10. The limits of U.S. racial equality without a Latin American constitutional "right to work" – a thought experiment

Tanya Katerí Hernández

While some might dispute the premise that the United States constitutional model is in theoretical decline, there is very little dispute that its racial equality jurisprudence has significantly narrowed over the last three decades.[1] Anti-discrimination jurisprudence has demonstrated a decided shift to color-blindness and a progression from a desire to narrow the examination of the political meaning of race to a complete disavowal of the social significance of race.[2] Volumes have been expended in theorizing the reasons for the retrenchment in racial equality law that narrowly focuses on intentional discrimination rather than discriminatory impact or cultural meaning,[3] all in the pursuit of a color-blindness that prizes formal equality over substantive equality.[4] For instance, a number of commenta-

[1] *See*, *e.g.*, Stephen Steinberg (1995), *Turning Back: The Retreat from Racial Justice in American Thought and Policy* (Boston: Beacon Press), p. 213 (noting the law's intensifying dissociation from racial justice); Kevin M. Clermont and Stewart J. Schwab (2009), "Employment discrimination plaintiffs in federal court: From bad to worse?", *Harv. L. & Pol'y Rev.*, **3**, 103, 104 (stating that empirical review of employment discrimination cases demonstrates that plaintiffs are disfavored in federal courts).

[2] *See* Tanya Katerí Hernández (1998), "'Multiracial' discourse: Racial classifications in an era of color-blind jurisprudence", *Md. L. Rev.*, **57**, 97, 140 (discussing Supreme Court cases that exemplify the salient jurisprudential move towards color-blindness in educational admissions, voting rights, government business contracting, and the capital sentencing process).

[3] Charles R. Lawrence III (1987), "The id, the ego, and equal protection: Reckoning with unconscious racism", *Stan. L. Rev.*, **39**, 317.

[4] T. Alexander Aleinikoff (1991), "A case for race-consciousness", *Colum. L. Rev.*, **91**, 1060, 1115 (maintaining that color-blind theory has been transformed into serving the ultimate goal of color-blindness as a formality rather than as a means of ending material inequality).

tors view the retrenchment in anti-discrimination law as the result of the 1980s' Reagan-led white backlash against institutions perceived as sympathetic to black interests.[5] Some commentators even view the conservative Supreme Court's majority's seeming hostility to racial equality claims brought by non-whites as emblematic of racism itself[6] and "intentional blindness".[7] The jurisprudential imbalance in deference to white claims of inequality as compared to the suspicion of most non-white claims of inequality[8] is particularly evident in the employment discrimination context.[9]

Yet a comparative law perspective may offer an additional explanation for the constrained U.S. equality jurisprudence that has thus far not been fully considered. Specifically, a comparative assessment of Latin American constitutional frameworks suggests that the lack of a constitutional "Right to Work" as exists in many Latin American contexts (as a worker protection distinct from the U.S. use of the term to refer to the right to be free of compelled union membership), may adversely impact U.S. race jurisprudence. This chapter submits that without a constitutional Right to Work in the U.S., courts may not be adequately focused on the realities of the workplace context with its prevalent racial bias. Indeed, substantive racial equality is not possible without fully considering the vulnerabilities of workers that both exacerbate racial discrimination and impede the ability to make claims of discrimination. The workplace is thus pivotal in actualizing racial equality.[10]

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[5] *See*, *e.g.*, Kimberlé Williams Crenshaw (1988), "Race, reform, and retrenchment: Transformation and legitimation in antidiscrimination law", *Harv. L. Rev.*, **101**, 1331, 1362.

[6] *See*, *e.g.*, David Kairys (1996), "Unexplainable on grounds other than race", *Am. U. L. Rev.*, **45**, 729, 735.

[7] *See* Ian Haney-López (2012), "Intentional blindness", *N. Y. U. L. Rev.*, **87**, 1779, 1861 ("Intentional blindness, not intentional ignorance, more aptly characterizes the racial jurisprudence of the Supreme Court's conservatives. They seem to understand that racism is a pervasive problem, yet oppose the courts and the Constitution to contribute to the solution.").

[8] Vincent Martin Bonventre (2014), "(Part 4–Scalia's Voting) The Supremes' record in racial discrimination cases: Decisional & voting figures for the Roberts Court", New York Court Watcher Blog, 16 March, available at: http://www.newyorkcourtwatcher.com/2014/03/part-4-scalias-voting-supremes-record.html (accessed 20 September 2017) (tracking the Supreme Court conservative majority voting record that demonstrates that only White "reverse discrimination" plaintiffs garner any success in the current application of equality jurisprudence).

[9] Cheryl I. Harris and Kimberly West-Faulcon (2010), "Reading Ricci: Whitening discrimination, racing test fairness", *UCLA L. Rev.*, **58**, 73, 80 (noting that "the paradigmatic victim of race discrimination is now White").

[10] *See* Cynthia Estlund (2003), *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* (Oxford: Oxford University Press).

Moreover, constitutional frameworks often profoundly influence the judicial assessment of employment discrimination contexts.[11] This dynamic has been observed in the United States, and this chapter considers a particular constitutional influence in Latin America – that of the Right to Work.

Specifically, this chapter conducts a thought experiment to consider both the potential benefits of a Right to Work and what its absence may implicate for the United States. To be clear, this inquiry is by no means intended to present empirical proof of the benefits of a Right to Work. Indeed, it would be quite challenging to assert any definitive causality between the textual provision of a Right to Work and its potential for beneficial effects upon jurisprudential analysis or race discrimination claims. However, there is much to be gained from exploring what even the possible influence of the Right to Work provides from a transnational comparison. While many different factors may co-exist, this chapter focuses on the possible role of a Right to Work. Like all thought experiments, the value is not in a definitive "QED" proof of causality, but rather in how constrained contexts can be reconsidered, minds opened, and fresh perspectives contemplated.[12]

This thought experiment is particularly relevant in the context of comparing jurisdictions with similar communities of judges drawn from white elite social spheres which would otherwise suggest a similar cautious reception to claims of racial discrimination. A vast literature confirms that the social status of judges influences their perception of legal claims. It is thus a worthy endeavor to consider what sort of interventions may help to mitigate the adverse effects of white elite social status on the judicial evaluation of discrimination claims.

The chapter proceeds in the following manner. Section I introduces the parameters of the Right to Work set forth in international human rights treaties and Latin American constitutions. Section II explores the potential value of an aspirational constitutional "Right to Work" to racial equality jurisprudence as it exists in Latin America. Section III then examines the U.S. context and the possible harms to racial equality caused by the absence of a constitutional "Right to Work". Section IV considers that without a constitutional Right to Work in the United States, to serve

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[11] George Rutherglen (2010), *Employment Discrimination Law: Visions of Equality in Theory and Doctrine*, 3rd edn (New York: Foundation Press), pp. 4–5.

[12] QED stands for the Latin phrase *quod erat demonstrandum*, meaning "what was to be demonstrated", or, less formally, "thus it has been demonstrated" and is a notation often placed at the end of a mathematical proof to indicate its completion. *See Cambridge Dictionary* at http://dictionary.cambridge.org/us/dictionary/english/qed (accessed 20 September 2017).

as an external judicial prompt about the salience of workplace realities, racial jurisprudence will be adversely subjected to the assessments of many jurists with no personal experience with worker vulnerabilities in racially hierarchical workplaces.

I. THE RIGHT TO WORK

The origins of the Right to Work emanate from the International Human Rights context. Article 23 of the Universal Declaration of Human Rights ("UDHR"), which was enacted in 1948, protects the Right to Work. It states, "Everyone has the Right to Work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."[13] Stemming from this right, the International Labor Organization ("ILO") protects the Right to Work in the Convention Concerning Employment Policy (No. 122), enacted in 1964. "With a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment."[14] The policy ensures that "there is work for all who are available for and seeking work; such work is as productive as possible; [and] there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin".[15]

The ILO further protects the Right to Work in the Employment Policy Recommendation No. 169, enacted in 1984. The recommendation recalls the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), adopted by the United Nations General Assembly in 1966, which "provides for the recognition of inter alia the Right to Work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and for the taking of appropriate steps to achieve progressively the full realisation of, and to safeguard, this right . . . Noting the deterioration of employment opportunities in most

[13] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

[14] International Labour Organization, Convention concerning Employment Policy (ILO No. 122), 569 UNTS 65, preamble, entered into force 15 July 1966.

[15] Id., at Art. 1(2).

industrialised and developing countries and expressing the conviction that poverty, unemployment and inequality of opportunity are unacceptable in terms of humanity and social justice, can provoke social tension and thus create conditions which can endanger peace and prejudice the exercise of the Right to Work, which includes free choice of employment, just and favourable conditions of work and protection against unemployment . . .".[16] Among the General Principles of Employment Policy outlined in the Recommendation is "[t]he promotion of full, productive and freely chosen employment provided for in the Employment Policy Convention".[17] This promotion "should be regarded as the means of achieving in practice the realisation of the Right to Work".[18] The ILO further recommends that "[f]ull recognition by Members of the Right to Work should be linked with the implementation of economic and social policies, the purpose of which is the promotion of full, productive and freely chosen employment."[19]

In summary, the UDHR, ILO Convention 122 and Recommendation 169, and the ICESCR all provide for the Right to Work, free choice of employment, and protection against unemployment. Encompassed in those rights is the right to just and favorable working conditions. "Equitable conditions of work also include the provision of adequate remuneration."[20] "Fair remuneration involves the principle of equal pay for equal work."[21]

These international documents have been influential on employment and labor protections in Latin America.[22] Most Latin American countries have been members of the ILO since it was created in 1919, and as a whole the Latin American region is second only to Western Europe in the record of ratification of ILO conventions.[23] It follows that ILO standards are extensively used in the making of Latin American labor law.[24] Moreover, ratified international treaties and covenants, including ILO conventions, are integrated into the national legal system, and prevail over national

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[16] International Labour Organization, Employment Policy (Supplementary Provisions) Recommendation, R169, Preamble (1984).
[17] Id., at Art. 1.
[18] Id.
[19] Id., at Art. 2.
[20] James Avery Joyce (ed.) (1978), *Human Rights: International Documents*, Vol. 1 (Leiden: Sijthoff & Noordhoff), at p. 584.
[21] Id., at 585.
[22] Arturo S. Bronstein (2010), "Labour law in Latin America: Some recent (and not so recent) trends", *Int'l J. Comp. Lab. L. & Indus. Rel.*, **26**, 17, 19.
[23] Id.
[24] Id., at 20.

laws and regulations whenever a conflict arises between national and international law.[25] "[I]t is not uncommon for national judges to set aside national law and decide on the basis of ratified ILO standards if they hold that the former is in breach of obligations arising out of ratification of these standards."[26] It is also most noteworthy that most if not all Latin American governments are now keen supporters of the ILO Decent Work Agenda.[27]

The U.S. employment-at-will context thus contrasts greatly with the Right to Work constitutions of many Latin American countries.[28] Indeed, within the United States the term "Right to Work" instead refers to protecting "the right of every American to work for a living without being compelled to belong to a union".[29] In the United States, a Right to Work law is one that prohibits the traditional union security devices of the closed shop and union shop. It may be enacted in the form of a constitutional amendment, a statute, or both, and by its terms such a law usually forbids discrimination with respect to employment or continuation of employment on account of membership or non-membership in a labor organization. In addition, it generally contains a clause forbidding contracts between employers and labor unions requiring membership in the union

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[25] Id., at 21.

[26] Id.

[27] Id., at 40. "Putting the Decent Work Agenda into practice is achieved through the implementation of the ILO's four strategic objectives, with gender equality as a crosscutting objective: Creating Jobs – an economy that generates opportunities for investment, entrepreneurship, skills development, job creation and sustainable livelihoods. Guaranteeing rights at work – to obtain recognition and respect for the rights of workers. All workers, and in particular disadvantaged or poor workers, need representation, participation, and laws that work for their interests. Extending social protection – to promote both inclusion and productivity by ensuring that women and men enjoy working conditions that are safe, allow adequate free time and rest, take into account family and social values, provide for adequate compensation in case of lost or reduced income and permit access to adequate healthcare. Promoting social dialogue – Involving strong and independent workers' and employers' organizations is central to increasing productivity, avoiding disputes at work, and building cohesive societies." ILO (2006), "Decent Work for All: UN moves to strengthen global efforts and sustainable development to promote Decent Work for poverty reduction", *World of Work*, **57** (September), at 4, 5, available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/dwcms_080598.pdf (accessed 2 October 2017).

[28] *See* n 39.

[29] National Right to Work Legal Defense and Education Foundation, Inc., "Right to work frequently-asked questions", available at: http://www.nrtw.org/b/rtw_faq.htm (accessed 20 September 2017).

as a condition of employment.[30] States that have enacted Right to Work statutes and constitutional amendments[31] view compulsory unionism in any form – "union", "closed", or "agency" shop – as a contradiction of the Right to Work principle and the fundamental human right that the principle represents.[32] This chapter will not discuss the U.S. refracted version of a Right to Work, but will instead focus upon the international human rights understanding of a Right to Work.

II. THE POTENTIAL VALUE OF AN ASPIRATIONAL CONSTITUTIONAL "RIGHT TO WORK" TO RACIAL EQUALITY JURISPRUDENCE

In drawing the contrast between the United States and Latin America, I do not mean to suggest that the material equality of non-whites is starkly different across the two regions. In fact, many socioeconomic indicators suggest that both regions continue to struggle with large-scale material racial inequality.[33] Rather, the importance in the contrast to the Latin American Right to Work context lies in how the existence of a constitutional Right to Work may prime judges to consider the realities of the workplace when evaluating labor law claims given the constitutional mandate for the state to ensure just and favorable conditions of work and protection against unemployment. Operating under the constitutional

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[30] Michael F. Alberti (2003), "Validity, construction, and application of state right-to-work provisions", *A.L.R.5th 243*, **105**, 11.

[31] *See* Ala. Code § 25-7-1; Ariz. Const. art. XXV; Ark. Stat. Ann. §§ 11-3-301 through 11-3-304; Fla. Stat. Ann. § 447.01; G.A. Code Ann. § 34-6-6 to 28; Idaho Code §§ 44-2001 through 44-2011; Iowa Code Ann. §§ 20.8, 20.10 and 731.1 through 731.8; Kan. Stat. Ann. § 44-831; La. Rev. Stat. Ann. §§ 23:881 through 889; Miss. Code Ann. § 71-1-47; Mich. Act No. 349; Neb. Rev. Stat. §§ 48-217 through 219, 824; Nev. Rev. Stat. §§ 613.130, 613.230, 613.250 through 613.300; N.C. Gen. Stat. §§ 95-78 to 84; N.D. Cent. Code §§ 34.01.14 – 14.1; Okla. Code § 51-208; S.C. Code Ann. §§ 41-7-10 through 90; S.D. Codified Laws §§ 60-8-3 through 8-8; Tenn. Code Ann. §§ 50-1-201 through 204; Texas Codes Ann. Title 3 §§ 101.003, 004, 052, 053, 102, 111, 121, 122, 123, 124; Utah Code Ann. §§ 34-34-1 through 34-17; Va. Code Ann. §§ 40.1-58 through 40.1-69; Wyo. Stat. Ann. §§ 27-7-108 through 115.

[32] National Right to Work Legal Defense and Education Foundation, Inc. (n 29).

[33] *See*, *e.g.*, Tanya Katerí Hernández (2013), *Racial Subordination: The Role of the State, Customary Law, and the New Civil Rights Response* (Cambridge: Cambridge University Press); Tanya Katerí Hernández (2013), *La Subordinación racial en Latinoamérica* (Bogotá: Siglo del Hombre).

mandate of a Right to Work, signals the salience of workplace realities. Thus, while the "Right to Work" does not literally guarantee every citizen a job let alone a job free of any uncomfortable circumstances, the constitutional articulation of the aspiration for equitable workplaces has value.

Indeed, Mauricio Garcia-Villegas notes that "aspirational constitutions keep alive a political conscience of social change".[34] While such constitutions cannot insure that social change will result, they provide the fertile soil with which social movements can try to effectuate change.[35] Julieta Lemaitre also suggests that aspirational constitutions are part of a "legal fetishism" that provides psychic sustenance to law reformers committed to pursuing social change in the midst of massive inequality.[36] Moreover, Roberto Gargarella notes that the U.S. constitution's absence of a detailed delineation of aspirational social rights "often works against their materialization".[37]

It should of course be noted from the outset that to speak of a "Latin American" Right to Work, is an over-broad term. The region is far from a legal monolith despite the shared Spanish colonial experience and formations as civil law jurisdictions.[38] Indeed, while a large number of the countries contain constitutional rights to work, it is not the case that all do.[39] Indeed, Chile is an example of a Latin American country that not

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[34] Mauricio Garcia-Villegas (2003), "Law as hope: Constitutions, courts, and social change in Latin America", *Fla. J. Int'l L.*, **16**, 133, 140.

[35] Id., at 140–41 (stating that "it would seem that, at least in some cases, aspirational constitutions create a strong symbolic connection between the constitutional text and at least some grass-roots leaders, who find in the constitution a political banner that inspires them to use legal strategies to vindicate rights"). *See also* Rodrigo Uprimny (2011), "Las Transformaciones constitucionales recientes en América Latina: tendencias y desafíos", in César R. Garavito (ed.), *El Derecho en América Latina: Un Mapa para el pensamiento jurídico de siglo XXI* (Buenos Aires: Siglo Veintiuno Editores), pp. 109, 123 (arguing that aspirational constitutional processes seek to deepen democracy and combat social, ethnic, and gender exclusion and inequality).

[36] Julieta Lemaitre (2008), "Legal fetishism: Law, violence, and social movements in Colombia", *Rev. Jur. U.P.R.*, **77**, 331, 343.

[37] Roberto Gargarella (2012), "Latin American constitutionalism then and now: Promises and questions", in Detlef Nolte and Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America* (London: Routledge), pp. 143, 153.

[38] Rogelio Pérez Perdomo (1991), "Notas para una historia social del derecho en América Latina: La relación de las prácticas y los principios jurídicos", *Rev. Colegio de Abogados P.R.*, **52**, 1.

[39] *See* Constitución Nacional [Const. Nac.] (Arg.), Art. 14; Const. Nac. Arg., Art. 14bis.; Const. Nac. Arg., Art. 75.23; Constituição Federal [C.F.] [Constitution], Art. 5 (XIII and XX) (Braz.); Constitución Política del Estado Plurinacional de Bolivia, Art. 46–48; Constitución Política de la República

only does not have a constitutional Right to Work, it also is distinctive in how bare it is of social rights.[40] Yet it is the variety of constitutional frameworks in the region itself that supports the thesis that an explicit Right to Work yields benefits. For instance, in Roberto Gargarella's comparison with the extreme spartan nature of the Chilean Constitution he notes:

> Typically when judges do not find a written basis for these new rights (when the constitution contains no mention of the right to health or indigenous rights, say), they tend to act as if such rights do not exist at all. In other words, there seems to be a link between the "non-inclusion of new rights" and "judicial non-recognition of new rights". This is not to imply that inclusion of new rights in a constitution magically makes them real; rather, the point is that the absence of these rights works against their materialization.[41]

In contrast to Chile, Brazil exemplifies the opposite constitutional extreme with its long delineation of numerous social rights including the Right to Work. For that reason, it serves as a useful case example. At the same time there has been a longstanding critique of the difficulty Afro-Brazilian Plaintiffs encounter with a judiciary that has been traditionally resistant to recognizing general claims of racial discrimination based on the presump-

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de Chile [C.P.], Art. 19(16); Constitución Política de Colombia [C.P.], Arts 13, 25–27, 43; Constitución Política de la República de Costa Rica, Art. 56; Constitución Política de la República de Cuba, Arts 9(b), 44, 45; Constitución de la República Dominicana, Art. 8; Constitución de la República de Ecuador, Arts 33, 66(2), 325; Constitución de la República de El Salvador, Arts 2, 37; Constitución de la República de Guatemala, Art. 101; Constitución de la República de Honduras, Arts 60, 127; Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, Diario Oficial de la Federación, 5 February 1917 (Mex.), Art. 123; Constitución de la República de Nicaragua [Cn.], as amended by Ley No. 330, Reforma Parcial a la Constitución de la República de Nicaragua, 13 January 2005, Arts 27, 57, 80; Constitución de la República de Panama, Arts 19, 64; Constitución de la República de Paraguay, Arts 86, 88, 89; Constitución Política de la República de Peru, Arts 2, 22; Constitución de la República Bolivariana de Venezuela, Arts 21, 87, 89.

[40] Constitución Política de la República de Chile [C.P.], Art. 19(16) ("Every individual has the right to freely enter employment contracts and to freely choose his/her occupation with a just pay."). *See also* Roberto Gargarella (2013), *Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution* (Oxford: Oxford University Press), p. 145 ("The countries that appear to fall the farthest behind in this slow march toward public recognition of social rights appear to be those that, for one reason or another, more strongly resisted the incorporation of those social demands into the bodies of their constitutions. Examples that stand out include the austere Chilean Constitution.").

[41] Gargarella (n 37), at 153.

tion that all Brazilians are racially mixed.[42] The Brazilian labor cases thus provide a useful context to explore whether the contrast to the labor law courts where the anti-discrimination principle is complemented by a co-existing Right to Work, yields a more hospitable venue for proving claims of discrimination.

In addition, Brazil is a country in which Afro-descended social justice movements have garnered a great deal of traction in advancing their anti-discrimination laws in ways that somewhat approximate the panoply of laws that exist in the United States for purposes of a transnational comparison.[43] It is also a jurisdiction where employment contracts can be terminated at any time by either party without cause in ways that somewhat approximate the U.S. employment-at-will context.[44] The primary distinction with the U.S. employment-at-will context is that the Brazilian Right to Work context justifies the right to receive a termination payment and prior notice in the event of dismissal, but other than granting prior notice there are no formal procedural requirements which employers must comply with prior to dismissals without cause (except for a few designated job categories).[45] In short, while the Brazilian case example cannot stand in as the embodiment of a singular "Latin American" Right to Work experience, its particularities do situate it as a useful exploration of the possible salutary benefits of a Right to Work in the anti-discrimination context, and in turn how it compares to the U.S. absence of such a Right to Work.

Indeed, a concrete example of the osmotic influence of aspirational constitutions in the operation of racial equality claims can be located in an examination of Brazilian workplace discrimination claims. Despite the fact that Brazilian racial discrimination law in general has been critiqued for its pro-defendant demand of direct evidence of racial bias rather than indirect

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[42] Seth Racusen (2002), "A mulato cannot be prejudiced: The legal construction of racial discrimination in contemporary Brazil", PhD dissertation, Massachusetts Institute of Technology.

[43] Mala Htun (2004), "From 'racial democracy' to affirmative action: Changing state policy on race in Brazil", *Lat. Am. Res. Rev.*, **39**, 60; Hernández (n 33), at 118–29 and 151–64.

[44] Lex Mundi Labor and Employment Practice Group (2012), *Labor and Employment Desk Book*, available at: www.lexmundi.com/Document.asp?DocID=3903 (accessed 20 September 2017), at pp. 31–32.

[45] Id. Female employees who are pregnant are protected against dismissal without cause for the length of their pregnancy and for the five months following the birth of their child. Such protection against dismissal without cause also applies to trade union officials and employees who serve in the company's Internal Commission for Accident Prevention. The applicable collective bargaining agreement may also establish other protections against dismissal. Id.

evidence with statistical showings of patterns of racial disparity,[46] an empirical tabulation of published Labor Court decisions from 2008–2014, shows a very strong win rate for plaintiffs alleging racial discrimination that contrasts starkly with the plaintiff struggle to win race claims outside of the Labor Court context.[47] Indeed, this chapter purposefully focuses on the recent time frame in order to draw the contrast between the success rate in Labor Court decisions since the Labor Code's 1999 inclusion of color discrimination claims,[48] with the fortification of constitutional anti-discrimination in 1995,[49] and the anti-discrimination penal law in 1997.[50]

In the Brazilian legal system the specialized labor courts operate parallel to the general jurisdiction civil and criminal justice courts. The first instance level Trial Labor Courts (Varas do Trabalho) can be appealed to Regional Labor Courts (Tribunais do Trabalho – TRT). The highest Court of Appeal for labor cases is the Superior Labor Court (Tribunal Superior do Trabalho – TST).[51] Finally, the Federal Supreme Court (Supremo Tribunal Federal – STF) can exercise jurisdiction for extraordinary appeals in cases where the judgments below concern the Constitution.[52]

In my empirical review of Labor Court appeals, plaintiffs were successful 70 percent of the time in 68 national Superior Labor Court cases available online (TST/Tribunal Superior do Trabalho – the highest Labor Court). In addition, in a sample of 18 regional Labor Court cases (TRT/Tribunal Regional do Trabalho – appellate Labor cases) from the same time period, plaintiffs were successful 72 percent of the time. Despite the fact that the judicial opinions issued in civil law jurisdictions such as Latin America tend to be concise and parsimonious in the theoretical discussion of laws, the potential influence of the Right to Work can be traced nonetheless.[53]

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[46] Justice Studies Center of the Americas (JSCA) (2004), T*he Judicial System and Racism against People of African Descent: The Cases of Brazil, Colombia, the Dominican Republic and Peru* (Santiago: JSCA).

[47] I tabulated the cases by searching for "racial discrimination/discriminação racial" in the website of the national Superior Labor Court, Tribunal Superior do Trabalho at http://www.tst.jus.br/en/home, along with the same search in the sampling of the 24 Regional Labor Courts, Tribunais Regional do Trabalho at http://www.lexml.gov.br/.

[48] Lei No. 9.799 de 26.5.1999 (Braz.) (adding section 373-A to the C.L.T. Consolidação das Leis do Trabalho).

[49] Lei No. 9.029 de 13.4.1995 (Braz.).

[50] Lei No. 9.459 de 13.5.1997 (Braz.).

[51] Constituição Federal [C.F.] [Constitution], Art. 111 (Braz.).

[52] Constituição Federal [C.F.] [Constitution], Art. 102 (Braz.).

[53] Alejandro M. Garro (1995), "On some practical implications of the diversity of legal cultures for lawyering in the Americas", *Rev. Jur. U.P.R.*, **64**, 461, 474–75 (observing that there are significant differences in the style of writing civil

A useful example is the 2014 TST (Superior Labor Court) case of Ricardo Fagundes Nunes, an Afro-Brazilian man whose denial of various promotions by the Porto Alegre Institute of the Methodist Church (an educational institution), was prompted by a supervisor who explicitly stated "it depends on me whether that black man moves forward or not".[54] In the Court's assessment of the problematic work structures that allowed racial discrimination to affect the promotion process (such as a lack of formal parameters for evaluating candidates and the lack of transparency in how promotion decisions were made), the Court did not restrict itself to the mechanical application of the specific law that prohibits discrimination in the workplace.[55] The Court instead went on to elaborate how the protection of workers from discrimination is an international human right mandated by the Constitution including Article 7's Right to Work "aim to improve the . . . social condition" of workers. With this aim, the Court noted that simply because other black workers were employed by the defendant did not mean that the employer was not capable of the discriminatory treatment alleged by the plaintiff.

Moreover, once the plaintiff-worker presented his witness testimony regarding the racialized perspective of the supervisor and the lack of a formal evaluation process, the Court indicated that the burden of proof shifted to the defendant-employer. In Brazil, the party making the claim generally has the burden of proof. However, Brazilian labor courts are very protective of employees, as they are considered to be the weaker party in any employment relationship. Thus, in some cases, the burden of proof may be shifted to the employer, even though the employee made the claim.[56] In this case, the Court reasoned that the shift in burden to the defendant-employer was justified by the constitutional Right to Work protection against dismissal without cause, since any non-discriminatory justifications

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law judicial decisions); Catherine A. Rogers (2002), "Fit and function in legal ethics: Developing a code of conduct for international arbitration", *Mich. J. Int'l L.*, **23**, 341, 388–89 (noting that there is a "formulaic, bureaucratic style of civil law judicial opinions").

[54] T.S.T., No. TST-RR-17500-53.2008.5.04.0005, Relator: Min. José Roberto Freire Pimenta, 04.06.2014, http://www.tst.jus.br (accessed 20 September 2017).

[55] Lei No. 9.029, de 13.4.1995 (Braz.) (setting forth the enabling legislation for the constitutional protection against arbitrary dismissal of workers in Article 7 of the Brazilian Constitution).

[56] IUS Laboris (2012), "Human resource lawyers, discrimination law in the Americas", available at: http://www.iuslaboris.com/files/documents/Public%20Files/Publications/2012_Publications/IUS_LABORIS_2012_Discrimination_Law_in_the_Americas.pdf (accessed 20 September 2017).

for dismissal are in the sole possession of the defendant-employer.[57] This is a striking difference to the U.S. racial discrimination jurisprudence where despite having a longstanding system of burden shifting for employment discrimination cases,[58] the mere presence of other employees of color seemingly insulates employers from substantive judicial inquiry.[59]

Another important contrast is that despite the U.S. plaintiff right to discovery, courts still pay great deference to the presumed business judgments of the employer notwithstanding the asymmetry in power and access to information.[60] Despite the absence of procedural devices that are especially helpful to plaintiffs (like automatic burden shifting and rights to discovery), the Brazilian judge in the Ricardo Fagundes Nunes case decided the racial discrimination claim within the broader context of a constitutional Right to Work that then enabled additional contextual elements for judicial decision-making. The realities of the workplace, in which an asymmetry in power and access to information exist for the employee, and employers may act on discrimination even within a racially diverse workplace, were factors that were able to be considered in assessing the case. Stated differently, the constitutional Right to Work focus on workers' just and favorable conditions of employment and protection against unemployment, may center judges on examining allegations within the context of real-world workplaces rather than an idealized workplace where employers are presumed to act rationally and have no greater power than their employees. While the Right to Work influence in Labor Court cases is generally not as overtly stated as in the Ricardo Fagundes Nunes

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[57] Unlike in the United States, in Brazil, parties do not have automatic rights to discovery. Instead, the discovery phase is conducted by the judge who determines what documents a party should produce. The parties are entitled to request the disclosure of any particular document, and the judge determines whether documents should be disclosed, having regard to whether it is necessary to determine the case. The parties may also request that any documents disclosed are kept out of the public domain if the disclosure may cause damage to a party or the information is confidential. *See* Ronald Meisburg et al. (2011), "International trends in employment dispute resolution – counsel's perspectives", Materials for the Worlds of Work: Employment Dispute Resolution Systems Across The Globe, hosted by St John's University School of Law and Fitzwilliam College, Cambridge University, 21 July, available at: http://www.proskauer.com/files/Event/f4ce52c8-78cb-4634-993f-6a188b827e63/Presentation/EventAttachment/18218ba8-fba8-4d9d-85e7-717a66791533/Agenda.pdf, at 21.

[58] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

[59] Tanya Katerí Hernández (2007), "Latino inter-ethnic employment discrimination and the 'diversity' defense", *Harv. C.R.-C.L. L. Rev.*, **42**, 259, 284–88.

[60] *See* Lauren B. Edelman et al. (2011), "When organizations rule: Judicial deference to institutionalized employment structures", *Am. J. Soc.*, **117**, 888.

case described herein, the right still implicitly provides an important backdrop for analyzing racial discrimination allegations.

For instance in the 2008 TST case of Paulo dos Reis Pereira, an employee of Parmalat Brasil, there were no explicit legal citations to the constitutional Right to Work.[61] Nevertheless, the Court affirmed the lower court's conclusion that it was not necessary for the plaintiff-employee to report the racial harassment he experienced to a more senior supervisor as a prerequisite for filing a legal claim. The Court stated it was not necessary because it is the responsibility of an employer to care for the welfare of its employees. The court reasoned that labor law requires that employers be "vigilant" in keeping the workplace environment safe and free from the harms of discrimination. Such vigilance would have made the employer cognizant of all the witness testimony that indicated what a common practice the public racial harassment was against the plaintiff.

This is a judicial perspective that echoes the concern of the constitutional Right to Work aim to care for the social condition of workers. Particularly extraordinary was the TRT Regional Court of Labor lower court's real-world concern that the subordinated status of employees makes official reporting of discrimination difficult in the face of fears of being discharged or further harmed by the harassing supervisor.[62] This helps to explain why an employer's duty to care for the welfare of its employees requires vigilance in being alert to discriminatory behavior. This consideration of how the realities of workplace hierarchies may influence employee reporting behavior, contrasts greatly with the U.S. jurisprudence insulating employer liability for employee harassment by a supervisor when a worker "unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided".[63]

Another indicator of how the Right to Work may implicitly provide an important backdrop for analyzing racial discrimination allegations, is in the comparison of the labor law plaintiff success rate with that of racial discrimination claims filed outside of the Brazilian workplace context.

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[61] T.S.T.J. 1011/2001-561-04-00.5, Relator: Min. Carlos Alberto Reis da Paula, 24.03.2008 (Braz.) (available at: http:/www.tst.gov.br).

[62] T.R.T.J. 94.2001.5.04.0561 8 Turma do 4 Região, Relator: Juíza Ana Luiza Heineck Kruse, 30.04.2003 (Braz.) (available: at www.trt4.jus.br).

[63] *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998). The U.S. framework bars employer liability with this employer affirmative defense when the supervisor harassment is unaccompanied by a tangible employment action (such as dismissal, discipline, failure to promote, transfer or increase wages). In instances of co-worker harassment, the employer is liable only if it was negligent in controlling working conditions. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

Specifically, the Brazilian labor law plaintiff success rate is much higher than that for racial discrimination claims filed outside of the Brazilian workplace context.

Like the vast majority of Latin American countries, the focus of Brazilian anti-discrimination law litigation is placed in its criminal law. This is because criminalization symbolically suggests a strong normative commitment to the eradication of discrimination. Unfortunately the criminal law context also situates discrimination as caused by aberrant individuals and is thus an environment in which plaintiffs encounter less receptivity to their claims.[64]

A study of Brazilian racial discrimination criminal cases on file for 2005–2006 found that only 32.9 percent were successful for the plaintiff.[65] Similarly, a study of criminal racial discrimination cases decided in 2007–2008 again found that only 30 percent were successful for the plaintiff.[66] The contrast between the labor law cases and criminal law cases of racial discrimination highlight both the litigation constraints on plaintiffs within the criminal law context with its higher penalty stakes, and the potential benefit of presenting a claim against the backdrop of a Right to Work. The distinction between the contexts is highlighted by the fact that both operate under anti-discrimination laws that parallel each other,[67] and are implemented by jurists emanating from the same elite backgrounds.[68] Such facts would suggest a similar predisposition for viewing anti-discrimination claims in both criminal courts and labor law courts. Yet this is not the case. Nor can the contrast be explained by the development of the labor law courts dating back to the 1930s and the 1943 codification of the Consolidation of Labor Laws (Consolidação das Leis do Trabalho – CLT). Historians of the evolution of Brazilian labor law have long noted the early anti-worker bias that existed in the labor law courts, and how the CLT was in part motivated as a

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[64] Hernández (n 33), at 104–109.

[65] Maiá Menezes (2008), "Vítimas de racismo perdem 57.7% das ações", *O Globo*, 20 November.

[66] Marcelo Paixão, Irene Rossetto, Fabiana Montovanele and Luiz M. Carvano (2010), *Relatório Anual das Desigualdades Raciais no Brasil; 2009–2010* (Rio de Janeiro: Editora Garamond), p. 264.

[67] Both Lei Número 9.029 de 1995, the employment law, and Lei Número 9.459 de 1997, the criminal law against racism that updated Lei Número 7.716 de 1989, have parallel language prohibiting "discrimination based upon race and color". In addition, the Labor Code C.L.T., Art. 373-A, prohibits discrimination based upon color as of its 1999 amendments.

[68] Maria Angela Jardim de Santa Cruz Oliveira and Nuno Garoupa (2011), "Choosing judges in Brazil: Reassessing legal transplants from the U.S.", *Am. J. Comp. L.*, **59**, 529.

vehicle to defuse and channel class tensions in the government fight against communism and class warfare.[69] Furthermore, the CLT did not begin to specifically address matters of racial discrimination until its 1999 amendments for addressing gender discrimination included language sanctioning color discrimination as well.[70]

Thus, social justice movement actors can work very hard to raise an issue of inequality to the forefront of societal concerns, but some legal contexts appear to be more conducive to responding to those concerns. I contend that the Right to Work context of labor law courts may be that hospitable space, and that with the proliferation and fortification of racial equality social justice movements across Latin America many more labor law courts and other lower courts in the region may begin to parallel the Brazilian example.[71]

On the other hand, U.S. racial equality jurisprudence does not hold such promise. In remarkable contrast to the Brazilian example of plaintiff success rates, the United States is now emblematic of outright hostility to employment racial discrimination claims. In the United States, 94 percent of employment discrimination cases never reach a trial because so many are dismissed outright on preliminary motions to dismiss and later with motions for summary judgment.[72] More than 40 percent of employment discrimination cases in the United Sates are dismissed before trial, and another 54 percent of plaintiffs only receive token amounts to settle their cases out of court.[73] Of the 6 percent that progress to trial in the United States, only one in three has a chance of winning.[74] The absence of a

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[69] John D. French (2004), *Drowning in Laws: Labor Law and Brazilian Political Culture* (North Carolina: University of North Carolina Press), pp. 20–21 and 120.

[70] Lei No. 9.799 de 26.5.1999 (Braz.) (adding section 373-A to the CLT).

[71] It should be noted that some Right to Work jurisdictions such as France, have so tightly regulated the ability of employers to dismiss employees for cause that it has inadvertently interfered with integrating excluded racial groups into the labor market. *See* Julie C. Suk (2007), "Discrimination at will: Job security protections and equal employment opportunity in conflict", *Stanford L. Rev.,* **60**, 73. Yet a Right to Work does not preordain a heavy bureaucratic burden on employers. Indeed, Brazil's Right to Work context simply mandates notice and a proportionate termination fee. *See* n 45 (above) and accompanying text. *See also* Nicole B. Porter (2008), "The perfect compromise: Bridging the gap between employment at will and just cause", *Nebraska L. Rev*., **87**, 62.

[72] Laura Beth Nielsen, Robert L. Nelson, and Roy Lancaster (2010), "Individual justice or collective legal mobilization? Employment discrimination litigation in the post civil rights United States", *J. Empirical Leg. Stud*., **7**, 175.

[73] Id.

[74] Id.

constitutional Right to Work may be part of the reason for the hostility to employment discrimination claims that I analyze in the next section.

III. THE U.S. "RIGHT TO WORK" CONSTITUTIONAL VOID HARM TO RACIAL EQUALITY

The absence of what U.S. labor law historian Sophia Lee calls a "workplace constitution" means that unlike in Brazil and the rest of Latin America, U.S. judges approach labor law cases primed only by their own experience of what it means to be a worker rather than having the cases embedded within a constitutional Right to Work's concern for the realities of the workplace.[75] This is a dynamic that extends itself across the spectrum of judges from the U.S. Supreme Court and lower courts. Yet the potential ill effects of the absence of a constitutional Right to Work are particularly acute in the U.S. Supreme Court context. This is because, for the vast majority of U.S. Supreme Court justices, their primary work histories were as workers with privileged status in hierarchical workplaces. Research on the U.S. Supreme Court has demonstrated empirically that judges' behavior is motivated, in large part, by their individual attitudes as informed by their histories,[76] and elite life experiences.[77] Such data helps

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[75] Sophia Z. Lee (2014), *The Workplace Constitution: The New Deal to the New Right* (New York: Cambridge University Press), p. 3 (defining workplace constitutions as those that include constitutional protections from arbitrary firings, due process before workers are terminated, and freedoms of speech, association, and privacy).

[76] David W. Rohde and Harold J. Spaeth (1976), *Supreme Court Decision Making* (San Francisco: W.H. Freeman); Jeffrey Segal and Harold J. Spaeth (1993), *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press); Harold J. Spaeth and Jeffrey Segal (1999), *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court* (Cambridge: Cambridge University Press).

[77] Lawrence Baum and Neal Devins (2010), "Why the Supreme Court cares about elites, not the American people", *Geo. L.J.*, **98**, 1515 ("[b]ecause the Justices are 'sheltered, closeted,' and 'overwhelmingly upper-middle or upper-class and extremely well educated, usually the nation's more elite universities,' the views of social and economic leaders are likely to matter more to the Court than to popularly elected lawmakers . . .". The authors use "opinion poll data which suggests that the Court is often more attentive to the views of individuals with post-graduate degrees than it is to the public as a whole"); Mark A. Graber (2013), "The coming constitutional yo-yo? Elite opinion, polarization, and the direction of judicial decision making", *How. L.J.*, **56**, 661 (noting that "Justices tend to act on

to explain why when President Obama presented Justice Sonia Sotomayor as a Supreme Court nominee he commended her "extraordinary journey" from a Bronx housing project to the Second Circuit Court of Appeals, and stated that "it is experience that can give a person a common touch and a sense of compassion, an understanding of how the world works".[78] A natural corollary is that the elite work histories of U.S. Supreme Court justices would thus limit their ability to envision the vulnerabilities of non-elite workers without any other external priming.[79] A review of several key racial discrimination employment cases supports this supposition.[80]

In the 2013 decision of *Vance v. Ball State University*,[81] Justice Alito authored the majority decision in which the Supreme Court narrowed who could be considered a supervisor for the purposes of seeking employer vicarious liability for workplace harassment. A sharply divided five to four Court decided that only employees who had the explicit power to take tangible employment actions (like firing, demoting, transferring or officially disciplining) could be viewed as supervisors whose actions the employer could be held vicariously liable for. Speaking for the Court, Justice Alito stated: "The ability to direct another employee's tasks is simply not sufficient. Employees with such powers are certainly capable of creating intolerable work environments . . . but so are many other co-workers."[82]

In contrast, Justice Ginsburg's dissent observed:

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elite values because Justices are almost always selected from the most affluent and highly educated stratum of Americans" and that "the direction of judicial decision making at a given time reflects the views of the most affluent and highly educated members of the dominant national coalition"); Benjamin H. Barton (2012), "An empirical study of Supreme Court justice pre-appointment experience", *Fla. L. Rev.*, **64**, 1137 (noting that the Roberts Court justices are outliers compared to prior justices in their deficit in "much needed practical wisdom" and explains that justices "with more real-life experiences" in the past had a prior history of law practice, trial judging, and political experience); Susan Navarro Smelcer (2010), *Supreme Court Justices: Demographic Characteristics, Professional Experience, and Legal Education, 1789–2010*, Congressional Research Service, 9 April (providing a review of the homogenization of the career experiences of Supreme Court Justices).

[78] Jonathan Weisman (2009), "Hispanic picked for top court", *Wall Street Journal*, 26 May.

[79] *See* Michele Benedetto Neitz (2013), "Socioeconomic bias in the judiciary", *Clev. St. L. Rev.*, **61**, 137 (discussion of the privileged socioeconomic status of judges in the United States and their implicit socioeconomic bias).

[80] It should be noted that the comparison between the U.S. Supreme Court employment discrimination cases and those of the Brazilian Superior Labor Court (TST) discussed above is most apt because the TST is the highest court on labor law issues. *See* nn 51–52 and accompanying text.

[81] *Vance v. Ball State University*, 133 S. Ct. 2434 (2013).

[82] Id., at 2448.

> The Court today strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category to those formally empowered to take tangible employment actions. The limitation, the Court decrees diminishes the force of [precedent on employer liability], *ignores the conditions under which members of the work force labor*, and disserves the objectives of Title VII to prevent discrimination from infecting the Nation's workplaces.[83]

Moreover, Justice Ginsburg also noted that "[*w*]*orkplace realities* fortify my conclusion that harassment by an employee with power to direct subordinates' day-to-day work activities should trigger vicarious liability" and then proceeded to detail concrete examples from cases where a person vested with authority to control employment conditions had used that to facilitate harassment.[84] In other words, Justice Ginsburg's focus on workplace realities of worker vulnerability that foster discrimination influenced her assessment of the proper legal parameters for furthering equality.

Given how pivotal the consideration of workplace realities was for Justice Ginsburg's thicker notion of equality it is important to note that her own experience as a vulnerable worker formed her vision of what the workplace is like for subordinates. Indeed, as President Clinton noted during his announcement of Justice Ginsburg's selection to be a justice of the U.S. Supreme Court, "[d]espite her enormous ability and academic achievements, she could not get a job with a law firm in the early 1960's because she was a woman and the mother of a small child. Having experienced discrimination, she devoted the next 20 years of her career to fighting it and making this country a better place for our wives, our mothers, our sisters and our daughters."[85] Justice Ginsburg herself stated "As the President said, not a law firm in the entire city of New York bid my employment as a lawyer when I earned my degree."[86] Justice Ginsburg's direct experience of discrimination also included being relegated to work as a clerk-typist after having earned a college degree from Cornell University.

Unlike Justice Ginsburg, Justice Alito's work history (apart from

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[83] Id., at 2455 (emphasis added).

[84] Id., at 2459–60 (emphasis added).

[85] (1993), "The Supreme Court; Transcript of President's announcement and Judge Ginsburg's remarks", *New York Times*, 15 June, available at: http://www.nytimes.com/1993/06/15/us/supreme-court-transcript-president-s-announcement-judge-ginsburg-s-remarks.html?src=pm&pagewanted=1 (accessed 20 September 2017).

[86] Id.

college summer internships) was restricted to positions of authority.[87] It is thus not so surprising that Justice Alito's perspective of the workplace from his unitary experience as an elite worker would give him a very different perspective of the power dynamics that affect the majority of lower status workers. In fact, a recent empirical study found that Justice Alito, along with Justice Roberts, are the two most pro-business of all the justices who have served on the Court since 1946.[88]

A similar disassociation with the power dynamics of the workplace is evident in the 2013 case of *University of Texas Southwestern Medical Center v. Nassar*.[89] In *Nassar*, Justice Kennedy authored the majority decision that raised the standard of proof for employment discrimination retaliation claims. The Court again divided five to four in assessing how discrimination can be proved. While the 1991 amendments to Title VII of the 1964 Civil Rights Act specified a "motivating factor" standard for finding liability in cases where discriminatory employer motives are mixed with discriminatory motives, the statute and its amendments were silent regarding retaliation claims.[90] The Court majority refused to extend what it termed a "lessened causation standard" to similar claims of retaliation under Title VII. Instead, it mandated that a plaintiff making a retaliation claim must establish that the alleged wrongful activity was a traditional but-for cause of the unlawful retaliation by the employer even where other causes co-exist and overlap.

The Court majority seemed particularly concerned with the fact that

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[87] Justice Alito's judicial biography states: "Graduated from Princeton University's Woodrow Wilson School of Public and International Affairs, 1972. Graduated from Yale Law School, 1975. Clerked for Leonard I. Garth of the United States Court of Appeals for the Third Circuit from, 1976–1977. Became an Assistant U.S. Attorney, District of New Jersey, 1977–1981. Was an Assistant to the Solicitor General, U.S. Department of Justice, 1981–1985. Deputy Assistant Attorney General for the U.S. Department of Justice, 1985–1987. Served as the U.S. Attorney for the District of New Jersey, 1987–1990. Was a Judge for the United States Court of Appeals for the Third Circuit, 1990–2006. Became an Associate Justice of Supreme Court of the United States, 2006–present." *See* Clare Cushman (2012), *The Supreme Court Justices: Illustrated Biographies, 1789–2012* (Thousand Oaks: Sage Publications, Inc.), at pp. 499–502.

[88] Lee Epstein, William M. Landes and Richard A. Posner (2013, "How business fares in the Supreme Court", *Minn. L. Rev.*, **97**, 1431.

[89] *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013).

[90] Under this legal standard sufficient proof of unlawful discrimination can include proof that a prohibited characteristic like race, "was a motivating factor for any employment practice, even though other factors also motivated the [employer's] practice". T. VII Civil Rights Act of 1964, § 703(m) codified at 42 U.S.C, § 2000e-2(m).

retaliation claims had risen in recent years inasmuch as it stressed that the causation issue has:

> central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency . . . Indeed, the number of retaliation claims filed with EEOC has now outstripped those for every type of status-based discrimination except race.[91]

Significantly, Justice Kennedy anchored his concerns about the rise in retaliation claims in hypothetical suppositions rather than in concrete data about the workplace. For instance, he noted that:

> [Lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer [*sic*], administrative agencies, and courts to combat workplace harassment. Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in the argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances.[92]

Yet, the empirical data indicates that only a small percentage of those who believe they have experienced discrimination actually file a claim given the financial and emotional costs of being considered a "troublemaker" in the workplace.[93] Justice Kennedy's skewed hypothetical suppositions may very well relate to his lack of experience as a vulnerable worker. As the son of a prominent politically connected lawyer and lobbyist, Justice Kennedy's family connections positioned him to be a Senate page at the age of ten.[94] Thereafter his elite education at Stanford College and

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[91] 133 S. Ct. at 2531.

[92] Id., at 2531–32.

[93] *See* Kristin Bumiller (1987), "Victims in the shadow of the law: A critique of the model of legal protection", *Signs*, **12**, 421 (documenting the large extent to which victims of discrimination are disinclined to file claims); *see also* Michael Selmi (2001), "Why are employment discrimination cases so hard to win?", *La. L. Rev*., **61**, 555, 557 (describing the distorted picture of employment discrimination cases being numerous and easy to win).

[94] Robert Reinhold (1987), "Man in the news; Restrained pragmatist Anthony

Harvard Law School ushered him into the professional status of lawyer.[95] Even Justice Kennedy's youthful part-time jobs working in oil fields were connected to his uncle's executive position in the oil business.[96] In other words, being hired as the result of nepotism in a working class job that is meant to be a temporary way station until an elite education is completed, is not conducive to obtaining keen insights about the real extent to which subordinates are exposed to enduring discrimination and retaliation. Moreover, when Justice Kennedy was a practicing attorney, the bulk of his practice was representing businesses as opposed to workers.[97]

In contrast, Justice Ginsburg's dissent focused on what she termed "sensitivity to the realities of life at work".[98] With the realities of the workplace as the focal point, Justice Ginsburg referenced empirical facts about the leading reason for employee silence about discrimination being the fear of retaliation, rather than speculating about the hypothetical possibilities of worker abuse of the legal system.[99] As a result, Justice Ginsburg's dissent concluded that retaliation complaints are "tightly bonded to the core prohibition [of discrimination] and cannot be disassociated from it" as a matter of proof standards.[100]

Further support for the thesis that a judicial focus on workplace realities (whether initiated from a justice's own work history or from the external cue of a constitutional Right to Work) is integral to a robust and effective racial equality jurisprudence, can be found in the contrast to the seminal 1971 employment discrimination case of *Griggs v. Duke Power Co*.[101] In *Griggs*, the Supreme Court ruled that under Title VII of the Civil Rights Act, employment tests that disparately impact racialized groups are in themselves discriminatory unless the businesses demonstrates that such tests are "reasonably related" to the job for which the test is required. Justice Burger drafted the majority opinion which stated in relevant part:

M. Kennedy", *New York Times*, 12 November, available at: http://www.nytimes.com/1987/11/12/us/man-in-the-news-restrained-pragmatist-anthony-m-kennedy.html?module=Search&mabReward=relbias:s,[%22RI:7=%22,=%22RI:12=%22]=&src=pm&pagewanted=1 (accessed 20 September 2017).

95 Cushman (n 87), at 472–76.

96 "The justices of the United States Supreme Court – Justice Anthony Kennedy", Supreme Court Review.com, available at: http://supremecourtreview.com/default/justice/index/id/34 (accessed 10 July 2014).

97 Reinhold (n 94).

98 *Nassar* (n 89) at 2547.

99 Id., at 2534–35.

100 Id., at 2539.

101 *Griggs v. Duke Power Co*., 401 U.S. 424 (1971).

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, *Congress has now required that the posture and condition of the job seeker be taken into account*. It has – to resort again to the fable – provided that the vessel in which the milk is proffered be one all seekers can use.
>
> Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms *that operate as "built-in headwinds" for minority groups* and are unrelated to measuring job capability.
>
> The facts of this case demonstrate the inadequacy of broad and general testing devices, as well as the infirmity of using diplomas or degrees as fixed measures of capability. *History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees*. Diplomas and tests are useful servants, but Congress has mandated the common sense proposition that they are not to become masters of reality.[102]

In short, Justice Burger justified the highly progressive disparate impact standard based upon employment realities of how racially exclusionary employment tests unrelated to business necessity can unfairly exclude good workers even if the employer does not intend to be racially biased. This of course contrasts with the more restrictive intent-based standard that exists for U.S. constitutional inequality claims under the 14th Amendment.[103]

Justice Burger's own work history provided a rich understanding of workplace realities. Because his family's financial circumstances from farming were modest, Justice Burger was delivering newspapers by the age of nine to help with his family of seven siblings.[104] He earned his way through college and night classes at law school working in the accounting department of a life insurance company.[105] This rich employment history from humble origins very likely influenced Justice Burger's active work in racial equality as a young lawyer. He was the first president of the St.

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[102] Id., at 430–34 (emphasis added).

[103] *Washington v. Davis*, 96 S.Ct. 2040 (1976). The Burger Court did not extend the *Griggs* disparate impact standard to the constitutional context because of the fear that it might have the effect of invalidating a wide range of legislative programs that were not the result of racial discrimination. The Court thought that "extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription". Id., at 2052.

[104] *Warren Burger Biography*, Biography.com, available at: http://www.biography.com/people/warren-burger-9231479#growing-up-in-a-working-class-family (accessed 20 July 2014).

[105] "Warren E. Burger", The Oyez Project at IIT Chicago-Kent College of Law, available at: http://www.oyez.org/justices/warren_e_burger (accessed 20 July 2014).

Paul, Minnesota Council on Human Relations.[106] That group, which he helped to organize, sponsored training programs for the police to improve relations with minority groups. For many years, he was also a member of the Minnesota Governor's Interracial Commission.[107] Thus despite having been the Republican appointee of President Nixon, Justice Burger's own experiences of workplace realities trumped his role as the carrier of Nixon's "ideological heritage".[108]

In marked contrast, the contemporary judicial hostility to the relevance of disparate impact which Justice Burger supported in *Griggs*, is demonstrated with the corporate focus of Justice Kennedy in the 2009 case of *Ricci v. DeStefano*.[109] In the five to four *Ricci* decision, the Court ruled that the city of New Haven, Connecticut violated Title VII when it declined to make promotions in the fire department on the basis of a test that disproportionately screened out non-white candidates. The city also had evidence that more fair and effective tests were available. Rather than making promotions on the basis of the discriminatory test, the city declined to certify the results, and sought to explore less discriminatory alternatives, in keeping with its obligations under Title VII of the Civil Rights Act of 1964. When the city declined to make promotions on the basis of the test results, white firefighters who had scored highly on the test filed suit alleging that the city discriminated on the basis of race.

Justice Kennedy, writing for the majority, concluded that New Haven's decision to ignore the test results violated Title VII because the city did not have a "strong basis in evidence" that it would have been subjected to liability if it had promoted the white firefighters instead of the black firefighters. Justice Kennedy asserted that in instances of conflict between the disparate-treatment (intent-based standard) and disparate-impact provisions, permissible justifications for disparate treatment must be grounded in the strong-basis-in-evidence standard. He concluded that "once [a] process has been established and employers have made clear their selection criteria, they may not then invalidate the

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[106] Linda Greenhouse (1995), "Warren E. Burger is dead at 87; was Chief Justice for 17 years", *New York Times*, 26 June, available at: http://www.nytimes.com/1995/06/26/obituaries/warren-e-burger-is-dead-at-87-was-chief-justice-for-17-years.html?src=pm&pagewanted=4 (accessed 20 September 2017).

[107] Id.

[108] Max Lerner (1994), *Nine Scorpions in a Bottle: Great Judges and Cases of the Supreme Court* (Richard Cummings, ed.) (New York: Arcade Publishing), p. 242 (describing Justice Burger's difficult role as "Nixon's prime appointee, the carrier of his ideological heritage").

[109] *Ricci v. DeStefano*, 557 U.S. 557 (2009).

test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed, §2000e–2(j), and is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race." He rejected the respondents' position that "an employer's good-faith belief that its actions are necessary to comply with Title VII's disparate-impact provision should be enough to justify race-conscious conduct".

Once again, Justice Ginsburg's contrasting dissent was embedded in a consideration of workplace realities. Ginsburg's opinion stated that "the Court holds that New Haven has not demonstrated 'a strong basis in evidence' for its plea. In so holding the Court pretends that [t]he City rejected the test results solely because the higher scoring candidates were white. That pretension, essential to the Court's disposition, ignores substantial evidence of multiple flaws in the tests New Haven used. The Court similarly fails to acknowledge the better tests used in other cities, which have yielded less racially skewed outcomes." Thus in considering workplace realities, Justice Ginsburg took notice of other big city fire departments with tests that provide a more racially integrated workplace.[110] In short, Justice Ginsburg's personal experiences of employment discrimination likely prompted her concern with examining the New Haven fire department actions within the actual context of contemporary municipalities striving for integrated workforces.

IV. CONCLUSION

This brief review of significant Supreme Court employment discrimination cases accords with all the existing literature detailing the influence of jurist backgrounds and experiences upon their decision-making.[111]

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[110] For instance, the Los Angeles firefighting force is 57 percent people of color, Philadelphia's – 51 percent; Boston's – 40 percent; and Baltimore – 30 percent. Center for Constitutional Rights, "In victory for black firefighters, FDNY hiring practices rules racially discriminatory", press release, 22 July (on file with author).

San Antonio, and Chicago both have firefighting forces that are anywhere from 30 to 50 percent African American and Latino. Jane Latour (2001), "Looking for a fire department that looks like New York", *Gotham Gazette*, 2 December, available at: http://www.gothamgazette.com/iotw/firedepartment/doc1.shtml (accessed 20 September 2017).

[111] *See* nn 76–77.

Racial jurisprudence in the United States has decidedly narrowed over the last few decades in ways that permit few racial discrimination cases to survive. The narrowness of the insulated elite work histories of the jurists may have a bearing on the predisposition to articulate abstract analyses divorced from the concrete realities of the workplace. In the absence of a mandate that judges be drawn from a more diverse selection pool, the signal for judicial attention to workplace realities will have to be an external prompt.[112] A constitutional Right to Work could be one such external prompt.

There are those who might argue that there is no need to consider a constitutional Right to Work when the U.S. Constitution already has a fully realized equality provision in the 14th Amendment. In fact, Michael Dorf posits that the U.S. Constitution in its present iteration can be considered "aspirational".[113] Yet the key difference with those Latin American constitutions known to be aspirational and that of the United States, is that Latin American constitutions are overtly aspirational in their inclusion of generous social rights provisions.[114] In contrast, the U.S. Constitution can only be understood to be implicitly aspirational inasmuch as its abstract provisions require judicial elaboration for social rights to be considered legally relevant.

The Brazilian case example suggests that an overtly aspirational constitution may more effectively enable social justice movements to operationalize their concerns. In fact, constitutional scholar Roberto Gargarella notes that significant shifts in the attitudes of Latin American courts regarding disadvantaged groups have arisen since the advent of aspirational constitutions and their inclusion of a plethora of human rights.[115] The shift is particularly noteworthy when one considers that like U.S. jurists the vast majority of Latin American judges are drawn from an elite

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[112] The lack of racial and gender diversity in U.S. judicial positions has long been observed. *See* Barbara L. Graham (2004), "Toward an understanding of judicial diversity in American courts", *Mich. J. Race & L.*, **10**, 153, 180 (detailing the data that reveal that U.S. courts continue to be occupied overwhelming by Whites at both the federal and state levels); Sally Kenney (2012), "Choosing judges: A bumpy road to women's equality and a long way to go", *Mich. St. L. Rev.*, 1499, 1500 (discussing lack of gender diversity in judgeships).

[113] Michael C. Dorf (2009), "The aspirational constitution", *Geo. Wash. L. Rev.*, **77**, 1631.

[114] Detlef Nolte and Almut Schilling-Vacaflor (eds) (2012), *New Constitutionalism in Latin America: Promises and Practices* (Farnham: Ashgate), p. 26. *See also* Daniel Bonilla Maldonado (2006), *La Constitución Multicultural* (Bogotá: Siglo del Hombre).

[115] Gargarella (n 40).

cadre of society given the historic racial exclusivity of the educational system.[116]

In the specific case of the Brazilian labor courts assessed in this chapter, it has been noted that the judges come "from the well-off classes [and are therefore] psychologically inclined to be better understanding the point of view of the employers than that of the workers" such that workers are likely to lose two to one.[117] One scholar further observes that the TST/ Tribunal Superior do Trabalho (Superior Labor Court) as the highest labor court has traditionally had a propensity to overrule the few TRT/ Tribunal Regional do Trabalho (Regional Labor Court) cases decided in favor of the worker.[118] In addition, of the 26 TST (Superior Labor Court) judges presiding during the 2014 tabulation of this chapter's cases, only two were non-white and five were white women.[119]

Moreover, the vast majority of Brazilian and Latin American law schools provide a conservative legal education focused on educating the region's political elite.[120] Indeed, "traditional legal education in Latin America is under wide attack for its excessive legalism, which promotes the ideal of an autonomous, self-contained legal thinking isolated from social contexts".[121] A culture of legalism where the actual behavior and values of citizens is ignored is still deeply "rooted in Latin American legal culture".[122]

Furthermore, the pre-judicial appointment work histories of the Brazilian judges are similar to the elite work histories of the federal court judges and Supreme Court justices of the United States. This is particularly so given that the basic law degree is earned during undergraduate study after students complete high school at the average age of 18, thereby channeling them immediately into their careers as lawyers. Thus the con-

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[116] Tanya Katerí Hernández (2005), "To be brown in Brazil: Education and segregation Latin American style", *N. Y. U. Rev. of L. & Soc. Change*, **29**, 683.

[117] French (n 69), at 46–47.

[118] French (n 69), at 51.

[119] Biographies of TST Justices, Tribunal Superior do Trabalho, available at: http://www.tst.jus.br/ministros (accessed 30 October 2014).

[120] Juny Montoya (2010), "The current state of legal education reform in Latin America: A critical appraisal", *J. Leg. Educ.*, **59**, 545, 546.

[121] Id., at 549. Notable exceptions do exist such as the Fundação Getulio Vargas in Brazil, Universidad Metropolitana in Venezuela, Universidad Torcuato di Tella in Argentina, Universidad Diego Portales in Chile, Universidad de Sonora in Mexico, Universidad de los Andes in Colombia, and Universidad Nacional de Córdoba in Argentina. Id., at 551–58.

[122] Rogelio Pérez-Perdomo (2006), *Latin American Lawyers: A Historical Introduction* (Redwood City: Stanford University Press), p. 69.

trasting receptivity to racial discrimination claims cannot be explained as a difference in the demographics of the composition of judiciaries across the Americas, when in point of fact the exclusivity of higher education and the structure of legal education in Latin America fosters a judiciary aligned with privileged interests as is observed in the United States.[123]

What is notable about the contrast between North and South America is the legal positioning of the importance of worker interests. In Brazil for instance, the constitutional Right to Work is complemented not only by having specialized labor law courts but by a particular formation process. Specifically, new judges tend to be appointed to courts in small cities in the countryside with the hope that living so close to the community and being, most of the time, the only labor law judge in the area, the new judge can more fully learn to grasp the contrasting social and economic predicaments in the area.[124] After six to ten years, judges can be relocated to urban centers. To further the Right to Work's principle of promoting a better and more reasonable workplace, each Labor Court has the discretion to innovate greater access to justice. For instance, in the North of Brazil there is a special itinerant Labor Court located in boats to assist with the indigenous populations living along the river.[125] Similarly, in the South of Brazil there are itinerant labor courts located in trucks to service those working in remote areas of the countryside.[126] In short, the Right to Work frames judicial interventions in labor law cases such that judges need not rely upon their own elite work histories for evaluating worker claims in Brazil.

By according constitutional status to international human rights treaties, many Latin American judges have begun to consider more seriously those legal arguments based on the value of human rights.[127] This chapter suggests that the international human rights value of a Right to Work has the same potential for change in the race jurisprudence context across the region as well. The picture for the United States is more somber given the large-scale contemporary challenges to amending the Constitution, and the cultural attachment to the employment-at-will context.[128] Nevertheless,

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[123] *See* Susan Maloney Smith (1994), "Diversifying the judiciary: The influence of gender and race on judging", *U. Rich. L. Rev.*, **28**, 179.

[124] Email from Glenda Regine Machado, Principal Labor Judge to the 65a Judiciary Section of the City of São Paulo, Regional Labor Law Court (TRT) of state of São Paulo, to author (7 November 2014, 12:23 EST) (on file with author).

[125] Id.

[126] Id.

[127] French (n 69), at 51.

[128] Cass R. Sunstein (2005, "Why does the American constitution lack social and economic guarantees?", *Syracuse L. Rev.*, **56**, 1) (discussing the difficulty of amending the U.S. Constitution). Employment at will is the established law in

the comparative analysis provided herein further illuminates the extent to which the call for diversifying the judiciary in the United States might assist in partially filling the gap that the absence of a constitutional Right to Work creates for emphasizing workplace realities and worker vulnerabilities. While greater attention to matters of racial, gender, and work-history diversity in the judicial selection process will not act as a direct proxy for the absence of a Right to Work, it will certainly place the United States on a better path to recalibrating its race jurisprudence to consider the realities of workplace realities and worker vulnerabilities that racism can create.

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every state except Montana, which has modified the default rule by statute. *See* Montana Wrongful Discharge from Employment Act, Mont. Code Ann., § 39-2-904(1)(b) (2009) (making discharge wrongful if "the discharge was not for good cause"). *See generally* Lisa J. Bernt (2008), "Finding the right jobs for the reasonable person in employment law", *UMKC L. Rev.*, **77**, 1, 7 ("[E]mployment-at-will is still the default rule in almost every jurisdiction in the United States . . . ."); Mayer G. Freed and Daniel D. Polsby (1989), "Just cause for termination rules and economic efficiency", *Emory L. J.*, **38**, 1097,1097 (explaining that employment at will is the general presumption, and "in the private sector and in the absence of unions, employment is almost always at will").