to citizenship's classical construction. Although Rome may not have produced as much well-known literature on the subject as did its Eastern counterpart, its great contribution lies in its grand application of the citizenship construct. Due to the success of the Roman Empire, lasting effects of its expansion and influence,

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<sup>74</sup> PETER RIESENBERG, *CITIZENSHIP IN THE WESTERN TRADITION: PLATO TO ROUSSEAU* 15 (North Carolina University Press, 1992). *See also*, James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 U. Pitt. L. Rev. 421, 429 (1999) (noting that Greeks developed a construction of citizenship that combined political participation in the polis with membership in the polity).

<sup>75</sup> JOSEPH A. ALMEIDA, *JUSTICE AS AN ASPECT OF THE POLIS IDEA IN SOLON'S POLITICAL POEMS* 10-11 (Boston: Brill, 2003). The first three classes of the society--requiring 500, 300, and 200 measures of produce from their land--were eligible to hold offices proportionate to their wealth; those with less than this wealth were members of the assembly and could serve as jurors.

<sup>76</sup> RIESENBERG, *supra* note 76, at 6.

<sup>77</sup> *Id.* at 45.

<sup>78</sup> *Id.*

including the construction of citizenship as a concept, have affected almost every region of the world.

Rome's creation of a theory of universalism associated with citizenship is the great transformation of the concept.<sup>79</sup> Rome eventually managed and ensured the growth of its empire on the basis of a form of universal citizenship of free men and a Stoic notion of universal brotherhood of mankind.<sup>80</sup> In many respects, the universalism inherent in the Roman construction resembles the Greek construction's egalitarian notions that extol the virtues of equality among the citizenry. The Roman approach, perhaps due to the instrumental motivations of expansion, was far more inclusive than the Greek manifestations. This is due, perhaps, to the Stoics' development of Natural Law as the correct law of the nation and the world. Although Rome could only pass laws of convention, the notion of being a citizen of the world, as well as a Roman citizen, was fostered by both Roman law and Stoic ideology. The ideal nation-state was a universal nation-state. The innovation of Rome's citizenship ideal in the Natural Law context stems from the Roman people's understanding of liberty, freedom from involuntary servitude, and freedom to exercise specific rights and to assume specific duties. Under this ideal of liberty, the Roman people were their own masters, free from internal domination by a monarch or by a political faction and free from subjection to any foreign power. The Roman people were thus free to exercise their sovereignty, free to determine their destiny, and were free to follow those laws and customs that represented the Roman way of life.<sup>81</sup> As an individual, the citizen was free from the impositions of slavery; and was free from arbitrary exactions of fellow citizens, including magistrates. He was free to enjoy a variety of rights: free to elect his own occupation, free to marry the woman of his choice, free to own slaves, and to

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<sup>79</sup> *Id.* at 53. *But see* Dred Scott v. Sandford, 60 U.S. 393, 478 (1856) (Daniel, J., concurring). Justice Daniel argued that the emancipation of a former slave, under Roman law, did not confer citizenship status on the slave. *Id.* He assumed the status of the "lower grades of domestic residents," which were called "freedmen" in Rome. *Id.* Justice Daniel further noted that it was the decline of the Roman empire when citizenship rights were extended; this resulted in the "proud distinctions of the republic being gradually abolished". *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

dominate his wife and children. As a citizen, he was free to participate in the assembly, free to vote, free to hold public office, and free to serve in the army.<sup>82</sup>

Despite this fervently egalitarian ideal, gradations of membership existed even in this model.<sup>83</sup> For instance, by the fourth century, the plebeian class could hold a number of political positions, although they were still restricted from the higher rungs of political power. After a bitter Samnite War also during this time period, Rome offered full citizenship rights to several former enemy towns, including Arica, but many Latin cities were granted a new kind of second-class or limited citizenship.<sup>84</sup> The inhabitants of these Latin cities were granted legal and economic rights, but not full political ones.<sup>85</sup> Subsequently, other examples of Rome's struggles with citizenship gradations arose, such as the "conflict of the orders."<sup>86</sup> In this struggle between the patricians and plebeians, Rome eventually allowed wealthy plebeians a political voice and upward social mobility provided that they achieved military successes.<sup>87</sup> Thus, in expanding her original tribal organization from four to thirty-five tribes, Rome maintained the fiction of political participation,<sup>88</sup> but did not create an organization of equal tribes. During this post-Dark Age and pre-Renaissance period, nation-states recognized the concept of citizenship, but equally recognized its component of gradations of membership.

During this period, nation-states recognized the concept of citizenship, but with gradations of membership. Later Western civilizations followed suit. Not unlike the classical Greek gradations,

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<sup>82</sup> J. RUFUS FEARS, "ANTIQUITY: THE EXAMPLE OF ROME" IN AN UNCERTAIN LEGACY: ESSAYS ON THE PURSUIT OF LIBERTY 7 (Edward B. McLean ed., Wilmington, DE: Intercollegiate Studies Institute, 1997).

<sup>83</sup> E.T. SALMON, ROMAN COLONIZATION UNDER THE REPUBLIC 117 (Cornell University Press, 1970). Some of these gradations were designated by community, its location, and relationship to Rome. *Id.* at 40, 70. In other instances, gradations affected individual non-Romans living within Italy. *Id.* at 102, 117-18. For example, citizenship was withheld from those who could not speak Latin, *Id.* at 149, while xenophobia and an "innate conviction of their own superiority" were demonstrated by the continuing expulsion of even enfranchised immigrants. *Id.* at 102.

<sup>84</sup> Fears, *supra* note 84.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 57.

<sup>87</sup> *Id.* at 59-61.

<sup>88</sup> *Id.* at 61.

these early levels of citizenship were largely based on property ownership. For example, in the fourteenth century, Pierre Jacobi writing on what can be described as municipal citizenship in France,<sup>89</sup> acknowledged the concept of grades of membership. For instance, the *major pars* was a group of decision-making citizens, but the citizens who made it up were not equally admitted to it, which introduced its own differentiation in the kind of citizenship each was granted. This rule of exclusion was borne by women in particular, who were made ineligible to be participants within society.<sup>90</sup> Sixteenth and seventeenth century citizenship in Bologna also recognized “grades of citizenship.”<sup>91</sup> The sovereign recognized ranks within the citizenry, where nobles held the highest rank, and merchants—no matter how important—were ignoble, and correspondingly were among the lowest of ranks.<sup>92</sup> Spain, within its own domestic arena as well as in its colonies, included levels of membership in its eighteenth century notion of citizenship.<sup>93</sup>

### *C. The Modern Construction*

Contemporary domestic citizenship theory was significantly influenced by both the ancient and seventeenth and eighteenth century philosophers. It should therefore be of little surprise that the modern construction focuses on the equality component of the concept. This domestic construction of citizenship, which is the theoretical bedrock of twentieth century citizenship studies, seems to refer not only to delineated rights but also to a broad concept of equal membership and

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<sup>89</sup> Albert Rigaudiere, *Municipal Citizenship in Pierre Jacobi's Practica aurea libellorum*, in PRIVILEGES AND RIGHTS OF CITIZENSHIP: LAW AND THE JUDICIAL CONSTRUCTION OF CIVIL SOCIETY 1 (Julius Kirshner and Laurent Mayali ed., 2002).

<sup>90</sup> *Id.* at 10.

<sup>91</sup> Angela de Benedicts, *Citizenship, Government in Bologna (Sixteenth-Seventeenth Centuries)*, in PRIVILEGES AND RIGHTS OF CITIZENSHIP: LAW AND THE JUDICIAL CONSTRUCTION OF CIVIL SOCIETY 127 (Juliu Kirshner and Laurent Mayali ed., 2002).

<sup>92</sup> *Id.* at 129.

<sup>93</sup> Tamar Herzog, *Citizenship and Empire: Communal Definition in Eighteenth Century Spain and Spanish America*, in PRIVILEGES AND RIGHTS OF CITIZENSHIP: LAW AND THE JUDICIAL CONSTRUCTION OF CIVIL SOCIETY 149-50 (Juliu Kirshner and Laurent Mayali ed., 2002).

incorporation into the body politic.<sup>94</sup> A correlative to this concept is a sense of belonging and participation in the community that is the nation.<sup>95</sup> This last component, which contains both legal and conceptual aspects, demonstrates a psychological component of the term. This construction suggests that the anointment of citizenship is an important title that goes to the heart of the individual's feeling of inclusion as well as the collective citizenry's sense of the value and virtue of the democracy.<sup>96</sup>

Citizenship's belonging or membership facet exhibits a subjective psychological or "imagined quality" to citizenship.<sup>97</sup> The formal recognition of rights, as well as the imagined attributes of the status, demonstrates the importance in the construction of self for those within and outside the status classification. These citizen attributes are supposed to define both who are the people in "We the People."<sup>98</sup> Michael Walzer observed that "[w]e who are already members do the choosing, in accordance to our understanding of what membership means in our community and of what sort of a community we want to have."<sup>99</sup>

When one considers the concept's subjective or imagined qualities it may help explain why, despite the widely held belief that citizenship confers full membership and equality, these lofty goals are often not met for racial and ethnic minority and other marginalized groups. Indeed, American history is replete with instances where bias takes the place of sound inclusive egalitarian theory and those who should be, or actually were provided with citizen status do not enjoy the benefits of

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<sup>94</sup> Ediberto Román, *The Alien Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 Fla. St. U. L. Rev. 1 (1998).

<sup>95</sup> *Id.*

<sup>96</sup> See CABRANES, *supra* note 61, at 5, n.12.

<sup>97</sup> BENEDICT R. ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISMS* (1991). See also, Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 Hastings L.J. 331, 343 (2005) ("We know also from Benedict Anderson's work that culture and community are imagined, often in response to, in solidarity with, or in opposition to colonialism, trade, immigration, and other transnational projects.").

<sup>98</sup> ERIC FONER, *WHO OWNS HISTORY* 80 (2003).

<sup>99</sup> MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 32 (1983).

citizenship.<sup>100</sup> Though this tension concerning who are “the Americans” or who are “the People” can be aptly demonstrated by tracing the history of those who challenged their lesser citizenship status, the debate concerning this country’s national identity persists today. For instance, Peter Brimelow’s 1995 book *Alien Nation* warned that non-white immigrants were destroying America’s “ethno-cultural community.”<sup>101</sup> According to Brimelow, himself an Englishman, this American culture is grounded in a shared European ancestry. More recently, Samuel Huntington questions whether the increasing multiculturalism in the United States will disintegrate into the type of ethnic strife that destroyed Yugoslavia.<sup>102</sup>

Irrespective of whether one is willing to accept these recent ethnocentric opinions, this country has repeatedly used the citizenship construct in exclusionary ways.<sup>103</sup> Indeed, one leading citizenship scholar recently observed that with respect to immigrants, indigenous people, and the inhabitants of the island colonies, the Supreme Court cases establishing the rights of those groups established “a vision of the United States as . . . a nation that defined itself in ethno-racial terms as Anglo-Saxon.”<sup>104</sup> Many, such as African-Americans, Latinos and Latinas, Asians, and Arab-Americans, would argue that they have existed in an anomalous status by holding the title of citizen

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<sup>100</sup> Such benefits relate to certain fundamental rights, such as the right to vote, to serve on juries, protection of laws, just to name a few. *See, e.g.,* Vikram David Amar, *Jury Service As Political Participation Akin To Voting*, 80 Cornell L. Rev. 203 (1995). This also suggests that citizenship is subjective and is to be applied depending upon whether the collective psyche believes an individual or group deserves the status. As Michael Walzer observed, “we who are already members do the choosing, in accordance with our own understanding of what membership means in our community and of what sort of a community we want to have.” WALZER, *supra* note 101, at 32. Accordingly, when the citizenry, through their officials, decide on membership, “whether like us or not we have to consider them as well as ourselves.” *Id.*

<sup>101</sup> PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER 1* (Random House, 1995). *But see,* Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the Agjobs Bill of 2003*, 42 Harv. J. on Legis. 417, 474 (2005) (noting that xenophobic displays in a mainstream publication from a respected American academic community were surprising).

<sup>102</sup> Kevin R. Johnson & Bill Ong Hing, *National Identity In A Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 Mich. L. Rev. 1347 (2005) (surveying Samuel Huntington’s book, *Who Are We? The Challenges To America’s National Identity*).

<sup>103</sup> Aleinikoff, *supra* note 58, at 1690.

<sup>104</sup> *Id.* at 1692. “By defining insiders, the concept of citizenship necessarily defines outsiders; and by guaranteeing full and equal rights for those within the charmed circle it supports fewer rights--or at least less attention--for those outside the circle.”

yet enjoying less than full membership status. Whereas ancient societies like Greece formally recognized inferior groups, such as “metics” or “freedmen;” modern citizenship theory does not seem to support inferior classes of citizens. Irrespective of whether one accepts the suggestion that there are levels of citizenship, federal decisions have, at best, been slow in granting full rights to all those holding citizenship status, particularly with respect to racial and ethnic minorities.

As demonstrated above, the focus of the domestic literature on the modern constructions of citizenship emphasize equality and inclusion. Although the modern theory of citizenship extols the virtues of equality as much as the ancients did, the modern practice denies equality to many members within society. While in ancient times the gradations were largely based upon wealth and gender, in the heterogeneous society that became the United States, the gradations also manifest themselves in terms of race and ethnicity.<sup>105</sup>

Little of the modern discourse of democracy or citizenship would question the concept of equality, let alone accept levels of membership. Indeed, the United States Congress, as well as the Supreme Court, has repeatedly addressed the importance of the citizen in a democracy, but has never openly admitted to endorsing levels of inclusion.<sup>106</sup> In analyzing arguably the most significant twentieth century citizenship decisions—*Afroyim v. Rusk* and *Reid v. Covert*,<sup>107</sup> one can fairly easily conclude that by defining insiders, citizenship necessarily defines outsiders, and by guaranteeing full and equal rights for those within the charmed circles it supports fewer rights—or at least less attention—for those outside it.<sup>108</sup>

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<sup>105</sup> U.S. CONST. amend. XIX (recognizing a woman’s right to suffrage).

<sup>106</sup> See, e.g., *Afroyim v. Rusk*, 387 U.S. 253 (1967) (holding that under the Fourteenth Amendment, the government had no power to rob a citizen of his citizenship under a statute that provided that a citizen should lose his citizenship for voting in political election in a foreign state); *Reid v. Covert*, 354 U.S. 1 (1957) (holding that the provisions of the Uniform Code of Military Justice that extend court-martial jurisdiction to persons accompanying the armed forces outside of the continental limits of the United States could not be constitutionally applied to the trial of civilian dependents of members of the armed forces overseas, in times of peace, for capital offenses).

<sup>107</sup> *Id.*

<sup>108</sup> Aleinikoff, *supra* note 58, at 1690

The domestic creation of membership levels is a result of using legal fictions to create subordinate rights. In fact, the role that constructions of subordination, including national origin and race, have played in excluding members from the United States' body politic, at the very least, calls into question the sincerity of the egalitarian citizenship rhetoric. In fact, historically full birthright citizenship, as well as citizenship through naturalization, the other primary means of attaining membership, were attainable goals for those not considered to be racial minorities, but remained elusive or illusory for other classifications of minorities.

American citizenship unfortunately has all too often been a tool for including Caucasians and excluding African-Americans,<sup>109</sup> indigenous peoples,<sup>110</sup> and other non-whites.<sup>111</sup> For instance, the legal doctrines created over a century ago to maintain African-American slave status<sup>112</sup> and to deport and exclude legal immigrants, such as the plenary powers, still maintain an inferior citizenship status in law for the inhabitants of this country's island colonies, as well as the indigenous people of this land, as well as a *de facto* subordinate status of other minorities such as African-Americans.

Despite this reality, the central concept of citizenship in the United States Constitution is not based on inequality but equality. The primary source for citizenship within this country, the Citizenship Clause of the Fourteenth Amendment, is a post-reconstruction amendment specifically aimed to provide former slaves, i.e., African-Americans, the political rights associated with citizenship. Although this clause centers on the notion of equality among the citizenry, in practice,

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<sup>109</sup> See *Scott v. Sandford*, 60 U.S. 393, 481-82 (1856) (holding that African Americans are not citizens as contemplated by the federal or state constitutions).

<sup>110</sup> See *Goodell v. Jackson*, 20 Johns. Rep. 693, 712 (1822) (holding that Indians are not citizens, but are distinct tribes or nations).

<sup>111</sup> Natsu Taylor Saito, *Asserting Plenary Power Over The "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 Yale L. Pol'y Rev. 427 (2002).

<sup>112</sup> See Abel A. Bartley, *The Fourteenth Amendment: The Great Equalizer of the American People*, 36 Akron L. Rev. 473, 481 (2003). Despite adoption of the Thirteenth Amendment, most former slaves found their status little changed. While the amendment ensured that humans would no longer be considered property, it did not grant equality. Institution of "Black Codes" in many states "returned the belief in subhumans and restored the idea of human chattel....Collectively, the 'Black codes' were intended to reduce the status of African Americans to a level just above slavery and to demolish thoughts of racial equality."

citizens, particularly those of color, have been repeatedly denied the benefits of equal treatment.<sup>113</sup> Many of the inconsistencies in treatment with respect to this group stem from century-old constitutional doctrines that gave the political branches of government complete or plenary power over these groups and established disparate treatment for the less favored citizens.<sup>114</sup> Those over whom the United States government exercises complete power were in effect deemed by that same government to be not true citizens, but in actuality the “outsiders.”<sup>115</sup>

Much of the disparate domestic treatment of these inferior members of society derives from century-old constitutional doctrines that are based on xenophobic, nativist, and racist sentiments. For some, the exclusionary nature of citizenship evinces a relationship between governments and the governed that can always be dissolved.<sup>116</sup>

In the 1800’s the United States Supreme Court began articulating a doctrine that formally

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<sup>113</sup> As Justice Ginsberg noted in her dissent in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), numerous instances of unequal treatment “. . . reflective of a system of racial caste only recently ended, are evident in our workplaces, markets and neighborhoods. Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.” *Id.* at 273-74 (references omitted).

<sup>114</sup> See *Scott v. Sandford*, 60 U.S. 393, 481-82 (1856) (holding that African Americans are not citizens as contemplated by the federal or state constitutions); *Goodell v. Jackson*, 20 Johns. Rep. 693, 712 (1822) (holding that Indians are not citizens, but are distinct tribes or nations); Natsu Taylor Saito, *Asserting Plenary Power Over The “Other”: International Law*, 0 Yale L. Pol’y Rev. 427 (2002); Abel A. Bartley, *The Fourteenth Amendment: The Great Equalizer of the American People*, 36 Akron L. Rev. 473, 481 (2003). Despite adoption of the Thirteenth Amendment, most former slaves found their status little changed. While the amendment ensured that humans would no longer be considered property, it did not grant equality. Institutions of “Black Codes” in many states “returned the belief in sub-humans and restored the idea of human chattel . . . Collectively, the ‘Black codes’ were intended to reduce the status of African Americans to a level just above slavery and to demolish thoughts of racial equality.” Never changed since the adoption of the Constitution is the clause giving Congress “. . . Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .” U.S. Const. Art IV §3. American Indians have long been subject to plenary powers of the United States, variously attributed to the Constitution’s war powers (Art. I § 8), treaty powers (Art. II § 2) and commerce clauses (Art. I § 8). Lawrence Baca, “The Legal Status of American Indians,” in Volume 4 HANDBOOK OF AMERICAN INDIANS 230, 231 (Smithsonian, 1988). Finally, while the Thirteenth Amendment superseded the U.S. Const. Art. IV § 2 requirement that slaves be returned to their owners, as noted earlier, it did not grant equality to persons of color, hence facilitating adoption of Jim Crow laws in several states, which were ratified by the famous doctrine of “separate but equal” in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>115</sup> Saito, *supra*, note 113.

<sup>116</sup> ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 53 (1975).

subordinated certain groups by allowing the government's "political" branches so-called "plenary power" to discriminate against indigenous peoples, inhabitants of the United States' colonial possessions, and immigrants. The Supreme Court has defined plenary as a full or complete power, causing courts to defer to Congress when faced with challenges to official conduct.<sup>117</sup> The doctrine was and continues to be used as a weapon to disenfranchise those groups universally recognized as the most vulnerable.<sup>118</sup> The plenary power doctrine and a similar one applied to African-Americans, forms the central constitutional doctrine that supports the disenfranchisement of millions of Americans. The disparate treatment of these groups provokes this criticism concerning the citizenship jurisprudence's rhetoric concerning equality.

The period from the second decade of the nineteenth century to the second decade of the twentieth century is the significant juridical period when the Supreme Court and Congress attempted to define what groups were true American citizens.<sup>119</sup> The eventual habitual response to this question by both the United States Supreme Court, as well as the United States Congress, was that each and every statistically significant racial minority group was excluded from full citizenship status.<sup>120</sup> Between 1823 and 1922 the United States Supreme Court, consistent with the classical constructions of the construct, iterated the importance of citizenship in a democracy, but endorsed a model of differentiated levels of membership. In a series of decisions dealing with immigration, national security, and overseas expansion, the Court endorsed the unequal treatment and inferior status of various groups that should have been considered citizens. These cases include the

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<sup>117</sup> See, e.g., *United States v. Kagama*, 118 U.S. 375 (1886) (upholding a law that subjected Indians to federal law as valid and constitutional; being within the limits of the United States, they are subject to acts of Congress).

<sup>118</sup> Saito, *supra* note 113, at 427.

<sup>119</sup> *Id.* at 37-47. Despite the likely assumption that the English doctrine of *jus soli* (one who is born within a nation's jurisdiction is a citizen of the country) would govern citizenship rights in America, the United States did not apply this doctrine to racial minorities. Any doubts about these exclusions were clarified in the *Dred Scott* decision which held that blacks could not be citizens, even if free persons—a rule until the Civil Rights Act of 1866 and the adoption of the Fourteenth Amendment.

<sup>120</sup> See *id.* at 49-77. Even though after 1870 naturalization was open also to blacks, in only one case did a petitioner for citizenship even attempt to assert a claim other than on the basis of being "white." See, e.g., IAN HANEY LOPEZ, *WHITE BY LAW* (New York University Press, 1996)

infamous *Dred Scott*<sup>121</sup> and *Plessy v. Ferguson*<sup>122</sup> decisions with respect to African Americans; *Elk v. Wilkins*,<sup>123</sup> *United States v. Kagama*,<sup>124</sup> and *Lone Wolf v. Hitchcock*<sup>125</sup> with respect to indigenous peoples; the *Chinese Exclusion Cases*<sup>126</sup> with respect to Asian immigrants; and the *Insular Cases*<sup>127</sup> with respect to the inhabitants of the island conquests. In each of these decisions, racial and ethnic minority groups challenged the propriety of governmental action that discriminated against them. In each decision, the Court used similar racial and xenophobic justifications to uphold the disparate treatment. With the exception of the treatment of African-Americans, the constitutional justification to support such unequal treatment was the plenary powers doctrine under which courts deferred to the political branches of government, when certain groups challenged the violation of their constitutional rights.

The plenary powers doctrine, essentially deriving from what was first developed as the inherent powers doctrine, was developed in the late nineteenth century, during this country's colonial expansion. Beginning in 1822, the Supreme Court upheld the federal government's doctrine of inherent plenary powers over the indigenous people of this land, the inhabitants of the island colonies, and immigrants in entry and exclusion proceedings. The decisions that established

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<sup>121</sup> 60 U.S. 393 (1856).

<sup>122</sup> 163 U. S. 537 (1896) (holding that a statute requiring railroads carrying passengers to provide equal but separate accommodations for white or colored races was constitutional).

<sup>123</sup> 112 U. S. 94 (1884) (holding that an Indian born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the government of the United States, who has voluntarily separated himself from his tribe and taken up his residence among the white citizens of a state, but who has not been naturalized or taxed or recognized as a citizen, either by the United States or by the state, is not a citizen of the United States, within the Fourteenth Amendment).

<sup>124</sup> 118 U. S. 375 (1886).

<sup>125</sup> 187 U. S. 553, 565 (1903) (holding that Congress may pass laws that are in conflict with treaties made with the Indians).

<sup>126</sup> These cases grew out of the Chinese Exclusion Act of 1882, which prevented immigration of Chinese laborers. Act of May 6, 1882 (22 Stat. 58). Upon its original sunset, the law was expanded ten years later to tighten all immigration and travel from China. Act to Prohibit the Coming of Chinese Persons into the United States of May 1892 (27 Stat. 25). National Archives and Records Administration, Chinese Immigration and the Chinese in the United States, available at <http://www.archives.gov/locations/finding-aids/chinese-immigration.html>

<sup>127</sup> The Insular Cases, several separate opinions during the first two decades of the Twentieth Century, determined the status and applicability of the United States Constitution to territories, facilitating U.S. imperialism without granting full citizenship rights to territorial residents. For a revisionist view of the doctrine established by the cases, see Christina Duffy Burnett, *United States: American Expansion And Territorial Annexation*, 72 U. Chi. L. Rev. 797 (2005).

and first applied the plenary powers doctrine to various outsider groups included: *United States v. Kagama*,<sup>128</sup> *Chae Chan Ping v. United States*,<sup>129</sup> *Jones v. United States*,<sup>130</sup> *In re Ross*,<sup>131</sup> *Nishimura Ekin v. United States*,<sup>132</sup> *Fong Yue Ting v. United States*,<sup>133</sup> *Stephens v. Cherokee Nation*,<sup>134</sup> *Cherokee Nation v. Hitchcock*,<sup>135</sup> *Lone Wolf v. Hitchcock*,<sup>136</sup> *De Lima v. Bidwell*,<sup>137</sup> *Downes v. Bidwell*,<sup>138</sup> *Goetzze v. United States*,<sup>139</sup> *Dooley v. United States*,<sup>140</sup> *The Diamond Rings*,<sup>141</sup> *Hawaii v. Mankichi*,<sup>142</sup> *Kepner v. United States*,<sup>143</sup> *Dorr v. United States*,<sup>144</sup> *Huus v. Porto* [sic] *Rico S.S. Co.*,<sup>145</sup> *Balzac v. Porto* [sic] *Rico*.<sup>146</sup>

In each of the above cases, the United States Supreme Court concluded that even the most basic liberty protections, as a matter of a constitutional law, did not apply to these groups. The

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<sup>128</sup> 118 U. S. 375 (1886).

<sup>129</sup> 130 U. S. 581 (1889) (holding that Congress has power, even in times of peace, to exclude aliens from, or prevent their return to, the United States, for any reason it may deem sufficient).

<sup>130</sup> 137 U. S. 202 (1890) (holding that Congress can pass legislation concerning Guano Islands discovered by citizens of the U.S., and to extend the criminal jurisdiction of the U.S. courts to such islands).

<sup>131</sup> 140 U. S. 651 (1892).

<sup>132</sup> 142 U. S. 651 (1892) (declaring constitutional an act by Congress that provides for the exclusion from admission into the United States of certain classes of aliens).

<sup>133</sup> 149 U. S. 698 (1893) (reaffirming that the power to exclude or to expel aliens is vested in the political departments of the government).

<sup>134</sup> 174 U. S. 445 (1899) (stating that the lands of the Cherokee Nation are not held in individual ownership, but are public lands, held for the equal benefit of all the members).

<sup>135</sup> 187 U. S. 294 (1902) (holding that full administrative power is was possessed by Congress over Indian tribal property).

<sup>136</sup> 187 U. S. 553 (1903).

<sup>137</sup> 182 U. S. 1 (1901) (holding that upon the ratification of the treaty with Spain, Porto [sic] Rico ceased to be a foreign country and became a territory of the U.S., and that duties were no longer collectible upon merchandise brought from that island).

<sup>138</sup> 182 U. S. 244 (1901) (holding that because Porto [sic] Rico was not a part of the U.S. for purposes of Article I, section 8 of the U.S. Constitution, Congress can impose a duty on goods shipped from Porto [sic] Rico to the U.S.).

<sup>139</sup> 182 U. S. 221 (1901) (holding that Hawaii and Porto [sic] Rico were not foreign countries for purposes of the tariff laws of the United States).

<sup>140</sup> 183 U. S. 141 (1901) (holding that on the cession of Porto [sic] Rico to the United States, the U.S. could no longer levy duties on goods shipped from the U.S. into Puerto Rico).

<sup>141</sup> 183 U. S. 176 (1901) (holding that the Philippines, after their cession to the U.S. by Spain, was not a foreign country for purposes of the tariff laws of the U.S.).

<sup>142</sup> 190 U.S. 197 (1903) (accepting the cession made by the Republic of Hawaii, and continuing the municipal legislation of the islands, not contrary to the U.S. Constitution, until Congress should otherwise determine).

<sup>143</sup> 195 U. S. 100 (1904) (holding that because Congress had enacted a statutory Bill of Rights for the Philippines that prohibited double jeopardy, such provision barred an appellate court from finding a criminal defendant guilty after acquittal by trial court).

<sup>144</sup> 195 U. S. 138 (1904) (stating that the right of trial by jury was not extended by the federal constitution, without legislation and of its own force, to the Philippine Islands).

<sup>145</sup> 182 U.S. 392 (1901) (holding that ports in Porto [sic] Rico were ports within the U.S. for purposes of the U.S. coastwise laws).

<sup>146</sup> 28 U. S. 298 (1922) (the Sixth Amendment right to trial by jury does not apply to territories belonging to the U.S. that have not been incorporated into the Union).

Court based its holdings on international law principles and found that because the government's political branch was primarily responsible for national security, issues that touched upon the status of individuals from sovereigns within and without the physical boundaries of the United States should be addressed primarily by the political branch of government, Congress, and not the judicial branch. The view that ultimately became the plenary powers doctrine evolved over a series of decisions that purportedly based their determinations upon national security, but also contained racist, as well as xenophobic, foundations.

The doctrine is perhaps more widely recognized in the immigration area and was first developed in the immigration setting in the so-called *Chinese Exclusion Cases*. In *Chae Chan Ping*, the Court in 1889 upheld the exclusion of legal Chinese residents, and concluded that courts would not interfere with the government's action because it derived from the government's authority over national security.<sup>147</sup> Three years later, in 1892 in *Nishimura Ekiu v. United States*, the Court upheld an exclusion of a Japanese immigrant without a hearing,<sup>148</sup> invoking the "accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."<sup>149</sup> As it subsequently explained in the 1936 decision of *United States v. Curtiss-Wright Export Corp.*,<sup>150</sup> the theory of inherent plenary powers was premised essentially upon concerns over international law principles that recognized a nation-state as having the inherent power to take its place among the sovereign nations of the world despite being a government of limited and enumerated powers.<sup>151</sup>

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<sup>147</sup> *Chae Chan Ping*, 130 U.S. 582.

<sup>148</sup> *Nishimura Ekiu*, 142 U.S. 651.

<sup>149</sup> *Id.* at 659.

<sup>150</sup> 299 U. S. 304, 318 (1936) ("The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.")

<sup>151</sup> *Id.*

### **III. Subordinates in Law**

The use of the plenary powers doctrine and other similar ones with respect to African-Americans created gradations of members within this society. The constructions of membership levels have resulted in subordinate rights and created two types of subordinate member groups within the political structure of a society.

The first group includes those who are subordinate in law, who derive their membership not from the Fourteenth Amendment, but from the inherent powers of the political branches of government and the Territorial Clause of Article Four of the United States Constitution.<sup>152</sup> This group includes indigenous people and the territorial island people. There can be little question concerning the subordinate nature of their rights. The United States Congress has plenary or total power to govern them, including the ability to nullify any local laws, and may enact federal legislation that it deems appropriate. Although all indigenous people, as well as the inhabitants born on the overseas island territories, are United States citizens (nationals in the case of Samoans), they hold a very different and an inferior kind of citizenship.

The second group includes those who may be subordinate members in fact. This classification is far more controversial because this group's members are Fourteenth Amendment citizens, and yet their treatment, after their formal grant of citizenship, raises questions whether in fact they are equal members of society. Members of this group may include African-Americans and other racial and ethnic minorities.

We will first examine the *de jure* subordinates, including this land's indigenous peoples and this country's island territories inhabitants. The focus will then shift to the *de facto* group of subordinates, who are less equal than other American citizens.

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<sup>152</sup> In many respects, the inherent powers doctrine is at the forefront of political debates today. For instance, in response to the recent disclosure of the government's use of domestic wiretaps without court approval, the executive department has argued that the Constitution gives the President the inherent authority to for such actions by virtue of his position as commander-in-chief.

### *A. The Indigenous People*

If the primary means to attain United States citizenship is to be born on United States soil, indigenous peoples, because they are indigenous, should have been accordingly considered citizens. They, however, were excluded. Their disenfranchised status stems from the plenary powers doctrine.<sup>153</sup> As mentioned, this doctrine is premised on the notion that the political branches of the federal government are responsible for the nation's security and for its relations with other sovereigns.<sup>154</sup> Since indigenous tribes were seen as part of sovereign nations within the United States, the doctrine was applied to them in a variety of ways. Paradoxically, a doctrine premised upon the authority of the political branches of the government to protect the people of the United States from a foreign enemy was used to justify the continued subjugation and mistreatment of the original inhabitants of this land. Thus, the original inhabitants of the United States were deemed a potential foreign threat from within the United States.

The plenary power of Congress over the indigenous nations stems from a series of Supreme Court decisions that began in 1823.<sup>155</sup> The doctrine endorsed the repeated abuse of these peoples' rights, including the continuous breaches of treaties they entered into with the United States government and theft of their inhabiting lands.<sup>156</sup> In membership terms, within the United States the doctrine justified the Supreme Court's imposition of limited membership rights for the

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<sup>153</sup> For a brief history and analysis of this doctrine and its application with American Indians, see VINE DELORIA, JR. & DAVID WILKINS, *TRIBES, TREATIES, & CONSTITUTIONAL TRIBULATIONS* 21-31 (University of Texas Press, 1999) (this book offers a full historical analysis of the relationship between the United States Constitution and Indians).

<sup>154</sup> Saito, *supra* note 113, at 436 (discussion of how the plenary powers doctrine has been asserted over Indians and other immigrants).

<sup>155</sup> See DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* 25-27, 45 (University of Texas Press, 1997) (this book discusses fifteen landmark cases where the United States Supreme Court truncated Indian human rights). See also, DELORIA AND WILKINS, *supra* note 155, at 29.

<sup>156</sup> See generally, DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* (Hold Rinehart, 1972) (giving eyewitness accounts of the U.S. government's attempts to acquire Native Americans' land by using threats, deception, and murder); VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES* (Dell Publishing Co., 1974) (raising questions about the status of Native Americans within the political landscapes); GLORIA JAHODA, *THE TRAIL OF TEARS* (Random, 1975) (describes how white settlers forced Indian tribes of plains).

indigenous people. Perhaps more importantly, at the same time the doctrine justified the continued use of racist stereotypes to maintain paternalistic “wardship” over the indigenous people that typically resulted in the theft of their land and other rights.<sup>157</sup> Chief Justice John Marshall described the attitude of that era: “[t]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness.”<sup>158</sup> In 1823, the case of *Johnson v. McIntosh*, the Court began developing what was going to become the doctrine justifying the taking of indigenous lands by looking to the international law principle of discovery,<sup>159</sup> which gave the first Western power to “discover” new lands the exclusive right to that land against other Western powers and the power “to acquir[e] the soil from the natives, and [establish] settlements upon it.”<sup>160</sup> In *Worcester v. Georgia*, Justice Marshall seemed to recognize the indigenous peoples’ sovereignty, declaring that the United States government “manifestly consider[s] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive.”<sup>161</sup> This notion of sovereignty was soon unmasked in *United States v. Rogers*, where the Supreme Court rejected a claim that the federal courts did not have jurisdiction over crimes committed in a reservation.<sup>162</sup>

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<sup>157</sup> See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (Oxford Univ. Press, 1990).

<sup>158</sup> *Johnson v. McIntosh*, 21 U.S. 543, 573 (1823) (“The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no European could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all asserted.”).

<sup>159</sup> See Utter, *supra* note 12. See also, VINE DELORIA, JR., AND CLIFFORD M. LYTTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 2-6 (University of Texas Press, 1983); DELORIA AND WILKINS, *supra* note 155, at 4-5; WILKINS, *supra* note 157, at 31-32.

<sup>160</sup> *Id.* See also VINE DELORIA, JR., *OF UTMOST GOOD FAITH* 6-37 (Straight Arrow Books, 1971); Utter, *supra* note 12.

<sup>161</sup> *Worcester v. Georgia*, 31 U.S. 515, 557 (1832) (holding that the state of Georgia did not have the right to redraw boundary lines negotiated by treaty between the Indian tribes and Congress).

<sup>162</sup> *United States v. Rogers*, 45 U.S. 567 (1846) (holding that Congress may, by law, punish any offense committed in a territory occupied by the Indians and not within the limits of any state).

The next series of decisions in 1831, *Cherokee Nation v. Georgia*,<sup>163</sup> also known as the Cherokee cases, involved the Cherokee Nation's effort to halt the State of Georgia's attempt to seize Cherokee land. In dismissing the Cherokees' claim, the Court found the indigenous territory was part of a domestic dependent nation that the United States nonetheless held title to, irrespective of the Cherokee's will.<sup>164</sup> Professor Sarah Cleveland recently observed that the decision not only crippled the Cherokee Nation's ability to sue in United States courts, it placed the indigenous people "in a 'no-man's land' status of being neither citizens of the United States nor aliens of sovereign foreign state."<sup>165</sup> This language makes it clear that as early as 1831 the United States Supreme Court implicitly created an alien-citizen paradox applicable to this country's indigenous people.<sup>166</sup> In this paradoxical state, the individuals within this group are neither full citizens with all the rights associated with the status nor are they completely foreign because they have some form of citizenship.<sup>167</sup>

The subordinate as well as paradoxical status of the indigenous people was further confirmed in the 1884 case of *Elk v. Wilkins*.<sup>168</sup> John Elk, an indigenous person, renounced his tribal membership, became a Nebraska resident, and sought to register to vote.<sup>169</sup> The State of Nebraska rejected Elk's application because he was not a citizen despite the passage of the Fourteenth Amendment.<sup>170</sup> The Elk Court determined that the Fourteenth Amendment established that citizenship was available only to persons who at birth were completely subject to United States

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<sup>163</sup> 30 U. S. 1 (1831) (holding that an Indian tribe within the United States was not a foreign state within the meaning of the Constitution).

<sup>164</sup> *Id.*

<sup>165</sup> Sarah H. Cleveland, *Powers Inherent In Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 Tex. L. Rev. 1 (2002).

<sup>166</sup> See, e.g., Román, *supra* note 96. In this work, the author examines the anomalous second-class citizenship of the inhabitants of Puerto Rico, who hold a status with attributes of both citizen and foreigner.

<sup>167</sup> *Id.*

<sup>168</sup> 112 U. S. 94 (1886) (holding that if Native Americans born within the United States had not been neutralized and had not become a citizen through any treaty or statute, these Native Americans were not citizens within the meaning of the Fourteenth Amendment).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

jurisdiction.<sup>171</sup> Because indigenous nations were “distinct political communities” “within the territorial limits of the United States,” they were not completely subject to United States jurisdiction. Noting the exclusive as well as exclusionary nature of United States citizenship, the Court concluded “no one can become a citizen of a nation without its consent” and because indigenous people “form[ed] no part of the people entitled to representation,” they “were never deemed citizens.”<sup>172</sup>

Thus, even after the ratification of the Fourteenth Amendment, the United States courts continued to struggle with indigenous peoples’ citizenship rights.<sup>173</sup> Despite Elk’s being born in an America before the Americans had “discovered” America, the *Elk* decision established that the indigenous people of America were treated as wards of the United States’ Anglo-Saxon majority. The United States has always viewed these people, despite being born in the United States, as different from full or first-class citizens.<sup>174</sup> Even after the Fourteenth Amendment’s ratification, the Supreme Court concluded that indigenous peoples were not citizens by birthright. In an effort to protect the perception of what was an American, courts became resolute in not diluting citizenship with that which was perceived to be an inferior class of people. The government used the pretext that indigenous peoples were part of a “distinct political community” within the United States, and they had never engaged in the social compact to swear allegiance to this country.<sup>175</sup> Indeed, the subordination of indigenous peoples in decisions such as *Johnson v. McIntosh*,<sup>176</sup> facilitated the alternative models of subordinate citizens. This in turn facilitated the *Dred Scott* decision as well as other subordination, such as people of color seeking to be naturalized and the inhabitants of this country’s overseas colonial conquests.

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<sup>171</sup> *Id.*

<sup>172</sup> See Cleveland, *supra* note 167, at 57 (quoting *Elk v. Wilkins*).

<sup>173</sup> See Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 Harv. Black Letter L.J. 107 (1999).

<sup>174</sup> See DELORIA AND WILKINS, *supra* note 155, at vii-xi.

<sup>175</sup> *Jackson v. Goodell*, 20 Johns. Rep. 693, 712 (“Though born within our territorial limits, the Indians are considered as born under the jurisdiction of their tribes. They are not our subjects, born within the purview of the law, because they are not born in obedience to us.”).

<sup>176</sup> *Id.*

Shortly after the United States government considered indigenous people to be something other than citizens, the government entered into treaties with tribes in order to maintain a relationship that would purportedly afford each side a sense of sovereignty.<sup>177</sup> Not long after the euphemism of sovereignty was established and treaties were entered into, the United States government ceased to use treaties and simply “told the indigenous peoples what they could and could not do, and where they could do it.”<sup>178</sup> In large part because indigenous peoples were viewed as part of their own sovereign tribes and were subject to tribal laws, the United States took the position that the indigenous people could be dismissed as a separate people living in certain sections of America that could be controlled without any recourse on their part.<sup>179</sup>

Eventually, the complete disregard for indigenous peoples gave way to compromises to another form of subordinate citizenship. The process of granting United States citizenship to indigenous peoples came in steps and occurred over a considerable period of time. The first step was the grant of citizenship as an “incentive” to remove these people to the West.<sup>180</sup> Thus, some early treaties between the Indian Nations and the United States provided for the attainment of citizenship.<sup>181</sup> Congress then began to grant citizenship to certain tribes through legislation.<sup>182</sup> Other efforts were made via treaty with Mexico in the treaty of Guadalupe Hidalgo, in which the Pueblo Indians were deemed United States citizens by their failure to “choose” Mexican citizenship.<sup>183</sup> Yet another step was through the Allotment Act, where indigenous peoples were granted citizenship

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<sup>177</sup> Sharon O’Brien, *Tribes and Indians, With Whom Does the United States Maintain a Relationship?*, 66 *Notre Dame L. Rev.* 1461, 1462 (1991).

<sup>178</sup> *Id.* at 1480. “In fact, Thomas Jefferson stated: [W]e shall with great pleasure see your people become disposed to cultivate the earth, to raise herds or useful animals and to spin and weave, for their food and clothing . . . We will with pleasure furnish you with implements for the most necessary arts and with persons who many instruct how to make and use them.”

<sup>179</sup> *Id.*

<sup>180</sup> Porter, *supra* note 175, at 111.

<sup>181</sup> *Id.* (citing Treaty with the Cherokee, July 8, 1817, art. 8, 7 Stat. 1256; Treaty with the Cherokee, Feb. with Ottawa, June 24, 1862, art. 4, 12 Stat. 1237, 1238; Treaty with the Seneca, Mixed Seneca, Shawnee, Quapaw, Etc., Feb 23, 1867, art. 13, 17, 28, 15 Stat. L. 513).

<sup>182</sup> *Id.* at 112 (citing Act of March 3, 1843, S. Stat. 647 which naturalized the Stockbridge Tribe).

<sup>183</sup> *Id.*

upon issuance of an allotment.<sup>184</sup> With the passage of the 1924 Indian American Citizenship Act, the United States government imposed a form of citizenship on all indigenous peoples and declared them to have concurrent citizenship with their respective tribes.<sup>185</sup> By 1924, indigenous peoples could become United States citizens through legislation, treaty, allotment, and a patent in fee simple by adopting the habits of civilized life.<sup>186</sup>

Their membership's subordinate nature was premised on notions of inferiority. The group was characterized as existing in a state of "ignorance and mental debasement."<sup>187</sup> The Supreme Court, in *United States v. Ritchie*,<sup>188</sup> declared "[f]rom their degraded condition . . . and ignorance generally, the privileges extended to them in the administration of the government must have been limited; and they still, doubtless, required its fostering care and protection."<sup>189</sup> Subsequently, in 1909 the United States Supreme Court confirmed their limited nature of citizenship. In *United States v. Celestine*, the Court held that granting citizenship to "Indians" did not grant them the "privileges and immunities" of United States citizens.<sup>190</sup> In the 1913 case of *United States v. Sandoval*, the Court similarly concluded that "citizenship [was] not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians."<sup>191</sup> In continuing to portray these people in a demeaning manner, Justice Van Devanter observed that "as a superior and civilized nation," the United States was obligated to protect "all dependent Indian communities

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<sup>184</sup> *Id.* at 120.

<sup>185</sup> Indian Citizenship Act of 1924, 8 U. S. C. § 1401(2); *see also, generally*, Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. Rev. 1615 (2000).

<sup>186</sup> *Id.* at 123.

<sup>187</sup> Goodell, 20 Johns, at 720.

<sup>188</sup> *United States v. Ritchie*, 58 U. S. 525 (1854) (holding that the title of the land to the purchaser in the purchaser's petition to the board of commissioners setting forth his claim to the land against the government and others is confirmed).

<sup>189</sup> *Id.* at 540.

<sup>190</sup> *United States v. Celestine*, 215 U.S. 278 (1909) (holding that although Native Americans were allotted land and made United States citizens pursuant to 24 Stat. 390, it did not cause the United States to lose jurisdiction over the Native Americans for offenses committed within the limits of the reservation).

<sup>191</sup> *United States v. Sandoval*, 231 U.S. 28 (1913) (holding that although the Pueblo Indians might arguably have been citizens, congress still had the authority to prohibit the sale of liquor in their territory because they were Indians).

within its borders,”<sup>192</sup> and this was particularly appropriate in that case because Pueblo people were an “ignorant” and “degraded” people.<sup>193</sup> In 1916 the same Justice in *United States v. Nice* concluded that “citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection.”<sup>194</sup> Professor Robert Porter recently observed that “Indians today have the status of a minor--acknowledged as citizens but not fully recognized as being able to care for one’s own affairs.”<sup>195</sup> They are United States citizens simply because they have been born on American soil, but they are regarded as being part of their tribal communities and are afforded rights and immunities subject to their tribal governments.<sup>196</sup>

The application of the plenary powers doctrine constitutionalized the inferior citizenship status of indigenous people and as Professor Saito observed in practical terms, resulted in Indian nations losing 90 million acres of reservation land, more than two-thirds of their former holdings.<sup>197</sup>

### ***B. The Territorial Island Inhabitants***

The plenary powers doctrine is also the basis for the subordination of island inhabitants who were colonized after the Spanish-American War and World War II.<sup>198</sup> For this group, the United States Supreme Court used the plenary powers doctrine to avoid extending them constitutional protections. In the period’s major public policy debate, the Court in the leading Insular Case decision *Downes v. Bidwell*<sup>199</sup> concluded that the Constitution did not “follow the flag.” “The power to acquire territory by treaty,” Justice Brown affirmed, “implied not only the power to govern such

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<sup>192</sup> *Id.* at 46.

<sup>193</sup> *Id.*

<sup>194</sup> *United States v. Nice*, 241 U.S. 591 (1916) (Congress had the power to regulate or prohibit the sale of intoxicating liquor to such Indians).

<sup>195</sup> Porter, *supra* note 175, at 153.

<sup>196</sup> *Id.*

<sup>197</sup> Saito, *supra* note 113 at 441.

<sup>198</sup> Román, Alien-Citizen, *supra* note 96, at 1.

<sup>199</sup> *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901).

territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the ‘American Empire.’”<sup>200</sup> In sum, the plenary power of Congress arose from the inherent right to acquire territory, and the Territorial Clause (of the Constitution) endorsed the United States’ treaty-making power, and the power to declare and conduct war in other lands. The Constitution applied to the territories only to the degree that it was extended to them by Congress.<sup>201</sup> As a result, for this group there has never been any pretense concerning the Fourteenth Amendment’s applicability or equality for that matter.<sup>202</sup> These individuals did not receive citizenship through the Fourteenth Amendment, the vehicle used to grant or impose such status on virtually all other groups who have attained it. They became associated with the United States by being inhabitants of lands conquered by the United States. As acquired in this manner, the United States Supreme Court has concluded that the Territorial Clause in Article IV of the Constitution, and not the Fourteenth Amendment, determined the rights of this group.<sup>203</sup> As interpreted, this provision endowed Congress with complete or plenary power over these people.<sup>204</sup> In turn, the Court and Congress have kept this group in a subordinate and disenfranchised status.

The island people who exist under United States’ control but are not full members of the body politic, reside in the island groups of Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the United States Virgin Islands, the Federated States of Micronesia, the Marshall Islands, and the Republic of Palau.<sup>205</sup> These island groups examined here fall under two categories:

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<sup>200</sup> *Id.*

<sup>201</sup> Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases, (1901-1922)*, 65 Rev. Jur. U.P.R. 225, 246-47 (1996).

<sup>202</sup> The label of Alien-Citizen can also theoretically apply equally to the other non-white citizens addressed in the previous section.

<sup>203</sup> De Lima, *supra* note 201; Downes, *supra* note 201.

<sup>204</sup> *Id.*

<sup>205</sup> See e.g., Ediberto Roman, *THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THIS COUNTRY’S NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS* (CAROLINA ACADEMIC PRESS, 2006).

the first are the unincorporated United States territories, and the second are the newly created sovereign, yet dependent, island groups of the South Pacific. The islands of Puerto Rico, the Northern Mariana Islands, Guam, the United States Virgin Islands, and American Samoa are so-called unincorporated territories.<sup>206</sup> These island groups are dependent lands that the United States Supreme Court, in a series of decisions known as the Insular Cases, concluded were neither “foreign” countries nor “part of the United States.”<sup>207</sup> The unincorporated territories, undoubtedly should be classified as those existing under a colonial regime because: the United States Congress has plenary or complete power to govern the territories, including the ability to nullify local laws and enact federal legislation dictating the rights of the inhabitants of those territories; none of the territories are fully incorporated as a state of the union or are sovereign nations; and although all inhabitants born on the territories are United States citizens (nationals in the case of Samoans), they do not enjoy similar rights as citizens on the mainland and have no voting representation in the federal government.<sup>208</sup> These last colonial indicia ensures that the island inhabitants do not receive the same amount of aide or other government largess provided to similarly situated citizens on the mainland, nor do these people have the ability to vote for President, Vice-President, or any member of Congress. The second category of islands include: The Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. In international circles, they are considered to be autonomous nation-states but are included herein because of their similar history of annexation and the existing issues concerning their sovereignty.<sup>209</sup>

The territories of Micronesia, the Marshall Islands, and Palau were formally United States’ dependencies and still are largely controlled by the United States. In fact, the United States federal agency responsible for administering the United States’ territories, the Office of Insular Affairs,

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<sup>206</sup> *Id.*

<sup>207</sup> Downes, *supra* note 201.

<sup>208</sup> *See supra* note 197.

<sup>209</sup> *Id.*

identifies the Republic of the Marshall Islands, the Federated State of Micronesia, and the Republic of Palau as being under the jurisdiction of the United States. Despite the international perception of sovereignty stemming from labels such as “Republics,” or “Federated State,” the Office of Insular Affairs website classifies these lands as territories where the United States maintains the responsibility for administering and providing assistance.<sup>210</sup> In essence, the method of United States’ control over these three “sovereigns” mirrors the controlling efforts over the unincorporated United States island territories. This unique history of Palau, Micronesia, and the Marshall islands closely resembles the stories of the unincorporated United States’ territories of Puerto Rico, the Northern Mariana Islands, Guam, the United States Virgin Islands, and American Samoa.<sup>211</sup>

The United States began its overseas expansion during the period of the Spanish-American War, which resulted in several Spanish territorial concessions. In the Treaty of Paris, Spain officially ceded “to the United States the island of Porto [sic] Rico and other islands now under Spanish sovereignty in the West Indies.”<sup>212</sup> Consistent with the United States Constitution’s grant of Congress’s plenary power under the Territorial Clause, Article Nine of the treaty granted Congress the power over “the civil rights and political status” of the territories and its people.<sup>213</sup> The Treaty of Paris endorsed the United States’ imperialistic venture as it was among the first times in American history that in a treaty acquiring territory for the United States, there was no promise of American citizenship.<sup>214</sup> In addition, the treaty contained “no promise, actual or implied, of statehood.”<sup>215</sup> As a result of the war, the United States acquired Puerto Rico, Guam, and the Philippines.<sup>216</sup> The U.S.

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<sup>210</sup> Official web site for U.S. Office of Insular Affairs, *available at* <http://www.doi.gov/oia/firstpginfo/islandfactsheet.htm>.

<sup>211</sup> *See supra* note 197.

<sup>212</sup> *See* Treaty of Paris, Dec. 10, 1898, United States-Spain Art. II, T.S. No. 343.

<sup>213</sup> *Id.*, Art. IX; *see also* U.S. Const. art. IV, §3, cl. 2 (“The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States”).

<sup>214</sup> CABRANES, *supra* note 61, at 1.

<sup>215</sup> *Id.* *See also* Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Mexican Republic, Feb. 2, 1848.

<sup>216</sup> JULIUS W. PRATT, AMERICA’S COLONIAL EXPERIMENT 68 (1950).

Virgin Islands were later purchased from the Danish government in 1907.<sup>217</sup>

While the inhabitants of Puerto Rico, Guam, and Virgin Islands have obtained a form of citizenship, and a status of nationals for Samoans, each membership differs from traditional Fourteenth Amendment citizenship. The consequential aspect of these colonized islanders' subordinate membership is that unlike their brethren on the mainland, they are not entitled to participate in the national political process;<sup>218</sup> they have no representation in Congress, and, as residents of the territories, cannot vote for President and Vice-President, and their respective territories bear no electoral rights. Further, they are not entitled to the full Constitutional protection and their status can arguably be stripped at any time.<sup>219</sup>

The inhabitants of Puerto Rico were granted citizenship in 1917. However, unlike their brethren on the mainland, these Americans are not entitled to participate in the national political process,<sup>220</sup> are not entitled to the full protection of the Constitution, and can arguably be stripped of their status citizenship at any time.<sup>221</sup> Similarly, the unincorporated territory of Guam has been granted this same form of American citizenship, which clearly states that as a possession of the United States the island can be "bought, sold, or traded by the federal government."<sup>222</sup> Similarly, the residents of the Virgin Islands were granted United States citizenship in 1927 and the inhabitants of the Northern Mariana Islands attained citizenship in 1976.<sup>223</sup> The residents of the unincorporated

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<sup>217</sup> See EDIBERTO ROMAN, *THE OTHER AMERICAN COLONIES: THE INTERNATIONAL AND CONSTITUTIONAL LAW OF THE UNITED STATES NINETEENTH-TWENTIETH CENTURY ISLAND CONQUESTS* (Carolina Academic Press, 2005).

<sup>218</sup> See, e.g., Román, *Alien-Citizen*, *supra* note 96, at 1-47 (observing that the residents of Puerto Rico retain an alien attribute despite being United States citizens as they cannot vote for President and Vice-President and do not have representation in Congress).

<sup>219</sup> See Congressional Research Service Memorandum: *Discretion of Congress Respecting Citizenship Status of Puerto Rico* (Mar. 9, 1989), in 2 *PUERTO RICO: POLITICAL STATUS REFERENDUM, 1989-1991*, at 81-85 (Puerto Rico Fed. Affairs Admin. ed., 1992).

<sup>220</sup> See, e.g., Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 *Fl. St. L. Rev* 1 (1997) (observing that Puerto Rican born the residents of Puerto Rico retain an alien attribute despite being U.S. Citizens as they cannot vote for President and Vice-President and do not have representation in Congress).

<sup>221</sup> See *supra* note 211.

<sup>222</sup> H.R. 1720-01 (1993).

<sup>223</sup> See Rivera Ramos, *supra* note 203, at 156 n. 69.

territory of American Samoa have received even less, for as nationals they have even fewer rights. Accordingly, the diluted form of citizenship granted to these people under the auspices of Congress's power under the Territorial Clause changed little in terms of rights but merely facilitated a belief of belonging to the United States. The inhabitants were granted a title that suggested power in the political process, but in actuality they received little more than a label, coupled with a perception on their part that they were attaining something of consequence.

Thus, the inhabitants of the unincorporated territories, with the exception of Samoans, were granted a title that suggested equal rights and power in the political process but, in actuality, they received little more than a label, coupled with a perception on their part that they were attaining something of consequence. For the United States, the effect of these grants was that “[t]hose at the helm of all branches of the metropolitan government saw as fit that citizenship be granted for particular political and strategic reasons without effectuating a change in the political condition of the territories.”<sup>224</sup>

For the residents of these island territories, their disenfranchised status has not only caused inequality of political and civil rights, but has also manifested itself through unequal economic treatment.<sup>225</sup> For instance, as a result of their subordinated status, residents of Puerto Rico receive less favorable treatment than the mainland citizens under a number of major federal benefits programs. For the residents of Puerto Rico, federal payments under Aid to Families with Dependent Children (AFDC), Medicaid, and food stamps are made at lower levels and are subject to

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<sup>224</sup> *Id.* at 156.

<sup>225</sup> Puerto Rican citizens, with the exception of federal employees, are exempt from federal income taxes on income earned in Puerto Rico. *See* IRC United States § 936 (1994).

an overall cap.<sup>226</sup> Similarly, the Supplemental Security Income program (SSI) does not apply to Puerto Rico.<sup>227</sup> Benefits under a similar program are capped and are made at lower levels than SSI payments made to eligible persons residing in the States.<sup>228</sup> Benefits for needy children are likewise provided at appreciably lower levels.<sup>229</sup>

Relying on the territorial incorporation doctrine, the United States Supreme Court upheld this unequal economic treatment. The Justices have concluded that as long as there is a rational basis for the discrimination, the Court will uphold the acts. For instance, in *Califano v. Torres*,<sup>230</sup> the Court held that Congress can discriminate against the elderly, the blind, and the disabled if they are inhabitants of Puerto Rico, even though they would otherwise be eligible under the SSI program of the Social Security Act.<sup>231</sup> Similarly, in *Harris v. Rosario*, the Court upheld as constitutional the reimbursement of lower levels of AFDC to the people of Puerto Rico.<sup>232</sup> Resting on Congress's power under the Territorial Clause, the Court in these decisions summarily found a rational basis for disparate treatment, thereby justifying Congress's discriminatory action.<sup>233</sup>

Thus, United States citizenship status to the inhabitants of this country's island conquests

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<sup>226</sup> See S. REP. NO. 101-481, at 10-11 (1990) ("Under present law, federal social welfare programs under the Social Security Act such as AFDC, Medicaid, Aid to the Aged, Blind and Disabled, Foster Care and Adoption Assistance, and Social Services block grant operate differently in Puerto Rico than they do in the states. Under statehood, both the amount of the welfare benefits and percentage of population receiving them would increase."); see also T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 Const. Commentary 15, 15 (1994).

<sup>227</sup> See *Califano v. Torres*, 435 U.S. 1, 2 (1978) (holding that government benefits of a state citizen do not transfer when that citizen moves to Puerto Rico).

<sup>228</sup> See Social Security Amendments of 1972, Pub. L. No. 92-603, § 303(b), 86 Stat. 1329, 1494 (repealing Titles, I, X, and XIV of the Social Security Act with the exception that these titles would still apply to Puerto Rico, Guam, and the Virgin Islands); see also 42 U.S.C. § 1308(a)(1) (Supp. 1997) (specifying the amount of social security payments to Puerto Rico, Guam, the Virgin Islands, and American Samoa); see also 41 U.S.C. § 1396(b) (1994).

<sup>229</sup> See 42 U.S.C. § 1396(b) (1994).

<sup>230</sup> *Califano v. Torres*, 435 U.S. 1, (1978).

<sup>231</sup> See *id.* at 4-5.

<sup>232</sup> See *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (holding that Congress could treat Puerto Rico differently from states so long as there was a rational basis for its actions).

<sup>233</sup> See *id.*; see also *Califano*, 435 U.S. at 4-5.

was and remains different from that held by their mainland counterparts.<sup>234</sup> Such membership, simply stated, flies in the face of basic foundational constructs of United States citizenship law.

#### **IV. Subordinates in Fact?**

##### ***A. African-Americans***

African-Americans, without question, fall into a category of individuals who were subordinates in law. This aspect of their subordination will be briefly explored here. After exploring the *de jure* subordination of African-Americans, a conceptual shift will be made to question whether African-Americans are still subordinates despite attaining citizenship status with the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. While African Americans were finally granted United States citizenship through constitutional amendment following the Civil War, over a hundred years after that grant, questions persist as to whether they are truly American citizens. In other words, although they may no longer be subordinates in law, they may be subordinates in fact. African-Americans and other groups identified here may have attained official Fourteenth Amendment citizen status, but they have repeatedly been treated as something less than equals. Thus, even after attaining Fourteenth Amendment citizenship, a status not achieved by the territorial island people, it appears that African-Americans and other racial minorities may be subordinates in fact.

The depth of the frustration, estrangement, and alienation of this citizen group was poignantly expressed by the words of Malcolm X:

The Black should be exempt from all taxation . . . we want the federal government to exempt our people from all taxation as long as we are

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<sup>234</sup> Rivera Ramos, *supra* note 203, at 235 (reviewing the role of the United States Supreme Court in justifying United States imperialism). Ironically, the United States, as the colonial sovereign, exercises jurisdiction over the most basic aspects of life in the territory as it does in the states, including communications, currency, labor relations, postal service, environment, foreign affairs, and military defense.

deprived of equal justice under the laws of the land...why should you be taxed if you don't get anything in return? How can you be charged the same tax as the White man...you have no business in a government, as a second class citizen, paying first class taxes. The government of the United States should exempt our people from all taxation as long as we're deprived of equal protection of the laws . . . you don't have second class citizenship anywhere on earth, you only have slaves and people who are free.<sup>235</sup>

While the inferior status of African-Americans did not derive from the plenary powers doctrine, it derives from the United States Constitution, interpreted through similarly racist constructions. As originally drafted, the Constitution excluded African-Americans in Article I, Section 2, which counted African-Americans as three-fifths of a free person.<sup>236</sup> In addition, the first Supreme Court decision to address the political status of African-Americans did not base its decision on the plenary powers doctrine; it did however, arise during the same period of that doctrine's creation and similar racist and nativist bases were used to subordinate indigenous people, recent Asian immigrants, and inhabitants of United States island conquests. Thus, while the case that sanctioned the disenfranchised African-Americans was technically not a plenary powers decision, it is analogous in terms of its white-supremacist foundation.

The very nature of how African-Americans arrived in this country strongly suggests that, particularly those born here must be citizens, as they could owe no allegiance to any other government of their place of birth.<sup>237</sup> Thus, the principles of equality and membership should have always applied to African-Americans. They, however, have not.

The court-sanctioned exclusion of African-Americans is most vivid in the United States Supreme Court's decision in *Dred Scott v. Sandford*,<sup>238</sup> where the Court held that African-Americans,

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<sup>235</sup> Malcolm X, *Wisdom of Malcolm X* (Black Label, Inc., Compact Disk Number BLCD3-001).

<sup>236</sup> U.S. Const. Art. 1, §2.

<sup>237</sup> Drimmer, *supra* note 57, at 691-94.

<sup>238</sup> *Scott v. Sandford*, 60 U.S. 393 (1856).

even those born in a free territory, were not United States citizens.<sup>239</sup> In that matter, the plaintiff Dred Scott was born into slavery in Virginia sometime around 1800. Scott's master, an Army doctor, eventually moved him to Minnesota, a jurisdiction that forbade slavery. Scott sued for his freedom claiming that he was in a free territory and therefore could not be a slave in that land. After engaging in an extensive discussion surrounding the meaning of citizenship, Justice Taney, writing for the Court, concluded "we think the Negroes are . . . not included and were not intended to be included, under the word 'citizens' in the constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures citizens of the United States."<sup>240</sup>

The Court refused to recognize citizenship for this group because of their perceived inferiority.<sup>241</sup> Specifically, the Court characterized African-Americans "as beings of an inferior order, and altogether unfit to associate with the white race."<sup>242</sup> The levels or gradations of membership established in the very first writings on the concept of citizenship, dating back to the ancient Greek writings of Aristotle, were specifically endorsed in the *Scott* decision. Writing for the majority, Justice Taney declared:

We proceed to examine the case as presented by the pleadings. The words 'people of the United States' and 'citizens' meant the same thing. 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. They are what we familiarly call the 'sovereign

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<sup>239</sup> *Id.* at 397. After engaging in an extensive discussion of the meaning of citizenship, Justice Taney, writing for the Court noted: "We think they [African-Americans] are . . . not included and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures citizens of the United States."

<sup>240</sup> *Id.* at 393. Here, the Court's decision comports with a decades old opinion of United States Attorney General William Wirt. Asked by President Monroe whether free Negroes in Virginia were United States citizens, Wirt responded: "I am of the opinion that the Constitution, by the description of 'citizens of the United States,' intended those only who enjoyed the full and equal privileges of white citizens in the State of their residence. . . . Then, free people of color in Virginia are not citizens of the United States." II Opinions of Attorneys-General 426, quoted in ROCHE, *supra* note 40, at 18.

<sup>241</sup> *Scott*, 60 U.S. at 407.

<sup>242</sup> *Id.* Accepting differing models of membership, the Court refused to recognize African-Americans even those born free, as citizens because "[i]t is not a power to raise to the rank of citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class." *Id.* at 417.

people,' and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and they are not included, and were not intended to be included, under the word 'citizen in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.<sup>243</sup>

In his concurring opinion, Justice Daniel observed:

The African . . . was regarded and owned in every State in the Union as property merely, and as such was not and could not be a party or an actor, much less peer in any compact of form of government established by the States or the United States . . . [S]o far as rights and immunities appertaining to citizens have been defined and secured by the Constitution and laws of the United States, the African race is not and never was recognized [sic] either by language or purpose of the former . . .<sup>244</sup>

Justice Daniel went further and specifically argued that freed blacks possessed an intermediate membership level akin to that of a “freedman” instead of what Dred Scott argued in favor of—citizen. Accordingly, as a result of the propriety of membership, Justice Daniel opined that African-Americans could not possess citizenship’s rights and privilege. The Justice made specific references to the Roman law system of membership that included slaves, freedmen, and citizens as a basis to support a similar class system within the United States. He noted:

The institution of slavery, as it exists and has existed from the period of its introduction into the United States, though more humane and mitigated in character than was the same institution, either under the republic or the empire of Rome, bears, both in its tenure and in the simplicity incident to the mode of its exercise, a closer resemblance to Roman slavery than it does to the condition of villanage, as it formally in England. Connected with the latter, there were peculiarities, from custom or positive regulation, which varied it materially from the slavery of the Romans, or from slavery at any

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<sup>243</sup> Scott, 60 U.S. at 404

<sup>244</sup> *Id.*

period within the United States.

...

With regard to slavery amongst the Romans, it is by no means true that emancipation, either during the republic or the empire, conferred, by the act itself, or implied, the status or the rights of citizenship.<sup>245</sup>

Ultimately, the *Scott* Court adopted the Roman subordinate level of participation model within the 1800's American society. Irrespective of their title of free person or slave, the African-American could not become a full member of society.<sup>246</sup> In other words, because of the Court's endorsement of state-sanctioned racism and marginalization, non-whites, such as African-Americans, were incapable of attaining equality in terms of full rights under the Constitution.

Eventually, after a long, bloody, and destructive civil war, the United States Constitution was amended and purportedly granted "all persons" born in the United States citizenship status. Nonetheless, as W.E.B. Dubois questioned after the civil war, serious doubts persisted as to whether

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<sup>245</sup> *Id.* at 477-78.

<sup>246</sup> See ERIC FONER, RECONSTRUCTION, 1863-1877 25-26 (Harper & Row, 1988). Even Northern states did not grant equality and full citizenship to the free black population prior to the Civil War. As Foner synthesizes: "[T]he war . . . held out hope for an even more radical transformation in the condition of the time despised black population of the free states. Numbering fewer than a quarter million in 1860, blacks comprised less than 2 percent of the North's population, yet they found themselves subjected to discrimination in every aspect of their lives. Barred in most states from the suffrage, schools, and public accommodations, confined by and large to menial occupations, living in the poorest, unhealthiest quarters of cities like New York, Philadelphia, and Cincinnati, reminded daily of the racial prejudice that seemed as pervasive in the free states as in the slave, many Northern blacks had by the 1850s all but despaired of ever finding a secure and equal place in American life. Indeed, the political conflict between free and slave societies seemed to deepen racial anxieties within the North. The rise of political antislavery in the 1840s and 1850s was accompanied by the emergence of white supremacy as a central tenet of the Northern Democratic party, and by decisions by Iowa, Illinois, Indiana, and Oregon to close their borders entirely to blacks, reflecting the fear that, if slavery weakened, the North might face an influx of black migrants." (citing LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 (Chicago, 1961)).

African-Americans were not only free but political persons.<sup>247</sup> Dubois noted that the Fourteenth Amendment emancipates a multitude with no political rights. Accordingly, while the perception of many may be that emancipation would immediately evolve to enfranchisement, as Dubois feared, that conclusion was far from the case.<sup>248</sup> Despite theoretically attaining citizenship and its related rights and anointments of belonging, African-Americans were subsequently and repeatedly treated in an unequal manner,<sup>249</sup> notwithstanding the enactment of the Fourteenth Amendment, which was

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<sup>247</sup> W.E.B DUBOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880*, 289 (1935). Dubois observed:

“It is clear that from the time of Washington and Jefferson down to the Civil War, when the nation was asked if it was possible for free Negroes to become American citizens in the full sense of the word, it answered by a stern and determined ‘No!’ the persons who conceived of the Negroes as free and remaining in the United States were a small minority before 1861, and confined to educated free Negroes and some of the Abolitionists. . . . Were we not loosing a sort of gorilla into American freedom? Negroes were lazy, poor, and ignorant. Moreover their ignorance was more than the ignorance of whites. It was a biological, fundamental and ineradicable ignorance based on pronounced and eternal racial differences. The democracy and freedom open and possible to white men of English stock, and even to Continental Europeans, were unthinkable in the case of Africans.” *Id.* at 130 (1962). Carl Schurz, German immigrant, intellectual, and idealist, who traveled the South extensively in preparing a report on the reconstruction efforts in the gulf states for President Johnson, found the situation little improved in the years after the war. DuBois quotes from Schurz’s account at length and also finds corroboration from reports from several states to the congressional Joint Committee on Reconstruction. Among Schurz’s observations: “The emancipation of the slaves is submitted to only in so far as chattel slavery in the old form could not be kept up. But although the freedman is no longer considered the property of the individual master, he is considered the slave of society, and all independent state legislation will share the tendency to make him such. The ordinances abolishing slavery passed by the conventions under the pressure of circumstances will not be looked upon as barring the establishment of a new form of servitude . . . . Wherever I go—the street, the shop, the house, the hotel, or the steamboat—I hear the people talk in such a way as to indicate that they are yet unable to conceive of a Negro as possessing any rights at all. Men who are honorable in their dealings with their white neighbors, will cheat a Negro without feeling a single twinge of their honor. To kill a Negro, they do not deem murder; to debauch a Negro woman, they do not think fornication; to take property away from a Negro, they do not consider robbery. The people boast that when they get freedman’s affairs in their own hands, to use their expression, ‘the [expletive] will catch hell.’ The reason of all this is simple and manifest. The whites esteem the blacks their property by natural right, and however much they admit that the individual relations of masters and slaves have been destroyed by the war and by the President’s emancipation proclamation, they still have an ingrained feeling that the blacks at large belong to the whites at large.” *Id.* at 136.

<sup>248</sup> *Id.* at 180. Reconstruction evoked great fear of political equality in the South, which had already begun passing black codes in many of its states. Dubois analyzes the South’s outlook thus: “Here, then, was the dominant thought of that South with which Reconstruction must deal. Arising with aching head and palsied hands it deliberately looked backward. There came to the presidential chair, with vast power, a man who was Southern born; with him came inconceivable fears that the North proposed to make these Negroes really free; to give them a sufficient status even for voting, to give them the right to hold office; that there was even a possibility that these slaves might out-vote their former masters; that they might accumulate wealth, achieve education, and finally, they might even aspire to marry white women and mingle their blood with the blood of their masters. Nevertheless, lest the North attempt to claim the moral upper hand on enfranchisement issues, one must recall that voting was still a privilege for ‘whites only’ in states like Ohio, Maryland (a split loyalty state during the Civil War), and New Jersey in 1867.” JOHN HOPE FRANKLIN, *RECONSTRUCTION: AFTER THE CIVIL WAR* 74 (University of Chicago Press, 1961).

<sup>249</sup> See STETSON KENNEDY, *JIM CROW GUIDE: THE WAY IT WAS* (Florida Atlantic University Press, 1990).

supposed to grant them full citizenship status. As a reconstruction amendment, the Fourteenth Amendment was enacted to specifically recognize that African-Americans born in the United States were citizens. In the Civil Rights Cases in 1883, the Court struck down the Civil Rights Act of 1875, which prohibited “any person” from denying “any citizen” access to privately owned places of public accommodations on the basis of race.<sup>250</sup> Justice Bradley confirmed the lower citizenship status of African-Americans when he declared:

There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, though it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discrimination in the enjoyment of accommodations in inns, public conveyances, and places of amusement.<sup>251</sup>

Scholars have chronicled the pre-Civil War, as well as post-Civil War, disenfranchisement of African-Americans. These chronicles trace the post-Civil War efforts by white Southerners to immediately attempt to implement a *de facto* form of slavery through efforts such as the “Black Codes” designed to ban political participation in particular, and destroy any pretense of equality, in general.<sup>252</sup> These oppressive efforts occurred with the full support of President Andrew Johnson.<sup>253</sup> The continued disparate treatment of these people, which was often sanctioned by the Court, created the *de facto* inferior citizenship status of this group.<sup>254</sup> For instance, despite the passage of the Fourteenth Amendment, in *Plessy v. Ferguson*,<sup>255</sup> Justice Brown, writing for the majority, upheld a

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<sup>250</sup> Civil Rights Cases, 109 U.S. 3, 11 (1883).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 480. See also W.E.B. DuBois, *supra* note 249, at 166-79; KENNEDY, *supra* note 251.

<sup>253</sup> KENNEDY, *supra* note 251.

<sup>254</sup> For an excellent discussion of the history of the disenfranchisement of African-Americans, see Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events* (manuscript available with the author).

<sup>255</sup> *Plessy v. Ferguson*, 163 U. S. 537 (1896) (the Court rejected petitioner’s argument that the separation of the two races stamped one race with a badge of inferiority.).

statute that required the segregation of white and “colored” persons.<sup>256</sup> Justice Brown based his discussion on a constructed distinction between social and legal quality.<sup>257</sup> He concluded that “[t]he object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality.”<sup>258</sup>

The social versus legal distinction of *Plessy* replicated the tortured logic of *Dred Scott*, despite the enactment of the Fourteenth Amendment. The *Plessy* Court reiterated that, notwithstanding the Amendment’s declarations that “all persons born or naturalized” would be citizens, African-Americans were not recognized as true citizens; African-Americans were citizens in name, not in law. The concepts of equality of rights and equality of opportunity were inapplicable to them. Even after the Fourteenth Amendment’s enactment, which was specially passed to acknowledge the freedom and equality of former slaves, the Supreme Court in *Plessy* reiterated that African-Americans could be treated unequally. Indeed, they were something less, perhaps even still slaves, to borrow Malcolm X’s sentiments. These events highlight that despite attaining a status that is supposed to connote equality, African-Americans, at least during the era closely following the reconstruction amendments of the Constitution, were not full and equal citizens.

Though *Brown v. Bd. of Education*<sup>259</sup> specifically rejected the separate but equal dichotomy of

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<sup>256</sup> *Id.* at 544. Justice Brown based the opinion’s rationale on a constructed distinction between social and legal equality. Specifically, the Justice observed “[t]he object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality.” The social versus legal distinction of *Plessy* replicated the subordinated status of African-Americans even after the enactment of the Fourteenth Amendment. It reiterated that notwithstanding the Amendment’s declarations that “all persons born or naturalized” would be citizens, African-Americans were only citizens in name, *de jure* citizens, but not citizens in practice. The concepts of “equality of rights” and “equality of opportunity” were inapplicable to them. Drimmer, *supra* note 57, at 396. Even after the constitutional amendment that was enacted to acknowledge their freedom and equality, the Supreme Court reiterated that they were not true citizens, but second-class citizens or in Malcolm X’s words, perhaps still slaves.

<sup>257</sup> *Id.* at 544.

<sup>258</sup> *Id.* at 884.

<sup>259</sup> *Brown v. Board of Education*, 347 U. S. 483 (1954) (the Court overturned *Plessy v. Ferguson* and the “separate but equal” doctrine, finding that it had no place in public education. Segregation was a denial of the equal protection of the laws under the Fourteenth Amendment. Separate educational facilities were inherently unequal.).

*Plessy*, even that decision failed to lift segregation's stigma in public schools, as evidenced by the *Brown II* decision, its progeny, and the social phenomenon of white-flight. African-Americans to this day face either unequal treatment or must be members of a group that repeatedly face a series of unfortunate events.<sup>260</sup> These examples may come from a variety of circumstances including: racial profiling by police, such as DWB or "Driving While Black,"<sup>261</sup> or the more subtle forms of subordination as identified by Ellis Close in his book *The Rage of a Privileged Class*,<sup>262</sup> where he addresses how African-Americans, irrespective of their academic or financial achievements, are repeatedly reminded of their inequality of society.<sup>263</sup>

A recent manifestation of the African American subordinate citizenship debate concerns the voting representation of residents in the District of Columbia. Of the over 550,000 residents of D.C., 60% are African American.<sup>264</sup> While members of this community pay federal and local taxes, serve in the armed forces, and serve on juries to uphold federal law and policies, these residents have

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<sup>260</sup> I am often reminded of this subordinated status when I recall when a dear friend, who happens to be African-American and named Rodney King, oddly enough, wanted to leave my house after a long debate about racial politics at around 2:00 a.m. I told him to stay because the bus station, the New York/New Jersey Port Authority, wasn't very safe. He simply reminded me "Ed, remember I'm black, everyone sees me as a criminal, so they are scared -- I've got more problems with cops." This saddened me and still does because you see my friend, who happens to be the most honest and honorable man I've ever met, could never take off the chains of stigma and subordination. It reminds me that despite my pride and willingness to fight for racial justice, I can hide. Because of racial constructions based on skin color, I can put on a suit or sweats and be the proverbial boy next door. My best friend can rarely, if ever, do that and I hope I never forget that fact.

<sup>261</sup> For a detailed exposé of the too often substantiated perception that blacks often face greater scrutiny at the hands of police officers than whites, see David A. Harris, *The Stories, The Statistics, And The Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265 (1999).

<sup>262</sup> ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (Harper Perennial, 1993).

<sup>263</sup> *Id.* at 4-10 ("You feel the rage of people, [of] your group . . . just being the dogs of society."). Note: on micro-aggression often non-minority speakers and actors are oblivious to the repetitive, debasing innuendoes, even unintended disrespectful comments that comprise micro-aggression. See Peggy C. Davis, *Symposium: Popular Legal Culture, Law as Micro-aggression*, 98 Yale L.J. 1559 (1989). In a synthesis of writings on the topic, Prof. Davis explains micro-aggression as ". . . subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders . . . Psychiatrists who have studied black populations view them as 'incessant and cumulative' assaults on black self-esteem." (citations omitted); reprinted in RICHARD DELGADO AND JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (New York University Press, 2001).

<sup>264</sup> US Census, 2000 available at <http://www.census.gov/>.

no voting representation in Congress.<sup>265</sup> It wasn't until 1961 when the Twenty-Third Amendment of the Constitution was ratified by the states, in which the residents of the District of Columbia were granted the right to vote in presidential elections.<sup>266</sup> This marked the first time that United States citizens—who were not residing within the political, governmental unit of a state—were granted the right to vote in presidential elections.<sup>267</sup> However, this is their only voice in the political process. Voters in the District of Columbia elect a delegate to the House of Representatives who can vote in committee and draft legislation, but who does not have full voting rights.<sup>268</sup> Additionally, voters elect two “shadow” senators<sup>269</sup> and one shadow representative<sup>270</sup> as non-voting representatives who lobby Congress on District of Columbia issues and concerns. Denial of Congressional representation to the predominantly African American community in the District of Columbia to at least some scholars “not only suggests a belief in the unfitness of the population to participate equally in national life but creates the kind of ‘uncomfortable resemblance to political apartheid’ that the Supreme Court condemned and invalidated . . . ”<sup>271</sup>

More recent “unfortunate events” faced by African-Americans is evidenced by the treatment of this group during the 2000 presidential election. In a racially charged national election that was decided by less than 700 votes in the pivotal State of Florida, a state where the governor is the brother of the election’s eventual victor, and where both brothers were strongly disliked by a majority of African-American voters due to their positions on matters such as civil rights, the United States Commission on Civil Rights investigated widespread allegations of discrimination of African-

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<sup>265</sup> Jasmin B. Raskin, *Is This America? The District of Columbia and the Right To Vote*, 34 Harv. C.R.-C.L.L. Rev. 39, 40 (1999). See also, Aaron E. Price, *A Representative Democracy: An Unfulfilled Ideal For Citizens of the District of Columbia*, 7 U. D.C. L. Rev. 77 (2003).

<sup>266</sup> U.S. CONST. amend XXIII.

<sup>267</sup> Amber L. Cottle, *Silent Citizens: United States Territorial Residents and the Right To Vote In Presidential Elections*, 1995 U. Chi. Legal F. 315, 325 (1995).

<sup>268</sup> Currently, Congresswoman Eleanor Holmes represents the District of Columbia in this capacity.

<sup>269</sup> Shadow Senator Paul Strauss and Shadow Senator Florence Pendleton currently serve the District of Columbia.

<sup>270</sup> Shadow Representative Ray Browne currently serves the District of Columbia.

<sup>271</sup> Raskin, *supra* note 267, at 43-44.

Americans on election day. The Commission's report found numerous irregularities on Election Day and confirmed that perhaps thousands of African-Americans may have been denied their right to vote.<sup>272</sup> The report concluded: (1) the most dramatic undercount in Florida election was the uncast ballots of countless eligible voters who were wrongfully turned away from the polls; (2) statistical data, reinforced by credible anecdotal evidence, pointed to the widespread denial of voting rights; and (3) the disenfranchisement of Florida's voters fell most harshly on the shoulders of African-American voters. The report concluded that the magnitude of the impact could be seen from any of several perspectives:

- Statewide, based upon county-level statistical estimates, black voters were nearly ten times more likely than non-black voters to have their ballots rejected.
- Estimates indicated that approximately 14.4 percent of Florida's black voters cast ballots that were rejected. This compared with approximately 1.6 percent of non-black Florida voters who did not have their presidential votes counted.
- Statistical analysis showed that the disparity in ballot spoilage rates—i.e., ballots cast but not counted—between black and non-black voters was not the result of education or literacy differences.
- Approximately 11 percent of Florida voters were African-American; however, African-Americans cast about 54 percent of the 187,000 spoiled ballots in Florida.<sup>273</sup>

The Commission found further troubling facts concerning the election including that there was a high correlation between counties and precincts with a high percentage of African-American voters and the percentages of spoiled ballots. It concluded that nine of the ten counties with the

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<sup>272</sup> Executive Summary, The United States Commission on Civil Rights Report on Voting Irregularities in Florida During the 2000 Presidential Election, available at <http://www.usccr.gov/pubs/vote2000/report/exesum.htm>.

<sup>273</sup> *Id.*

highest percentage of African-American voters had spoilage rates above the Florida average; of the ten counties with the highest percentage of white voters, only two counties had spoilage rates above the state average. Gadsden County, with the highest rate of spoiled ballots, also had the highest percentage of African-American voters. The data further showed that 83 of the 100 precincts with the highest numbers of spoiled ballots were black-majority precincts.<sup>274</sup>

### ***B. Mexican-Americans***

Mexican-Americans are another group whose equal treatment under the law is suspect. Their theoretical inclusion as subordinates arose during the same period of the first use of the plenary powers doctrine was similarly based on racist and nativistic perspectives. As one writer noted: “Fifty years before the pilgrims landed at Plymouth Rock, there were Latino-Latina urban centers in New Mexico and in Florida. Yet, Latinos and Latinas, according to most Americans, are our most recent arrivals—and they have some basis for thinking that.”<sup>275</sup> Many Americans know that the United States conquered land from the indigenous people consisting of approximately “two million square miles of territory by conquest and by purchase.”<sup>276</sup> What is not as well known is the fact that the United States conquered Mexico in 1848 and took over half its then-existing territory. The states of California, Nevada, and Utah, as well as portions of Colorado, New Mexico, Arizona, and Wyoming were created from a 529,000 square mile cession by the Republic of Mexico.<sup>277</sup>

The taking of the Mexican land was a result of the nation’s westward expansion as journalist John O’Sullivan noted in 1845:

Away, away with all these cobweb tissues of rights of discovery, exploration, settlement, contiguity, etc. The American claim is by the

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<sup>274</sup> *Id.*

<sup>275</sup> Harry Pachon, *Special Report: What Color is the Constitution? Crossing the Border of Discrimination: Has the Civil Rights Movement Ignored Generations of Hispanics?*, 15-FALL Hum Rts. 32, 33 (1988)

<sup>276</sup> Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M.L. Rev. 201, 201 (1996).

<sup>277</sup> *Id.*

right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federative self-government entrusted to us. It is a right such as that of the tree to the space of air and earth suitable for the full expansion of its principle and destiny of growth.<sup>278</sup>

Prompted by this spirit of ‘manifest destiny,’ the United States declared war against Mexico to acquire additional territory.<sup>279</sup> The result was the signing of the Treaty of Guadalupe Hidalgo, which states in part:

The United States of America, and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two Republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure, harmony and mutual confidence, wherein the two peoples should live, as good neighbors . . .<sup>280</sup>

Among other things, the treaty provided that the United States would respect private property rights of Mexican citizens in the newly created portions of the United States and those individuals would be granted United States citizenship.<sup>281</sup>

However, as had occurred with the indigenous peoples,<sup>282</sup> many of the treaty provisions were never honored.<sup>283</sup> Despite the treaty’s pledge to “secure Mexicans their rights to property, by the turn of the century almost all Mexican-owned land was lost during the land grant adjudication

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<sup>278</sup> *Id.* at 208 (citing to RICHARD WHITE, *IT’S YOUR MISFORTUNE AND NONE OF MY OWN, A HISTORY OF THE AMERICAN WEST* 73 (1991)).

<sup>279</sup> *Id.*

<sup>280</sup> Guadalupe T. Luna, *En El Nombre De Dios Todo-Poderoso: The Treaty of Guadalupe Hidalgo and Narrativos Legales*, 5 S.W. J.L. & Trade Am. 45 (1998) (citing to Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, Feb. 2, 1848, United States-Mex., 9 Stat. 922).

<sup>281</sup> *Id.* in, *supra* note 278, at 214.

<sup>282</sup> Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved? And We Are Not Saved: The Elusive Quest for Racial Justice*, By Derrick Bell, 97 Yale L.J. 923, 940 (1988). Hereinafter “Derrick Bell.” In fact, the Treaty of Guadalupe Hidalgo was “modeled after ones drawn up between the United States and various Indian tribes, and was given similar treatment . . . property [was] stolen, rights were denied, language and culture suppressed, opportunities for employment, education, and political representation were thwarted.”

<sup>283</sup> Luna, *supra* note 282, at 71.

process [and] . . . challenges from squatters, settlers, and land speculators also promoted land alienation.” Most fundamentally, “many Mexican citizens, transformed by the Treaty into United States citizens of Mexican descent, and their descendants, never enjoyed full membership rights in this society, despite the Treaty’s promise that they would.”<sup>284</sup> As Professor Richard Delgado observed:

The Treaty of Guadalupe Hidalgo purported to guarantee to Mexicans caught on the United States side of the border, full citizenship and civil rights, as well as protection of their culture and language. The Treaty, modeled after ones drawn up between the United States and various Indian tribes, was given similar treatment: The Mexicans properties were stolen, rights were denied, language and culture suppressed, opportunities for employment, education, and political representation were thwarted.<sup>285</sup>

Mexican-Americans were disenfranchised in numerous other ways including immigration. The Constitution and the courts did little to interfere with the racist immigration quotas, the Bracero system, and dragnet searches, seizures, and deportations of anyone who looked Mexican.<sup>286</sup> In theory, the Treaty, which ended the Mexican-American War of 1846 to 1848, promised ‘grace and justice’ by codifying the principal diplomatic objectives of each party. For the United States, ‘grace’ meant purchasing, for the bargain-basement price of \$15 million, thousands and thousands of acres of former Mexican territories. For Mexico, ‘justice’ meant protecting the civil and property rights of Mexican citizens, including Indians, who without moving had suddenly become new residents (and citizens) of a foreign nation.<sup>287</sup> As one writer observed:

In the Treaty of Guadalupe Hidalgo and in numerous Indian treaties, the United States promised to respect property rights of the conquered. To make such promises during the nation’s idealistic youth or during its feverish expansion across a seemingly-unlimited

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<sup>284</sup> Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 S. W. J.L. & Trade Am. 121, 123 (1998).

<sup>285</sup> Delgado, *supra* note 284.

<sup>286</sup> *Id.*

<sup>287</sup> Christopher David Ruiz Cameron, *Mexican Americans in the United States on the Sesquicentennial of the Guadalupe Hidalgo*, 5 S. W. J.L. & Trade Am. 5, 6 (1998).

continent is one thing; to keep them is quite another.<sup>288</sup>

Despite the grant of United States citizenship pursuant to the treaty of Guadalupe Hidalgo in 1848, over one hundred years later Mexican-Americans were still not accepted as full members of the body politic. For instance, in 1954, the United States government initiated “Operation Wetback,” the campaign to deport undocumented Mexicans.<sup>289</sup> During this massive campaign, over one million<sup>290</sup> Mexican immigrants, as well as United States citizens of Mexican ancestry, and undoubtedly other Latinas and Latinos, were deported.<sup>291</sup> The Mexican-American community was directly affected by this campaign because it was “aimed at racial groups, which meant that the burden of proving citizenship fell totally upon people of Mexican descent.” Those unable to present such proof were arrested and sent to Mexico.<sup>292</sup>

Moreover, when examining the disenfranchisement of Mexican-Americans one does not have to look further than the popular depictions of illegal immigrants as Mexicans who have illegally crossed the border, despite the fact that many illegal immigrants are individuals overstaying their visas.<sup>293</sup> A classic example of the current anti-Mexican-American fervor and the potential consequences of such labeling is California’s attempt to implement Proposition 187, which would have denied aliens access to government-funded social services including health care and education.<sup>294</sup> The campaign to pass Proposition 187 played a consequential role<sup>295</sup> in former

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<sup>288</sup> *Id.* in, *supra* note 278, at 253; see also Guadalupe T. Luna, *On the Complexities of Race: The Theory of Guadalupe Hidalgo and Dred Scott v. Sandford*, 53 U. Miami L. Rev. 691 (1999).

<sup>289</sup> JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN AMERICAN UNDOCUMENTED WORKERS IN 1954 229-231 (Greenwood Press, 1980); see also JULIAN SAMORA, LOS MOJADOS: THE WETBACK STORY 52 (1971).

<sup>290</sup> Garcia, *supra* note 291 at 227.

<sup>291</sup> See RONALD T. TAKAKI, A DIFFERENT MIRROR (Little, Brown & Co. 1993).

<sup>292</sup> See Garcia, *supra* note 291, at 231; Samora, *supra* note 291, at 52.

<sup>293</sup> STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 955 (2ed. 1997).

<sup>294</sup> 1994 Cal. Legis. Serv. Prop. 187 (West); see also Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 Iowa L. Rev. 707 (1996).

<sup>295</sup> See Ron Unz, How the Republicans Lost California, Wall Street Journal, Aug. 28, 2000, at A18 (explaining that “California isn’t too liberal for the GOP . . . [but that] Republicans simply scared away immigrant voters”).

California Governor Pete Wilson's re-election campaign.<sup>296</sup> Television advertisements emphasized Wilson's support for the proposition as they depicted "shadowy Mexicans" crossing the border in large numbers.<sup>297</sup> Much of the support for the proposition used loaded pejoratives such as "those little f--kers" and even suggested that California may become a "third world country" or "annexed."<sup>298</sup> Obviously, Proposition 187, though facially neutral, centered on the issue of race and proponents gained support by stirring the fear of the foreigner.<sup>299</sup> While some may suggest that appropriate immigration limits are warranted, if Proposition 187 had been implemented, further subordination and resulting stigmatization of Mexican-Americans and other Latina-Latino immigrants would likely result with profound negative effects.<sup>300</sup>

Similarly, if Proposition 187 had been implemented, authorities could presume that those of Mexican ancestry and even other Latinas and Latinos were illegal; this presumption could lead to the denial of benefits and related deprivations for Latinas and Latinos unless they could prove citizenship. Such negative consequences have resulted from provisions of United States Immigration Laws that permit sanctions against those who employ undocumented persons.<sup>301</sup> In fact, the United States Commission on Civil Rights has found "no doubt that the employer sanctions have caused many employers to implement discriminatory hiring practices."<sup>302</sup>

### ***C. Other Non-Whites***

Several legal scholars have addressed the outsider or foreign status of other ethnic citizens in

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<sup>296</sup> Takaki, *supra* note 293, at 1144.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 1143-45.

<sup>299</sup> *Id.*

<sup>300</sup> Unz, *supra* note 297, at 1139.

<sup>301</sup> 8 U.S.C.A. § 1321 et seq. ("It shall be the duty of every person...bringing an alien to, or providing a means for an alien to come to, the United States...to prevent the landing of such alien in the United States at a port of entry other than as designated by the Attorney General or at any time or place other than as designated by the immigration officers. Any such person, owner, master, officer, or agent who fails to comply with the foregoing requirements shall be liable to a penalty to be imposed by the Attorney General of \$ 3,000 for each such violation...")

<sup>302</sup> U.S. Comm'n on Civil Rights, *The Immigration Reform and Control Act: Assessing the Evaluation Process*, at iv (Sept. 1989)

the United States. Several writings have turned to the treatment of Asian-Americans to demonstrate their subordinate status notwithstanding their attainment of citizenship. According to these works,<sup>303</sup> American society has imposed a label of foreignness on several groups of American citizens.<sup>304</sup> The scholarship includes Latina and Latino citizens, Asian-Americans, Arab-Americans, and other non-whites in the category of other non-white/non-black subordinates.<sup>305</sup> In addition to being characterized as the “forgotten Americans” and the “invisible” members of society, they are

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<sup>303</sup> See Román, *supra* note 96.

<sup>304</sup> See Kevin R. Johnson, *The End Of "Civil Rights" As We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. Rev. 1481, 1486-1489 (2002). As Johnson observes, “Over the course of its history, U.S. society consistently has viewed new waves of immigrants as racially different outsiders . . . At different historical moments, German, Irish, Jewish, and Italian immigrants all were deemed to be of different and inferior racial stock . . . Benjamin Franklin, for example, decried the settling of German immigrants in Pennsylvania and considered them to be of a different race than the English. . . . Lawful exclusion of certain groups of immigrants reinforced their status as racially inferior . . . thereby contributing to the construction, and maintenance, of racial categories. At first glance, the racialization of European national origin groups is wholly incongruous with modern notions of race, particularly the almost reflexive treatment of all Europeans as white. . . . Classifying European immigrants as nonwhite becomes understandable only with the realization that race is a social and legal creation. The social assimilation, or “whitening,” of various immigrant groups, such as the Irish . . . and Jews . . . which occurred slowly over time, reveals how concepts of races are figments of our collective imagination, albeit with real-life consequences. The racial classification of various immigrant groups reflects the fluidity of racial constructions. Immigrants from Asia, the focus of the initial federal immigration laws, long have been classified as racially different . . . Differences of physical appearance contribute to the resilience of the racial classification of persons of Asian ancestry, which contrasts with the erosion of such classifications for European immigrants . . . Immigrants from Mexico and Latin America continue to be racialized in the United States, just as all persons of Mexican and Latin American ancestry historically have been in this country . . . Physical appearance, class, cultural, linguistic, and religious differences contribute to this racialization. Racial distinctions have resulted in housing and education segregation and other forms of discrimination, particularly in the Southwest . . . The demise of concepts of “race” and “races,” and the assimilation of racial minorities into the mainstream, is in part a function of physical appearance. For example, an Anglo-appearing Latina/o is more likely to be treated socially as white . . . As people of color from Latin America and Asia continue migrating to the United States, it becomes more likely that physical appearance differences will remain prominent in U.S. society. This contributes to the maintenance of popular perceptions of racial difference. Consequently, continued migration--with no apparent end in sight--differs from previous immigration patterns. . . . With a different culture and religious faith, persons of Arab ancestry or Muslim faith also have been treated as racially different, even though most racial categorization schemes consider them white . . . Even before the tragic events of September 11, 2001 . . . Arab and Muslim immigrants had been subject to special immigration procedures as presumed “terrorists” and effectively treated as a distinct and separate race . . . In the aftermath of that horrible loss of life, Arab- and Muslim-appearing persons became the focus of the ‘war on terrorism,’ . . . experiencing special treatment at airports . . . interrogations, arrests, and detention . . . and suffering hate crimes, including murder . . .” *Id.* (citations omitted).

See also Kevin R. Johnson, *Symposium: Citizenship and its Discontents: Centering the Immigrant in the International Imagination Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law The Way To Go?*, 76 Or. L. Rev. 347 (1997).

<sup>305</sup> NEIL GOTANDA, “ASIAN AMERICAN RIGHTS AND THE ‘MISS SAIGON SYNDROME,’” IN ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1088 (Hyung-Can Kim ed., 1992)

arguably endowed with the immutable characteristic of alien or foreigner.<sup>306</sup> Noting that race relations in America are typically analyzed in the white-over-black paradigm, Professor Gotanda has argued that this construct has the effect of facilitating the failure to examine the unique racism faced by the non-white non-black racial minorities.<sup>307</sup> In the white-over-black paradigm, if a person is not white, then that person is socially regarded as something other than American.<sup>308</sup>

An example of the inferior status of other non-whites is the historical use of the plenary powers doctrine to justify the deportation and exclusion of undesirable Asian immigrants who otherwise were entitled to enter or stay in the United States. In the *Chinese Exclusion* cases the United States Supreme Court first extended the plenary powers doctrine to immigration. In *Chae Chan Ping v. United States*<sup>309</sup> the plaintiff, a Chinese resident, obtained a required certificate of re-entry pursuant to an 1884 law established by Congress and visited family in China. Prior to his return, Congress passed a new law precluding re-entry of all Chinese workers, irrespective of whether they had a certificate of re-entry. The Supreme Court rejected the claim that the government had violated an international treaty as well as the Fifth Amendment's Due Process Clause. Though acknowledging a technical violation of the treaty with China, the Court decided to enforce the Congressional action under the "last in time rule," whereby a court would uphold a federal law that conflicts with a treaty even if it violates international law.<sup>310</sup> In subsequent cases, the Supreme Court iterated Congress' power to regulate the rights of immigrants, which was deemed an inherent power of the government to protect itself from foreign threats. In practice, then as it is now, the foreign

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<sup>306</sup> Professor Gotanda in his work concerning "the Miss Saigon Syndrome" addressed the label of foreignness in what he termed as the "other non-whites dualism." *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 161.

<sup>309</sup> *Chae Chan Ping v. U.S.*, 130 U. S. 581 (1889) (holding that entry into the United States could be denied to Chinese laborers because the legislature had authority under the sovereign powers delegated by the Constitution to exclude foreigners and that any existing treaty with China did not strip them of their power).

<sup>310</sup> *Id.* at 600.

threat was typically categorized in racial constructions as non-white.<sup>311</sup>

The preceding section illustrated how two of the three classic means of attaining citizenship—(1) Jus Soli or acquisition of the status by birth by being in this country and (2) Jus Sanguinis or being born of a United States citizen—were not sufficient for the attainment of full or equal citizenship status for a wide variety of people of color, including the indigenous people of the United States and the inhabitants of the island conquests. Thus, the history of birthright citizenship has been raced or perverted by the pernicious and yet lesser-known side of the citizenship duality.

### **V. The Raced Nature of Naturalization**

Unfortunately, the other means of attaining membership status under the Citizenship Clause of the Fourteenth Amendment has been applied in an equally racist manner as recently documented in the book *White By Law*, where Ian Haney Lopez chronicled the history of United States naturalization law.<sup>312</sup> Pursuant to Article I of the United States Constitution, Congress is empowered “to establish a uniform rule of naturalization.”<sup>313</sup> Haney Lopez observed that “from the start, Congress exercised this power in a manner that burdened naturalization laws with racial restrictions that tracked these in law of birthright citizenship.”<sup>314</sup>

For instance, the first naturalization act enacted in 1790 limited naturalization to “any alien, being a free white person who shall have resided within the limits and under the jurisdiction of the United States for a term of two years.”<sup>315</sup> For over 162 years, race was a determining factor in whether one could become naturalized. It was only after the Civil War in 1870 that African-

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<sup>311</sup> More recently, writers have even questioned the propriety of the disenfranchisement of felons. See e.g., Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 Va. L. Rev. 109 (2003).

<sup>312</sup> HANEY LOPEZ, *supra* note 122.

<sup>313</sup> U.S. Const. Art. 1.

<sup>314</sup> HANEY LOPEZ, *supra* note 122, at 42.

<sup>315</sup> *Id.* at 44.

Americans could be naturalized.<sup>316</sup> From 1870 until 1952 when strict white versus black racial prerequisites were abolished whites and blacks could be naturalized, but other minority group members, particularly Asians, could not. During the period of these racial prerequisites applicants from Hawaii, China, Japan, Burma, and the Philippines, as well as all mixed-race applicants, failed in their naturalization arguments before courts.<sup>317</sup> Courts, however, concluded that applicants from Mexico and Armenia were “white,” but vacillated over the whiteness of applicants from India, Syria, and Arabia.<sup>318</sup> Not only were these naturalization laws shameful examples of this country’s racist hostility to non-whites, but these hostilities were specifically expressed, ironically, through the concept of citizenship. Haney Lopez cogently summarized the effect of such exclusionary efforts:

The prerequisite cases make clear that law does more than simply codify race in the limited sense of merely giving legal definition to pre-existing social categories. Instead, legislatures and courts have served not only to fix boundaries of race in the forms we recognize today, but also to define the content of racial identities and to specify their relative privilege or disadvantage in United States society. The operation of law does far more than merely legalize race; it defines as well the spectrum of domination and subordination that constitutes race relations.<sup>319</sup>

That awful chapter in our nation’s history, which legally validated segregation and racial subjugation, also propagated those same racist ideologies through the concept of membership in the body politic. There is no more powerful or efficient method of disassociating those unwanted ethnic and racial groups from the more desirable majority than by excluding them from membership into “Our Country.” If Aristotle was correct and a nation is little more than a composite “like any other whole, made up of many parts [and] these [parts] are the citizens that compose it,”<sup>320</sup> then this tool of alienation forces those unfit for membership to become parts of nothing—aliens in their

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<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 2.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 10.

<sup>320</sup> ARISTOTLE, *POLITICS* Book III.

own land.

Having understood the mechanics of the duplicitous application of the citizenship concept, the question begged is: What should the ideal form of citizenship look like? While this is a simple question with an altogether very complex and possibly controversial answer, a review of the citizenship construct's current manifestation is in order before exploring an arguably more aspirational vision of citizenship.

## ***VI. The Contemporary Domestic Development***

Contemporary domestic citizenship theory was significantly influenced not only by the ancient and Eighteenth Century philosophers, but also by the work of T. H. Marshall's 1949 "Citizenship and Social Class."<sup>321</sup> Marshall divides citizenship rights into three categories: civil rights, political rights, and social rights. Virtually every academic discourse since Marshall's work has used his rights-based paradigm. This not to say, however, that the Marshall framework is not without its critics. Marshall's liberal framework has been criticized by both the political left and right. The new right school on citizenship criticizes the framework for focusing on a passive model of membership without any significant obligations attached to citizenship.<sup>322</sup> While the notion of greater civic participation is appealing when one considers, just to name two examples, the recent wave of tax breaks for the rich in this country<sup>323</sup> and the disproportionate representation in the military by

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<sup>321</sup> Kymlicka and Norman, *supra* note 25, at 354.

<sup>322</sup> *Id.* at 354-55.

<sup>323</sup> Marian Wright Edelman, *Why Don't We Have the Will to End Child Poverty?*, 10 *Geo. J. on Poverty L. & Pol'y* 273 (Summer 2003) ("The irresponsible \$1.3 trillion Bush tax cut enacted in 2001 will give the top 1% of taxpayers, those with average incomes over a million dollars, \$477 billion when in full effect . . ."). *See also*, DAVID CAY JOHNSTON, *PERFECTLY LEGAL* (Penguin 2003) (describing how the rich are able to exploit the tax system).

children of the poor, working-poor, and of color,<sup>324</sup> the new right's vision of obligations appears selective. On the left, cultural pluralists advocate differentiated citizenship or preferred citizenship rights for marginalized groups because citizenship has been defined as rights for white men.<sup>325</sup> The pluralists argue that rights, including special rights and exemptions, should depend upon group membership. While also sounding appealing, the pluralists' model, practically and politically speaking, is highly unlikely to be achieved. More importantly, as this article demonstrates, there has always existed differentiated citizenship; it has just worked to marginalize the politically weak. To borrow from Derek Bell's interest convergence theory, without any incentive for the majority, the question that arises is how will citizenship theory and practice make a 180 degree turnaround to now favor the minority? Another group, the communitarians, call for a greater emphasis and focus on civil or social associations, such as churches, charities, or neighborhood associations to promote more active citizenship and responsibilities.<sup>326</sup>

While devotees of the communitarian, cultural pluralist, and new right schools of citizenship have questioned or expanded upon Marshall's rights-based focus,<sup>327</sup> virtually all groups address citizenship through Marshall's rights-based framework. In fact, virtually all citizenship discourse for the latter part of the last century implicitly or explicitly derived from Marshall's theoretical model.

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<sup>324</sup> Charles B. Rangel, op-ed, "Bring Back the Draft," *The New York Times*, December 31, 2002, p. A19; National Priorities Project, Representation of Recruits By Income, *available at* [http://nationalpriorities.org/index.php?option=com\\_content&task=view&id=181&Itemid=107](http://nationalpriorities.org/index.php?option=com_content&task=view&id=181&Itemid=107). In the past couple of years, percentages of minority recruits in the services appear to have declined, according to recent statistics. Ann Scott Tyson, "Youths in Rural U.S. Are Drawn To Military," *Washington Post*, Friday, November 4, 2005, p. A01; Tim Kane, Who Bears the Burden? Demographic Characteristics of U.S. Military Recruits Before and After 9/11, The Heritage Foundation, Center for Data Analysis Report #05-08, November 7, 2005 *available at* <http://www.heritage.org/Research/NationalSecurity/cda05-08.cfm>. Calculations based on U.S. Census Bureau and Department of Defense statistics note that the number of recruits in lower income classes may have declined since 9/11. However, although percentages of recruits from lower income and racial minority groups may have declined since 9/11, the percentages of minorities serving in the military continues to be much higher than their representation in the general population. Compare defense personnel reports in Tables 2.18, 2.20 and 2.21 *available at* <http://www.mfrc-dodqol.org/pdffiles/demo2003/SectionIIActiveDutyMembers.pdf> with 2002 census estimates *available at* <http://www.census.gov/popest/archives/files/MRSF-01-US1.html#pep>.

<sup>325</sup> Kymlicka and Norman, *supra* note 25, at 370.

<sup>326</sup> *Id.* at 363.

<sup>327</sup> *Id.* at 355-57, 362-67.

According to Marshall's framework, a properly functioning liberal welfare state is required to guarantee complete civil, political, and social rights to all citizens.<sup>328</sup> Accordingly, the welfare state by ensuring full rights to all ensures that every member of society feels like a full member of society.<sup>329</sup> This contemporary domestic construction of citizenship would seem to refer not only to delineated rights but also to a broad concept of equal membership or incorporation into the body politic.<sup>330</sup> A correlative of this concept is a sense of belonging and participation in the community that is the nation.<sup>331</sup> This last component, which contains both legal and conceptual aspects, demonstrates a psychological component of the term. This construction suggests that the anointment of citizenship is an important title that goes to the heart of the individual's feeling of inclusion as well as the collective citizenry's sense of the value and virtue of the democracy.<sup>332</sup>

### **VII. A New Construction**

The classical contemporary writer on the subject, T.H. Marshall, probably had it right. He envisioned and elaborated on a model that has an egalitarian and inclusive bent coupled with an affirmative obligation by the state to achieve the goals of equal citizenship. The communitarian model for greater civic participation through associations expands upon this model without necessarily contracting it. The new right's vision reeks of the perceived classic conservative effort to focus blame on the weak.

To step back for a moment, the classic ancient writers, such as Aristotle, also extolled theories facially based on inclusion, but Greek and Roman leaders, as well as many others in their practice, included slavery and elitism within their framework as a natural extension of citizenship. However, the classical notion was at least honest in the sense that it never purported to be

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<sup>328</sup> *Id.* at 354.

<sup>329</sup> *Id.*

<sup>330</sup> *See Román, supra* note 96.

<sup>331</sup> *Id.*

<sup>332</sup> *See CABRANES, supra* note 61, at 5, n.12.

something it was not, namely, a wholly inclusionary and egalitarian architecture for socio-political function. The Greeks admitted with blunt sincerity the inferiority of their subjects and slaves. Plato, author of that famous model for republican government, wrote in his *Laws*, that “the soul of the slave is utterly corrupt, and . . . no man of sense ought to trust [him].”<sup>333</sup>

Certainly, this is far from an ideal application of the egalitarian concept of citizenship. It is, nevertheless, truthful about its citizenship architecture. This is far from the case in the United States. With one hand, we argue with the laudable words of John Locke, James Madison, and Thomas Jefferson, and the other hand, we ignore the subordinate legal status of the indigenous peoples of our land and the inhabitants of our island colonies. We, in essence, in almost an unnoticed fashion, declare that certain groups of persons cannot be admitted or fully accepted. The solution is not merely to accept the hypocritical result of citizenship theory’s egalitarian nature vis-à-vis its application, but, indeed, to apply the egalitarian concept in accordance with the principles of nationhood that this country espouses.

While some may argue, as others have for over 2500 years, that a nation’s greatness depends on the caliber of its citizens, one should remember that the survival of an idea does not necessarily make it any more correct or less narrow-minded. Accordingly, T.H. Marshall’s status and rights based paradigm, which focuses on the state’s obligation to ensure the full effectuation of all political, civil, and social rights for all citizens, is a framework that should be followed. Marshall’s framework is the closest means to ensure the nation’s greatness is achieved, not through constructions of superiority, but through recognition of equality. By ensuring the guarantee of fundamental rights to all its citizens and the equal application of those rights to every member, can greatness be accurately measured? Nonetheless, the first step towards achieving that laudable goal is to acknowledge the wrongs of the past. Specifically, this land has to admit that for too long it managed to use

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<sup>333</sup> PLATO’S LAWS, BOOK VI.

constructions under the law to exclude disfavored groups of every sort throughout civilization's history. The unforgivable act, however, is that this exclusion has all too often been advanced through a concept fundamentally believed to be egalitarian in nature, which demeans the unwanted group more than would any other form of alienation.

### **VIII. Conclusion**

The United States government's prosecution of similarly situated individuals that were accused of engaging in terrorist activities or engaging in war against the United States varies greatly. The most obvious difference in John Walker Lindh, Yaser Esam Hamdi, and Jose Padilla is that, while they are United States citizens, they are of different ethnic backgrounds. While we cannot be certain of the basis for their disparate treatment, what we do know is: (1) One accused was of Arab-descent, one was Puerto Rican, the other was Caucasian. (2) The government put the Caucasian through our traditional legal system, where he had his day in court and decided to plead guilty; the government never produced any evidence against the Arab-descendant, but nevertheless gave him little option other than to renounce his citizenship and agree to be deported or face the possibility of indefinite confinement; the Puerto Rican remains to this day confined indefinitely as an enemy combatant. The disparate treatment of these individuals provides fodder for the critics of the neutrality of the law. The government's action also raises questions concerning the raced nature of the domestic war on terror, and will likely be part of the ongoing civil rights versus national security debate following September 11.

This project uses the current debate regarding the appropriate levels of civil rights held by those accused of terrorism to contextualize a broader debate concerning the application of the citizenship construct and the rights associated with that construct. The bulk of the literature on both sides of the post-September 11, civil rights-national security debate merely compares the treatment of Arab-Americans and Muslim-Americans after September 11 to the World War II era Japanese

internment cases. While such comparisons are appropriate, the disparate treatment of citizens dates considerably further back than World War II. Differences or gradations of citizenship are the little known component of the construct of citizenship. While the term is almost universally recognized as including a notion of equality among all those holding the title, the application, as well as a lesser known aspect of the construct, also condones inequality among those who should or do hold the status. While historically these differences between the members of a society often manifested themselves in terms of differences in gender or economic class, the differences or stratifications in the domestic arena have more vividly demonstrated themselves when ethnic and racial minority groups sought full and equal membership. Unfortunately, the United States Supreme Court and Congress throughout this country's history have repeatedly refused to grant individuals from such group's full membership. While these denials have to some extent been ameliorated by constitutional amendments, to this day certain groups, such as the indigenous people of this land and the territorial island people, still hold a formal *de jure* inferior citizenship status. Other groups, such as African-Americans continue to challenge whether the formal grant of citizenship, through vehicles such as the Fourteenth Amendment to the Constitution, granted them full civil and political participation.

The preceding pages have thus examined a little-addressed phenomenon concerning the history of citizenship. What emerges from this examination is the fact that despite the repeated inclusive declarations dating back to the term's genesis, not all who have possessed the status, or by definition of the concept should have held the status, have had anything resembling the full compliment of rights one would expect from the status. In the domestic arena, despite a constitutional amendment that is premised on equality of membership, that bestows citizenship on all born or naturalized in the United States, and was specifically written to endow African-Americans with the status of citizenship, a history of United States citizenship reveals that disfavored groups

rarely easily attained citizenship status. And when such groups, particularly ethnic and racial minorities, attained the *de jure* status, the United States repeatedly denied full membership or participation in the American body politic. Indeed, each and every major racial minority group within the United States during this country's crucial juridical period exploring the bounds and applicability of citizenship—from roughly 1822-1922—the Supreme Court defined citizenship in such a manner to exclude the minority group from a notion of full or equal citizenship. This phenomenon of differentiated levels of participation occurred when, in addition to other disfavored groups, African-Americans, the indigenous people of this land, and the inhabitants of the territorial islands challenged their status as citizens.

Largely basing their decisions on racist and xenophobic constructions, the Court and Congress disenfranchised these groups. To this day, some within this society, which by the definition of the concept should be full and equal citizens, continue to exist in a formal or *de jure* inferior status. As witnessed by the Civil Rights Commission Report on the 2000 Presidential Election, others such as African-Americans, despite a civil war, a constitutional amendment, and an era of civil rights, may actually remain in a less than equal status. A new vision of citizenship is needed: one where the proclamations of equality are not just laudable declarations that merely espouse an ideal that is attainable for only certain groups within a society. The question that remains is: When will constitutional scholars, practitioners, jurists, political leaders, activists, and the populous insist that the stratifications of citizenship come to an end?