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# SEPARATE, UNEQUAL, AND ALIEN: COMMENTS ON THE LIMITS OF *BROWN*<sup>†</sup>

LENNI B. BENSON\*

## I. TWO ANNIVERSARIES

May of 2004 marked fifty years since the U.S. Supreme Court unanimously ruled that the long held constitutional doctrine of separate but equal must fall. *Brown v. Board of Education*,<sup>1</sup> of course, is a case unique to its facts and circumstances. As a matter of precedent *Brown* is a case about public elementary and secondary school education. But *Brown* is also a symbol. It is a case that stands for the Supreme Court's ability to transcend prior constitutional holdings. In my view, it is a case that proves that the Supreme Court can adapt to our society's need for legally guaranteed equality of treatment and equality of opportunity. It is a case that ensures that the rights of minorities will be protected from abuse by political majorities. It is a case that aptly erodes the stone cliffs of *stare decisis*.

May 2004 marks the anniversary of another Supreme Court case, much less welcome, at least to me, but one still upheld as a powerful legal doctrine.<sup>2</sup> The case, *Galvan v. Press*,<sup>3</sup> discussed the rights of a lawful permanent resident to remain in the United States. Justice Frankfurter, writing for the majority, ruled that a permanent resident alien could be deported based on a retroactive change in the immigration law. While Frankfurter plainly stated that "an alien who legally became part of the American community . . . is a 'person,' an alien [who] has the same protection for his life,

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† This essay was first presented at the Faculty Presentation Day held at New York Law School, March 2, 2004, and was part of a panel reflecting on the fiftieth anniversary of *Brown v. Board of Education*, 347 U.S. 483 (1954). Several New York Law School students made significant, appreciated, contributions to this article: Sarah Kroll-Rosenbaum, Matthew Goldsmith, and Wendy Williams.

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1. 347 U.S. 483 (1954).

2. The coincidence of the two anniversaries was first brought to my attention by Nancy Morawetz. See Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998).

3. 347 U.S. 522 (1954).

liberty and property under the Due Process Clause as is afforded to a citizen . . .” and while he went on to acknowledge that, “due process bars Congress from enactments that shock the sense of fair play — which is the essence of due process . . .,”<sup>4</sup> he ultimately concluded that the retroactive law was constitutional. In his now famous opinion Frankfurter wrote:

[M]uch could be said for the view, *were we writing on a clean slate*, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation. But the slate is not clean. As to the extent of the power of Congress under review, there is not merely “a page of history,” but a whole volume.<sup>5</sup>

Who is the person being deported? Even the dissent calls him “the alien Galvan.”<sup>6</sup> Nowhere in the opinion is his first name used. He is simply “the alien Galvan.” And, what was it about “the alien Galvan” that caused the Supreme Court, the same Supreme Court that had in the same year ruled that separate is not equal, to rule that retroactive application of a law to him did not violate the most fundamental tenets of our fairness-based system of justice? What distinguished him from an individual the Court would have found deserving of the basic protections of fundamental due process? Mr. Galvan was a “lawful permanent resident” but not a “citizen.” This technical distinction in labeling, which cost Mr. Galvan the life that he knew and his residence in the country in which he grew up and lived most of his life, is just one of the many different labels that our immigration laws assign to define status. These technical distinctions, like many others, can be arbitrary and unjust in that they assign labels that in no way reflect the reality of a person’s life and relationship to this country. In 1954, Mr. Galvan was forty-three years old. He had lived in the United States since he was seven. He

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4. *Id.* at 530.

5. *Id.* at 531 (emphasis added).

6. *Id.* at 534 (Douglas, J., dissenting).

never applied for U.S. citizenship. He married a U.S. citizen and had four children. He worked as a “laborer at the Van Kamp Sea Food Company. . . .”<sup>7</sup> In 1947 he left the country for a short visit to Mexico. Upon his return he was stopped and questioned by an immigration officer. Had he ever belonged to the Communist Party?

Yes, he answered, but he became disillusioned and had dropped out in 1946. He was allowed in the country but then put into deportation proceedings for his past membership in the Communist Party. At the time he had belonged to the Party, membership was not a ground of deportability and the Party was a legal political organization in California. But Congress amended the laws to apply the penalty of deportation to past party membership. So, after thirty-six years of lawful residence, Galvan was ordered deported to Mexico.

Yet that description is far from the whole story. You will not find it in the case, but Robert Galvan was also active in labor politics.<sup>8</sup> He was not merely a “laborer who worked for Van Kamp Seafood Company”; he was also an officer of the United Seafood Workers Union. He was active in civil rights demonstrations for Latino workers. He was among several other Latino leaders targeted by Jack Tenney, a California state senator who chaired the California Un-American Activities Committee (1941-1949).<sup>9</sup> Tenney advocated for the deportation of many labor and Latino organizers.<sup>10</sup>

Who is Robert Galvan? Was he a labor activist? A husband and father? A Communist? A Latino? A Mexican citizen? A permanent resident alien? As lawyers and law students we think we know the answer that is relevant. We are trained to sort through the facts to uncover the relevant essential considerations. In constitutional and statutory law the relevant inquiry here is: what is this non-citizen’s — this *alien’s* — status? Our legal line-drawing starts and may end with the answer to that question. But does it really do justice? Fifty years ago, Frankfurter joined the Supreme Court in the revolu-

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7. *Id.* at 532 (Black, J., dissenting).

8. Carlos M. Larralde & Richard Griswold del Castillo, *Luisa Moreno and the Beginning of the Mexican American Civil Rights Movement in San Diego*, 43 J. SAN DIEGO HIST. 3 (1997).

9. See EDWARD L. BARRETT, JR., *THE TENNEY COMMITTEE: LEGISLATIVE INVESTIGATION OF SUBVERSIVE ACTIVITIES IN CALIFORNIA* (1951).

10. Larralde & Griswold del Castillo, *supra* note 8.

tionary rejection of a line-drawing that allowed non-white children to be segregated — separate is not equal and therefore it is unlawful. But the line of inclusion and equality in our society stopped short in the *Galvan* case. The majority accepted congressional power to deport Mr. Galvan, free from any substantive due process limitation. Alien Galvan, by never becoming a citizen, was on the wrong side of a legal line.<sup>11</sup> The line created by his lack of citizenship took away Galvan's right to be protected against retroactive application of a law, one of the foundations of due process.

Perhaps I should be forgiving of Justice Frankfurter. It was a time when Communism was greatly feared. But I *am* harsh, for Justice Frankfurter sat on the "right" side of this line-drawing only by luck. He was born in Austria and his family immigrated to the United States at a time when the United States had no visa requirement nor any quota limit on immigrants.<sup>12</sup> Both Frankfurter and Galvan began their lives in the United States with the same legal status. Neither was called a "lawful permanent resident," for such a category did not exist. Both men simply entered the United States as immigrants. When Frankfurter's father applied for naturalization, Frankfurter, by virtue of his minor status at the time, became a

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11. The Supreme Court also rejected Galvan's argument that the *ex post facto* Clause prohibited deportation laws that expel based on past legitimate conduct. The Court has consistently found the *ex post facto* Clause to limit only criminal statutes. *See Galvan*, 347 U.S. at 742-743. Once he had been a member of the Communist Party he was also ineligible for citizenship pursuant to the statutes of that time. Immigration and Nationality Act ("INA") § 313, 8 U.S.C. § 1424 (1994). Moreover, for those lawful permanent residents who were not "white," citizenship was also not available because our naturalization laws expressly forbade non-whites from acquiring citizenship. *See* IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996). The issue of whether Mexicans qualified as white had also been contested; however, a federal court in Texas had ruled that because Mexicans were granted full citizenships rights under treaty, Mexicans, including Mexicans of indigenous ethnicity, were entitled to be defined legally as white. *See In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897). In 1940 Congress specifically authorized all the peoples of the Western hemisphere as eligible for citizenship. The last racial barriers to citizenship were not removed until 1952. *See, e.g.*, Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525 (2000), Rogers M. Smith, *Black & White After Brown: Constructions of Race in Modern Supreme Court Decisions*, 5 U. PA. J. CONST. L. 709 (2003).

12. 4 THE SUPREME COURT OF THE UNITED STATES NOMINATIONS: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1975, 124 (Roy M. Mersky & J. Myron Jacobstein eds., 1977).

citizen by operation of law. Frankfurter chose citizenship no more than he chose to be born a Jew in Austria. Galvan chose his status, lawful permanent resident, no more than Frankfurter chose his, yet Galvan's failure to naturalize would be the legal distinction that made Frankfurter able to support his deportation.

## II. FIFTY YEARS LATER

This article is not meant to trace the complete and complicated evolution of the rights of aliens in our society. Fifty years later we could still deport Mr. Galvan.<sup>13</sup> Still, our constitutional law would protect Mr. Galvan's right to be free from many forms of governmental discrimination, at least while he held lawful residence in the United States. The Supreme Court has not clearly settled how strictly the court must scrutinize legal classifications that bar non-citizens, albeit permanent resident aliens, from certain forms of employment or governmental programs such as welfare or food stamps.<sup>14</sup> Mr. Galvan, had he been allowed to remain a permanent resident of the United States, might have obtained a fishing license<sup>15</sup> or become a notary public,<sup>16</sup> but he might lawfully have been excluded from public school teaching.<sup>17</sup> The list is odd and constitutional law professors and commentators can help you wind your way through it and come out with a coherent rationale; but

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13. See INA § 237(a)(4)(iii), 8 U.S.C. § 1227(a)(4)(iii) (1990): "any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is deportable".

14. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (applying heightened scrutiny and holding that a state statute denying welfare benefits based on alien and resident status violates Equal Protection Clause); *Foley v. Connelie*, 435 U.S. 291 (1978) (applying rational review and holding that a state may confine eligibility for police force service to citizens); *Plyler v. Doe*, 457 U.S. 202 (1982) (declaring that classification of undocumented persons is not entitled to heightened scrutiny, but that denial of primary education to undocumented children did not further a substantial state interest and was not permissible).

15. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

16. *Bernal v. Painter*, 467 U.S. 216 (1984) (holding that state cannot restrict licensing of notary publics to citizens alone).

17. *Ambach v. Norwick*, 441 U.S. 68 (1979) (holding that state may deny teaching licenses to non-citizens as part of the political function exception).

wend and wind you must, for this area of law is anything but settled.<sup>18</sup>

While the analogy between lines drawn by race and lines drawn by immigration status is not exact — certainly the government has some interest in regulating immigration — the lines drawn according to immigration status have not always produced lines that are rational, fair, or clear. Not surprisingly, then, the case law is unsettled about the constitutional rights of lawful permanent residents. Change the label from that vaulted status, lawful permanent resident, to an alien who has not been admitted, and suddenly the legal terrain is much less welcoming. Consider the stories of Freddy Vasquez and Brian Marroquin.<sup>19</sup> Both grew up in Virginia and attended public schools there. Both have strong academic credentials and planned to attend college in Virginia. When Freddy applied to Virginia Tech's architecture program, the application asked him to identify whether he was a citizen, a lawful permanent resident alien or other. Freddy Vasquez currently holds temporary protected status, a form of temporary safe haven which does not lead to permanent resident status.<sup>20</sup> This option did not appear on the application for Virginia Tech; Freddie checked "other." His application for admission to the college was denied. Brian Marroquin planned to apply to schools in the fall of 2004. At that time the legal policy of the State of Virginia denied any undocumented alien admission to all public universities.<sup>21</sup> Brian believed that he would be denied admission based on the policy of the state of Virginia. Freddy Vasquez and Brian Marroquin sued the state of Virginia.

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18. See Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994).

19. See *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004).

20. INA § 244, 8 U.S.C. § 1254a (1996). temporary protected status is also called the "safe haven" provision. It was created by Congress to authorize the U.S. Attorney General to recognize short term needs for temporary residence due to natural disasters or political turmoil. Freddy is a citizen of El Salvador. See *Equal Access Educ. v. Merten*, 325 F. Supp. 2d 655, 669 (E.D. Va. 2004); he came to the United States as a child to join his parents. See *Merten*, 305 F. Supp. 2d. at 593.

21. See Commonwealth of Virginia Attorney General Memorandum, *Immigration Law Compliance Update* (Sept. 5, 2002). Virginia is not alone in barring admission to post secondary education for those people who are not permanent residents of the United States or otherwise authorized to attend school under a temporary visa. For an excellent discussion of the issues see Michael Olivas, IIRIRA, *The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004). See also *infra* note 37.

Freddy alleged that he was not considered for admission because of his perceived illegal status. The court initially ruled that Freddy had standing to sue for perceived illegal status, but then ruled that Freddy no longer had standing to sue at all because there was not enough evidence to show that Freddy's denial of admission was based on immigration factors.<sup>22</sup> Brian's claim survived a motion to dismiss because he had standing based on his illegal status, but the claim was dismissed on summary judgment for lack of standing due to his illegal status.<sup>23</sup> The court held that an "illegal alien" does not have standing to challenge denial of admission to a state university. The court declared that states may, consistent with the Supremacy Clause, deny admission or enrollment to undocumented aliens, so long as the states use federal standards to determine status.<sup>24</sup> Both Freddy and Brian are caught in a legal void: Freddy cannot show he was denied admission based on his perceived illegal status, because his status is actually legal, and Brian cannot show he suffered an injury from his denial of admission because of his illegal status. Plaintiffs asserted that Brian fell within one of the exceptions to "unlawful presence" and therefore held legal status.<sup>25</sup> Interestingly, several pages of the opinion are devoted to deciphering exactly what Brian's status was under federal law. The court relied on an *ad hoc* interpretation of the statute defining the exceptions to unlawful presence, without any case support, and ultimately decided that Brian's status was "illegal."<sup>26</sup> In spite of the obvious challenges the court itself faced in determining status based on federal standards, and the strong possibility of error,<sup>27</sup> the court held that states are entrusted with the power of determining who is illegal based

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22. *Merten*, 325 F. Supp. 2d at 669-72. The evidence consisted entirely of affidavits and deposition testimony by Virginia Tech admissions officers, who claimed that status had no bearing on Freddy's application; there was no record of any written policy of the school.

23. *Id.* at 667.

24. *Id.* at 660. The court also refused to allow the plaintiffs to pursue their claims anonymously. *Doe v. Merten*, 219 F.R.D. 387 (E.D. Va. 2004) as cited in *Merten*, 325 F. Supp. 2d at 657-58.

25. *Merten*, 325 F. Supp. 2d at 663-65.

26. *Id.* at 662-65. Plaintiffs argued that Brian qualified for one of the exceptions under "unlawfully present" status.

27. It is noteworthy that the application to Virginia Tech has the options Citizen, Lawful Permanent Resident and "Other." If this is indicative of the school administration's view of the range of possible status designations, it does not bode well for the

upon federal standards, and thereafter may bar these “illegal” aliens from admission.<sup>28</sup>

The terms temporary protected status,<sup>29</sup> refugee,<sup>30</sup> asylum applicant,<sup>31</sup> F-1,<sup>32</sup> G-4,<sup>33</sup> J-2,<sup>34</sup> deferred action,<sup>35</sup> and parolee<sup>36</sup> are just a handful of the labels for the varied categories in our immigration laws. The media, legal decisions, and scholars constantly talk about immigration law and aliens as one category — to some a likely protected category, such that classification and separate treatment by the government would become suspect<sup>37</sup> — but there is not one category. Any attempt to reduce the options to a label of legal or illegal simply defies the complexity of the reality.

### III. THE LEGAL BOXES ARE POROUS

People who know the reality of immigration law are fond of saying that “today’s illegal is tomorrow’s legal alien.” Consider the straightforward example of a person who marries a U.S. citizen and files for permanent residence. The current waiting period for processing the forms is well over a year; the process of adjudicating the individual’s qualities and eligibility for immigration entails another waiting period. The person is technically defined in the law as “an applicant for adjustment of status.”<sup>38</sup> Some applicants for adjustment of status were technically illegally present in the country

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ability of institutions of higher education to make proper determinations under federal standards concerning status.

28. *Merten*, 325 F. Supp. 2d at 660.

29. INA § 244, 8 U.S.C. § 1254a (1996).

30. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42)(1996).

31. INA § 209, 8 U.S.C. § 1159 (1996).

32. INA § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F) (1994).

33. INA § 101(a)(15)(G)(i)-(iv), 8 U.S.C. § 1101(a)(15)(G)(i)-(iv) (1994).

34. INA § 101(a)(15)(J), 8 U.S.C. § 1101(a)(15)(J) (1994).

35. Deferred action is a discretionary status which government attorneys may confer in unusual removal cases. See CHARLES GORDON ET AL., 6 IMMIGRATION LAW AND PROCEDURE § 72.03(2)(h) (rev. ed. 2004) (explaining that this exercise in administrative discretion, originally known as “nonpriority” was developed for humanitarian reasons and stops further action against an apparently deportable alien).

36. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1994).

37. Suspect classification is a term courts generally use to indicate that legislation or policies affecting members of a group will be entitled to more intense scrutiny of the government’s rationale supporting its discrimination or treatment of this group. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

38. INA § 245, 8 U.S.C. § 1255 (1996).

but due to their eligibility for adjustment are now in a transitional phase. Determining who has a *bona fide* eligibility for adjustment is only part of the determination of “legality.” The ultimate decision about granting the adjustment is in the discretion of the agency. If state governments try to draw simple lines such as legal or illegal, documented or undocumented, they are acting in ignorance of the complexity of the immigration law and process.

Let us consider another example: an individual entered the United States without inspection and without any documents authorizing residence. He or she has lived here for many years and is sponsored for permanent immigration by an employer. The employer establishes that no qualified willing U.S. worker is available to fill the position. The employer files the required immigrant employment based visa petition and the government approves the petition. Thus the person who lived and resided here illegally is now the beneficiary of an approved visa petition authorizing immigration eligibility. But our law treats that person as “illegal.” Until the individual either qualifies for adjustment (and most people who entered without inspection are not eligible) or that individual departs the United States and applies for an immigrant visa at a U.S. consulate abroad, the individual is deemed to be “illegal.” Neither the years of residence nor the approved visa petition necessarily afford any greater rights than the person who entered the United States without inspection two weeks ago.

Until 1996, many people made the transition from illegal to legal by finding such a sponsoring employer or a sponsoring close relative, but in 1996 Congress amended the immigration laws to include a barrier to immigration for anyone who had overstayed or resided illegally in the United States for more than six months.<sup>39</sup> The person who overstayed or resided unlawfully for more than six months but less than one year is barred for three years from reentering. The person who overstayed or resided unlawfully for more than one year is barred for ten years. While there are limited waivers ameliorating the three and ten year barriers, many people will not risk being stuck outside the United States, separated from employment and/or family. Further, the waiver adjudication process

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39. INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) (1996).

is highly discretionary and far from transparent, and processing times may vary from months to years.

Judges facing constitutional challenges by the undocumented alien, the alien in transition between forms of status, or even the lawful permanent resident are reluctant to engage in close evaluation of the equities of each person's ties to the United States. Judges willingly defer to the decisionmaking and adjudications of the government agencies and defer to the agencies' classification of status. But this deference is shielding the harsh reality of the complexity and black adjudicatory holes of the immigration agency process. When evaluating constitutional claims, judges are allowing barriers like the three-year and ten-year bars to be effective in forbidding legalization, full incorporation into our society; the judicial focus on meaningless status lines to define the rights of aliens ignores their humanity. This legalism creates a class of invisible people who live among us but whom the law refuses to recognize. We have entire classes of people the law cannot or will not see.

This status of invisibility is one of the worst evils of the *Dred Scott* decision.<sup>40</sup> Until the passage of the Thirteenth, Fourteenth and Fifteenth Amendments to the U.S. Constitution, the personhood of people of color was severely limited and correspondingly so were the constitutional rights of those the law did not recognize. *Plessy v. Ferguson*<sup>41</sup> may have been based upon a false premise of separate but equal, but at least it acknowledged personhood.<sup>42</sup> Will we take the steps forward for aliens to be seen first as people? Will aliens' rights be determined not by technical legal status but in the context of their families, relationships, and contributions to society? The rights of aliens must be seen in light of the very fundamental rights that so many of us take for granted as "certain unalienable rights."<sup>43</sup>

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40. *Scott v. Sandford*, 60 U.S. 393 (1857).

41. 163 U.S. 537 (1896).

42. Of course, in reality the government never tried to create equal institutions. The step forward was a doomed illusory promise.

43. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

#### IV. MAKING THE ALIEN VISIBLE AND INCORPORATED IN OUR CONSTITUTION

Notwithstanding the vision of *Brown* as proof that the Court can reverse decades of discrimination, it is unrealistic to expect the Supreme Court to take the lead in incorporating the alien. The legal and social culture is far too comfortable with the technical line drawing. Especially in immigration law, the Supreme Court's deference to Congress and the Executive as to the manner in which they draw those lines, even if they discriminate on the basis of gender, race or national origin, is both long standing and unlikely to change.<sup>44</sup> Instead we must educate ourselves and our elected representatives. We must ask more questions about why we draw lines between citizens, lawful permanent residents, nonimmigrants, and undocumented. What is our purpose? Do we know what the status entails? What are the bureaucratic obstacles to obtaining such status? We must stop hiding behind the labels of status and illegality if we want to shape a just society.

In 2002 I began an article with a quote from Ralph Ellison's *Invisible Man*. In that piece I asked how our government can set labor and employment policy or immigration policy when it does not fully acknowledge the invisible workers among us.<sup>45</sup> I use the same quote here, because Ellison has a real message for us. When he wrote his book Ellison was asking us to fully see the humanity behind the skin color of a Black person. I ask you to read his words and ask yourself if you see the person in the label of "alien."

I am an invisible man. No, I am not a spook . . . I am a man of substance, of flesh and bone, fiber and liquids - and I might even be said to possess a mind. I am invisible,

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44. See Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984). I recently discussed these cases with Ira Gollobin, an attorney who began immigration practice in 1933. He said he too was disappointed that Frankfurter could see clear to avoid *stare decisis* in *Brown* but refused to "wipe the slate" clean in *Galvan*. I speculated that Frankfurter was reluctant to challenge Congressional authority over immigration because the judiciary, an unelected branch, would be rewriting the immigration laws. Mr. Gollobin, who argued cases before the Supreme Court in the *Galvan* era, shook his head and said, "[i]n Frankfurter, a former champion of civil liberties and an immigrant, it was really disappointing." Interview with Ira Gollobin, New York, New York (Feb. 2005).

45. Lenni B. Benson, *The Invisible Worker*, 27 N.C.J. INT'L & COM. REG. 483 (2002).

understand, simply because people refuse to see me . . . . That invisibility to which I refer occurs because of a peculiar disposition of the eyes of those with whom I come in contact. A matter of the construction of their inner eyes, those eyes with which they look through their physical eyes upon reality.<sup>46</sup>

Our laws, our statutes, and our cases refuse to see the person who is labeled alien. In 1954 the Supreme Court did not fully see “the alien Galvan.” Although I am speculating based on Galvan’s labor activities and civil rights work in California, it may have been Galvan’s efforts to earn equal rights for Latinos in Southern California and to desegregate the public school system there that helped make him a target to the legislators seeking to purge our country of Communists. After Galvan’s deportation to Mexico, I could find no reference to him. Did he live the rest of his life in Mexico? While he may have lost his status in the United States, surely he remained visible to his family, friends, and labor colleagues. How did he live as an invisible man? Our deportation laws silenced his social protest. We made him both invisible and politically impotent. Would *Brown* have ever happened if the civil rights leaders who sought the inclusion of African Americans could have been deported?

Will Freddy Vasquez remain in the United States? At some point his temporary protected status may end. Will he then join the invisible? This is the future we offer a man who was raised in the United States? If Freddy is going to rely on the courts to see his life in its full complex context and to grant his protection from government discrimination he will most likely fail.

As we celebrate *Brown* as opening our educational institutions and bringing down invidious racial barriers, we appropriately should also use the occasion to reappraise. Can we have an egalitarian society based on arbitrary classification and ignoring the rights of many people who live among us? There are small signs that some of our legislators are looking for a way to more fully incorporate the invisible aliens. In the spring of 2004 the Senate Judiciary Committee approved “The Development, Relief and Education for

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46. RALPH ELLISON, *THE INVISIBLE MAN* 3 (Modern Library, 1994)(1952).

Minors (“DREAM”) Act.”<sup>47</sup> This legislation would allow non-citizens who have graduated from a U.S. high school and who have lived in the United States for at least five years to become lawful permanent residents if they complete two years of college. This legislation at least recognizes that these students should be allowed to pursue a college education. But it is only a partial recognition that our immigration policies are far out of sync with the patterns of migration and residence in the United States.

Perhaps one day the Supreme Court will see this gap between the reality of individuals’ lives and their legal status and the Court will question whether equality has once again been denied by arbitrary legal line-drawing. Perhaps one day the Supreme Court will revisit *Galvan* and the odd assortment of alienage cases and finally “wipe the slate clean.”<sup>48</sup>

Until that day there will be no true equality, no fair play, as long as the alien is only viewed through the lens of a legal status that bears no relationship to the reality of his life in this country. We must reform the law and undertake the delicate, complicated, and messy task of recognizing the aliens among us. Perhaps we cannot in every case offer full incorporation, but surely our legal procedures and our line-drawing can do a better job of making the human visible. And even if the alien must remain “separate” we can strive toward greater fairness and equality.

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47. S. 1545, 108th Cong. (2003), introduced on July 31, 2003. A related bill introduced in the House of Representatives, Student Adjustment Act of 2003 (H.R. 1684). The DREAM Act has not been enacted into law. The bill awaits reintroduction in the 109th Congress. See Andrew Stephenson, *Dreaming of an Equal Future for Immigrant Children: Federal and State Initiatives to Improve Undocumented Students’ Access to Postsecondary Education*, 46 ARIZ. L. REV. 551 (2004) (discussing the legislation and the need for solutions for undocumented students who are long term U.S. residents). The author won the American Immigration Lawyers’ Association annual Dubroff writing competition based on this paper.

48. See *Galvan*, 347 U.S. at 530-31 (explaining that since the Court was not writing on a clean slate, that the Court could not circumscribe Congressional power according to due process; authority had long since been entrusted to Congress to determine the scope of due process protection afforded to immigration procedures.)

