

*We the People* of the United States  
insure domestic Tranquility, provide for the common Defence, promote the  
and our Posterity, do ordain and establish this Constitution for the United States

*Article 1.*

*Section 1. All legislative Powers herein granted shall be vested in a Congress of Representatives.*

*Section 2. The House of Representatives shall be composed of Members chosen in each State shall have the Qualifications requisite for Electors of the most numerous Branch in that State.*

*No Person shall be a Representative who shall not have attained to the Age of twenty five Years, seven Years, and a Day, shall not when elected be seven Years, and a Day, shall not when elected be seven Years, and a Day, shall not when elected be seven Years, and a Day.*

**Race, Ethnicity and Citizenship in  
the United States 150 Years After  
*Dred Scott v. Sandford***

The Charles Hamilton Houston Institute for Race and Justice  
Harvard Law School  
April 2007

## Citizenship across the years...

### 220 YEARS AGO (1787)

“No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.” – *The United States Constitution, Article 4, Section 2*. (Prior to the 13th Amendment, ratified in 1865).

“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 fifth of all other Persons.” *The United States Constitution, Article 1, Section 2*. (Prior to the 14th Amendment, ratified in 1868).

“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” – *Article 1, Section 9, The U.S. Constitution*.

### 200 YEARS AGO (1808)

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that from and after the first day of January, one thousand eight hundred and eight, it shall not be lawful to import or bring into the United States or the territories thereof from any foreign kingdom, place or country, any negro, mulatto, or person of colour, with intent to hold, sell or dispose of such negro, mulatto, or person of colour, as a slave, or to be held to service or labour.” – *The Act to Prohibit The Importation of Slaves of 1808*.

### 150 YEARS AGO: (1857)

“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? . . . The legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words used in that memorable instrument.” – C.J. Taney for the Majority of the U.S. Supreme Court, *Dred Scott v. Sandford*, 1857.

*The New Colossus*

*Not like the brazen giant of Greek fame,  
With conquering limbs astride from land to land;  
Here at our sea-washed, sunset gates shall stand  
A mighty woman with a torch, whose flame  
Is the imprisoned lightning, and her name  
Mother of Exiles. From her beacon-hand  
Glow world-wide welcome; her mild eyes command  
The air-bridged harbor that twin cities frame.  
"Keep ancient lands, your storied pomp!" cries she  
With silent lips. "Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tost to me,  
I lift my lamp beside the golden door!"*

*-- Emma Lazarus*



**We the People:**

*Race, Ethnicity and Citizenship in the United States 150 Years After  
Dred Scott v. Sandford*

Susan Eaton & Nancy McArdle

The Charles Hamilton Houston Institute for Race and Justice  
Harvard Law School

Charles J. Ogletree, Jr., Executive Director

In this report, The Charles Hamilton Houston Institute for Race and Justice surveys the most current data available to assess the state of citizenship in the United States of America.

We consider vital indicators in four broadly defined segments of our society: political participation, the courts and criminal justice, the workplace, and the public schools.

We find that for African Americans, other people of color and a significant portion of economically contributing foreign-born residents, the nature and quality of citizenship is not on par with that enjoyed by white, U.S.-born Americans.

Trends also suggest that we find ourselves at a key moment in history, a time in which we are again faced with decisions about whether we will be a nation of expansiveness and inclusion or one of constriction and exclusion.

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Cover design by Ethan Thomas at Harvard Law School.

**Opening Doors, Closing Doors**  
**Citizenship from Jamestown to *Dred Scott* to Here and Now**

In the United States of America, citizenship, as a social concept and legal status, has forever inspired tugs-of-war between exclusion and inclusion. We Americans have never decisively answered a central, divisive question: Are we an open, welcoming, expansive society or a closed, restricted one? And related to this: Is it the nature and job of government in an evolving society to expand rights and privileges of citizenship? Or, is government mainly in the business now of limiting such rights and privileges?

Perhaps it is America's unique fate to perpetually adjust exactly where we stand between these two extremes. The *Dred Scott* decision of 1857 is the piece of American jurisprudence that perhaps speaks most directly, definitively and disturbingly to the question of citizenship. Its anniversary gives us occasion to consider where we have been, where we are and, most importantly, where we might go in the near future.

Four hundred years ago, in 1607, explorers dispatched by King James I of England landed in the Chesapeake region of North America. They had been ordered to settle the area, build a fort, and find gold and a water route to the Orient. The settlers convened their first representative assembly in 1619. This small triumph for democracy occurred the same year the first African slaves came to North America. It was a Dutch trader who exchanged his cargo of black slaves for food the colonists had. As seemed perfectly natural then, the Africans became indentured servants in the first colony in what would later become the United States of America. The American slave system wouldn't fully develop until the late 17<sup>th</sup> century, but the Jamestown history reveals that from even our earliest days, enslavement of black Africans underpinned our economy and represented a widely accepted feature of our social life.

More than a century and a half later, in 1770, a 46-year-old black former slave named Crispus Attucks stood on a platform before a crowd in Boston, Massachusetts and urged his fellow townspeople to stand up and claim freedom from occupying British soldiers. Several months later, in March, Attucks led a small group of townspeople on a march to confront the British with whom tensions had been steadily increasing. According to accounts, Attucks challenged the British soldiers to fight without weapons. In response, a British soldier opened fire, shot and killed Attucks. He was the first casualty of the American Revolution in the famous battle known now as the Boston Massacre. It would take 100 years for Crispus Attucks to get a monument on Boston Common. (The memorial presents Attucks as "the first to pour out his blood as a precious libation on the altar of a people's rights" would be erected in 1888 over the objection of the Massachusetts Historical Society, which had considered Attucks a troublemaker and villain.)

In 1776, we officially declared our independence from England -- a cause for which Attucks, a black man without full rights -- was the first to die. The pendulum kept swinging between the expansion and the constriction of rights, privileges and responsibilities we associate with citizenship. Two hundred and thirty years ago, the Declaration of Independence famously declared: "We hold these truths to be self-evident, that all men are created equal, that they are endowed . . . with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."

Ten years later, the elite, white male framers of the Constitution claimed an inclusive identity for themselves: "We The People." "In Order to form a more perfect Union. . . establish Justice, ensure domestic tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do. . . establish this Constitution for the United States of America." With admirable clarity, the men laid out the scope of power and purpose of our government in what remains our principle guiding document. At the same time, though, the men affirmed and enabled slavery. In doing, they endorsed the systematic denial of humanity, rights and citizenship human bondage requires. Our grand guiding documents might express our noblest goals, highest aspirations of inclusiveness and intention to

exact “justice” for all. From the beginning, though, they also revealed our government’s contrary inclination to restrict, to limit and to deny, all without much self-examination.

By the time the Constitution came into being, slavery had been sewn ever more deeply into our economic and cultural fabric. However, even in the antebellum period many free blacks, especially in the North, participated in activities associated with citizenship. They labored. They voluntarily enlisted and had fought in the American Revolution and later, the War of 1812. Many blacks owned homes, paid taxes and operated their own businesses. In Northern cities especially, free blacks were often permitted to vote.

In 1849, a former American slave named Henry Bibb wrote his autobiography and invoked the now famous words of the Declaration of Independence. Bibb’s poignant testimony underscores the most basic of American tensions – that between high aspirations of “equality” and the reality of state-enforced inequality.

“. . . I could see that the All-wise Creator, had made man a free, moral, intelligent and accountable being; capable of knowing good and evil. And I believed then, as I believe now, that every man has a right to wages for his labor. . . a right to liberty and the pursuit of happiness. . . But here, in the light of these truths, I was a slave, a prisoner for life; I could possess nothing, nor acquire anything but what must belong to my keeper. No one can imagine my feelings in my reflecting moments, but he who has himself been a slave. . .” Bibb continued: “This is the regulation and law of American Slavery, as sanctioned by the Government of the United States, and without which it could not exist. . . I only judge by their actions, which speak louder than words. . .”<sup>1</sup>

In particularly harsh terms, *Dred Scott* animated the United States’ vexing gulf between official words and official deeds. Chief Justice Taney, writing for the majority, declared that such “inalienable” rights spelled out in the Declaration of Independence did not apply to African Americans who represented 14 percent of the population. Slaves, former slaves, free black people and their descendants, the High Court ruled, had long been considered a separate, distinct category, not like “us.” In other words, blacks may very well be actively contributing to the society, but “We The People” owed “them” nothing. The High Court resolved that the word “citizen” as employed in the Constitution simply was not intended to include blacks who were considered then “as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect.”<sup>2</sup>

Blacks had not been considered worthy of citizenship during the time of the Constitution’s writing and thus, the High Court decided, we need not start considering them worthy now. And this was true, Chief Justice Taney wrote, even if our thinking had evolved to consider African Americans as equals.

“The legislation and histories of the time, and the language used in the Declaration of Independence, show, that neither the class of persons who 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.”<sup>3</sup>

In light of the fact that African-Americans had been active participants in society and heroes in the wars we waged, *Dred Scott* was not a decision that affirmed common, universal practice. *Dred Scott* was, more accurately, a decision that *took rights away* and moved us backward. Many signs indicated that, as a people, we were progressing where basic humanity,

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<sup>1</sup> HENRY BIBB, NARRATIVE OF THE LIFE AND ADVENTURES OF HENRY BIBB, AN AMERICAN SLAVE (New York, The Author, 1849). This edition includes an introduction by Lucius C. Matlack..

<sup>2</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

<sup>3</sup> *Id.*



rights and inclusion of blacks were concerned. It was the judicial branch of our government, using our founding documents as justification, which set us in retreat.

Perhaps it goes without saying that we have come a long way since *Dred Scott*. The measurable distance has, on the one hand, been remarkable – so striking that we collectively view *Dred Scott* as a stain, a shame, a travesty, perhaps even, a sin. In the years that followed *Dred Scott*, our body politic and our courts explicitly expanded citizenship and thus rights and protections to African Americans, to women and other groups. But the ebb and flow of restriction and constriction that *Dred Scott* exemplifies continues unabated today. Our historical story is as much about expanding rights and welcoming new members as it is a narrative about limiting rights and membership. In this sense, *Dred Scott* is not ancient history. It is most effective not as a baseline by which to judge our impressive progress. The questions at the heart of this 150 year old case -- about the meaning of citizenship, belonging participation and assimilation, about who comes here, who has rights and under what conditions, who stays, who works and contributes without full membership and who decides those things -- remain unresolved and forever at the heart of our contemporary society.

Many of today's modern decisions that limit and suspend rights, privileges and life possibilities find justification in unexamined concerns of the moment. As this report suggests, these contemporary justifications include the threat of terrorism, the desire to stem immigration for unclear ends and the unexamined impulse to "punish" former criminals. One hundred and fifty years ago, many people rationalized *Dred Scott's* racist analysis as a necessarily decisive ruling that would finally settle arguments over slavery and fend off the threat of civil war. It had exactly the opposite effect. *Dred Scott* galvanized abolitionists and accelerated the nation's march toward civil war and was later nullified by the 13<sup>th</sup> and 14<sup>th</sup> Amendments to the Constitution.

*Dred Scott* carries clear lessons for our modern democracy. At the close of each of the following four sections, we pose a series of questions to guide our thinking and investigations into the state of citizenship over the coming year. Several social and political conditions -- manifest in our systems of voting, criminal justice, labor and education -- demand our attention as we try to live up to the aspiration of one nation, indivisible, with liberty and justice for all, a nation where we consider all people "created equal" with the right to "life, liberty and the pursuit of happiness."

For the purposes of this report, we consider "citizenship" as both a legal status that affords rights and too, more broadly, as a social idea that implies membership and participation in a collective. The U.S. Constitution grants certain rights. Certainly, the Declaration of Independence, even the Pledge of Allegiance offer guides by which to measure the state of citizenship.

In 2008, the Charles Hamilton Houston Institute for Race and Justice will convene a major conference on the "State of Citizenship" in the United States. We will grapple with these vital questions and continue conversations we begin at today's conference observing the 150<sup>th</sup> anniversary of the *Dred Scott* decision.

### The Multi Realities of the United States

Any comparative discussion of citizenship requires an understanding of the monumental demographic shifts that have reshaped the political, social and cultural realities of the United States since 1857.

- In 1860, the U.S. was 86 percent white and 14 percent black. Nine out of ten of these blacks were slaves.<sup>4</sup> Today, the United States is 67 percent white, 12 percent black, 14 percent Latino 4 percent Asian and just less than 3 percent American Indian or multiracial.<sup>5</sup>
- Forty-five percent of U.S. children younger than 5 are children of color.<sup>6</sup>
- Latinos are our largest and fastest-growing minority group.<sup>7</sup> In 2003, Latinos surpassed African-Americans as the largest minority group. Their growth is fueled by immigration and higher relative birth rates.<sup>8</sup>
- Latinos represented half of the nation's population growth from 2000 to 2005.<sup>9</sup>
- The non-Hispanic, white population accounted for less than a fifth (or 19 percent) the nation's population growth between 2000 and 2005.<sup>10</sup>
- In 1860, about 13 percent of the population was foreign-born. Nearly all these immigrants, though, were of relatively light skin tone and classified by Census enumerators as "white."<sup>11</sup>

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<sup>4</sup> Campbell Gibson & Kay Jung, "Historical Census Statistics on Population Totals By Race, 1790 to 1990, and by Hispanic Origin, 1790 to 1990, For The United States, Regions, Divisions, and States," Working Paper Series No. 56, September 2002, Table 1 (citing U.S. Census Bureau, Decennial Census, 1860), available at <http://www.census.gov/population/www/documentation/twps0056.html>.

<sup>5</sup> U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES (NC-EST2005-03) (April 1, 2000 to July 1, 2005). Racial groups include only non-Hispanic members. "Asians" include Pacific Islanders. "American Indians" include Alaskan Natives.

<sup>6</sup> THE U.S. CENSUS BUREAU, NATION'S POPULATION ONE-THIRD MINORITY (May 10, 2006). Detailed tables were released by the Bureau to track population changes between July 1, 2004 and July 1, 2005. The data are based on estimates of U.S. population for July 1, 2005. The Census Bureau estimates population change from the most recent decennial census (Census 2000) using annual data on births, deaths and international migration.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> U.S. CENSUS BUREAU, TABLE 3: ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2005, (NC-EST2005-03).

<sup>10</sup> Ibid.

<sup>11</sup> For a discussion of "white" as an achieved status in the United States, see NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (Routledge 1996). THE U.S. CENSUS BUREAU, DECENNIAL CENSUS, 1860. Cited as Table 8 in HISTORICAL CENSUS STATISTICS ON THE FOREIGN-BORN POPULATION OF THE UNITED STATES: 1850-1990 GIBSON, C.J. AND LENNON, E. (February 1999).

- Today, about 12 percent of the population -- about 37 million people -- is foreign born. Four out of five of these immigrants are people of color. Nearly three in ten people of color in the United States are foreign born.<sup>12</sup>
- One out of five children in the United States was born to at least one immigrant parent.<sup>13</sup>
- Among the foreign-born, about 35 percent earned citizenship through naturalization. About 33 percent are legal permanent residents. About 31 percent -- or 12 million people -- are undocumented immigrants. (A small share has other statuses).<sup>14</sup>
- By 2050, half the people in the United States will be people of color.<sup>15</sup>

At the time of the *Dred Scott* case, questions about inclusion and citizenship were surely intense but also more straightforward than those same questions in today's multiracial society. Nevertheless, we still face stark inequalities between African Americans and whites. In many cases, these inequalities, whatever their source, diminish the ability of African Americans to enjoy and fulfill the duties, privileges and responsibilities of citizenship. As will be discussed in more detail, laws and commonly accepted government practices serve to dilute the citizenship-related activities of African Americans a century and a half after *Dred Scott*.

At CHHIRJ, we will grapple this coming year with long-avoided questions about how or even whether to incorporate and accommodate increasing numbers of foreign-born residents into society. Exploring continuing inequalities for African Americans and the challenges facing immigrants are not separate endeavors. They are related ones. Some admittedly sensitive questions we can no longer avoid and that can't be fully answered in separate ethnically and racially defined spheres include: 1) As Latino population and, in time, voting strength and political power increases, where will that leave African Americans as a group? 2) Do African Americans and Latinos find common interests in, for example, struggles for rights and privileges in the workplace, voting and political representation? 3) To what end might African Americans and Latinos form political coalitions around these common interests? 4) What are the similarities and differences in the contemporary political agendas of various segments of the Latino and African American communities? How were these agendas shaped and how might they be enhanced or "brought up to date" in the coming years? 5) How might the faith community play a role in enabling conversations and coalitions between African-American and Latino communities?

Our nation was on a path toward settling some vexing immigration-related matters when the events of September 11, 2001, shifted priorities. The specter of terrorism threatens to obscure our thinking about immigration. Like the justices in *Dred Scott* 150 years ago, we are today forced to address basic questions not merely about policy, law, numbers, costs and benefits. Immigration forces us to also confront questions about basic humanity.

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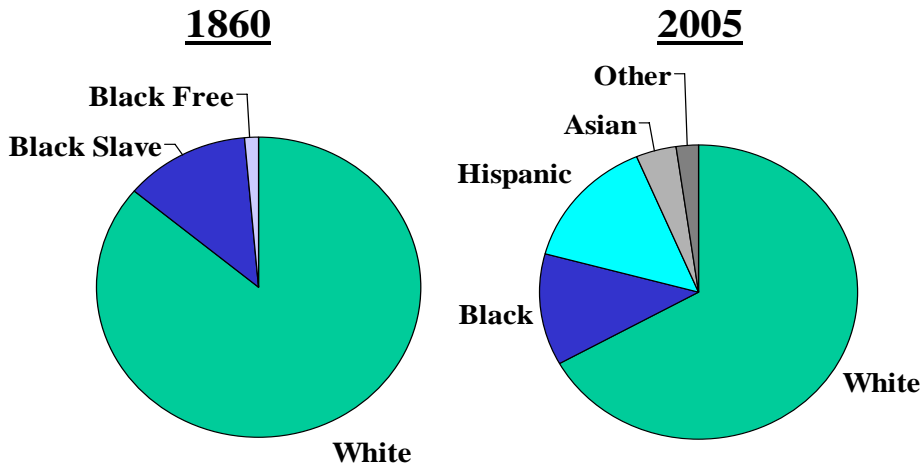
<sup>12</sup> Tabulations of 2000 Census, Summary File 4.

<sup>13</sup> *Children of Immigrants: Facts and Figures May 2006*, The Urban Institute (2006) available at [http://www.urban.org/UploadedPDF/900955\\_children\\_of\\_immigrants.pdf](http://www.urban.org/UploadedPDF/900955_children_of_immigrants.pdf).

<sup>14</sup> Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey*, Pew Hispanic Center Research Report (March 7, 2006), available at <http://pewhispanic.org/files/reports/61.pdf>. Also, Jeffrey S. Passel, *Growing Share of Immigrants Choosing Naturalization*, Pew Hispanic Center. <http://pewhispanic.org/files/reports/74.pdf>

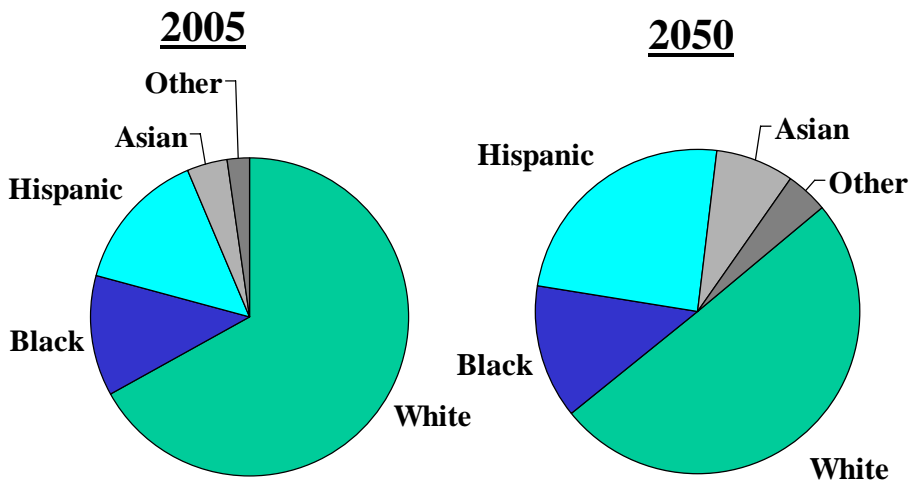
<sup>15</sup> 2005 Census Population Estimates by Race and Ethnicity and estimates based on Census 2005 Projections.

The Racial/Ethnic Profile of the U.S. Has Changed Dramatically Since the Dred Scott Era  
(Share of Population)



Note: Racial groups in 2005 refer only to non-Hispanic members of those groups. 1860 data omit groups making up less than 1% of the population.  
Sources: 1860 Decennial Census and 2005 Census Population Estimates by Race and Ethnicity.

By 2050, People of Color Will Comprise Half of U.S. Population  
(Share of Population)



Note: Racial groups refer only to non-Hispanic members of those groups. "Other" includes American Indian and Alaska Native, Native Hawaiian and Pacific Islander, and multiracial.  
Sources: 2005 Census Population Estimates by Race and Ethnicity and estimates based on Census 2050 Projections.

In the process of becoming American, immigrants during the last major wave were often expected to and forced, in varying degrees, to shed their native language, national identity and emotional connections of their homelands. The reality of contemporary immigration though, obligates us to formulate new meanings for that old term "assimilation." In part because of technology – cell phones, foreign-language television, computers, inexpensive air travel – it is far

easier for immigrants to the United States to retain their native language, their emotional ties and their national identity.<sup>16</sup>

### **QUESTIONS TO CONSIDER**

The nature of this new immigrant experience leads to questions CHHIRJ will explore in the coming year and beyond. Some of these include: 1) Should fluency in English or, for example, the promise to bear arms for the nation be a requirement of citizenship? 2) Should American schools be required or strongly encouraged to offer Spanish or other foreign languages, perhaps in elementary or middle school? 3) Might there be room in our nation for two or even three official languages, similar to common practices of other countries, including Switzerland, Canada and South Africa? 4) What role might lawyers, social scientists and advocates and members of the faith community play in formulating legal theories, cases and political movements to enhance and clarify the rights of U.S.-born citizen children of foreign born parents? 5) What are the trends in local and state policies where immigrants and, for example, English-language policies are concerned?

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<sup>16</sup> Marcelo M. Suarez-Orozco, Carola Suarez-Orozco and Desiree Baolian Qin. THE NEW IMMIGRATION: AN INDERDISCIPLINARY READER. New York: Routledge, (2005).

## **VOTING, REPRESENTATION AND POLITICAL PARTICIPATION**

In *Dred Scott*, Chief Justice Taney, writing for the majority (inaccurately) stated that blacks “had no rights which a white man was bound to respect.”<sup>17</sup> But as Justice Benjamin Curtis observed in his dissent in the case, blacks in the United States had indeed exercised their rights as citizens of the United States. Curtis’ most convincing evidence was that at the time of the American Revolution, blacks “possessed the franchise” of voting “on equal terms with other citizens.”<sup>18</sup> Thus, the majority’s decision in *Dred Scott* constructed, endorsed and made more uniform an even harsher reality than had previously existed for many blacks.

As historical documents demonstrate, several state constitutions contained provisions that protected the black vote. These included, among others, Delaware, Maryland, New Hampshire, New York and Massachusetts.<sup>19</sup> In addition to voting rights, blacks in some northern states enjoyed the explicitly stated right to hold public office.<sup>20</sup> After *Dred Scott*, those rights were suddenly in question.

The symbolic and practical importance of voting was obvious in 1857 and remains equally essential today. The most recent data available reveals troubling trends in this most basic guarantee of citizenship. For a variety of reasons, some related to history, others related to government policy, and still others to demographics, African Americans and other people of color generally do not possess voting power proportionate to the size of their population would predict. They are also still less likely to vote even when they have the privilege.

At the same time, people of color are increasingly visible on national, state and local political scenes. The number of people of color in Congress is at its highest level in history, with 42 Black members, 27 Latinos, seven Asian American members and one Native American.<sup>21</sup> The U.S. Senate includes three Latino members, two Asian and one black member. People of color have recently been appointed to Cabinet positions. Barack Obama, a black man and son of an immigrant, is, at this writing, a front-runner for the Democratic nomination for president.

These developments signal progress. However, we must ensure that increased visibility on the national scene does not cause us to overlook the vast inequalities that haunt us 150 years after *Dred Scott*.

***In the last 40 years, both voter registration and voting rates have increased for African-Americans in the South. Nationally, though, the trend is reversed, with voting and registration rates declining for African-Americans.***

A half century ago, the Civil Rights Act of 1957 created the Civil Rights Division within the larger U.S. Department of Justice. It granted the Executive Branch authority to investigate and

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<sup>17</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

<sup>18</sup> *Id.* at 573, Curtis, J. (dissenting).

<sup>19</sup> THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 92 (Boston: Norman and Bowen, 2d ed. 1785); 1776 DELAWARE CONSTITUTION, Declaration of Rights, 6 (reproduced on 92 of CONSTITUTIONS); 1776 Maryland Constitution, Declaration of Rights, 5 (reproduced on 105-106 of CONSTITUTIONS); 1784 New Hampshire Constitution, Bill of Rights, 11 (reproduced on 5 of CONSTITUTIONS); 1777 New York Constitution, Declaration of Rights, 7 (reproduced on 58 of CONSTITUTIONS).

<sup>20</sup> For example, this right is provided in the Constitutions of New Hampshire, Massachusetts and Pennsylvania.

<sup>21</sup> This includes non-voting member delegates. Information on black elected representatives from personal communication with Joint Center for Political and Economic Studies. <http://www.jcpes.org> Information on Latino representatives from National Association of Latino Elected and Appointed Officials. <http://www.naleo.org>. Numbers include non-voting member delegates. Asian members of the House include one black member of Filipino heritage.

intervene in situations in which there had been widespread complaints of intimidation of African Americans voters. It was not a highly dramatic chapter in the civil rights movement. However, the Act and the more sweeping legislation that followed symbolized the fundamental importance of voting -- so important in fact that tampering with the system justified the always controversial federal intervention into the affairs of state governments. Voting is perhaps the most commonly fought for privilege and responsibility of citizenship. Suffrage has inspired some of the defining struggles of our nation. As we attempt to bring democracy to other nations, our elected leaders often stress that free elections are a hallmark of any democracy.

After the passage of the 1957 Act, though, it soon became clear that state governments, especially in the South, were ever more actively devising a variety of tactics to suppress the black vote. Sometimes these policies were race-neutral on their face, though carried the clear effect of limiting the voting rights of African Americans. The U.S. Justice Department, using its new authority gained by the 1957 legislation, commenced litigation. However, such efforts often proved futile. As soon as one racist tactic was deemed illegal, local governments would devise another. Thus, in 1965, Congress passed the more explicit Voting Rights Act (VRA).

The VRA, reauthorized in 2006, has long been viewed as one of the most important victories of the civil rights movement. It contained special enforcement provisions for the South, where voter intimidation was most prevalent. Through a series of requirements and provisions, it established a nationwide ban on many of the tests, taxes and other requirements states had put in place in order to deny or limit the voting rights of African Americans. The VRA is such a pivotal piece of legislation that civil rights groups measuring voting trends use 1965, the year of the Act's passage, as the baseline.

The effect of the VRA on black registration in the South was particularly dramatic. Several states, including Mississippi and Alabama, demonstrated manifold increases in black registration rates. But in keeping with the ebb and flow of expanding and then limiting rights, more recent legislation appears to be sending us in an opposite direction. The reasons for this retreat are complex. In the coming year, we hope to understand them better.

- In 1968, 61.6 percent of eligible blacks in the South were registered to vote. By 2004, 65.3 percent of eligible blacks in the South were registered to vote.
- Outside the South, in 1968, 71.8 percent of eligible blacks were registered to vote. By 2004, just 63.3 percent of eligible blacks were registered.
- Black voting rates have trended up between the last two presidential elections. However, the longer-term trend in black voter registration nationally has been downward. It fell from 66.2 percent in 1968 to 64.4 percent in 2004.<sup>22</sup>
- In 1964, only 44 percent of eligible blacks in the South actually voted.
- By 1968, in the South, 51.6 percent of eligible blacks voted.
- By 2004, in the South, 55.9 percent of eligible blacks voted.
- Outside the South in 1964, 72 percent of eligible blacks voted. By 1968, that share had decreased to 64.8 percent. By 2004, just 56.7 percent of eligible blacks voted.

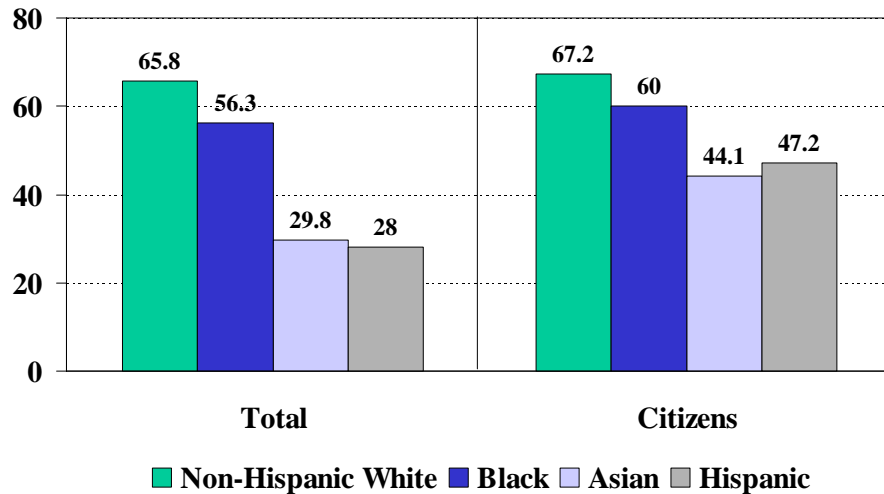
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<sup>22</sup> U.S. CENSUS BUREAU, HISTORICAL TIME SERIES TABLE A-10: REPORTED REGISTRATION RATES IN PRESIDENTIAL ELECTION YEARS, BY SELECTED CHARACTERISTICS: NOVEMBER 1968 TO 2004, available at <http://www.census.gov/population/www/socdemo/voting.html>.

- The net result is that nationally, the voting rate for blacks in 2004 was 56.3 percent. This marks a decline from the national 58.5 percent voting rate for blacks in 1964 recorded just prior to passage of the Voting Rights Act.<sup>23</sup>

### Voting Rates for Hispanics and Asians Greatly Lag Whites, Even Among Citizens

(Percent of Voting Age Population that Voted in 2004)



Source: U.S. Census Bureau, Current Population Survey, 2004.

*Latinos and Asians generally have weaker voting power in proportion to their population size when compared to whites. This is due in large part to the fact that a comparably larger share of their communities are non-citizens. For Latinos, the fact that a significant share of their group is younger than voting age also dilutes their power.*

Generally speaking, Latinos and Asians vote at lower levels than whites and blacks.

- Among eligible voters in the 2004 November election, only 44 percent of eligible Asians voted.<sup>24</sup>
- Among eligible voters in the 2004 November election, only 47 percent of Latinos voted.<sup>25</sup>
- Comparably, 67 percent of non-Latino whites and 60 percent of blacks voted in the 2004 November election.<sup>26</sup>
- Currently just about 40 percent of Latinos and 40 percent of Asians is eligible to vote.

<sup>23</sup> *Id.* at Table A-9.

<sup>24</sup> U.S. CENSUS BUREAU, HISTORICAL TIME SERIES TABLES, TABLE A-1: REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE GROUPS: NOVEMBER 1964 TO 2004, available at <http://www.census.gov/population/www/socdemo/voting.html>.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*



- Demographers predict that by 2025, about 50 percent of Latinos and 50 percent of Asians will be eligible to vote.<sup>27</sup>

Citizenship has generally been a requirement for voting at the federal level throughout much of our history. However, this hasn't always been the case at the state and local levels.

Prior to the fervent anti-immigrant backlash of the early 20<sup>th</sup> century, as many as 22 states allowed non-citizens to vote. Most times, officials granted this privilege to non-citizens who'd declared their intentions to become citizens. More recently, officials in some municipalities with a substantial share of non-citizen residents extended some voting rights to them.

For example, the Immigrant Voting Project reports that since 1988, Chicago has allowed non-citizens to vote in school board elections. Also, six towns in Maryland permit non-citizens to vote in local elections. Several municipalities in Massachusetts have passed immigrants voting rights proposals, though the plans have not won needed state approval.<sup>28</sup>

Even though non-citizens are generally not granted the right to vote, the U.S. Census still counts them as official members of the population. In turn, reapportionment in Congress and in state Legislatures is based, in part, on the presence of these non-citizens. This raises the question of whether or not the right to representation is (and whether or not it should be) more fundamental than the right to select that representative.

***State-level legislation strips 5.3 million Americans, disproportionate numbers of them African-American, of their right to vote because of prior criminal convictions. This includes men and women currently living in prison and those who have completed their sentences.***

Being a citizen of a certain age does not guarantee the right to vote. The starkest example of this fact, and one with a highly disproportionate impact upon African Americans, is the denial of suffrage to people who have been convicted of a felony.

- In 48 states and the District of Columbia, people in prison on a felony conviction are not allowed the right to vote.<sup>29</sup>
- In 36 of these states, people under parole supervision and/or sentenced to felony probation are stripped of their voting rights.<sup>30</sup>
- In 11 states, a felony conviction, under certain circumstances could result in a lifetime ban from voting.<sup>31</sup>
- The consequence of these policies is the denial of voting privileges to 1 in 41 Americans of voting age.<sup>32</sup>

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<sup>27</sup> Jeffrey Passel, *Election 2004: The Latino and Asian Vote*, Urban Institute Immigration Studies Program (2004), available at <http://www.urban.org/UploadedPDF/900723.pdf>.

<sup>28</sup> *Common Misconceptions About Immigrant Voting*, Immigrant Voting Project, available at <http://www.immigrantvoting.org/material/misconceptions.html>.

<sup>29</sup> Ryan S. King, *A Decade of Reform: Felony Disenfranchisement Policy in the United States*, The Sentencing Project (October 2006), available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=529>.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

- The disenfranchisement of incarcerated adults and ex-felons has a particularly negative effect on the voting rights of black men. In 2004, 1 in 12 blacks were denied the right to vote because of a prior felony conviction. This is a rate of disenfranchisement nearly five times that of non-blacks. Among males, 1 in 8 blacks is prohibited from voting. In some states, as many as one in 4 blacks is disenfranchised because of a felony conviction.<sup>33</sup>
- In the last ten years, sixteen states instituted changes to their felony disenfranchisement rules that eased restrictions on voting.<sup>34</sup>

At least one U.S. representation-related policy disproportionately affects African Americans. The U.S. government counts inmates as residents of the community in which their prison is located instead of their community of residence prior to incarceration. This seemingly race-neutral practice tends to drain political power from urban, predominantly minority jurisdictions while shifting it to more heavily white, rural areas. There are currently about 2.1 million prisoners in the United States.<sup>35</sup>

In 2006, a National Research Council panel of the National Academies called for the Census Bureau to begin collecting the home addresses of people in prison and then to study whether or not this non-prison address should be used in the Census. The Council expressed concern about where people in prison were counted, stating that "the evidence of political inequities in redistricting that can arise due to the counting of prisoners at the prison location is compelling."<sup>36</sup>

***Voter-ID laws have become more common in recent years. Research demonstrates that the laws disproportionately affect eligible, would-be voters of color.***

The federal Help America Vote Act (HAVA) requires that officials ask for identification from first-time voters who had registered to vote by mail but didn't send verification of their identification with that mail-in registration. Twenty-four states have even broader identification requirements than HAVA. In such states, each voter is required to show identification before they vote. Seven of these states require voters to produce a *photo* ID. The remaining seventeen states accept additional forms of identification (not necessarily a photo).<sup>37</sup>

Voters who appear at the polls without IDs usually have some recourse. For example, they might be permitted to sign an affidavit verifying their residence, name and other identifying information. In some places, they are able to vote with a "provisional" ballot.<sup>38</sup>

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PRISON STATISTICS (as of December 31, 2005); U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DRUG AND CRIME FACTS (citing FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES, ANNUAL), available at <http://www.ojp.usdoj.gov/bjs/DCF/tables/arrtot.htm>.

<sup>36</sup> CENSUS PANEL ON RESIDENCE RULES IN THE DECENNIAL CENSUS, NATIONAL RESEARCH COUNCIL, ONCE, ONLY ONCE, AND IN THE RIGHT PLACE: RESIDENCE RULES IN THE DECENNIAL (D.L. Cork & P.R. Voss, P.R. eds., 2006).

<sup>37</sup> New voter ID laws passed in 2003 in the following states: Alabama, Colorado, Montana, North Dakota, South Dakota. New voter ID laws passed in 2005: Indiana, New Mexico, Washington. Also in 2005: Georgia tightened its existing voter ID law to require *photo* ID.

2006: Georgia passed SB 84, providing for the issuance of voter ID cards at no cost to registered voters who do not have a driver's license or state-issued ID card. Georgia's voter ID law was enjoined from enforcement in July 2006. This affects the primary, general and any runoff elections in 2006.

<sup>38</sup> *Requirements for Voter Identification*, National Conference of State Legislatures (2007), available at <http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm>.

Recently, federal courts upheld Indiana's law requiring a photo ID to vote. Interestingly, such an ID is not required for voting by absentee ballot there. However, federal courts blocked similar voter-ID laws in Georgia and Missouri, ruling that the laws are unconstitutional because they disenfranchise voters in violation of state constitutions.

The Georgia case illustrates the highly political nature of controversies surrounding Voter ID laws. Under the Voting Rights Act of 1965, changes to Georgia's voting laws must be pre-approved by the Justice Department. The Justice Department did approve the state's photo-ID requirements but did so over the clear objection of the majority of the government team of lawyers and analysts who'd been assigned to review the law.

A memo endorsed by four of five members of that team and based on such sources as the U.S. Census Bureau, argued that: "Georgia blacks were much less likely than whites to own vehicles and also less likely to have photo IDs. . . While no single piece of data confirms that blacks will [be] disparately impacted compared to whites, the totality of the evidence points to that conclusion." The memo continued: "The state has failed to meet its burden of demonstrating that the change is not retrogressive."<sup>39</sup>

The Voter-ID movement has also gained ground at the national level. The Federal Election Integrity Act of 2006 would have required voters in federal elections to provide picture ID by 2008. By 2010, voters would have had to prove U.S. citizenship. The bill passed the House of Representatives last year but failed in the Senate.

The existence of Voter-ID laws are associated with decreased voting activity, especially for Blacks and Latinos. A Rutgers University study recently concluded that, in states where voters were required to present identifying documents such as utility bills or credit card statements, they were 2.7 percent less likely to vote than in states where voters simply had to say their names. Blacks were 5.7 percent less likely to report that they had voted under such requirements compared to blacks in states where voters simply had to give their names. Latinos were 10 percent less likely to vote in such situations.<sup>40</sup> In a tightly contested election, of course, these differences in voting rates can determine the outcome.

### ***Voting-related practices on the federal, state and local levels suppress minority votes.***

The Voting Rights Act ended the most egregious of voting rights violations. However, questionable practices abound. Many such practices greatly disadvantage voters of color. The "hanging chad" controversy in Florida, so pivotal to the 2000 Presidential election outcome, drew attention to the issue of ballot spoilage. Less discussed, however, was the disproportionate impact of ballot spoilage policies upon racial minority voters.

- A 2001 study by the House Committee on Government Reform found that voters nationwide living in low-income, high minority Congressional districts, were three times more likely to have their votes for president discarded (due to ballot spoilage in 2000) than voters in more affluent, low-minority districts.<sup>41</sup>
- The House Committee study also found that residents of low-income, high minority Congressional districts were twenty times more likely than people in affluent, heavily

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<sup>39</sup> D. Eggen, *Criticism of Voting Law was Overruled*, WASHINGTON POST November 17, 2005, at A1, available at [http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504_pf.html).

<sup>40</sup> T. Vercellotti & D. Andersen D, *Protecting the Franchise or Restricting It? The Effects of Voter Identification Requirements on Turnout*, Paper prepared for the 2006 meeting of the American Political Science Association (2006), available at [http://www.eagleton.rutgers.edu/News-Research/VoterID\\_Turnout.pdf](http://www.eagleton.rutgers.edu/News-Research/VoterID_Turnout.pdf).

<sup>41</sup> *Income and Racial Disparities in the Undercount in the 2000 Presidential Election*, Special Investigations Division, Committee on Government Reform, U.S. House of Representatives (July 2001).

white districts to have their votes for Congress go uncounted for a variety of reasons, including ballot spoilage.<sup>42</sup>

- In 2001, additional analysis of the 2000 election in Florida found black votes were consistently spoiled “even when comparing counties with identical income, education, and other factors.”<sup>43</sup> This analysis showed that “with all else being equal, for every 1-point increase in the percentage of registered voters who are black, there was a .07 percentage point increase in spoiled ballots.”<sup>44</sup>

Finally, inadequate provision of assistance at the polls creates other barriers for non-English speaking Hispanic and Asians, one study suggests.

The Asian American Legal Defense and Education Fund monitored polls in 23 cities during the 2004 presidential election. The Fund found that, although local election workers worked diligently to comply with federal laws, limited English proficient Asian Americans had difficulty voting for a variety of reasons. These included a lack of interpreters and/or translated materials. Also, provisional ballots were not always offered to voters and in many cases weren’t counted. In some cases, poll workers made “improper or excessive demands for identification” or were “rude or hostile.”<sup>45</sup>

### ***Surveys reveal that black voters have declining confidence that their votes will even be counted***

The two most recent presidential elections generated significant publicity about the problem of voter suppression and ballot spoilage. Add to this the history of discrimination surrounding voting and African Americans and it should come as no surprise that black voters’ confidence that their vote will even be counted has declined.

- A Pew Research Center showed that in 2006, just 30 percent of blacks said they were “very confident” their votes would be accurately counted. This represents a 17 percentage point decline from just two years before in 2004 when 47 percent of blacks said they were very confident that their votes would be counted.<sup>46</sup>
- The same survey showed that the percentage of black voters who expressed “little” or “no” confidence in vote-counting procedures has approximately doubled from 15 percent in 2004 to 29 percent in 2006. More than three times as many blacks as whites now say they have little or no confidence their vote will be accurately tallied (29 percent vs. 8 percent).<sup>47</sup>

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<sup>42</sup> Ibid.

<sup>43</sup> Philip Klinker, WHOSE VOTES DON’T COUNT?: AN ANALYSIS OF SPOILED BALLOTS IN THE 2000 FLORIDA ELECTION, (June 25, 2001), Appendix XI in the USSCR Report, available at <http://www.hamilton.edu/news/florida/Klinkner%20Analysis.pdf>.

<sup>44</sup> Ibid.

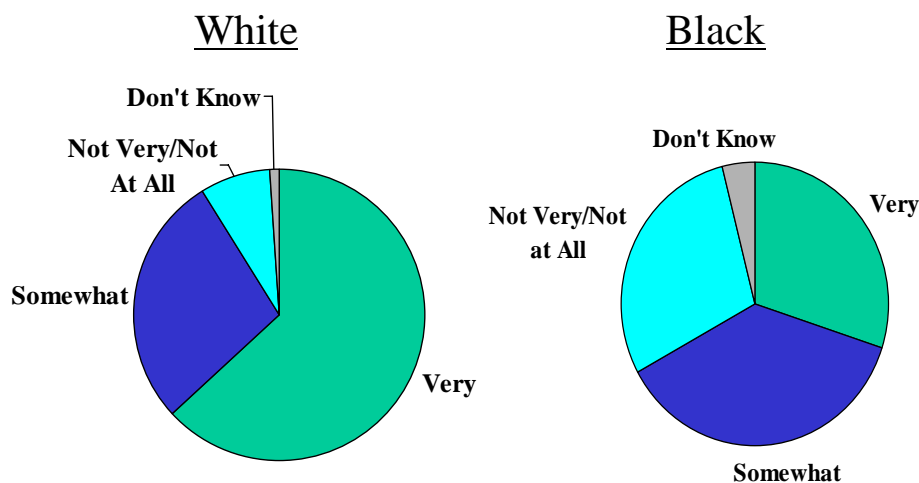
<sup>45</sup> Asian American Legal Defense and Education Fund, *Asian American Access to Democracy in the 2004 Elections* (2005), available at [http://www.aaldef.org/images/2005-08-18\\_ElectionReport.pdf](http://www.aaldef.org/images/2005-08-18_ElectionReport.pdf).

<sup>46</sup> *November Turnout May Be High*, The Pew Research Center for People and the Press (October 11, 2006) available at <http://people-press.org/reports/display.php3?ReportID=291>.

<sup>47</sup> Ibid.

## Likely Black Voters are Much Less Confident than Whites That Their Vote Will Be Counted Accurately: 2006

(Share of Voters Reporting Confidence Level That Their Vote Will be Accurately Counted)



Sources: The Pew Research Center, "November Turnout May be High," Oct. 11, 2006, <http://people-press.org/reports/display.php3?ReportID=291>

***Civil rights groups remain concerned about the detrimental effect the shape of voting districts and the form of particular elections, both of which may have detrimental impact upon the power of people of color.***

Historically, officials have weakened the voting rights of people of color not merely by creating barriers to voting, but by drawing voting districts in ways that dilute their power. In such cases, federal courts have invoked the Voting Rights Act to prohibit legislative "gerrymandering" that would dilute the voting strength of certain groups of citizens.

Such cases aren't common. However, when such cases do arise, they underscore the continuing relevance of the VRA.

For example, in 2006, the U.S. Supreme Court upheld Texas' statewide redistricting as constitutional. However, it struck down one particular district in that state as racial gerrymandering in violation of the VRA. Similarly, in Massachusetts in 2004, the courts enjoined elections in 17 districts because the legislature's redistricting plan, in the court's words, "sacrificed racial fairness to the voters on the altar of incumbency protection."<sup>48</sup> A federal court ordered the state to redraw its districts because of violations of the VRA.

At this writing, federal courts overseeing New York and Wyoming are considering whether or not local "at-large" voting systems in those states are discriminatory. In an at-large election, the subdivided categories within counties or within a municipality are erased. This differs from what is generally referred to as a "single-member" district in which a particular district would be subdivided to allow for more direct representation.

In New York, the U.S. Justice Department claims that the voting rights of Hispanic voters in Portchester were being violated by the village's at-large method of electing representatives. The federal government sued Portchester in December, alleging that the election system violates

<sup>48</sup> Black Political Task Force v. Galvin, U.S. District Court for the District of Massachusetts, Civil Action No. 02-11190 (February 24, 2004).

the federal Voting Rights Act. It is asking U.S. District Judge Stephen Robinson to replace the "at-large" system with one in which the six village trustees are elected from different districts, including at least one majority Hispanic district.<sup>49</sup> In Wyoming, five members of the Shoshone and Northern Arapaho tribes on the Wind River Indian Reservation claim the at-large system of electing county commissioners results in discrimination by diluting Indians' voting strength.

***150 years after Dred Scott, the largely black District of Columbia is still denied voting representation in Congress.***

The District of Columbia counts a larger share of residents as racial minorities than any other state besides Hawaii. About 69 percent of its residents are racial minorities, the majority of them African American, yet they have no vote in Congress. A bill granting the some 580,000 residents of District of Columbia a voting member in Congress gathered momentum earlier this year before being delayed by political maneuvering. The House bill H.R. 1433 represents a compromise. It would grant the residents of D.C. voting representation and also provide Utah, a heavily white, largely Republican state, another seat in Congress. At this writing, approval of the bill had been expected in the House. However, the White House on March 20 expressed its opposition to the bill and announced that senior advisers would recommend that the president veto it.<sup>50</sup> White House Spokesman Alex Conant told the Washington Post: "The Constitution specifies that only 'the people of the several states' elect representatives to the House. . . And D.C. is not a state." However, supporters of the bill counter that a section of the Constitution known as the "District Clause," gives Congress sweeping powers over the city and could indeed grant it voting rights in Congress.<sup>51</sup>

***Puerto Ricans living on the island are U.S. citizens but have neither voting representation in Congress nor the right to vote in presidential elections.***

As momentum for D.C. Congressional representation grows, a much larger group of U.S. citizens, residents of Puerto Rico, have neither voting representation in Congress nor the right to vote in presidential elections. With a population more than seven times the size of D.C. and larger than 25 states, Puerto Rico is nearly 100 percent Latino. Puerto Ricans have been U.S. citizens since 1917. As such, they are subject to most federal laws and to military service requirements. Technically, Puerto Rico is an "unincorporated, organized territory of the U.S. with "Commonwealth" The status of Puerto Rico in relation to the U.S., has been the subject of intense debate over decades. A series of plebiscites on the island confirmed Puerto Ricans' desire to maintain Commonwealth status, although support for statehood has also been strong.

***Native Americans represent a special situation in terms of citizenship and political representation. In some ways, their political power, at least in terms of self determination, might appear to be greater than that generally possessed by other people of color.***

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<sup>49</sup> Lisa Sadler, *Closing arguments made in Portchester voting-rights hearing*, THE JOURNAL NEWS, February 27, 2007.

<sup>50</sup> Jim Abrams, *Bush Administration Threatens DC Vote Veto*, THE ASSOCIATED PRESS, March 21, 2007.

<sup>51</sup> Mary Beth Sheridan, *White House Opposes D.C. Vote: Constitutional Concerns Put Bill in Jeopardy*, THE WASHINGTON POST, March 17, 2007, at A1.

The *Dred Scott* decision negated any citizenship aspirations for people of African descent. Interestingly the Court's conclusions were strikingly opposite where Native Americans were concerned. Chief Justice Taney, writing for the majority, stated:

*The situation of this population was altogether unlike that of the Indian race. . . These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged . . . they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.*<sup>52</sup>

It is important to include Native Americans in any discussion of people of color in the U.S., because, though relatively few in number, their place in American history is profound and their overall socio-economic status remains comparably low. Nevertheless, citizenship issues for Native Americans differ significantly from those of other people of color. While they are U.S. citizens, many are also members of the more than 550 federally recognized tribes that have sovereignty and a "government-to-government" relationship with the U.S.

Roughly two-thirds of Native Americans live outside tribal areas, and many face the types of discrimination and disadvantage described in this report and experienced by other people of color. Citizenship-related issues for Native Americans, however, occur more at the tribal level than the individual level. Tribal governments, as independent political entities, have the inherent right to create their own governments, determine their own citizenship, license, regulate, tax, make their own laws and be judged by such laws in tribal courts. As tribes continue to transition to self-governance, fostered by the passage of the Indian Self-Determination and Education Assistance Act of 1975, some have been economically successful. For others, huge challenges to economic self-sufficiency remain. Tribal leaders now find themselves as policy makers for emerging nations, rather than "field-administrators" of federal policies on the reservations.<sup>53</sup>

One of the most fundamental questions for tribal governance is exactly who is governed. Generally, each tribe is free to determine the answer to this question. In March 2007, the Cherokee Nation voted to revoke tribal citizenship for roughly 2,800 "freedmen" descendants of blacks who had been enslaved by Cherokees. The citizenship was revoked regardless of whether the former "freedmen" had Cherokee ancestry. As of 2005, half of American Indians counted by the Census Bureau were either multi-racial or of Hispanic ethnicity. This suggests that questions of who is an Indian will persist.

As more Indian nations pursue economic development, through gambling or other enterprises, questions of taxation will gain greater importance. Currently, states "cannot tax tribal members who live and derive their income from the provision of goods and services on tribal lands,"<sup>54</sup> according to one Harvard study. Further, the study states that there remain "unresolved contentions . . . around the ability of tribal governments to collect taxes from non-Indian businesses operating on the reservations, and on the ability of state governments to collect taxes on retail sales that take place within Indian lands."<sup>55</sup> Tribes also maintain their own courts, and questions of jurisdiction remain at the heart of many disputes regarding Indian law.

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<sup>52</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1856)

<sup>53</sup> HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, *THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* (Oxford University Press 2007).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

As a prominent Native scholar stated: “Indian Peoples are Nations, Not Minorities.”<sup>56</sup> Having something akin to dual citizenship, these members of “domestic dependent nations” within the U.S. will continue to confront challenges unique to their group as they move forward in self-determination.

### **QUESTIONS TO CONSIDER**

A survey of the state of voting and political participation today, and of the various ways in which the power of the minority vote is being diluted, lead us to the following questions to which CHHIRJ will seek answers in the coming year and beyond: 1) What are the legal theories currently used in cases challenging felony disenfranchisement laws or Voter ID legislation in certain states? How successful have various arguments been in court? What is the state of public opinion regarding felony disenfranchisement? 2) What is the stated justification for felony disenfranchisement laws? What are the assumptions underlying those justifications and how might we test their validity? 3) What political conditions and public justifications led to changes in felony disenfranchisement laws in certain states? How do ex-felons feel about having their voting rights taken away or restored? 4) What are the assumptions underlying policies to protect against voter fraud? How might we test those assumptions? 5) What are the roots of African-Americans’ declining confidence that their vote will be counted? 6) What is the relationship between voting rates and economic disenfranchisement? 7) What lessons can we draw from civil rights era voting campaigns? Might the faith community again play a pivotal role in increasing voter registration and turnout in communities of color? 8) Is there a case to be made to allow non-citizen immigrants the right to vote?

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<sup>56</sup> D.E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM (Lanham, MD. Rowman & Littlefield 2002).



## COURTS, CRIMINAL JUSTICE AND CITIZENSHIP

The matter of access to and fairness within the nation's court system was a central issue in the *Dred Scott* case. Because Scott was deemed a non-citizen, the Supreme Court ruled that he had no right to even file the original lawsuit suing for his freedom. In other words, Dred Scott, no matter how he might have been aggrieved, could not enter court as a plaintiff. Certainly, though, if he "ran away" from his master or had been charged with a crime, he could be tried and convicted by the court. A century and a half later, equal access to the judicial system and equal treatment within it continue to be areas of critical concern for people of color in the United States. A survey of the evidence reveals patterns of entrenched inequity in the provision of basic rights we associate with citizenship. People of color are underrepresented on juries and overrepresented in the defendant side of the criminal justice system.

Racial disparities are manifest in every segment of the nation's criminal justice system, from racial profiling, to arrest to imprisonment and in imposition of the death penalty. The causes of such disparities are exceedingly complex and not completely understood. However, some research demonstrates that racial and ethnic bias, often of an unconscious sort, play a role in determining who gets arrested, who serves time and even who gets sentenced to die at the hands of the state.

***Even after the Supreme Court outlawed race as a justification for prosecutorial striking of jurors, studies suggest a persistent trend in which blacks are underrepresented on government lists from which jurors are called and even when called for service, underrepresented on actual juries.***

Contrary to popular belief, the right to a jury of ones' peers is not found in the Constitution. It is actually a notion inherited from English common law. However, "jury of one's peers" has come into common usage as a statement of a constitutional right afforded to citizens. The ideals of the United States are rooted in the principle of fairness and in the case of the courts, "impartiality." Thus, the fact that most blacks are judged by overwhelmingly white juries should raise concern, especially when it comes to death penalty cases.

In the 1986 case, *Batson v. Kentucky*<sup>57</sup>, the Supreme Court ruled that prosecutors' exercises of peremptory challenges to strike a juror could not be used to excuse prospective jurors because of their race. In a 7 to 2 decision, the Court ruled that striking jurors based upon race violated the Equal Protection Clause of the 14<sup>th</sup> Amendment. Justice Lewis Powell Jr., writing for the majority, stated that the state denies a black defendant equal protection when it puts him on trial before a jury from which members of his racial group had been intentionally excluded. *Batson* overruled *Swain v. Alabama*, which had required that a defendant show purposeful discrimination in the case of peremptory strikes.<sup>58</sup>

In his concurring opinion in *Batson*, Justice Thurgood Marshall went even further. He wrote that "the decision today will not end the racial discrimination that peremptories inject into the jury-selection process."<sup>59</sup> That goal can be accomplished only by eliminating peremptory challenges entirely." He continued ". . .the inherent potential of peremptory challenges to distort

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<sup>57</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>58</sup> *Swain v. Alabama*, 380 U.S. 202 (1965).

<sup>59</sup> Generally, see Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994); see also, RANDALL KENNEDY, RACE, CRIME, AND THE LAW 168-255 (Pantheon Books 1997) (See 168-255 for a discussion of the history of discriminatory practices in jury selection); Hiroshi Fukurai, Edgar Butler & Richard Krooth, *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, JOURNAL OF BLACK STUDIES, VOL. 22, NO. 2 196-215 (Dec. 1991).

the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.”<sup>60</sup>

In 2005, the case *Miller-El v. Dretke*<sup>61</sup> further clarified the limitations of peremptory challenge. In this 6-3 decision, the Supreme Court overturned a death sentence for Thomas Miller-El after prosecutors used peremptory strikes to exclude 10 of 11 eligible black jurors. Of the full 108 member panel for Miller-El’s trial, only one of the 20 blacks actually served. In other words, 91 percent of eligible African American members were excluded by peremptory strikes.

Legal scholars and other investigators identify several variables that lead to the overrepresentation of white people on juries.<sup>62</sup> First, only citizens are allowed to serve, disqualifying a large share of people of color living in the country. Second, research suggests that more affluent, more heavily white communities keep more accurate jury rolls.<sup>63</sup> This makes it more likely that white residents will be called to serve. Third, studies suggest that in spite of the rulings in *Batson* and *Miller-El*, prosecutors continue to use their so-called peremptory challenges sometimes for no reason other than race.<sup>64</sup> Further, in cases in which the death penalty is a possibility, jurors can be struck from jury service if they express opposition to capital punishment. Since relatively larger shares of racial minorities are opposed to the death penalty, this, too, may contribute to disproportionately white juries.

- In 2003, a study revealed that, on average, criminal jury rooms in Allegheny County, Pennsylvania are only about 4 percent black. (At the time, blacks made up about 12 percent of the adult population in the county).<sup>65</sup>
- In 2003, a Joint State Government Commission in Pennsylvania found that blacks were summoned to jury duty far less often than their share of the population would predict. For example, the report found that blacks represented only 8 percent of the people called for jury duty.<sup>66</sup>
- A study of jury selection in the 1<sup>st</sup> Circuit, in Massachusetts, showed that the pool of available jurors who show up in court for jury duty contains about one half the number of African Americans as it should, given the overall population. This led a court-appointed expert to conclude that the problem of under-representation, at least in the

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<sup>60</sup> *Batson v. Kentucky*, 476 U.S. 79, 102-103.

<sup>61</sup> *Miller-El v. Dretke*, 545 U.S. 231 (2005).

<sup>62</sup> Mary Catherine Campbell, *Black, White and Grey: The American Jury Project and Representative Juries*, 18 GEO. J. LEGAL ETHICS 625 (year). There’s substantial evidence to suggest that peremptory strikes on the basis of race is practice that continues even after *Batson*. Generally, see *id.* note 61.

<sup>63</sup> For example, see data and testimony provided in *United States v. Green et.al*, Crim. no, 02-10301-NG (D. Mass. September 2, 2005).

<sup>64</sup> Leonard Post, *Boxing With Jury Selection: Despite 'Batson,' race and gender still play big roles in jury selection, say lawyers*, THE NATIONAL LAW JOURNAL, April 27, 2005. Also, see the investigation by the Louisville Courier Journal in Jefferson County, Kentucky. Specifically, Jason Riley, *Blacks cut more often by prosecutors: Analysis of Jefferson juries suggests bias, expert says*, THE COURIER-JOURNAL, March 13, 2007, at 1.

<sup>65</sup> Minority Representation in the jury selection process in Pennsylvania: 2002, S. R. 268 (as reported by General Assembly of the Commonwealth of Pennsylvania, Joint State Government Commission printer’s no. 2300). Staff Report General Assembly of the Commonwealth of Pennsylvania. John Karns. *Statistical Representativeness of a Sample of Persons Selected for Jury Duty in Allegheny County, Pennsylvania May 12, through October 11, 2001*. University of Pittsburgh. Also see, Mark Houser, *A Jury of Peers?* PITTSBURGH TRIBUNE-REVIEW, July 21, 2002.

Mark Houser, *CMU study shows shortage of black jurors*, THE PITTSBURGH TRIBUNE-REVIEW, February 19, 2003, at 1.

<sup>66</sup> *Ibid.* Also, Mark Houser, *Study: Juries short on blacks*, PITTSBURGH TRIBUNE REVIEW, May 8, 2003, at 1.

case of this court, was not so much peremptory strikes, but earlier, seemingly race-neutral practices that formed the jury pool in the first place.<sup>67</sup>

- The case *Wilson v. Beard*, currently pending before the U.S. Court of Appeals for the Third Circuit, challenges the peremptory strikes used by a prosecutor in Philadelphia who had, in a videotaped presentation, endorsed the exclusion of African Americans from jury service.
- In 2003, a community action center in Jefferson Parish, Louisiana studied 23,000 jurors and more than 500 trials. The study showed that prosecutors struck African-American jurors at more than three times the rate at which they strike white prospective jurors. Further, the study demonstrated that more than 20 percent of felony trials in the parish had no black jurors even though 23 percent of the population is African-American.<sup>68</sup>
- A Missouri Supreme Court in March, 2007 reversed the death penalty for a black defendant for the second time after determining that prosecutors from heavily black St. Louis County had struck potential black jurors in a “racially discriminatory” manner.<sup>69</sup>
- A 2004-05 University of Illinois College of Law study showed 11 percent of the adult population is African-American in Champaign and in Urbana, the African-American population is about 15 percent. But at the county courthouse serving this area, the jury pools on average are about 6 percent African American. For example, of 17 observed jury trials in a pilot observation period in which defendants were African-American men, only 4 African-American men and 10 African-American women jurors (out of 252 jurors and alternates for each jury) were seated. Nine other African-American potential jurors were excused in the jury selection of those trials.<sup>70</sup>

***Since the 1980s, studies have consistently shown that African Americans are more likely to be sentenced to death than are whites who committed similar crimes.***

- The classic 1983 study by University of Iowa professor and statistician David Baldus examined Georgia’s death penalty system. It found that prosecutors sought the death

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<sup>67</sup> Personal communication with Brandeis University Professor, Jeffrey Abramson. March 27, 2007. Abramson concluded: “Metaphorically speaking, there has to be a statute of limitations on how long a District can lament the undesirability of the under-representation of minorities in its jury pools without feeling compelled to act with imagination to do better.” Abramson’s full report is available at <http://pacer.mad.uscourts.gov/dc/opinions/gertner/pdf/greenjuryvenire.pdf>.

<sup>68</sup> Richard Bourke, *In Louisiana’s Most Notoriously Racist Parish, Prosecutors are Excluding African-Americans From Serving on Juries*, (Periodical name?) September 23, 2003.

<sup>69</sup> Robert Patrick, *Death Penalty for man is again rejected*, ST. LOUIS POST DISPATCH, March 21, 2007, at 1. Patrick reports: Both cases involved the same defendant, Vincent McFadden, 26, but separate death sentences were recommended by separate juries for separate murders. Assistant Public Defender Janet M. Thompson, who argued the case, said the decision, announced Tuesday, reflects a pattern of excluding blacks. She said her office has unsuccessfully sought data from judges on the rate at which blacks are excluded in St. Louis County juries, and is now calling for lawyers to create their own tracking system.”

<sup>70</sup> REPORT ON THE 2004-2005 PILOT PHASE OF THE CHAMPAIGN COUNTY COURTWATCHING PROJECT: A COLLABORATION OF THE LEAGUE OF WOMEN VOTERS OF CHAMPAIGN COUNTY AND THE UNIVERSITY OF ILLINOIS COLLEGE OF LAW.

- penalty for 70 percent of black defendants when there were white victims, but only 15 percent of the time for black defendants with black victims.<sup>71</sup>
- Blacks in Philadelphia, meanwhile, were four times more likely to get the death penalty than other defendants who committed similar murders.<sup>72</sup>
  - In 96% of the states where there have been reviews of race and the death penalty, there was a pattern of either race-of-victim or race-of-defendant discrimination, or both.<sup>73</sup>
  - 98% of the chief district attorneys in death penalty states are white; only 1% are black.<sup>74</sup>
  - A comprehensive study of the death penalty in North Carolina found that the odds of receiving a death sentence rose by 3.5 times among those defendants whose victims were white.<sup>75</sup>
  - A recent study in California found that those who killed whites were over 3 times more likely to be sentenced to death than those who killed blacks and over 4 times more likely than those who killed Latinos.<sup>76</sup>
  - A recent Stanford study found that male murderers with stereotypically "black-looking" features are more than twice as likely to get the death sentence as lighter-skinned African American defendants found guilty of killing a white person. The relationship between physical appearance and the death sentence disappears, however, when both murderers and their victims are black.<sup>77</sup>

***Blacks are vastly overrepresented in arrests, convictions and imprisonment.***

Blacks, and especially young black men, are disproportionately more likely than other demographic groups to be arrested, convicted and incarcerated. Increasing arrests for drug violations have had a particularly severe impact on this group.

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<sup>71</sup> David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

<sup>72</sup> Equal Justice U.S.A., *How Racism Riddles the U.S. Death Penalty*, available at [http://ejusa.org/?moratorium\\_now/broch\\_race.html](http://ejusa.org/?moratorium_now/broch_race.html).

<sup>73</sup> David C. Baldus et al., *Race Discrimination in America's Capital Punishment System since Furman v. Georgia: The Evidence of Race Disparities and the Record of Our Courts and Legislatures in Addressing the Issue*, REPORT TO THE AMERICAN BAR ASSOCIATION SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES (1997).

<sup>74</sup> Jeffrey Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL LAW REV. 1811 (1998).

<sup>75</sup> John C. Boger and Isaac Unah, RACE AND THE DEATH PENALTY IN NORTH CAROLINA: AN EMPIRICAL ANALYSIS. INITIAL FINDINGS. University of North Carolina. (April 16, 2001).

<sup>76</sup> Glenn Pierce and Michael Radalet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, SANTA CLARA LAW REVIEW 46 1-47 (2005).

<sup>77</sup> J.L. Eberhardt, P.G. Davies, V.J. Purdie-Vaughns & S.L. Johnson, *Looking deathworthy: Perceived stereotypicality of Black defendants predicts capital-sentencing outcomes*, PSYCHOLOGICAL SCIENCE 17, 383-386 (2006).

- For those aged 25-29, 8.1 percent of all Black males were in prison, compared with 2.6 percent of Latino males and 1.1 percent of white males.<sup>78</sup>
- Between 1990 and 2005, the arrests for drug violations in the U.S. increased by 69 percent.<sup>79</sup>
- New mandatory sentencing laws for crack cocaine offenses have led to long prison terms for relatively low level offenders and have particularly affected Blacks. More than 80 percent of people charged with crack cocaine offenses are black.<sup>80</sup> They receive much stiffer sentences than those convicted of powder cocaine offenses, who are less likely to be black.<sup>81</sup>
- Due in part to differences in drug sentencing, the rate of incarceration for black males was more than six times the rate for white males. The rate of incarceration for black men was more than 2.5 times the Latino rate in 2005.<sup>82</sup>
- Blacks are not only over-represented in the prison population, but also among death row inmates. As of Oct. 1, 2006, of the 3,344 people on death row, 4 percent were white, 42 percent black, and 11 percent Latino.<sup>83</sup>
- According to the Death Penalty Information Center, 123 people have been released from death row with evidence of their innocence since 1973; 62 of whom were black and 12 Latino.<sup>84</sup>

The differences in rates of incarceration by race have myriad causes. However, the connection of incarceration, low educational attainment and dropping out of high school is strong.

- Among African American men born between 1965 and 1969, 22 percent had prison records by 1999, compared to 3 percent of white men.<sup>85</sup>
- Among high school dropouts, more than half of African American men born between 1965 and 1969 had a prison record by 1999, compared with 13 percent of white male dropouts. Black men in this age cohort were twice as likely to have been in prison by age

<sup>78</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICES STATISTICS BULLETIN, PRISONERS IN 2005 (November 2006, revised January 18, 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>.

<sup>79</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES, ANNUAL, available at <http://www.ojp.usdoj.gov/bjs/dcf/tables/arttot.htm>.

<sup>80</sup> UNITED STATES SENTENCING COMMISSION, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, TABLE 34 (2006).

<sup>81</sup> For example, see The Sentencing Project, Washington D.C., *Crack Cocaine Sentencing Policy: Unjustifiable and Unreasonable*, available at [http://www.sentencingproject.org/Admin/Documents/publications/dp\\_cc\\_sentencingpolicy.pdf](http://www.sentencingproject.org/Admin/Documents/publications/dp_cc_sentencingpolicy.pdf).

<sup>82</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PRISON STATISTICS, available at <http://www.ojp.usdoj.gov/bjs/prisons.htm>.

<sup>83</sup> *Death Row U.S.A. Fall 2006*, NAACP Legal Defense and Educational Fund Quarterly Report (2006), available at [http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Fall\\_2006.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Fall_2006.pdf).

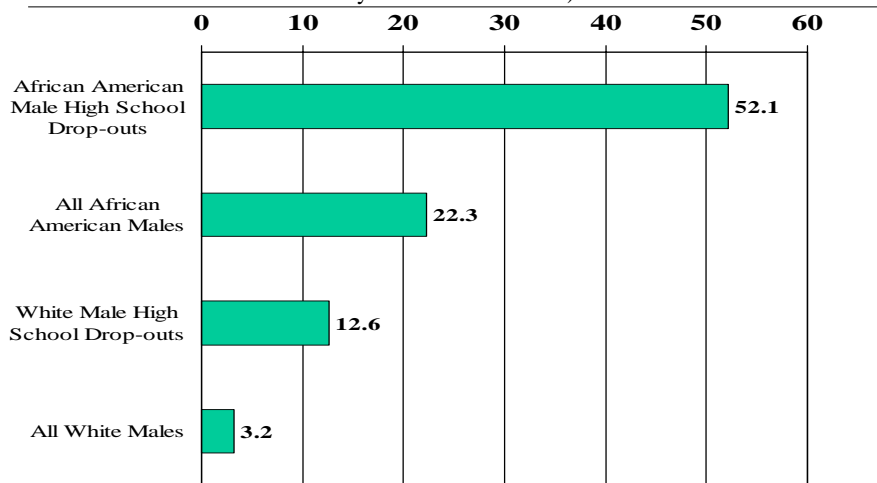
<sup>84</sup> *Exonerations by Race*, Death Penalty Information Center (2007), available at <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6#race>.

<sup>85</sup> B. Western, V. Schiraldi & J. Ziedenberg, *Education and Incarceration*, Justice Policy Institute, Washington, D.C. (2003), available at [http://www.soros.org/initiatives/justice/articles\\_publications/publications/education\\_incarceration\\_20030828/EducationIncarceration1.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/education_incarceration_20030828/EducationIncarceration1.pdf).

34 (22 percent) as they were to have attained a bachelors' degree (13 percent). In contrast, the share of white men to have been incarcerated (3 percent) was a just a tenth of the share with a bachelors' degree.”<sup>86</sup>

### Dropping Out Strongly Associated With Having Prison Record, Especially for African American Men

(Percentage of Men Born 1965-69 (Age 30-34) With Prison Records (in 1999),  
by Race and Education)



Source: Western, Bruce, Pettit, Becky, and Guetskow, Josh. Black Economic Progress in the Era of Mass Imprisonment. In *Collateral Damage: The Social Cost of Mass Incarceration*, edited by Meda Chesney-Lind and Marc Mauer. New York: Free Press. 2002.

***The 2006 Military Commissions Act suspended the right of habeas corpus for non-citizens detained as “enemy combatants” or waiting a possible determination as an “enemy combatant.”***

Just as the Supreme Court ruled that it did not have jurisdiction in Dred Scott’s case because his African heritage excluded him from citizenship, a new group of potential defendants have recently been denied the right of habeas corpus through the Military Commissions Act of 2006.

According to this act, “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”<sup>87</sup>

These aliens would include both undocumented and legal immigrants, the vast majority of whom are people of color. Instead, these defendants would have access only to military tribunals. A number of legal scholars and members of Congress have challenged the new law as a violation of the Constitutional provision that the right to challenge detention "shall not be suspended" except in cases of "rebellion or invasion."

### **QUESTIONS TO CONSIDER**

<sup>86</sup> Ibid.

<sup>87</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_public\\_laws&docid=f:publ366.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ366.109.pdf).

In reviewing the data, it is impossible to ignore the ubiquitous racial disparities that infect the criminal justice system in the United States. In the coming year and beyond, CHHIRJ will grapple with and seek answers to the following sorts of questions: 1) Post-*Batson*, blacks are still underrepresented on juries. What are the myriad causes and practical effects of such underrepresentation? 2) What alternative selection plans or monitoring mechanisms might reverse the trend of black under-representation on juries? 3) What can new and emerging research from social psychology and psychology teach us about the ways in which unconscious racial bias and stereotyping contribute to decisions powerful, discretionary actors make within the criminal justice system? 4) How might new understandings from such research lead to better informed criminal justice policies and practices from arrest to sentencing? 5) What kinds of data collection -- ie; information on peremptory strikes, the racial effects of mandatory drug laws -- can best document trends related to race and criminal justice? 6) How does the experience of Latinos in the criminal justice system compare with the experience of African Americans? 7) Given the strong link between incarceration and dropping out, how might officials from juvenile justice systems and educators construct programs designed to keep children in school and away from crime? 8) Some advocates have called for a system of “redistributive justice” or “justice reinvestment” in communities most beset by violent crime. In other words, money that would have been spent on criminal justice might be allocated to a single block or neighborhood. How might such a model be constructed? What combination of education, recreation, job training and public safety programs might it include?

## **WORK, SERVICE & CITIZENSHIP**

In a free market economy, work has always been one of the primary ways a person defines his or her role as a member of the larger collective. Citizenship does not grant a “right to work” or even specific rights as a worker. However, the high premium we place upon the value of “hard work” cannot be understated. This is a culturally constructed value that shapes our judgments about who is a good citizen -- or member -- and who is not. It feeds into decisions and judgments about who “deserves” citizenship and who does not. Current debates over immigration, for example, center on questions about who is working, how much, in what fields and to whose benefit and at whose expense? It is no coincidence that the recent most high-profile raids and sweeps resulting in the arrest of illegal immigrants have occurred in workplaces. A review of the current findings related to work and citizenship demonstrate, most of all, that these questions remain prevalent and yet largely unresolved. Partly as a result of these tensions, the life opportunities for millions of people hang in the balance.

We find a particularly stark example of these challenges and ironies in a recent Department of Homeland Security raid on a Massachusetts leather factory that resulted in the arrest of 361 mostly Latino immigrants making vests and backpacks for American soldiers fighting wars touted as means for spreading democracy. Meanwhile, there has been a notable increase in the size of the black middle class in the United States in recent years. However, this positive trend may mask complexities and persistent inequalities in other sectors of the workplace and in opportunities for social mobility.

### ***The unemployment gap between blacks and whites remains wide after 40 years.***

- Unemployment rates for blacks hover around 9 percent. This is more than twice the white unemployment rate.<sup>88</sup>
- Despite some fluctuations, no lasting progress has been made in reducing the black/white unemployment gap in the last four decades.<sup>89</sup>
- In 2006, about three in five black males aged 20 to 24 (not including those in prison or other institutions) were employed. This represents a decline from four decades ago when four in five young black men were employed.<sup>90</sup>

Racial differences in labor force participation have myriad causes related to education, differential work experience, demographics, personal preferences, and the spatial mismatch between job and residential locations. However, blacks especially perceive that discrimination is a factor in their decreased job opportunities. When asked whether there are equal job

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<sup>88</sup> U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY AGE, SEX, AND RACE (2006); see also ANDREW SUM, ET. AL, TRENDS IN BLACK MALE JOBLESSNESS AND YEAR-ROUND IDLENESS: AN EMPLOYMENT CRISIS IS IGNORED (Center for labor Market Studies, Northeastern University). Also, U.S. DEPARTMENT LABOR, BUREAU OF LABOR STATISTICS. 2006. HISTORICAL UNEMPLOYMENT RATES BY RACE. [www.bls.gov](http://www.bls.gov)

<sup>89</sup> Ibid.

<sup>90</sup> U.S. DEPARTMENT LABOR, BUREAU OF LABOR STATISTICS. 2006. EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY AGE, SEX, AND RACE. (2006). Also, Andrew Sum, et al., *Trends in Black Male Joblessness and Year-Round Idleness: An Employment Crisis Ignored*, Center for Labor Market Studies. Northeastern University. (June, 2004).



opportunities for minorities in the United States, 59 percent of whites said yes compared to just 23 percent of blacks and 45 percent of Latinos.<sup>91</sup>

***The earnings gap between whites and blacks persists even after controlling for education and experience.***

The earnings gap between black and white full-time workers remains wide. The earnings gap between white and black women has even increased over the last two and a half decades.

- In 2005, the average black woman working full-time earned 84 percent of the average white woman worker, down from 92 percent in 1979.<sup>92</sup>
- The wages of the average black male working full-time were about 75 percent of the wages earned by white males working full-time, which is about the same ratio as in 1979.<sup>93</sup>
- According to work by economist James P. Smith, the earnings gap between Latino and white men shrinks after controlling for schooling, age, and English-speaking skills. However, the gap between blacks and whites remain even after controlling for education and experience.<sup>94</sup>
- The relatively small number of earners per household also reduces earnings in black families. Almost half of all Asian and Latino households and 43 percent of white households have two or more earners. Only a third of black households do. A fifth of black households have no earners at all.<sup>95</sup>
- Higher unemployment, lower earnings, and fewer relative workers contribute to lower median household incomes for black households. As of 2005, the median household income for blacks was just less than \$31,000 a year, lower than for other major racial and ethnic groups.<sup>96</sup>

***Inequality between racial groups is related not merely to differences in income, but in “wealth and assets” to which homeownership contributes greatly.***

During the last decade, studies on economic inequality have come to focus less upon income differentials and increasingly upon differences in wealth and assets.

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<sup>91</sup> Gallup Organization, Historical poll results on race relations. Accessed online through Gallup Brain on November 12, 2005. Poll taken June 6-25, 2005.

<sup>92</sup> U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2005, REPORT 995 (September, 2005), available at <http://www.bls.gov/cps/cpswom2005.pdf>.

<sup>93</sup> Ibid.

<sup>94</sup> James P. Smith, *Race and Ethnicity in the Labor Market: Trends Over the Short and Long Term in AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES*, VOL. II (Neil J. Smelser, William Julius Wilson & Faith Mitchell eds., National Research Council Washington, D.C., National Academy Press 2001).

<sup>95</sup> U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES: HOUSEHOLDS 2003, TABLE H-12, HOUSEHOLD BY NUMBER OF EARNERS BY MEDIAN AND MEAN INCOME.

<sup>96</sup> U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005 (August 2006).

According to Brandeis University Professor Tom Shapiro, a leading expert on wealth differentials, “The racial wealth gap in 1988 was \$60,980, meaning that the net worth of white households on average was this much larger than it was for African-Americans. By 2002, the “wealth gap” between whites and African Americans had increased to \$82,663.” Generally, Shapiro demonstrates, blacks have about 10 cents in wealth for every dollar of wealth held by whites.<sup>97</sup>

Racial wealth inequalities have significant implications for future generations. The amount of money that will pass between generations over the next half century is the matter of some debate. Boston College researchers, however, estimate conservatively, that \$25 trillion will pass to all heirs from the estates of those age 18 and over as of 1998<sup>98</sup> and whites will clearly receive the vast majority of inheritances, thereby exacerbating existing inequalities.

- A primary form of wealth holding and accumulation for most Americans, especially minorities, is homeownership. In 2002, home equity was 63 percent of total net worth for blacks, 61 percent for Latinos and 38.5 percent for whites.<sup>99</sup>
- Although rising gradually over time, the homeownership rates of blacks have actually fallen over the past two years and are now less than two-thirds the rate of non-Hispanic whites.<sup>100</sup>

Meanwhile, the proliferation of alternative, non-traditional mortgage products allowed more minorities to become homeowners in the last decade. However, what is called subprime lending has put many of these homeowners at risk. Subprime loans are more commonly made to minorities, regardless of their income levels, and are marketed heavily in minority communities. The Center for Responsible Lending estimates that 124,000 black and Latino households became homeowners in 2005 through subprime loans. However, 209,000 black and Latino households who took out subprime loans in that year -- this includes new homes and refinancing -- will lose their homes to foreclosure.<sup>101</sup>

***Undocumented workers who contribute to the economy and pay taxes do not enjoy rights and privileges of citizenship. They currently have few, if any, paths to earn citizenship status. They subsidize many government programs; though also use services such as public schools.***

Dred Scott’s labor, like the labor of all slaves, contributed to the nation’s prosperity. However, this contribution didn’t afford Scott rights or privileges that other members – namely citizens – enjoyed. Today, a significant share of the contemporary workforce -- undocumented workers -- also labor without rights. They may indeed receive financial compensation for their labor, unlike Dred Scott. But while they contribute labor and, research shows, also pay taxes

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<sup>97</sup> THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN-AMERICAN* (Oxford University Press 2004).

<sup>98</sup> John Havens & Paul Schervish, *Why the 41 Trillion Wealth Transfer Estimate is Still valid: A Review of Challenges and Questions*, *THE JOURNAL OF GIFT PLANNING*, January 2003.

<sup>99</sup> Rakesh Kochhar, *The Wealth of Hispanic Households: 1996 to 2002*, Pew Hispanic Center, Washington, D.C. (October 2004).

<sup>100</sup> U.S. CENSUS BUREAU., *HOUSING VACANCIES AND HOMEOWNERSHIP, ANNUAL STATISTICS: 2006 (2007)*, available at <http://www.census.gov/hhes/www/housing/hvs/annual06/ann06t20.html>.

<sup>101</sup> CENTER FOR RESPONSIBLE LENDING ISSUE PAPER NO. 14, *SUBPRIME LENDING IS A NET DRAIN ON HOMEOWNERSHIP* (March 27, 2007), available at <http://www.responsiblelending.org/pdfs/Net-Losership-3-26.pdf>.

(from which they often times do not fully benefit), the nation provides undocumented workers none of the safeguards and protections afforded to citizens.

- In 2005, undocumented workers made up almost one in twenty members of the civilian labor force.
- One in four farm workers is undocumented.
- Seventeen percent of the “cleaning” workforce is undocumented.
- Fourteen percent of construction workers are undocumented.
- Twelve percent of food preparers are undocumented.<sup>102</sup>

Undocumented workers commonly work for low wages (sometimes being cheated of any wages at all) and, research demonstrates, are hesitant to complain because of their fear of deportation.<sup>103</sup>

***Undocumented workers pay taxes without getting benefits and rights most taxpayers get.***

The relationship between taxation, representation and receipt of public services is inextricably tied to citizenship. Indeed, “No Taxation without Representation” was one of the primary justifications for the American Revolution. As discussed earlier, undocumented immigrants receive representation in some ways, since they are included in official U.S. Census Bureau counts that apportion representatives. However, they are not allowed to choose that representation. The cost-benefit relationship of the taxes undocumented workers pay to be public benefits they receive is not straightforward. Contrary to public perception, the undocumented pay many forms of taxes, including sales taxes and property taxes through rents, when applicable. An estimated 50 to 60 percent of undocumented immigrants work for employers who withhold income and Social Security/Medicare taxes from their paychecks.<sup>104</sup>

In some cases, undocumented workers subsidize public programs from which they will never be able to benefit. For example, undocumented workers contribute up to \$7 billion per year<sup>105</sup> to the Social Security Fund but aren’t eligible to receive proceeds from that fund. Further, they are explicitly barred from receiving some public benefits, even if their taxes helped pay for such benefits.

For example, in 1996, the Personal Responsibility and Work Opportunity Reconciliation Act excluded undocumented immigrants from federally funded programs. It provided states the authority to restrict access from even more public benefits. Today, only “qualified aliens” are

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<sup>102</sup> J.S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S. Estimates Based on the March 2005 Current Population Survey*, Pew Hispanic Center (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

<sup>103</sup> See for example, U.S. DEPARTMENT OF JUSTICE, NATIONAL WORKER EXPLOITATION TASKFORCE, available at <http://www.usdoj.gov/crt/crim/wetf/wetf3.html>; see also L.E. FLETCHER, ET. AL., *REBUILDING AFTER KATRINA: A POPULATION-BASED STUDY OF LABOR AND HUMAN RIGHTS IN NEW ORLEANS* (June 2006), available at [http://www.hrcberkeley.org/download/report\\_katrina.pdf](http://www.hrcberkeley.org/download/report_katrina.pdf).

<sup>104</sup> K. Brulliard, *Study: Immigrants Pay Tax Share*, WASHINGTON POST, June 5, 2006, at B1; see also R. Capps, J.S. Passel & M. Fix, *Civic Contributions: Taxes Paid by Immigrants in the Washington, DC, Metropolitan Area*, The Urban Institute (May 2006).

<sup>105</sup> E. Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, NEW YORK TIMES, April 5, 2005, available at <http://www.nytimes.com/2005/04/05/business/05immigration.html?ex=1270353600&en=78c87ac4641dc383&ei=5090&>.

eligible for federally funded programs. However, in the United States, schools must provide resident children an education regardless of immigrant status.<sup>106</sup>

Under the 1996 Act, undocumented immigrants are not eligible for the following federal programs: Food Stamps, Supplemental Security Income (SSI), Earned Income Tax Credit (EITC), Temporary Assistance to Needy Families (TANF), Title IV Federal Student Loans, Medicare/Medicaid (except for Emergency Medicaid) and State Children's Health Insurance Program (SCHIP).

***The popular notion that immigrants negatively affect the employment prospects of citizens is not borne out by research. However, the question of immigrants' impact upon lower-wage immigrant workers and upon black low-wage workers in particular remains unsettled, in part because it is difficult to establish a direct relationship between immigration rates and wages.***

Most researchers agree that, on the whole, immigration provides a net benefit to the nation's economy.<sup>107</sup> Reviews of the literature on the effect of immigration on low-wage workers -- blacks in particular -- fail to settle the hotly contested question of whether, on the whole, black workers have been hurt by immigration. It might seem logical that since immigrants do increase the supply of labor, the wages of native workers should in turn go down. However, scholars warn that the equation is far more complicated and multivariate than this. In fact, several rigorous studies actually show no effect or only weak negative effects of immigration on low-skilled workers.<sup>108</sup> One oft-quoted study by Harvard economist George Borjas found immigration was associated with a 3 and 9 percent wage decline for native workers, depending upon education level.<sup>109</sup> Economists and other warn of the variation in effects across the country, depending on the size of the immigrant population, the availability of low-wage jobs and other variables. Meanwhile, a 2006 study from the American Immigration Law Foundation shows an actual net benefit to native workers in general and only a 1 percent decline in real yearly wages of native born workers who do not have a high school diploma.<sup>110</sup>

After considering recent evidence, the Migration Policy Institute concludes: "In essence, the literature indicates that the impact of immigration on native workers is an issue that is still up for debate, perhaps now more than ever. . . Some researchers have found divergent, large

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<sup>106</sup> Plyer v. Doe, 457 U.S. 202 (1982). In this 5 to 4 decision, the U.S. Supreme Court struck down a Texas statute that had denied funding for the public education of children who had not entered the country legally.

<sup>107</sup> DORIS MEISSNER, ET. AL., IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER, MIGRATION POLICY INSTITUTE (2006); see also Tamar Jacoby, *Immigrant Nation*, FOREIGN AFFAIRS, November/December 2006; see also Roger Lowenstein, *The Immigration Equation*, THE NEW YORK TIMES MAGAZINE, July 9, 2006, at 38.

<sup>108</sup> LINDA LEVINE, IMMIGRATION: THE EFFECTS ON NATIVE BORN WORKERS. WASHINGTON, D.C.: CONGRESSIONAL RESEARCH SERVICE (March 28, 2006); Giovanni Peri, *Rethinking The Effects of Immigration on Wages: New Data and Analysis from 1990 – 2004*, 5 IMMIGRATION POLICY CENTER, ISSUE 8.

<sup>109</sup> George J. Borjas, *The Labor Demand Curve is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, QUARTERLY JOURNAL OF ECONOMICS 118(4), November 2003, Table IX, at 1369.

<sup>110</sup> GIOVANNI PERI, RETHINKING THE EFFECTS OF IMMIGRATION ON WAGES: NEW DATA AND ANALYSIS FROM 1990-2004. (Washington, D.C. Immigration Policy Center, The American Immigration Law Foundation, October 2006). Peri concludes: "It is very hard to claim that immigration has caused a significant deterioration in the wages of native-born workers over the past 15 years. Quite the opposite, in fact. Because immigrants stimulate investment, have skill sets that complement those of natives and do not compete for the same jobs as most natives, immigration has increased the average wages of all native-born workers except the small share who do not have a high-school diploma. Even for this latter group, the decline in wages resulting from immigration is relatively minor." See also, GIANMARCO I.P. OTTAVIANO & GIOVANNI PERI, RETHINKING THE GAINS FOR IMMIGRATION: THEORY AND EVIDENCE FROM THE U.S. (Working Paper No. 11672) (Cambridge, MA, National Bureau of Economic Research, October 2005).

negative, small negative to non-existent, and positive impacts from immigration on native relative wages, even among the most vulnerable populations...”<sup>111</sup>

***Thirty-thousand non-citizens serve in our armed forces. Congress allows non-citizen, legal residents to serve in the military.***

The relationship between citizenship and military service is revealed with particular clarity in regards to naturalized citizens. The Oath of Citizenship for those naturalizing says: “. . . I will bear arms on behalf of the United States when required by law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law. . .”

Citizenship, however, isn't a requirement for enlistment. About 30,000 non-citizens make up about 2 percent of the active-duty force.”<sup>112</sup>

- A July 2002 executive order made non-citizen members of the armed forces eligible for expedited US citizenship.<sup>113</sup>
- Since then, more than 13,000 foreign-born members of the armed forces applied for citizenship.<sup>114</sup>
- About 4,600 foreign-born service members have since been granted citizenship.<sup>115</sup>
- In the last six years, about 100 non-citizens died in Iraq and Afghanistan combined.<sup>116</sup>

The use of non-citizens in the military isn't a new practice. In 2005, Max Boot of the Council on Foreign Relations wrote: “During the Civil War, at least 20 percent of Union soldiers were immigrants, and many of them had just stepped off the boat before donning a blue uniform. There were even entire units, like the 15th Wisconsin Volunteer Infantry [the Scandinavian Regiment] and General Louis Blenker's German Division, where English was hardly spoken.”<sup>117</sup>

Almost 60 years ago, President Truman signed Executive Order 9981. It declared “equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin.”<sup>118</sup> The military grew into one of the most integrated institutions in the nation. Communities surrounding military bases became some of the most racially and ethnically diverse municipalities.

- Despite some decline in share in recent years, Blacks, in 2002, were over-represented in the military. One in five enlisted males and one in three enlisted females was Black. (About one in eight civilians between the ages of 18 and 44 are Black).

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<sup>111</sup> Doris Meissner, et. al, *Immigration and America's Future: A New Chapter*. The Independent Task Force on Immigration and America's Future. The Migration Policy Institute. (2006).

<sup>112</sup> All data in this section from: B. Bender, *Military Considers Recruiting Foreigners*, BOSTON GLOBE, December 26, 2006.

<sup>113</sup> B. Bender. December 26, 2006. *Military Considers Recruiting Foreigners*. BOSTON GLOBE. A1.

<sup>114</sup> L. Barker and J. Batalova, *The Foreign Born in the Armed Services*, Washington, D.C. Migration Policy Institute. (January, 2007).

<sup>115</sup> Id. Bender.

<sup>116</sup> Id. Bender.

<sup>117</sup> Max Boot, *Uncle Sam Wants Tu*, THE LOS ANGELES TIMES, February 24, 2005.

<sup>118</sup> Executive Order 9981(July 26, 1948), available at <http://www.trumanlibrary.org/9981a.htm>.

- Latinos, in part because of their relatively younger overall population, are underrepresented.
- While black enlistment declines, the share of Latinos in the armed services is increasing. In 1985, for example, Latinos made up just 5 percent of the Marine Corps. By 2002, that share had increased to nearly 15 percent.<sup>119</sup>

### **QUESTIONS TO CONSIDER**

The multicultural realities of our nation, the history of racial discrimination against African Americans and the increasingly competitive global economy lead us to a host of questions with which CHHIRJ will grapple in the coming year and beyond: 1) Does proof of having worked hard alone justify provision of a path to citizenship? 2) Do citizens deserve higher pay or more work opportunities than non-citizens? 3) Should proof of past work be a prerequisite to citizenship? 4) What is the relationship between immigration and opportunities for blacks in search of lower-wage work in various parts of the nation? 5) To the extent that African American citizens have been displaced by non-citizens, especially in lower-wage jobs, what role does such displacement play in tensions between African American and Latino groups? 6) How might scholars, advocates and the faith community work to improve relationships and understanding between Latinos and blacks, especially around work-related, economic issues? 7) What are the variables, not related to immigration, that contribute to the declining labor force power of African Americans? 8) What are some effective alternative lending mechanisms that might be developed for higher-risk borrowers and for blacks and Latinos who generally have been hurt financially by subprime mortgage lenders? 9) How can we best incorporate knowledge about the importance of “wealth and assets” as opposed to “income” into scholarship and studies about racial inequalities in other areas of society? 10) Do immigrants who enlist in the military deserve automatic citizenship?

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<sup>119</sup> D.R. & M.W. Segal, *America’s Military Population*, POPULATION BULLETIN, December 2004, available at <http://www.prb.org/pdf04/59.4AmericanMilitary.pdf>.

## PUBLIC SCHOOLS, SOCIALIZATION AND CITIZENSHIP

Since the earliest days of our democracy, colonial leaders, reformers, jurists and elected representatives viewed schools as important training grounds for the duties of citizenship. During the common schools movement of the 19<sup>th</sup> century, reformers explicitly stated that one goal of schools was to perpetuate the values of American democracy and socialize young people, especially immigrants, toward a common American identity.

In 1848, Horace Mann, the leader of the common school movement said: "*A republican form of government, without intelligence in the people, must be, on a vast scale, what a mad-house, without superintendent or keepers, would be on a small one;--the despotism of a few succeeded by universal anarchy, and anarchy by despotism, with no change but from bad to worse.*"<sup>120</sup>

How well a child fulfills basic functions of citizenship, including informed voting, jury service and other forms of political participation, hinges in large part upon his or her preparation in school. If we agree that work is, too, an expression or function of membership/citizenship in society, the role of school in our society grows still larger. If only for these reasons, the long-standing, vast inequalities in educational opportunities between children of color and white children and between economically disadvantaged children and affluent children should raise significant concern. Such inequalities of opportunity challenge the country's vision of itself as a fair nation committed to equal chances. The numbers also beg the question of whether we, as a society, are adequately equipping schools and their students with the skills and practice necessary for citizenship in an increasingly complex, diverse United States.

***The U.S. Constitution does not guarantee a right to an education nor an equal educational opportunity. It is up to states to provide those rights. However, our jurisprudence and, too, our common practice has implied at least a right to education.***

The 1973 Supreme Court decision dealing with school funding, *San Antonio School District v. Rodriguez*, held that "*education is not among the rights afforded explicit protection under the federal constitution. . . Nor, . . . do we find any basis for saying that is implicitly so protected.*"<sup>121</sup> Still, our long-standing, broad support for public schools, compulsory attendance legislation, and educational obligations stated in state constitutions, indicate that education, at least in the basic sense, is assured for children who are U.S. citizens. In 1982, *Plyer v. Doe* secured that right for immigrant children in the United States who may have come to the country illegally.

Public schools in the United States have long been the setting for the nation's greatest shames and its greatest triumphs. During slavery, most children of slaves and slave children were denied education. Later, children in the South were intentionally segregated from white children and often attended school in abysmal conditions. Schools consciously stripped Native American children of their identities. Schools, too, have been the backdrop for several major civil rights advances.

In the most famous of these, the 1954 *Brown v. Board of Education* decision, a unanimous U.S. Supreme Court declared:

“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great

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<sup>120</sup> H. MANN, REPORT NO. 12 OF THE MASSACHUSETTS SCHOOL BOARD (1848), *cited in* THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN (Lawrence A. Cremin ed., 1957).

<sup>121</sup> *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>122,</sup>

***Racial and ethnic inequalities, exacerbated by racial and economic segregation, are defining characteristics of the public education system in the United States. While these conditions stem from a variety of causes, trends demonstrate that both inequality and segregation are deeply entrenched. Research suggests, too, that these conditions contribute to diminished life chances of millions of children in the United States.***

- Public schools, in general, are becoming more diverse. At the same time, however, black and Latino students in recent years have, on average, experienced increasing segregation in their schools.<sup>123</sup>
- The public schools in 2003-04 were 17 percent black, 19 percent Latino and 58 percent white.<sup>124</sup>
- The average black child in 2003 attended a school that was 53 percent black.<sup>125</sup>
- The average Latino child attended a school that was 55 percent Latino.<sup>126</sup>
- The average white child attended a school that was 78 percent white.<sup>127</sup>
- In 2003, a typical Black or Latino student attended a school where nearly half the students were poor. This is more than twice the share of poverty found in the school of a typical white student.<sup>128</sup>

In recent years, federal court decisions closed off routes for achieving desegregated schools.<sup>129</sup> In short, several decisions made it easier for school districts that had been under mandatory desegregation orders to get out from under such orders. This meant that many school districts, especially in the South, would simply return to rates of segregation that were similar to those that had existed before *Brown v. Board of Education*. Other school districts responded differently by developing voluntary plans that provided parents choices about where to send their

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<sup>122</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>123</sup> G. ORFIELD & C. LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION (The Civil Rights Project at Harvard University, 2006), available at [http://www.civilrightsproject.harvard.edu/research/deseg/Racial\\_Transformation.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? (The Civil Rights Project at Harvard, January 16, 2003).

<sup>129</sup> For an overview and discussion of decisions from the late 1980s through the 1990s, see GARY ORFIELD & SUSAN EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (The New Press 1996).



children to school. In order to avoid segregation, officials would, in some rare instances, deny a student's first choice of school if his or her enrollment would upset a racial balance. At this writing, the Supreme Court is considering the constitutionality of such plans in a pair of cases, one from Louisville and one from Seattle. The High Court will deliver a ruling as early as this spring. At issue is whether or not school districts may employ policies specifically designed to avoid racial segregation and create racially diverse schools.

Since the 1960s, social scientists have known about the problems that concentrated poverty and segregation introduce for schools and the students inside of them. Research shows that the chances of school failure are disproportionately high for children who live in poverty.<sup>130</sup> But the chances of failing and dropping out of school are even higher for poor children in high-poverty schools. Generally, high-poverty schools employ less qualified teachers, have higher rates of teacher turnover and register higher rates of suspensions and expulsions. By the time a student reaches high school in such a system, it is likely that even if he were qualified, he still would not be offered higher level Advanced Placement courses that are routine offerings in middle-class schools. In many urban districts that educate disproportionate shares of children of color, graduation rates commonly sink to the 30 to 40 percent range.<sup>131</sup>

Similarly, within the social science community, a research consensus has developed on the educational benefits of racially diverse learning environments.<sup>132</sup>

***Generally, school funding schemes disproportionately disadvantage low-income and racial minority students.***

According to the Washington-based Education Trust, \$908 less per student of state and local funds is spent on students in districts that enroll the most students of color compared to districts educate the fewest students of color.<sup>133</sup> Even within districts, less money is spent in schools with the most disadvantaged students, both in terms of teacher salaries and unrestricted funds.<sup>134</sup> As the Education Trust notes, Federal Title I funds are allocated, in part, upon the average per pupil spending in each state. This means high-spending states receive more funds per poor child than low-spending states. This, of course, serves to exacerbate existing inequalities. The 2006 Education Trust report showed that the ten highest-spending states spent "an average of more than 50 percent more dollars per pupil than the lowest spending ten states." The lowest-spending states tended to be clustered in the South, Southwest and the West and enroll a disproportionate share of the country's disadvantaged children.

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130 See, for example, RICHARD ROTHSTEIN, *CLASS AND SCHOOLS*, (The Economic Policy Institute May, 2004); also David C. Berliner, *Our Impoverished View of Educational Research*, 108 *TEACHERS COLLEGE RECORD* N6, 949-995 (June 2006); Edward B. Reeves, *Disentangling the Effects of Nonmetro Location and Student Poverty on School Performance/Improvement: Implications for Equitable Excellence in Kentucky Public Schools*, 18 *JOURNAL OF RURAL EDUCATION* N2, 17-30 (Spring 2003).

<sup>131</sup> *Id.*, Rothstein, "CLASS AND SCHOOLS..." Christopher Swanson, *Projections of 2003-04 High School Graduates: Supplemental Analyses Based on findings from Who Graduates? Who Doesn't?*, The Urban Institute (2004). Detroit: 21.7 percent; Baltimore City, Maryland: 38.5 percent; New York City: 38.9 percent; Milwaukee, 43.1 percent; Cleveland, 43.8 percent. Los Angeles, 44.2 percent.

<sup>132</sup> Frances E. Aboud, *Children and Prejudice*, in *BRIEF OF THE AMERICAN EDUCATIONAL RESEARCH ASSOCIATION*, (1988); Heidi McGlothlin & Melanie Killen, *Intergroup Attitudes of European American Children Attending Ethnically Homogeneous Schools*, 77 *CHILD DEV.* 1375 (2006); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 *J. PERSONALITY & SOC. PSYCHOL.* 751 (2006); also, Kathryn M. Borman, *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41 *AM. EDUC. RES. J.* 601 (2004).

<sup>133</sup> All school funding data drawn from The Education Trust, *Funding Gaps: 2006* (2006), available at <http://www.edtrust.org/NR/rdonlyres/CDEF9403-5A75-437E-93FF-EBF1174181FB/0/FundingGap2006.pdf>.

<sup>134</sup> *Ibid.*

***In recent years, schools have placed a declining emphasis upon civics curriculum. This is especially true in high-poverty schools.***

According to the Center for Civics Education, the amount of time devoted to civics education has declined, perhaps even more so for schools with high shares of nonnative English speakers and disadvantaged students. The Center suggests that civics has been a casualty as schools increase emphasis on reading and math in response to high stakes tests.

- In 1998, just more than a third of elementary school teachers reported covering civic education–related subjects regularly.<sup>135</sup>
- Most high schools only teach one civics class, usually “American Government” taught in twelfth grade, in contrast to the three classes that were typically taught until the 1960s.<sup>136</sup>
- Waiting until 12<sup>th</sup> grade to offer this class presents yet another problem for black and Latino youth, whose relatively higher dropout rates mean they might never even reach 12<sup>th</sup> grade.
- A recent study of seniors in California found that just 40 percent of non-college-bound students received instruction in government, law, and history, compared to about 75 percent of students who intended to attend four-year colleges.<sup>137</sup>
- This study showed that non-college-bound students were also 30 percent less likely than college-bound students to discuss social problems or current events, 20 percent less likely to take part in service learning, and 40 percent less likely to make speeches.
- Given the strong correlation of race and college preparation placement, it is likely that these studies reveal disparate access to civics education by race and ethnicity.
- 1998 results of the National Assessment of Educational Progress (NAEP) for civics (the most recent data available) show that 59 percent of black 12 graders and 55 percent of Hispanic 12 graders scored “below basic.”<sup>138</sup>
- Only 27 percent of whites and 37 percent of Asians scored below basic on the civics portion of the 1998 NAEP.<sup>139</sup>

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<sup>135</sup> S. Sole & T. McConnell, *A Campaign to Promote Civic Education: A Model of How to Get Education for Democracy Back into U.S. Classrooms in All Fifty States*, Center for Civic Education. (Paper presented at the International Conference on School Reform: Research and Practice, Vancouver, Canada December 13, 2006), available at <http://www.civiced.org/pdfs/research/paper1206soule.pdf> (citing data from 1998 National Assessment of Educational Progress in Civics, administered by the National Assessment Governing Board).

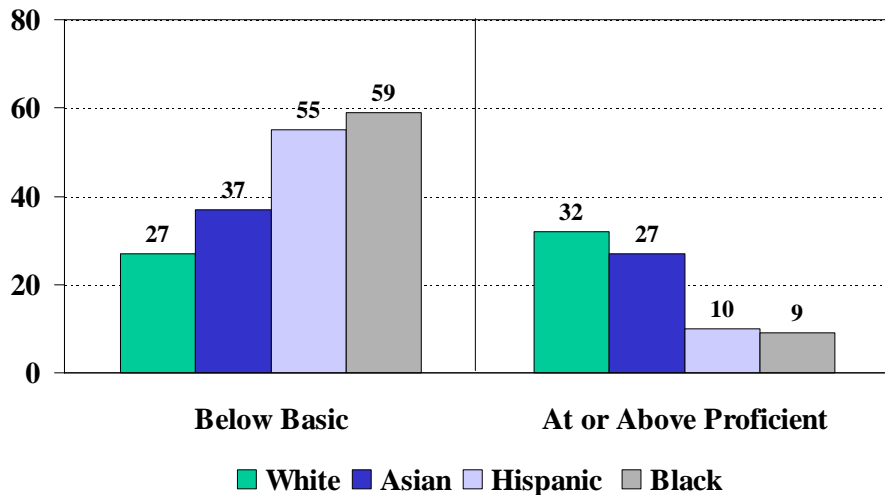
<sup>136</sup> Ibid. (citing State Citizenship Education Policies 2006, National Center for Learning and Citizenship at the Education Commission of the States, available at <http://www.ecs.org/nclc>).

<sup>137</sup> J. KAHNE, THE CALIFORNIA SURVEY OF CIVIC EDUCATION (2005), available at [http://www.cms-ca.org/civic\\_survey\\_final.pdf](http://www.cms-ca.org/civic_survey_final.pdf) (report commissioned by the California Campaign for the Civic Mission of Schools by the Constitutional Rights Foundation).

<sup>138</sup> U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS CIVICS ASSESSMENT (1998), available at <http://nces.ed.gov/nationsreportcard/civics/>.

## Black and Hispanic Students Lag Substantially in Civics Achievement

(Percent of 12<sup>th</sup> Graders Scoring at Each Level: 1998)



Source: National Center for Education Statistics, 1998 NAEP Civics Assessment.

### QUESTIONS TO CONSIDER

In the 2003 Supreme Court decision on affirmative action, *Grutter v. Bollinger*,<sup>140</sup> Justice Sandra Day O’Connor wrote: “*The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.*” At CHHIRJ, we view Justice O’Connor’s words as a call to arms to reduce inequalities that are particularly apparent in our public schools.

A review of the evidence on continuing racial inequalities related to educational opportunity and citizenship could lead to the conclusion that such disparities in K-12 education in a sense make the case for retaining affirmative action at the higher education level. However, post-*Grutter*, affirmative action finds its justification not as a remedial measure, but as one that helps achieve the legitimate interest of creating a diverse learning environment. Given that the Supreme Court may nullify the means used to achieve diversity in the K-12 level and given the changing demographics of our society and the seemingly decreasing emphasis schools place upon citizenship preparation, CHHIRJ hopes to explore the following questions in the coming year and beyond: 1) In an increasingly diverse society and depending on the Supreme Court’s ruling in cases from Seattle and Louisville, what legal mechanisms might exist for school districts to achieve schools that approximate the larger society students will some day join? 2) What other social inequalities, for example in health, recreation, access to safe play areas and pre school access, might advocates, litigators and educators address collectively in an effort to forge a new civil rights agenda focused upon children? 3) What new citizen-related curriculums might educators construct given the changing demographics of our nation? And, what has been the effect of new testing mandates on the teaching of civics? 4) How might officials and scholars from the fields of juvenile justice and education work together and craft preventative programs

<sup>139</sup> Ibid.

<sup>140</sup> *Grutter v. Bollinger*, 538 U.S. 306 (2003).

that provide students legitimate opportunities that provide an alternative to crime? Where are the most successful models of such programs? Can they be replicated and to what extent? 5) How might housing policies designed to reduce concentrated poverty be constructed, promoted and incorporated with school policies and the agendas of educators and others concerned about equal access and diversity?

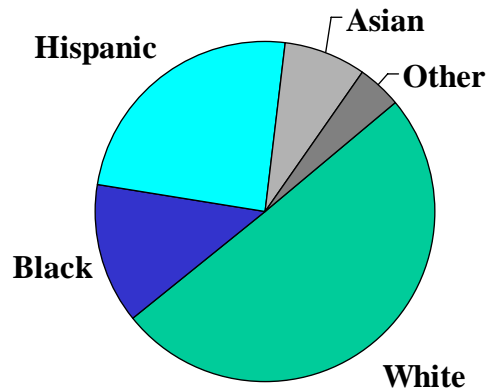
### **Defining Self-Evident Truths for the 21<sup>st</sup> Century**

In closing, we have gathered at Harvard University this weekend -- April 6<sup>th</sup> and 7<sup>th</sup> -- to observe the 150<sup>th</sup> anniversary of *Dred Scott* and to do something more. We hope this report might inspire attendees to view this rich experience not only as a chance for looking back but as an opportunity to take honest stock of the state of citizenship today in our communities, states and nation. This conference takes attendees back in time to observe not only changes we have made for the better but to consider as well whether we might be making similar missteps and omissions in our contemporary politics, discourse and jurisprudence. We may collectively be repulsed by the conclusion the High Court came to 150 years ago in *Dred Scott*. But as this report suggests, the modern parallels with this historic decision are too numerous to ignore. The United States of America may indeed forever be a nation that shifts back and forth between openness and exclusion and between the granting of rights and the removal of rights. We do not expect to resolve the central tension inherent in our society, for perhaps this push and pull exists to ultimately good effect.

However, what we do expect to resolve are questions about what kinds of policies and practices and the nature of jurisprudence we might endorse in order to form a more perfect union. What truths are self-evident in the 21<sup>st</sup> century? We identify many troubling trends in this report -- about inequality, diminished chances for equal citizenship and disenfranchisement. In what direction will such trends be headed in just 50 years at the 200<sup>th</sup> anniversary of *Dred Scott*? Will we choose the status quo or will we find the energy and determination to change course? In less than 50 years, by 2050, our nation will look far different than it does today. How we respond or fail to respond to these coming demographic changes will provide public measure of our commitment to the ideals of equal chances and one nation indivisible.

By 2050, People of Color Will Comprise Half of  
U.S. Population  
(Share of Population)

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Note: Racial groups refer only to non-Hispanic members of those groups. "Other" includes American Indian and Alaska Native, Native Hawaiian and Pacific Islander, and multiracial persons.  
Source: Estimates based on Census 2050 Projections.

This report, like the *Dred Scott* decision, demonstrates that the “we” in the Constitution’s opening, “We The People” and the “self-evident” truths referred to by the Declaration of Independence have forever been subject to debate, correction and negotiation. In the coming year and beyond, we will contribute to one of America’s oldest and most central debates. Through research, community advocacy, legal scholarship and new, creative collaborations with thinkers from a variety of disciplines and with professional backgrounds working in a several types of settings, CHHIRJ will bring more and increasingly diverse voices to the discourse around citizenship.

A year from now, in Spring, 2008, we will convene a major international conference on the state of citizenship in our country. This gathering will provide a forum for original ideas, thorough analysis and practical remedies for the racial and ethnic inequalities that, 150 years after *Dred Scott*, still diminish our ability to live up to our grandest, most noble aspirations – “one nation, indivisible,” “life, liberty and the pursuit of happiness,” “liberty and justice for all.”

E Pluribus Unum



## ...the giving and the taking

### 100 YEARS AGO: (1907)

“...the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feebleminded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended with any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living. . .persons. . .induced or solicited to migrate to this country by offers or promises of employment. . .” *The U.S. Immigration Act of 1907.*

### FIFTY YEARS AGO: (1957)

“The Commission shall – 1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based. 2) study and collect information concerning legal development constituting a denial of equal protection of the laws under the Constitution; and 3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution. – *The Civil Rights Act of 1957.*

### Today: 2006- 2007

“The military tribunals bill signed by President Bush on Tuesday marks the first time the right of habeas corpus has been curtailed by law for millions of people in the United States. . .before. . .(the law) the principle of habeas corpus meant that anyone thrown into jail in the U.S. had a right to ask a judge for a hearing. They also had a right to go free if the government could not show a legal basis for holding them. The Latin term for ‘you have the body’ habeas corpus is considered one of an accused person’s most basic rights. The new law says: ‘No court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined. . .to have been properly detained as an enemy combatant or is awaiting such determination.’ In early drafts, the bill would have cut off habeas corpus only for unlawful combatants held ‘outside the United States’ or at Guantanamo Bay. However, the final version deleted that phrase.” – David Savage, the *Los Angeles Times*.

White House officials have issued a discussion document on immigration that calls for legislation that would grant legal status to illegal immigrants and guest workers, but would not put them on a path to citizenship. – Rachel Swarns, *The New York Times* (March 30, 2007)

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