When the Wise (Latina) Judge Meets a Living Constitution - Why It IS a Matter of Perception

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ABSTRACT

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

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At the time of Justice Sonia Sotomayor’s confirmation hearings, much was made of a statement she made in a 2001 lecture at the University of California, Berkeley, School of Law concerning a judge’s approach to the cases that come before her. “. . . I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” The resulting backlash and condemnation caused Justice Sotomayor to apologize for her endorsement of the idea that a wise Latina would, and should, bring a different perspective to the bench.

The debate, however, is far from over – especially in Supreme Court jurisprudence regarding gender discrimination claims. Recently, Justice Antonin Scalia publicly asserted that there is no heightened equal protection right for gender claims at all. Scalia based his comments on the idea of “originalism,” the theory that the United States Constitution should be interpreted solely from the viewpoint of the original drafters. Under this interpretation, a justice’s life experiences are simply not relevant, even if that justice brings to the bench the life experience of an unrepresented minority group. Thus, instead of a living document, originalism imagines a Constitution frozen in time. And the time chosen, September 17, 1787, was unkind to any group that was not comprised of white, male property owners.

While no legitimate legal commentator would suggest that impermissible bias either in favor of, or against, a specific group of people be used in current case law, it does seem disingenuous to assert that the justices who serve on the United States Supreme Court do not already bring their individual life experiences to their legal opinions, even those justices who are labeled originalists or strict constructionists.

Indeed, a review of United States Supreme Court case law in the racial discrimination cases demonstrates that when the judiciary fails to apply, or simply lacks, a proper perspective of the facts presented to them in a dispute, the resulting judicial decision is weak. Beginning with Dred Scott to Plessy to Brown I, this article analyzes how the Supreme Court’s jurisprudence changed over one hundred years and how the life experiences of the majority writer in those decisions were on display. When the Court refused to apply a modern perspective to the case before it, and instead defaulted to an analysis that was premised on American life as of September 17, 1787, the resulting judicial decisions were weak - African Americans became property and “separate but equal” was not a badge of inferiority.
Using the racial discrimination cases as a backdrop, this article then looks at the modern gender discrimination cases of United States v. Virginia ("VMI") and Ledbetter v. Goodyear Tire. Once again, the perspective of the majority writer, and the dissenting writers, is seen throughout their opinions. More notably, echoes of the Court’s reasoning in the race cases is also reflected. Finally, this article provides examples of Supreme Court justices who are deemed to be originalists or strict constructionists plainly using their perspective in reaching a judicial decision.

As it becomes more and more fashionable to label the use of perspective by a judge as "judicial activism," we should be equally alarmed at a constitutional construction that forces the judiciary to render its decisions based on a Constitution that is frozen in time. For better or for worse, the American judiciary, and especially the Supreme Court, is the guardian of our constitutional rights. Those rights are compromised when there is no judicial perspective.
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I. INTRODUCTION

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

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

That same point can be made with respect to people of color. No one person, judge or nominee will speak in a female or people of color voice. I need not remind you that Justice Clarence Thomas represents a part but not the whole of African-American thought on many subjects. Yet, because I accept the proposition that, as Judge Resnik describes it, "to judge is an exercise of power" and because as, another former law school classmate, Professor Martha Minnow of Harvard Law School, states "there is no objective stance but only a series of perspectives - no neutrality, no escape from choice in judging," I further accept that our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that—it's an aspiration because it denies the fact that we are by our experiences making different choices than others. Not all women or people of color, in all or some circumstances or indeed in any particular case or circumstance but enough people of color in enough cases, will make a difference in the process of judging. . . .

Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.

Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a

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

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

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

Indeed, a review of United States Supreme Court case law demonstrates that when the judiciary fails to apply, or simply lacks, the same life experience presented to them in a dispute, the resulting judicial decision is weak. The judiciary cannot use a methodology to interpret the Constitution that requires decisions to be made in a vacuum. Case law demonstrates this type of legal deliberation will usually deprive unrepresented groups of Americans of their fundamental rights. For better or for worse,


\(^3\) Confirmation Hearing of Sonia Sotomayor, __ Cong. __ (2009) (Statement of Sonia Sotomayor, nominee to the United States Supreme Court) (“ Senator Leahy, yesterday, many of the senators emphasized that their -- the values they thought were important for judging, and central to many of their comments was the fact that a judge had to come to the process understanding the importance and respect the Constitution must receive in the judging process and an understanding that that respect is guided by, and should be guided by, a full appreciation of the limited jurisdiction of the court in our system of government, but understanding its importance as well. That is the central part of judging. What my experiences on the trial court and the appellate court have reinforced for me is that the process of judging is a process of keeping an open mind. It’s the process of not coming to a decision with a pre-judgment ever of an outcome and that reaching a conclusion has to start with understanding what the parties are arguing, but examining in all situations carefully the facts as they prove them or not prove them, the record as they create it, and then making a decision that is limited to what the law says on the facts before the judge.”)
the American judiciary, and especially the Supreme Court, is the guardian of our constitutional rights. Those rights are compromised when there is no perspective. As the future for heightened constitutional protection over gender discrimination claims is shaped, with Justice Antonin Scalia asserting there is no equal protection right for gender claims at all, the perception of the other Supreme Court justices is even more critical.

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

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

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

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

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

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

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

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

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

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4 The reasons that constitutional judging is not a mere combination of fair reading and simple facts extend way beyond the recognition that constitutions have to have a lot of general language in order to be useful over long stretches of time. Another reason is that the Constitution contains values that may well exist in tension with each other, not in harmony. Yet another reason is that the facts that determine whether a constitutional provision applies may be very different from facts like a person’s age or the amount of a grocery bill; constitutional facts may require judges to understand the meaning that the facts may bear before the judges can figure out what to make of them.” Justice David Souter, Harvard Commencement remarks (as delivered), Harvard Gazette (May 27, 2010)

5 60 U.S. 393 (1856)
considered a citizen by the United States Constitution?\textsuperscript{6} The answer was not obvious. After all, the Constitution was originally drafted with the following clause: “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”\textsuperscript{7} The infamous Dred Scott ruling held that Mr. Scott was not a citizen and therefore, could be legally deprived of all constitutional rights and privileges.\textsuperscript{8}

1. The Dred Scott Analysis

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

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

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

\textsuperscript{7} U.S. Const. art.1, §2 (emphasis added)(as a result of slavery, African Americans were deemed three fifths of a white man.).

\textsuperscript{8} Id. at 404-405 (“The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subdued by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”)
had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument."  

The Court painstakingly laid out its justification for the reduced status of African Americans based on their past historical treatment: (1) they were inferior; (2) they were unfit to associate with the white race; (3) they had no rights which the white man was bound to respect; and, (4) “they were properly reduced to slavery for their own benefit.”  

What is most jarring to the modern reader is the underlying implication that the Supreme Court did not question this treatment as either constitutionally improper or ethically questionable.

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

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

Thus, instead of a living document, the Court imagined a Constitution frozen in time. And the time chosen, September 17, 1787, was unkind to black freedman like Dred Scott.

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9 Id. at 406-07.
10 Id. at 407. The Court further elaborated: “He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.” Id. at 408. “And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States.” Id.
11 Id. at 410-11.
12 In further support of their legal conclusions, the Court reinforced its idea of black servitude by demonstrating that no governmental authority or document treated them as more than property. The Court first considered the laws of states deemed hostile to the slave trade at the time of the founding. “We have made this particular examination into the legislative and judicial action of Connecticut, because,
Unsurprisingly, the Court held that Mr. Scott did not have the ability to sue in American courts because he was not an American citizen.\textsuperscript{14} In an extraordinary extension of this decision, the Supreme Court then stated in dicta that it would not recognize Mr. Scott’s freedman status because he was born a slave and gained freedom by merely moving to a state that prohibited slavery.\textsuperscript{15}

...from the early hostility it displayed to the slave trade on the coast of Africa, we may expect to find the laws of that State as lenient and favorable to the subject race as those of any other State in the Union; and if we find that at the time the Constitution was adopted, they were not even there raised to the rank of citizens, but were still held and treated as property, and the laws relating to them passed with reference altogether to the interest and convenience of the white race, we shall hardly find them elevated to a higher rank anywhere else.” Id. at 415. Then, the Court analyzed the Articles of Confederation. “Words could hardly have been used which more strongly mark the line of distinction between the citizen and the subject; the free and the subjugated races. The latter were not even counted when the inhabitants of a State were to be embodied in proportion to its numbers for the general defence. And it cannot for a moment be supposed, that a class of persons thus separated and rejected from those who formed the sovereignty of the States, were yet intended to be included under the words ‘free inhabitants,’ in the preceding article, to whom privileges and immunities were so carefully secured in every State.” Id. at 418-9. “Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons, and authorized to be employed, if born in the United States.” Id. at 421.

\textsuperscript{13} September 17, 1787 was the date the Constitution was signed in Philadelphia, Pennsylvania. African Americans were not the only group given short shrift by the beliefs and perspectives of that date. The framers were white, male landowners and as result, conferred all authority, such as the right to vote, to their brethren. Cite. The group was so narrow that even white females did not enjoy full constitutional privileges. Cite. The minority groups of the time were black freedmen, like Mr. Scott, black slaves or Native Americans. Cite. As Dred Scott reminds us, they had no traces of citizenship or constitutional protection. Dred Scott, 60 U.S. at 410-11. Further, there was not a real diversity of religion in the United States. The dominant faith was Protestant, or at least, non-Catholic. Cite. Muslims, Jews, and atheists were not present in meaningful blocs. Cite.

\textsuperscript{14} Id. at 426-7 (“What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since, the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word ‘citizen’ and the word ‘people.’ And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.”)

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

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

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

Chief Justice Taney was closely allied with President Andrew Jackson, holding the offices of The United States Attorney General, from 1831 to 1833, and the Secretary


\[^{17}\text{Current Justice Antonin G. Scalia recently remarked on the lingering effect that *Dred Scott* had on Taney’s historical legacy. Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part, dissenting in part). Justice Scalia, like Chief Justice Taney, is Roman Catholic. “There is a poignant aspect to today’s opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. ‘It is the dimension’ of authority, they say, to ‘call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution.’ [citation omitted] There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer, and staring straight out. There seems to be on his face, and in his deep set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case–its already apparent consequences for the Court, and its soon to be played out consequences for the Nation–burning on his mind. *I expect that two years earlier he, too, had thought himself ”call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution.” It is no more realistic for us in this case, than it was for him in that, to think that an issue of the sort they both involved–an issue involving life and death, freedom and subjugation–can be ”speedily and finally settled” by the Supreme Court, as President James Buchanan in hisinaugural address said the issue of slavery in the territories would be. [citation omitted] Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish. We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”}
of the Treasury, from 1833 to 1834. After his appointment as Chief Justice in 1836, Taney's goal was to mold the Court into an effective and prestigious institution.

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

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

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

Chief Justice Taney's background as a slave owner and career politician provide the missing pieces that explain *Dred Scott*'s absolutism. While a superficial reading of Taney's background might suggest a Supreme Court justice who was far too involved with, and beholden to, political ideology, it would be a mistake to dismiss Taney's history as a slave owner. *Dred Scott* is the product of a justice who was comfortable

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18 His appointment as Chief Justice of the Supreme Court, replacing Chief Justice John Marshall, came at some controversy as Taney was unpopular with the United States Senate for actions he took as Treasury Secretary. Biographybase, Roger B. Taney Biography, [http://www.biographybase.com/biography/Taney_Roger_B.html](http://www.biographybase.com/biography/Taney_Roger_B.html) (last visited on Jan. 21, 2011). His nomination for Secretary was rejected by the Senate, marking the first time the Senate exercised its power to reject a presidential appointment. Id.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id. The case was entitled *Lemmon v. New York*
28 Id. In a striking coincidence, Chief Justice Taney died at the end of the Civil War and on the same day that his home state of Maryland abolished slavery. Id.
with the idea of slavery. He was so comfortable with the institution that the idea of fundamental civil liberties never entered his legal analysis. Justice Scalia used Taney’s mistake in judgment to decry the Court’s role in any issue more properly reserved to the legislative branch, but if it had not been for Taney’s individual perspective that slaves were entitled to nothing more than a property designation within the United States, then Dred Scott might have ended with a simply dismissal on jurisdictional grounds, Scott is not a citizen because the drafters of the Constitution did not intend to confer citizenship to any group who were not citizens on September 17, 1787. Instead, Chief Justice Taney used the opinion to deliver a complex explanation regarding the inferiority of African Americans, and why they did not deserve any civil liberties at all. Even in 1856, this opinion was controversial probably because of the presence of freedmen in the northern states who demonstrated that they could handle the duties associated with citizenship, so Taney supported the opinion with questionable interpretations of the Constitution and damning recitations of the country’s historical treatment of African Americans. The perspective of the Chief Justice was on full display throughout the Dred Scott opinion.

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

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

30 See infra n.18.
31 While it can certainly be inferred that Chief Justice Taney meant to abridge state and territorial power on the creation of freedmen, thus removing the incentive for slaves to escape to these safe havens, more than federal court supremacy is at issue in Dred Scott.
32 See infra ___
33 163 U.S. 537 (1896).
34 Id. at 540.
35 Id. at 540-541 (“The first section of the statute enacts ‘that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to.”).
36 Id at 541.
37 Id. (“By the second section it was enacted ‘that the officers of such passenger trains shall have power and are hereby required *541 to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to
refuse service to passengers that would not sit in the compartment where they “belonged.”38 Separate penalties were assessed against those railway companies that did not comply.39

1. The Plessy Analysis

Homer Plessy was riding the East Louisiana Railway when he attempted to sit in the white section of the train.40 Because he was 7/8 white and 1/8th black, Mr. Plessy maintained that he had the right to sit in the white section.41 Seeking a writ of prohibition against the state from the statute’s fines and imprisonment,42 Mr. Plessy argued that the Louisiana statute was unconstitutional under the 13th and 14th Amendments of the Constitution.43

Writing for the court, Justice Henry Billings Brown quickly held that it was “too clear for argument” that the statute did not conflict with the 13th amendment.44 “Slavery implies involuntary servitude, a state of bondage; the ownership of mankind as chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services.”45 The court found that refusing accommodations to persons of color does not impose a badge of slavery; therefore, the Louisiana statute was not in conflict with the 13th Amendment.46

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

imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state.”

38 Id.
39 Id. (“The third section provides penalties for the refusal or neglect of the officers, directors, conductors, and employées of railway companies to comply with the act, with a proviso that ‘nothing in this act shall be construed as applying to nurses attending children of the other race.’ The fourth section is immaterial.”)
40 Id. at 538. Mr. Plessy was subsequently jailed.
41 Id.
42 Id. at 539.
43 Id. at 542.
44 Id.
45 Id.
46 Id. at 542-543.
47 Id. at 543 (citing 83 U.S. 36 (1873)) (“The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.”)
of either race to the other. To support this construction, the Supreme Court turned to existing precedent regarding education and the 14th Amendment. It found that the judicial system “generally, if not uniformly,” upheld state legislation segregating schools as a valid exercise of a state’s police powers. The Court also recognized the constitutionality of laws against miscegenation.

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

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

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

The Supreme Court was not persuaded by Mr. Plessy’s claim that his reputation of belonging to the “dominant race” was his “property” and the statute deprived him of his right to such property. Engaging in circular logic, the Court found that Plessy was

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48 Id. at 544 The Court stated that the 14th amendment did not pertain to race, but instead to “exclusive privileges.” Id. According to the Slaughter-House cases, however, the 14th Amendment’s primary purpose was to establish “the citizenship of the negro, to give definitions of citizenship of the United States and of the states, and to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States.” 83. U.S. at __.

49 Id. at 544-545 (citing Roberts v. City of Boston, 5 Cush. 198 (1848-1849)). Examples included Massachusetts and the District of Columbia.

50 Id.

51 100 U.S. 303 (1880)

52 163 U.S at 545.

53 The act of Congress provided that “all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, on land or water, theaters, and other places of public amusement, and made applicable to citizens of every race and color.” 163 U.S. at 546. Citing 109 U.S. 3 (1883). The Supreme Court held Congress was invading the domain of state legislation provided for by the federal Constitution. Id. at 547.

54 Id. Citing 133 U.S. 587 (1890).

55 Id.

56 Id. at 548.

57 Id. at 549. At the time, the definition of race and who could be considered white or “colored” was controlled by state law. Id.
not deprived of any such property right because, as a matter of state law, if he is not a member of the "dominant race," then there can be no deprivation.\textsuperscript{58}

Holding that the Louisiana statute does not conflict with the 14\textsuperscript{th} Amendment,\textsuperscript{59} the Court stated:

the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment.\textsuperscript{60}

Moreover, the majority of the Court was not persuaded that the forced separation of the races necessarily stamps the colored race with inferiority.\textsuperscript{61}

Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the represent situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.\textsuperscript{62}

In an impassioned dissent, Justice John Marshall Harlan admonished the majority: "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The destinies of the two races, in this country, are indissolubly linked together and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."\textsuperscript{63}

\textsuperscript{58} Id. If he is a member of the dominant race, however, and was deprived of his reputational property interest, then he may sue for damages. Id. As long as the state’s exercise of its police power is reasonable, then the state may make racial distinctions and require that the races be separated. Id. The Supreme Court had already affirmed the use of a municipality’s state power to make “an arbitrary and unjust discrimination against the Chinese race.” Id. at 550, (citing \textit{Yick Woo v. Hopkins}, 118 U.S. 356 (1886)).

\textsuperscript{59} Id.

\textsuperscript{60} Id. at 548. The Supreme Court found that this analysis only required an inquiry of reasonableness. Id. (“The case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. [Louisiana is free to act] with reference to the established usages, customs, and traditions of the people, and with a view of the promotion of their comfort, and the preservation of the public peace and good order.” Id. at 550. Accordingly, Louisiana’s law is no more unreasonable or obnoxious than laws that require segregation of students in the District of Columbia. Id.

\textsuperscript{61} Id.

\textsuperscript{62} Id.

\textsuperscript{63} Id at 559-60. Harlan further predicted that \textit{Plessy} would only stimulate more transgression on the rights of colored citizens. Id.
2. Justice Henry Billings Brown and Social Darwinism

Unlike the opinion in *Dred Scott*, *Plessy* did not attempt to reduce African Americans to mere articles of commerce. Yet, the Court implicitly recognized that the white race could constitutionally segregate itself against all “colored” races. The majority author, Justice Henry Billings Brown, was considered a “social elite.”

Born in Massachusetts to a New England merchant’s family, Brown graduated from Yale in 1856. He trained in the legal profession at both Yale and Harvard, although he did not earn a law degree. Brown practiced law in Michigan and was a United States attorney there until his appointment as a district court judge for the Eastern District of Michigan.

Brown joined the Supreme Court in 1890 upon the nomination of President Benjamin Harrison. Primarily known for his expertise in admiralty law, Brown’s opinions on the Court reflected an aversion to government intervention in matters of commerce.

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

During Justice Brown’s tenure on the Supreme Court, being a member of the “colored” race was a socially undesirable trait. Brown would have little sympathy for a race deemed to be inferior. The basis for such a conclusion of course stems from the philosophy guiding *Dred Scott*, African Americans were inferior to the white race, with no chance for constitutional protection, much less equality. Social Darwinists would not think it a matter for the legal system to confer civil liberties to members of society who were powerless, because they were not the fittest, as decided by nature. Of course, this reasoning is obviously circular, much like Brown’s dismissal of Plessy’s claim to a

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

65 Cite.

66 Cite.

67 Cite.

68 Cite.

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

70 Cite.


72 Id.

73 Id.

74 Id.  This theory was notoriously applied by the Nazi regime during World War II. (cite) Unfortunately, some aspect of eugenics is still present today, most recently in the well publicized book, *The Bell Curve* by Charles Murray and Richard J. Hernstien, which maintained that blacks as a group were less intelligent than whites because of dysgenics, an increase in inadequate genes in the population. Daniel Kevles, *In the Name of Darwin*, [http://www.pbs.org/wgbh/evolution/darwin/name of/index.html](http://www.pbs.org/wgbh/evolution/darwin/name of/index.html).
property right as a member of the white race. The Court stated that Plessy could not have a property right unless the state of Louisiana decided he was a member of the dominant race. Of course, if Mr. Plessy was deemed white by Louisiana, then he would not be subjected to its segregation statute at all. Similarly, social Darwinism would not confer judicial protection on a member of the weaker race because if nature deemed Mr. Plessy a species worth preserving, he would be a member of the dominant race and as such, would not require constitutional protection. Justice Brown’s personal philosophy seems to have made him comfortable with the idea of superior and inferior races. Therefore, “separate but equal” would not only be a constitutionally acceptable accommodation for the white race, it might also be a necessity.

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

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

1. The *Brown I* Analysis

To strike down the segregation statutes, the *Brown* court had to depart from the reasoning in *Plessy*, which enunciated the ‘separate but equal’ doctrine. That doctrine provided that “equality of treatment is accorded when the races are provided

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75 See infra __
76 __
77 347 U.S. 483.
78 Id. at 493 ("Does the segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?") The state of Kansas had passed a statute that permitted but did not require separate school facilities for black and white children. Id. at 486 n1. The Topeka Board of Education chose to create segregated facilities. Id. The Kansas district court recognized that segregation had a negative effect upon the black children, but nonetheless found the school facilities were substantially equal. Id. In South Carolina, the relevant statute required segregation in public schools. Id. Unlike Kansas, the South Carolina district court found that the black schools were inferior to white schools; and ordered that the black schools be equalized immediately. Id. The state of Virginia also required the segregation of black and white school children. Id. Like South Carolina, the district court in Virginia upheld the validity of segregation but ordered the equalization of the black and white schools. Id. The Delaware state statute also required segregation of black and white students. The court of Chancery ordered that the admission of black children into white schools immediately, because the facilities for the black children were inferior. Id.
79 Id.
80 Id. (citing 163 US 537). Other than the Delaware, all of the courts below relied upon *Plessy* even though the case did not address secondary education.
substantially equal facilities, even though those facilities are separate.”\textsuperscript{81} Brown challenged the constitutionality of this premise, arguing that segregated public schools could never be made equal.\textsuperscript{82}

The Supreme Court found that the legislative history of the Fourteenth Amendment did not provide any illumination on the issue of segregation because public education had changed dramatically in the years since its adoption.\textsuperscript{83} In 1868, the United States did not have a developed system of public education in the south. “Education of white children was largely in the hands of private groups. Education of negroes was almost nonexistent and practically all of the race were illiterate.”\textsuperscript{84} In the north, there was some progress in public education, but “the conditions of public education did not approximate those existing [in 1954].”\textsuperscript{85} The Supreme Court began to acknowledge that that education was perhaps the most important function of state and local governments. “It is doubtful that any child can reasonably be expected to succeed in life if he is denied the opportunity of an education.”\textsuperscript{86}

The doctrine of ‘separate but equal’ had no place in the field of public education.\textsuperscript{87} Rejecting Plessy, the Court declared that “separate educational facilities are inherently unequal.”\textsuperscript{88} And that segregation itself communicates a message of inferiority to minority students, or a badge of inferiority.\textsuperscript{89}

“To separate [the minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”\textsuperscript{90}

\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 489.
\textsuperscript{84} Id. At 490.
\textsuperscript{85} Id. The Brown court recognized that school districts were in the process of equalizing their facilities. Id. One state court found equalization had occurred. Id. Therefore, the Court found it incumbent to look beyond just the tangible facilities and instead “to the effect of segregation itself on public education.”
\textsuperscript{86} Id. at 493.
\textsuperscript{87} Id. at 495. The Court began its analysis by reviewing existing precedent. There were six previous Supreme Court cases addressing the ‘separate but equal’ doctrine, none of which addressed its validity under the federal Constitution. Id at 491-92 (citing Cummings v. Board of Education of Richmond County, 175 US 528 and Gong Lum v. Rice, 275 US 78.) In Sweatt v. Painter, the court found that a segregated law school could not provide an equal educational opportunity because of “those qualities which are incapable of objective measurement but which make for greatness in a law school.” Id. Another case required that a minority student admitted to a white graduate school be treated like all the other students. Id. at 495 (citing McLaurin v. Oklahoma State Regents, 339 US 637 (1950)) (The Court relied again upon the intangible considerations of a student’s ability to engage in discussions and exchange views with other students.”) The Supreme Court held that such considerations apply with just as much force to children in grade and high school. Id. at 494.
\textsuperscript{88} Id. (finding that separate facilities usually led to less educational resources at the non-white school.)
\textsuperscript{89} Id at 494.
\textsuperscript{90} Id at 494.
The Supreme Court struck down the segregation statutes because they deprived the plaintiffs from the equal protection of the laws guaranteed by the Fourteenth Amendment.\textsuperscript{91}

2. Chief Justice Earl Warren and Social Change

Chief Justice Earl Warren was a polarizing figure during his years on the United States Supreme Court.\textsuperscript{92} Born to Swedish immigrants in Los Angeles, California, Warren was raised in Bakersfield.\textsuperscript{93} Chief Justice Warren began his public service career as a City Attorney for Oakland, then District Attorney for the County Of Alameda before eventually becoming the Governor of California.\textsuperscript{94} During this time period, in the late 1920s to 1930s, Warren was a member of whites-only ritual organizations such as the Order of the Elks.\textsuperscript{95} After rising to Governor, Warren heartily supported the wartime Federal order removing all persons of Japanese ancestry from the West Coast to holding camps inland.\textsuperscript{96} He also opposed the return of Japanese residents.\textsuperscript{97} Warren declared at a Governor’s Conference speech, “if the Japs are released, no one will be able to tell a saboteur from any other Jap.”\textsuperscript{98}

\textsuperscript{91} Id. at 495. (the Court did not address whether segregation also violated the Due Process Clause). Due to the wide scope of the Brown I opinion, the Supreme Court did not immediately address a remedy. Rather, it requested further argument on two distinct questions. Id. at 495. The first question was whether “Negro children should forthwith be admitted to schools of their choice” or whether the Court could permit a gradual adjustment from a segregated system to a system not based on color distinctions. Id. at 496 n14. The second question essentially asked what role the Court should play in the process and how detailed the decrees should be. Id. A year later, the Court issued its opinion in Brown v. Board of Education of Topeka II. 349 US 294 (1955). In Brown II, the Court found that “school authorities have the primary responsibility for elucidating, assessing, and solving these problems.” Id. at 299. The courts had the job of considering whether the actions of the school authorities constitute good faith implementation of the governing constitutional principles. Id. In recognition of the need for local solutions, the Supreme Court held that “the courts which originally heard these cases can best perform this judicial appraisal.” Id. Therefore, the cases could be most appropriately monitored by the district courts. This responsibility came with some ground rules. Because the district courts were acting in equity, they enjoyed a great deal of flexibility and could consider both public and private considerations. Id. at 300 “[C]ourts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact unites to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulation which may be necessary in solving the foregoing problems.” Id. at 300-01. The school districts needed to show they were making “prompt and reasonable” compliance to desegregate schools “with all deliberate speed.” Id. at 301. Therefore, the judgments below were reversed and remanded. Id.

\textsuperscript{92} After Warren led the Supreme Court in handing down decisions generally described as “liberal,” President Dwight D. Eisenhower remarked that his appointment of Warren was “the biggest damned-fool mistake I ever made.” http://www.pbs.org/wnet/supremecourt/democracy/print/robes_warren.html.

\textsuperscript{93} http://www.nytimes.com/learning/general/onthisday/bday/0319.html

\textsuperscript{94} Id.

\textsuperscript{95} Id. (“In those days, he said later, he accepted without thought the prevailing racial attitudes.”)

\textsuperscript{96} Id.

\textsuperscript{97} Id.

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

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

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

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

But yet, it cannot be overlooked that Warren, who was himself a first generation American citizen, had as a government official, presided over one of the nation’s greatest wrongs, the internment of resident Japanese and Japanese Americans on United States soil. Perhaps this was his motivating factor in the Warren Court cases, fairness and the opportunity to be heard even if your identity was a racial minority, an alleged criminal or pregnant female. In any event, Brown I and the other Warren

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100 http://www.nytimes.com/learning/general/onthisday/bday/0319.html
101 Id. Warren declined to attend the Senate hearings confirming his nomination despite over 200 objections. Id.
102 Id.
103 Id.
104 Id. Most commentators agree that the desegregation rulings tested the moral authority of the Court, but it did survive. Id.
105 Id.
106 Id.
107 Id. Warren later explained “I would like the Court to be remembered as the people’s court.” Id.
court cases caused a major judicial shift in the interpretation of the Constitution. Now unfrozen from September 17, 1787, the Constitution became a living document.

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

Justice Antonin Scalia recently declared:

You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t. Nobody ever thought that’s what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don’t need a constitution to keep things up-to-date.¹⁰⁸

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

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

The Supreme Court articulated a standard of heightened protection against gender discrimination in United States v. Virginia in 1996.¹⁰⁹ There were two issues before the Court: (1) whether Virginia’s policy of limiting enrollment at the Virginia Military Institute to men was a violation of the 14th amendment’s Equal Protection Clause;¹¹⁰ and (2) if the admission policy was found unconstitutional, whether the court needed to fashion a proper remedy.¹¹¹ Justice Ruth Bader Ginsburg wrote the majority opinion holding that Virginia’s policy of limiting enrollment at Virginia Military Institute only to men violated the Equal Protection Clause.¹¹²

¹⁰⁹ 518 U.S. 515 (1996). Six justices joined fully in the majority opinion. Chief Justice William Rehnquist concurred in the judgment but not the analysis of the majority. Justice Antonin Scalia filed a lone dissent. Justice Clarence Thomas took no part in the consideration because his son was enrolled in VMI.
¹¹⁰ Id at 530.
¹¹¹ Id. at 531.
¹¹² Id. VMI began in 1990 when a female high school student filed a complaint with the Attorney General complaining of the school’s exclusionary admission policy. The United States filed suit against the state of Virginia and VMI alleging a violation of the 14th amendment’s Equal Protection Clause. 518 U.S. at 523. The district court ultimately rejected the equal protection challenge. Id. In its opinion, however, the district court, did recognize that some women would want to attend VMI who would be capable of the activities required of VMI cadets. Id. Nonetheless, the district court held that Virginia provided an “exceedingly persuasive justification” for the classification in upholding VMI’s admission policy. 518 U.S. at 524. The court stated that “VMI’s school for men brought diversity to an otherwise coeducational
1. The VMI Analysis

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

The critical issue in VMI was the appropriate standard of review for a case alleging gender discrimination in violation of the Constitution: “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”  The Supreme Court held that allegations of gender discrimination must be scrutinized in light of the long history in the United States of sexual discrimination. While gender classifications were subject to a higher level of

Virginia system, and that diversity was ‘enhanced by VMI’s unique method of instruction.’ Id. Upon appeal, the Fourth Circuit vacated the lower court’s judgment, stating “the Commonwealth of Virginia has not...advanced any state policy by which it can justify its determination.” Id. A “policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender.” Id. Quoting 976 F.2d at 899 (1992). On remand, the Fourth Circuit tasked the state of Virginia with selecting a remedial course of action. 518 U.S. at 525. It suggested that Virginia could establish a parallel program, transform VMI into a private institution or admit women into VMI. Id. at 526. Virginia fashioned a remedy that would create a parallel program for women called the Virginia Women’s Institute for Leadership (VWIL). Id. Virginia would locate the program at Mary Baldwin College, a private liberal arts school for women. Id. The Supreme Court recognized the considerable differences between the male and female programs in size, prestige and in resources. Id. at 526-7. The Supreme Court later noted that a military model of training would be “wholly inappropriate” at VWIL. Id. at 526-527. The district court approved the program despite its recognition that VWIL was not a mirror image of VMI. Id. at 528. “If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination.” Id. The Fourth Circuit affirmed the remedy on appeal and held that Virginia had a legitimate purpose in seeking to provide single-sex education for its residents. “Exclusion of ‘men at Mary Baldwin College and women at VMI’...was essential to Virginia’s purpose, for without such exclusion, the Commonwealth could not “accomplish [its] objective of providing single-gender education.” Id. The United States Supreme Court accepted certioriori. Id. at 530.

113 518 U.S. at 520.
114 Id.
115 Id.
116 Id. at 520-521.
117 Id.
119 Id. at 531. In 1971, the Supreme Court ruled in favor of a woman who had complained that her State had denied her the equal protection of its laws. Id. at 532; see Reed v. Reed, 404 U.S 71 (1971). It was the first case to recognize a constitutional claim based on gender discrimination. Id.
scrutiny, the opinion was careful to establish that gender classifications were not equal to classifications based on race or national origin.\footnote{Id. at 532. Virginia had to show that any classifications based upon gender had an “exceedingly persuasive” justification, not a compelling one. Id. at 533. In other words, the challenged classification must serve an important governmental purpose and the discriminatory means used must be substantially related to the achievement of the government’s objectives. Id.}

Nonetheless, gender discrimination claims were subject to a new heightened review standard: “inherent differences” between men and woman were no longer acceptable as a justification for classifications; just as “inherent differences” were not acceptable as a basis for race or national origin classifications\footnote{Id.}

Sexual classifications may be used to compensate women for “particular economic disabilities [they have] suffered...But such classifications may not be used, as they once were...to create or perpetuate the legal, social, and economic inferiority of women.”\footnote{Id at 533-534.}

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

Virginia offered two justifications for its exclusion of women at VMI, both of which failed to meet the new standard.\footnote{Id. at 535.} First, while the Court recognized that single-sex education could afford benefits to some students, it was not enough to overcome the intent of the state in perpetuating those gender classifications: “Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth.”\footnote{Id.} Second, Virginia’s assertion that the unique character of the training at VMI would be lost if it had to admit women or modify its program was not justification enough because Virginia based its argument on the average capacities and preferences of men and women.\footnote{Id. at 540-41. Rejecting these broad assertions, the Supreme Court stated that reviewing courts must “take a ‘hard look’ at generalizations or ‘tendencies’ of the kind pressed by Virginia.” Id. These types of justifications were often used in the past to deny women rights and opportunities such as the right to vote, admission to the state bar or access to educational opportunities. Id. at 524-544. See Mississippi Univ. for Women, 458 U.S. ____ (19__).} Virginia’s argument also suffered from the fact that women had already successfully integrated federal military academies and the armed forces.\footnote{Id. 544-545.}
The VMI Court then turned its attention to fashioning an appropriate remedy to cure the constitutional violation. Because Virginia chose to create a parallel military academy for women, a solution that is uncomfortably close to the “separate but equal” methodology sanctioned in Plessy, the female program’s resources, teaching and facilities had to be equal in every respect. Drawing a comparison to the racial discrimination cases, the Supreme Court compared the female program to the law school that Texas opened for black students in 1950. In Sweatt, there was great contrast in the resources between the new school and the University of Texas Law School. In ruling that the black law school violated the Equal Protection Clause, the Sweatt court highlighted the importance of “those qualities which are incapable of objective measurement but which make for greatness.” Similarly, the Court found that “Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supported at VWIL and VMI.”

Unsurprisingly, the sole dissenting opinion in VMI came from Justice Antonin Scalia.

“Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. . . . Much of the Court’s opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women’s education,

127 Id. at 546. The remedy “must be shaped to place persons unconstitutionally denied an opportunity ‘in the position they would have occupied in the absence of [discrimination].’” 518 U.S. at 547 (quoting Milliken v. Bradley, 433 U.S 267, 280 (1977)). A proper remedy should not only eliminate the discriminatory effects of the past, but it should also bar similar discrimination in the future. Id. (citing Louisiana v. United States, 380 U.S. 145 (1965)).

128 Id at 547-50. When the Court compared the male and female programs in depth, it ultimately found that the programs were not truly parallel. Id. at 548. Where VMI is known for its rigorous military training, VWIL, the female program, “deemphasizes” military education and focuses on a “cooperative method” of education. Id. “In myriad respects other than military training, VWIL does not qualify as VMI’s equal. VWIL’s student body, faculty, course offerings and facilities hardly match VMI’s. Nor can the VWIL graduate anticipate the benefits associated with VMI’s 157-year history, the school’s prestige, and its influential alumni network.” Id. at 551. Rather VWIL represents a “‘pale shadow’ of VMI in terms of the range of curricular choices and faculty stature, funding prestige, alumni support and influence.” Id. at 553; see Court of Appeals, 44 F.3d at 1250 (Phillips, J. dissenting)

129 Id. See Sweatt v. Painter, 339 U.S. 629 (1950)

130 Id.

131 339 U.S. 629, 634.

132 518 U.S. at 554.

133 Id. at 557.

and even with regard to the treatment of women in areas that have nothing to do with education.”

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

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

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

Justice Scalia also asserted that providing an all-male single sex educational environment was clearly and substantially related to an important government objective; thus, Virginia had passed constitutional muster. Scalia accepted the ultimate findings of a commission formed by VMI, which purported to refute “the claim that VMI has elected to maintain its all-male student body composition for some misogynistic reason.” According to Scalia, the majority essentially ignored all the evidence in the

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135 Id. at 566. Justice Scalia appears to argue that change in areas of gender discrimination is not to be accomplished by the courts. Id. at 567. His interpretation of the founding documents is the creation of system that was capable of change by future generations. Id.
136 Id. at 568.
137 Id. at 568 (“[I]n my view the function of this Court is to preserve our society’s values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our authority, progressively higher degrees.”)
138 Id at 574.
139 Id. at 574 (citing the majority opinion at 518 U.S. at 533 n.6.)
140 Id.
141 Id. at 575.
142 Id.
143 Id. at 576-79. “It is thus significant that, whereas there are ‘four all-female private [colleges] in Virginia,’ there is only ‘one private all-male college,’ which ‘indicates that the private sector is providing for th[e] [former] form of education to a much greater extent that it provides for all male education.”
144 Id. at 580. Moreover, it is clear that Scalia believes in the merits of single-sex education. Citing the court below, Scalia repeats that experts testified in support of the claim that single sex education is advantageous. 518 U.S. 515, 586 (citing 766 F.Supp., at 1411-1312). “Not a single witness contested,
record. “It instead makes evident that the parties to this litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial. The Court simply dispenses with the evidence submitted at trial - it never says that a single finding of the District is clearly erroneous.” 145

The core of Scalia’s objection was his perspective that the majority opinion would destroy VMI as an institution because its educational philosophy was not easily adaptable to the admission of women.146

“The record supports the district court’s findings that at least three aspects of VMI’s program - physical training, the absence of privacy, and the adversative approach - would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI’s training . . . It sufficed to establish, as the District Court stated, that VMI would be ‘significantly different’ upon the admission of women, and ‘would eventually find it necessary to drop the adversative system altogether.’”147

Justice Scalia lambasted the majority for “lawmaking by indirection.”148 Scalia intoned that the Court’s actions were not the interpretation of a Constitution, but the creation of one.”149 Echoing the idea of a Constitution as a frozen document, Scalia argued:

In order words, the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.150

Notably, Justice Scalia gave no consideration to the opportunities lost by women who could not attend VMI. As such, Scalia appears to be more persuaded by the history of excluding women, much like the Supreme Court’s opinions in the pre-Brown racial discrimination cases, rather than the constitutional rights of women. Bemoaning the the functional death of public single-sex education,151 Justice Scalia asserted that the

for example, Virginia’s ‘substantial body of exceedingly persuasive’ evidence...that some students, both male and female, benefit from attending a single-sex college’ and '[that] [f]or those students, the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement.” Id.
145 Id. at 585.
146 Id at 587-8.
147 Id. at 588-89 (citing 766 F.Supp., at 1412-1413 and 976 F.2d at 896.897).
148 Id. at 587.
149 Id. at 570.
150 Id. at 569.
151 Id. at 596-7 (“The enemies of single-sex education have won; persuading only seven Justices (five would have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.”).
majority inappropriately targeted VMI because of its old-fashioned concepts, such as manly honor.\textsuperscript{152} Scalia was particularly moved by VMI’s “The Code of the Gentleman,” quoting it in its entirety.

I don’t know whether the men of VMI lived by this code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction.\textsuperscript{153}

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

The current Supreme Court is divided on the idea that gender discrimination deserves heightened protection.\textsuperscript{154} The divide exists largely because of the efforts of VMI’s majority writer, Justice Ruth Bader Ginsburg, to expand constitutional protection of women’s rights.

Ginsburg was born and raised in a working class neighborhood in Brooklyn, New York in 1933.\textsuperscript{155} After graduating first in her class from Cornell University and

\begin{center}
\textsuperscript{152} Id. at 601.  \\
\textsuperscript{153} Id. at 603. See full text below:
\end{center}

\begin{quote}
A Gentleman.....
\end{quote}

Does not discuss his family affairs in public or with acquaintances.
Does not speak more than casually about his girl friend.
Does not go to a lady’s house if he is affected by alcohol. He is temperate in the use of alcohol.
Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public.
Does not hail a lady from a club window.
A Gentleman never discusses the merits or demerits of a lady.
Does not mention names exactly as he avoids the mention of what things cost.
Does not borrow money from a friend, except in dire need. Money borrowed is a debt of honor, and must be repaid as promptly as possible. Debts incurred by a deceased parent, brother, sister or grown child are assumed by honorable men as a debt of honor.
Does not display his wealth, money or possessions.
Does not put his manners on and off, whether in the club or in the ballroom. He treats people with courtesy, no matter what their social position may be.
Does not slap strangers on the back nor so much as lay a finger on a lady.
Does not ‘lick the boots of those above’ nor ‘kick the face of those below him on the social ladder.’
Does not take advantage of another’s helplessness or ignorance and assumes that no gentleman will take advantage of him.
A gentleman respects the reserves of others, but demands that others respect those which are his.
A gentleman can become what he wills to be.

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

\textsuperscript{154} Editorial, \textit{There He Goes Again}, New York Times, Jan. 4, 2011 (Discussing an interview with Justice Scalia where he stated that the Equal Protection Clause contained in the 14th Amendment did not extend to gender discrimination.)

\textsuperscript{155} http://www.biography.com/articles/Ruth-Bader-Ginsburg-9312041.
Columbia Law School. Ginsburg entered academia, teaching law at Rutgers and Columbia, before joining the American Civil Liberties Union ("ACLU"). In 1973, she became the ACLU's general counsel where she served until her nomination to the United States Court of Appeals for the Second Circuit in 1980. During her tenure at the ACLU, Ginsburg was best known for cases involving gender equality, including the decision in Weinberger v. Wiesenfeld where the ACLU successfully invalidated a statute providing lower survivor benefits to widowers than widows.

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

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

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

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156 Id. Ginsburg initially matriculated at Harvard Law School, but transferred to Columbia when her husband accepted employment at a New York City law firm. Id.
157 Ginsburg was the first female to achieve tenure at Columbia University. http://www.discoverthenetworks.org/printindividualProfile.asp?indid=1583.
159 Id.
160 420 U.S. 636 (1975). Ginsburg argued a total of six cases before the Supreme Court, Id. She won five. Id.
161 Id.
162 Id.
163 Emily Bazelon, The Place of Women on the Court, N.Y. Times, July 12, 2009, "I was the first tenured woman at Columbia. That was 1972, every law school was looking for its woman. Why? Because Stan Pottinger, who was then head of the office for civil rights of the Department of Health, Education and welfare, was enforcing the Nixon government contract program. Every university had a contract, and Stan Pottinger would go around and ask, How are you doing on your affirmative action plan? . . . I never would have gotten that invitation from Columbia without the push from the Nixon administration. I understand that there is a thought that people will point to the affirmative-action baby and say she couldn't have made it if she were judged solely on the merits. But when I got to Columbia I was well regarded by my colleagues even though they certainly disagreed with many of the positions that I was taking. They backed me up: if that's what I thought, I should be able to speak my mind."
true, but certainly you felt that way. You were different and the object of curiosity.\textsuperscript{165}

And because of her life experience, Justice Ginsburg is particularly aware of the obstacles females encounter in historically male institutions—an insight her male colleagues on the Court could never bring. It is not surprising that the majority decision in \textit{VMI} resulted in integration, as opposed to the creation of a separate but equal female institution, given the presence of Ginsburg and Justice Sandra Day O’Connor on the Court.

3. Justice Antonin Scalia’s Use of Perspective

Justices Ginsburg and Scalia present two strong opposing viewpoints in \textit{VMI}, as the majority and dissenting writers. Justice Antonin Scalia’s background, however, may not appear to be too different from that of Ginsburg. Born in Trenton, New Jersey, in 1936, Justice Scalia was the only child of Italian immigrants.\textsuperscript{166} After graduating from Georgetown University, Scalia studied abroad in Switzerland, then obtained a degree from Harvard Law School. Scalia entered private practice with a large law firm in Cleveland, Ohio, before becoming a law school professor.\textsuperscript{167} Justice Scalia also held federal government positions as General Counsel of the Office of Telecommunications Policy, Chairman of the Administrative Conference of the United States and Assistant Attorney General for the Office of Legal Counsel.\textsuperscript{168} Scalia is also a devout Roman Catholic who is married with nine children.\textsuperscript{169}

Known for his combative personality and strong opinions, Justice Scalia does not suffer fools lightly. At a Florida event to promote a book he wrote on advocacy, a young college woman asked why the Supreme Court would not permit cameras in the courtroom even though some justices are engaged in promotional activities to sell books.\textsuperscript{170} Scalia responded: “That’s a nasty, impolite question.”\textsuperscript{171} Later, he explained “I’m doing her a favor to answer her question. I shouldn’t have to put up with her abuse.”\textsuperscript{172} Justice Scalia also discussed his approach to social issues as follows: “It takes courage not to be politically correct. If you’re a coward, that’s your fault.”\textsuperscript{173}

\textsuperscript{165} Emily Bazelon, \textit{The Place of Women on the Court}, N.Y. Times, July 12, 2009,


\textsuperscript{167} Biography of Antonin Scalia, \url{http://usgovinfo.about.com/od/uscourtsystem/a/scaliabio.html}

\textsuperscript{168} Id.

\textsuperscript{169} Id.


\textsuperscript{171} Id.

\textsuperscript{172} Id.

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

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

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

1. The Ledbetter Analysis

Ms. Ledbetter was an area supervisor for Goodyear from 1979 until 1998. After her retirement in 1998, Ms. Ledbetter became aware of a pay discrepancy between herself and other male employees with the same title. After filing a claim through the EEOC, Ledbetter then sued Goodyear, taking the case to trial under Title

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175 CONG. GLOBE, 39th Cong., 2nd Sess. 1376 (1867) (Table showing murders of Freedman in Texas in 1866); CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). The legislative history of the Fourteenth Amendment demonstrated that among other things, that discriminatory enforcement of States' criminal laws was a matter of great concern for the drafters. CONG. GLOBE, 39th Cong. 1st Sess. 129, 184, 211, 212, 421, 471, 497, 522, 569, 594, 1365, 1376, 1413, 1438, 1679, 1755, 1809, 1863 (1865-66) (Civil Rights Bill of 1866, a Bill to protect all persons in the United States in their civil rights and furnish the means of their vindication).
176 See n198 infra. Despite the passage of many years, it should be noted that women were still politically powerless, with no right to vote.
177 A Biography of Supreme Court Justice Antonin Scalia, http://usconservatives.about.com/od/champions/p/ScaliaBio.htm (quoting Scalia, “I do not think the Constitution or any text should be interpreted either strictly or sloppily; it should be interpreted reasonably.”)
178 550 U.S. 618 (2007)
179 550 U.S. 618 (2007)
180 Id.
181 Id at 621.
182 Id.
VII. Ms. Ledbetter prevailed at the trial court level but the Court of Appeals for the Eleventh Circuit reversed, holding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the charging period.\textsuperscript{184}

After accepting certiorari, the Supreme Court explained that under Title VII of the Civil Rights Act of 1964, it is an “unlawful employment practice” to discriminate against “any individual with respect to his compensation...because of an individual’s sex.”\textsuperscript{185} An individual wishing to challenge an employment practice under this provision must file a charge with EEOC within a state-specified time period.\textsuperscript{186} In \textit{Ledbetter}, the relevant period was 180 days. Failure to comply caused an employee to lose her right to challenge the employment practice in court.\textsuperscript{187}

Ms. Ledbetter’s claim was premised on two allegedly discriminatory employment practices within the 180 day charging period.\textsuperscript{188} First, Ledbetter asserted that each paycheck she received during the charging period was a different and separate act of discrimination.\textsuperscript{189} Second, the wrongful denial of a raise in 1998 carried forward intentionally discriminatory disparities from prior years.\textsuperscript{190} All of Ms. Ledbetter’s claims asserted disparate treatment, which required the showing of discriminatory intent on the part of the employer. The Supreme Court held that Ms. Ledbetter’s claim failed because she could not show an actual discriminatory intent during the charging period.\textsuperscript{191}

In its analysis, the Court reviewed prior case law. In \textit{United Air Lines v. Evans}, a flight attendant was forced to resign because the airline did not wish to employ married flight attendants.\textsuperscript{192} Several years later she was rehired, but was treated as a new employee for seniority purposes, which affected her pay and benefits.\textsuperscript{193} Unfortunately for that plaintiff, she failed to file an EEOC charge after she was initially forced to resign. The Court held that the continuing effect of the pre-charging period did not comprise a present violation: “A discriminatory act which is not made the basis for a timely charge...is merely an unfortunate event in history which has no present legal consequences.”\textsuperscript{194}

\textsuperscript{183} Id. The district court dismissed Ms. Ledbetter’s claim under the Equal Pay Act, Id.
\textsuperscript{184} Id. at 622-3.
\textsuperscript{185} Id.
\textsuperscript{186} Id. The relevant time period is either 180 or 300 days depending upon the state.
\textsuperscript{187} Id. at 624.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} "Ledbetter does not assert that the relevant Goodyear decision makers acted with actual discriminatory intent during the EEOC charging period or when they denied her a raise in 1998. Rather, she argues that the paychecks were unlawful because they would have been larger had she been evaluated in a non-discriminatory manner prior to the EEOC charging period.” Id.
\textsuperscript{192} Id. (citing United Air Lines v. Evans, 431 U.S. 553 (1977)).
\textsuperscript{193} Id.
\textsuperscript{194} Id at 625-6. Citing Justice Stevens.
Next, the Court addressed *Delaware State College v. Ricks*, in which a college professor was denied tenure allegedly because of his national origin. Following the denial of tenure, the professor was given a non-renewable one year contract. At the conclusion of the contract, the professor filed suit alleging the EEOC charging period ran from the date of his final termination. In *Ricks*, the Court found that “the EEOC charging period ran from ‘the time the tenure decision was made and communicated to Ricks.’” The Court’s reasoning was the discriminatory practice was the denial of tenure. The plaintiff’s ultimate termination was only an effect of the discriminatory practice. Therefore, the charging period, and the running of the statute of limitations, began much earlier than the plaintiff asserted.

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

The Supreme Court found the precedent to be clear:

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

Therefore, the Court was not persuaded by Ms. Ledbetter’s arguments that each paycheck during the charging period, and the denial of the 1998 raise, triggered a new charging period. The paychecks and the denial of a raise were simply the effects of the discriminatory employment practice that occurred outside the charging period. According to the Court, Ledbetter should have filed an EEOC charge after the discriminatory pay decisions were made, even if she was not aware of them.

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195 Id. at 626. Citing 449 U.S. 250 (1980).
196 Id.
197 Id.
198 Id.
200 Ledbetter, 550 U.S. at 626.
201 Id. at 627.
202 Id.
203 Id. at 628.
204 Id. at 628.
205 Id.
206 Id.
207 Id.
The Court chastised Ms. Ledbetter for attempting to shift the intent associated with the prior pay decisions to her 1998 pay decision claim.\footnote{Id. at 629.} Not only did the Court hold that previous case law prevented Ledbetter from accomplishing such a shift, it would directly undermine the process and procedure that Congress intended for Title VII claims.\footnote{Id. The Court then reiterated that courts must be respectful of the legislature and give effect to the statute as enacted. Id. at 630 (citing Mohasco Corp v. Silver, 447 U.S. 807, 819 (1980)).} Statutes of limitation served a policy purpose in preventing parties from the need to litigate stale claims.\footnote{Id. at 630.} The Court held that short deadlines, or a short statute of limitations, reflected a Congressional preference for the prompt resolution of employment discrimination claims.\footnote{Id. at 630-631.} “The EEOC filing deadline ‘protect[s] employers from the burden of defending claims arising from employment decisions that are long past.”\footnote{Id. at 630 (citing Ricks, 449 U.S.at 256-7). The Court stressed that filing deadlines were particularly important in discriminatory intent claims because the element of discrimination was always at issue. Id. at 631. “The passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened.” Id. at 632. As an example, the Court remarked that the supervisor principally responsible for discriminating against Ms. Ledbetter had passed away by the time of trial. Id. at 623 n.4.}

Ms. Ledbetter, however, premised her claim on the Court’s holding in \textit{Bazemore v. Friday},\footnote{Bazemore v. Friday, 478 U.S. 385 (1986).} in which the Supreme Court arguably adopted a “paycheck accrual rule” in holding that “[e]ach week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII.”\footnote{Ledbetter, 550 U.S. at 633.} \textit{Bazemore} addressed a disparate-treatment pay claim brought against the North Carolina Agricultural Extension Services, which paid black employees on a separate and lower pay scale.\footnote{Id.} The practice dated back to the 1960s when the employer had segregated service branches.\footnote{Id. at 630} The \textit{Bazemore} court found the employer was clearly violating Title VII because it had adopted and retained a pay structure that intentionally discriminated on the basis of race.\footnote{Id. at 634.}

The Court rejected this reading of \textit{Bazemore} as too broad.\footnote{Id.} \textit{Bazemore} focused on a current violation of Title VII, not the carrying forward of a past act of discrimination.\footnote{Id. at 635, FN5.}

For this reason it is generally true that, as the catch-phrase has it, Title VII imposed ‘no obligation to catch-up’ i.e. affirmatively to remedy present effects of pre-Act discrimination...But those cases cannot be thought to
insulate employment decisions that are presently are illegal on the basis that at one time comparable decisions were legal when made by the particular employer.\textsuperscript{220}

The Court elaborated that \textit{Bazemore} “stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure.”\textsuperscript{221} In contrast, Ms. Ledbetter produced no evidence that her employer’s pay structure was adopted for the purpose of discrimination on the basis of sex.\textsuperscript{222} As a result, the pay system is considered to be “facially nondiscriminatory and neutrally applied.”\textsuperscript{223}

Ms. Ledbetter also argued that analogous statutes supported the “paycheck accrual rule.”\textsuperscript{224} Acknowledging that the Equal Pay Act (“EPA”) was enacted contemporaneously with Title VII, the Supreme Court found the comparison unpersuasive.\textsuperscript{225} The EPA did not require the filing of a charge nor did it require proof of intentional discrimination.\textsuperscript{226} Similarly, the Fair Labor Standards Act (“FLSA”) would not be applicable because the FLSA did not require proof of a specific intent to discriminate.\textsuperscript{227} As for the National Labor Relations Act (“NLRA”), a statutory scheme that provided the model for Title VII’s remedial provisions,\textsuperscript{228} the Supreme Court stated that NRLA case law on the statute of limitations “corresponds closely” with Title VII precedent including \textit{Evans} and \textit{Ricks}.\textsuperscript{229}

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

“We are not in a position to evaluate Ledbetter’s policy arguments, and it is not our prerogative to change the way in which Title VII balances the

\begin{itemize}
\item \textsuperscript{220} Id. at 635 (quoting from the Court of Appeals opinion, \textit{Bazemore v. Friday}, 751 F.2d 662 (C.A.4 1984)).
\item \textsuperscript{221} Id. at 637.
\item \textsuperscript{222} Id.
\item \textsuperscript{223} Id. (citing Lorance, 490 U.S. at 911) (“A new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a facially neutral system.”) The dissent in \textit{Ledbetter} argued that pay claims are different from other types of Title VII claims in that they are “based on the cumulative effect of individual acts.” Id. at 638. In rebuttal, the majority stated that the dissent fundamentally misinterpreted precedent. Id. at 639. Ledbetter had not alleged a “single wrong consisting of a succession of acts”, instead her claim alleged a series of discrete discriminatory acts. Id. at 638. Moreover, the majority asserted that the dissent focused on particular aspects of the case “that is certainly not representative of all pay cases and may not even be typical.” Id. Instead, the majority adopted a rule it believed to be more universally applicable to pay discrimination cases. Id.
\item \textsuperscript{224} Id. at 640.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id. The opinion also noted that Ledbetter had originally asserted an EPA claim, which she failed to pursue after that claim was dismissed by the District Court. Id.
\item \textsuperscript{227} Id. at 641.
\item \textsuperscript{228} Id.
\item \textsuperscript{229} Id at 641-2.
\end{itemize}
interests of aggrieved employees against the interest in encouraging the ‘prompt processing of all charges of employment discrimination.’”

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

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

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

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

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

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

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230 Id. at 642.
231 Id.
232 Id. at 645.
233 Id.
234 Id.
235 Id. at 659-60.
236 Id. at 661.
2. Justice Samuel Alito’s Use of Perceptive

Justice Samuel Alito is unique among modern day justices with respect to perspective because he openly acknowledged that his Italian American heritage would play a role in his judicial decisionmaking at his Supreme Court confirmation hearings.\(^{238}\) No Senator raised an objection.\(^{239}\)

But when I look at those cases, I have to say to myself, and I do say to myself, "You know, this could be your grandfather, this could be your grandmother. They were not citizens at one time, and they were people who came to this country . . . .When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender. And I do take that into account.\(^{240}\)

Justice Samuel Alito was born in Trenton, New Jersey in 1950.\(^{241}\) His father was an immigrant who, through a stroke of kindness, received a scholarship to college, which enabled him to become a teacher.\(^{242}\) His mother was also a first generation American who was the first in her family to obtain an undergraduate degree, as well as a master’s degree.\(^{243}\) Justice Alito graduated from Princeton University and Yale Law School.\(^{244}\) Alito acknowledged that attitudes toward Italian Americans had changed by the time he matriculated to college, “A generation earlier, I think that somebody from my background probably would not have felt fully comfortable at a college like Princeton. But, by the time I graduated from high school, things had changed.”\(^{245}\) Prior to his nomination to the United States Court of Appeals for the Third Circuit, Alito was a United States Attorney and an assistant to the Solicitor General.\(^{246}\)

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

\(^{238}\) *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito’s Nomination to the Supreme Court, ___ Cong., ___* (Jan. 11, 2006) (response of Judge Samuel Alito).
\(^{239}\) Id.
\(^{240}\) *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito’s Nomination to the Supreme Court, ___ Cong., ___* (Jan. 11, 2006) (response of Judge Samuel Alito).
\(^{241}\) Id.
\(^{242}\) *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito’s Nomination to the Supreme Court, ___ Cong., ___* (Jan. 11, 2006) (response of Judge Samuel Alito).
\(^{243}\) Id.
\(^{244}\) *Supreme Court Justice Samuel Alito — Biography*, http://uspolitics.about.com/od/supremecourt/p/alito.htm.
\(^{245}\) *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito’s Nomination to the Supreme Court, ___ Cong., ___* (Jan. 11, 2006) (response of Judge Samuel Alito).
\(^{246}\) *Supreme Court Justice Samuel Alito — Biography*, http://uspolitics.about.com/od/supremecourt/p/alito.htm.
The judge’s only obligation – and it’s a solemn obligation – is to the rule of law. And what that means is that in every single case, the judge has to do what the law requires. Good judges develop certain habits of mind. One of those habits of mind is the habit of delaying reaching conclusions until everything has been considered. Good judges are always open to the possibility of changing their minds based on the next brief they read, or the next argument that’s made by an attorney who’s appearing before them, or a comment that is made by a colleague during the conference on the case when the judges privately discuss the case.247

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

But Justice Alito has expressed judicial concern in other areas of the law, specifically in a case involving animal cruelty.248 Alito is an owner of a Springer spaniel that he reportedly brings to court at times.249 He was the lone dissenting vote in a Supreme Court holding that animal protection laws conflicted with the First Amendment’s right of freedom of speech.

The Court strikes down in its entirety a valuable statute, 18 U. S. C. section 48 that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of “crush videos,” a form of depraved entertainment that has no social value. The Court’s approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted.250

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

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

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

For example, Chief Justice Rehnquist often articulated his disagreement with what he saw as an over-expansion of civil liberties accorded by the Supreme Court under Chief Justice Earl Warren.\textsuperscript{251} In his dissent in \textit{J.E.B. v. Alabama}, Rehnquist downplayed the severity of discrimination based on gender.

“That race and sex discrimination are different is acknowledged by our equal protection jurisprudence, which accords different levels of protection to the two groups. Classifications based on race are inherently suspect, triggering “strict scrutiny,” while gender based classifications are judged under a heightened, but less searching standard of review. [citation omitted.] Racial groups comprise numerical minorities in our society, warranting in some situations a greater need for protection, whereas the population is divided almost equally between men and women. Furthermore, while substantial discrimination against both groups still lingers in our society, racial equality has proved a more challenging goal to achieve on many fronts than gender equality. [citation omitted].\textsuperscript{252}

Yet, nine years later, Rehnquist appeared to back off from sounding the death knell of gender discrimination in \textit{Nevada v. Hibbs}.\textsuperscript{253}

The history of the many state laws limiting women’s employment opportunities is chronicled in \textit{and, until relatively recently, was sanctioned by-this Court’s own opinions}. For example, in \textit{Bradwell v. State}, [citation omitted], and \textit{Goesaert v. Cleary}, [citation omitted], the Court upheld state laws prohibiting women from practicing law and tending bar, respectively. State laws frequently subjected women to distinctive restrictions, terms, conditions, and benefits for those jobs they could take. . . . Such laws were based on the related beliefs that (1) a woman is, and should remain, “the center of home and family life,” [citation omitted], and (2) “a proper discharge of [a woman’s] maternal functions—having in view not merely her own health, but the well-being of the race—justifies legislation to protect her from the greed as well as the passion of man.” [citation omitted] . Until our decision in \textit{Reed v. Reed} . . . “it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any ‘basis in reason’ such as the above beliefs—‘could be conceived for the discrimination.’” [citation omitted] . . . . Reliance on such stereotypes cannot justify the

\textsuperscript{251} Cite. Chief Justice Roberts was a clerk for Rehnquist after his graduation from Harvard Law School.
\textsuperscript{252} J.E.B. v. Alabama, 511 U.S. 127 (1994) (Rehnquist, J., dissenting)
\textsuperscript{253} Chief Justice Roberts was born in Buffalo, New York and raised in Indiana. His father was an executive for a steel company, while his mother was a homemaker. Jeffrey Toobin, \textit{No More Mr. Nice Guy}, N.Y. Times, May 25, 2009. Educated at Catholic schools, Roberts ultimately graduated from an all male boarding high school before departing to Harvard University for his undergraduate and law degrees.

Id.
States’ gender discrimination in this area. [citation omitted.] The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here, as in Fitzpatrick, the persistence of such unconstitutional discrimination by the States justifies Congress’ passage of prophylactic §5 legislation.\textsuperscript{254}

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

That opinion was such a delightful surprise. When my husband read it, he asked, did I write that opinion? I was very fond of my old chief. I have a sense that it was in part his life experience. When his daughter Janet was divorced, I think the chief felt some kind of responsibility to be kind of a father figure to those girls. So he became more sensitive to things that he might not have noticed.\textsuperscript{255}

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

B. The Perspective of Current Chief Justice John Roberts

As a longtime participant in the Washington D.C. power spectrum, as White House lawyer, as partner in a major law firm, as a federal appellate court judge, then on the United States Supreme Court, Roberts’ opinions generally favor the protection of corporate rights.\textsuperscript{256} This viewpoint is a perfect reflection of his life experiences before joining the Supreme Court.

In \textit{Caperton v. A.T. Massey Coal Company}, Chief Justice Roberts authored a strong dissent from the majority opinion finding it was error for a judge not to recuse himself from hearing a case where one of his major campaign contributors, a large corporation, was a defendant.\textsuperscript{257}

And why is the Court so convinced that this is an extreme case? It is true that Don Blankenship spent a large amount of money in connection with this election. But this point cannot be emphasized strongly enough: Other than a $1,000 direct contribution from Blankenship, \textit{Justice Benjamin and his campaign had no control over how this money was spent}. Campaigns go to great lengths to develop precise messages and strategies. An insensitive or ham-handed ad campaign by an independent third party

\textsuperscript{255} Emily Bazelon, \textit{The Place of Women on the Court}, N.Y. Times, July 12, 2009,
\textsuperscript{257} Id.
might distort the campaign’s message or cause a backlash against the candidate, even though the candidate was not responsible for the ads.\textsuperscript{258} 

The majority repeatedly characterizes Blankenship’s spending as “contributions” or “campaign contributions,” [citation omitted] but it is more accurate to refer to them as “independent expenditures.” Blankenship only “contributed” $1,000 to the Benjamin campaign.\textsuperscript{259}

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

Before Brown, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis,” [citation omitted], is to stop assigning students on a racial basis. \textit{The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.}\textsuperscript{260}

It almost seems like Roberts believes racial discrimination is no longer such a problem in the United States that it is worthy of constitutional protection. Unlike Justices Ginsburg and Sotomayor, his perspective is one free of impermissible discrimination. Therefore, it is quite clear that the way to end racial discrimination is to merely “stop discriminating on the basis of race.”\textsuperscript{261}

\textbf{C. Justice Clarence Thomas’s Life Experiences}

Justice Thomas’s bitter confirmation hearings are still the subject of social commentary.\textsuperscript{262} Thomas faced accusations by Anita Hill, a former employee, of sexual harassment that allegedly occurred during his tenure as the head of the Equal Employment Opportunity Commission.\textsuperscript{263} In an echo of that experience, which Thomas likened to a “lynching,” he dissented from the majority’s analysis in a case involving sexual harassment.

\begin{itemize}
\item \textsuperscript{258} Id. (citing \textit{Buckley v. Valeo}, 424 U. S. 1, 47 (1976) (per curiam)) (“Unlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive”); see also Brief for Conference of Chief Justices as Amicus Curiae 27, n. 50 (citing examples of judicial elections in which independent expenditures backfired and hurt the candidate’s campaign)).
\item \textsuperscript{259} 129 S.Ct at __.
\item \textsuperscript{260} Parents Involved in Community Schools v. Seattle School District, ____ (emphasis added). Indeed, Roberts has expressed that the time for judicial, systemic overhauls to prevent racial discrimination has passed. \textit{See Northwest Austin Municipal Utility District No. 1 v. Holder, ____ (2009); Jeffrey Toobin, No More Mr. Nice Guy, N.Y. Times, May 25, 2009.}
\end{itemize}
Popular misconceptions notwithstanding, sexual harassment is not a freestanding federal tort, but a form of employment discrimination. As such, it should be treated no differently (and certainly no better) than the other forms of harassment that are illegal under Title VII. I would restore parallel treatment of employer liability for racial and sexual harassment and hold an employer liable for a hostile work environment only if the employer is truly at fault. I therefore respectfully dissent.  

Thomas revealed that the wounds were still fresh from his life altering confirmation appearance.

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

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

And history bears her out. This lack of perspective was the fundamental flaw in Chief Justice Taney’s opinion in *Dred Scott*.  

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

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

With Ledbetter, however, there was a Congressional will to rectify the harshness of the decision. While the Supreme Court was interpreting a federal statutory scheme in Ledbetter, it cannot be forgotten that the purpose of the statute was to protect against discrimination. Justice Alito strictly construed statutory language in a case where there was room for judicial discretion to prevent an unfair result. The result in Ledbetter serves as a good example of the perils of strict constructionism at the expense of perspective, or even fairness. Just like the frozen Constitution imagined by Chief Justice Taney, the perspective of the drafters can be of little guidance as to whether gender rights should be protected by a heightened state of judicial scrutiny because women did not enjoy the same place in society that they do now. Instead, the perspective of the drafters is meaningful on these issues only as to whether the Constitution confers the right at all. To restrict judicial scrutiny to 1787 perspectives is unwise, as well as unjust.

Absolutism on either end of the so-called “conservative-liberal” spectrum is never ideal. Yet, it is wrong to label a justice’s use of perspective as judicial activism. The power of the United States Constitution is as a living document. As Justice Souter explained, there are some constitutional rights that are easy to enunciate, legislate and judicially protect. But other rights are drafted broadly and in some cases, exist in

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269 Despite finishing at the top of their classes at Stanford and Columbia Law Schools respectively, both Justices O’Connor and Ginsburg experienced trouble finding legal employment upon graduation.
270 Justice Ginsburg stated that gender discrimination cases would have different outcomes if more of the judges were female. “Yes, I think the presence of women on the bench made it possible for the courts to appreciate earlier than they might otherwise that sexual harassment belongs under Title VII [as a violation of civil rights law].” Emily Bazelon, The Place of Women on the Court, N.Y. Times, July 12, 2009. But Justice O’Connor articulated the need for women on the Court in another way: “I’ve always said that at the end of the day, on a legal issue, I think a wise old woman and a wise old man are going to reach the conclusion. So I agree with [Justice John Paul Stevens] that probably in outcomes it’s not critical. But in terms of having the American people look at the court and think of it as being fair and appropriate for our nation, it helps to have women, plural, on the court.” The Interviews, Sandra Day O’Connor and John Paul Stevens, Newsweek, Jan. 3, 2011, at 38-39. Of course, as Justices Sotomayor and Ginsburg intimate, different perspectives are what lead to sound judicial decisions and a diversity of race and gender usually leads to many perspectives.
272 Infra __ (Ledbetter brought her claim under Title VII).
273 See dissent of Justice Ginsburg.
274 “There are, of course, constitutional claims that would be decided just about the way this fair reading model would have it. If one of today’s 21-year-old college graduates claimed a place on the ballot for one of the United States Senate seats open this year, the claim could be disposed of by simply showing the persons’ age, quoting the constitutional provision that a senator must be at least 30 years old, and interpreting that requirement to forbid access to the ballot to anyone who could not qualify to serve if elected. No one would be apt to respond that lawmaking was going on, or object that the age
tension with one another. In these areas of constitutional rights, the Supreme Court as well as the rest of the judiciary must apply their modern perspective, and the current realities of life in the United States to reach a sound legal decision. What hurts the United States, and all of its citizenry, is when a justice reaches a legal conclusion on the premise that “it has always been done this way.” The United States Constitution should not be susceptible to this form of tunnel vision.

VI. CONCLUSION

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