

Hernandez v. Texas: Legacies of Justice and Injustice

Kevin R. Johnson*

Introduction

- I. Legacy of Justice: Recognition of the Mexican “Race”
 - A. California’s Native Son: Earl Warren
 1. Japanese Internment
 2. The Sleepy Lagoon Murder Case
 3. The “Zoot Suit” Race Riots
 4. Mexican American Desegregation Litigation: *Westminister School District v. Mendez* (1947)

* Associate Dean for Academic Affairs, School of Law, and Mabie/Apallas Professor of Public Interest Law, School of Law, and Chicana/o Studies, University of California at Davis; A.B., University of California, Berkeley; J.D., Harvard University. Thanks to Michael Olivas for inviting me to participate in this important conference commemorating the 50th anniversary of *Hernandez v. Texas*, 347 U.S. 475 (1954). His support and mentorship has been invaluable to me throughout my professional career. Conversations with George A. Martínez helped my thinking on the issues raised in this paper. The expert staff of the U.C. Davis Law Library, especially Peg Durkin, Susan Llano, Aaron Dailey, and Elizabeth McKechnie, was extraordinarily helpful in patiently helping me locate historical documents and other materials. The able research and editorial assistance of Jeff Finucane is much appreciated. Michael Olivas, Ralph Armbruster-Sandoval, Miroslava Chavez-Garcia, and Nancy Marder offered insightful comments on a draft of this paper.

5. Summary

- B. The Multiracial Equal Protection Clause
- C. The Racialization of Mexicans in Jackson County, Texas
- D. The Court's General Acceptance of *Hernandez v. Texas*'s Racial Teachings

II. Legacy of Injustice: The Persistent Underrepresentation of Latina/os on Juries

- A. The Citizenship Requirement
- B. The English Language Requirement
- C. The Exclusion of Felons
- D. The Use of Peremptory Challenges to Strike Latina/os
- E. The Dangers of Racially Skewed Juries in a Multiracial Society

Conclusion

INTRODUCTION

The Supreme Court's 1954 decision in *Hernandez v. Texas*¹ was a legal watershed for Mexican Americans in the United States. In that decision, the nation's highest court ruled that the systematic exclusion of persons of Mexican ancestry from juries in Jackson County, Texas violated the Constitution. The evidence of exclusion included the fact that no person of Mexican ancestry had served on a jury in that county in the previous 25 years even though Mexicans comprised more than 10 percent of the adult population.²

¹ 347 U.S. 475 (1954).

² See *infra* text accompanying notes 106-38.

That discrimination against Mexican Americans existed in the United States was no surprise to the greater Mexican community in 1954, which had long been relegated to second class citizenship in much of the Southwest.³ Housing and job segregation was common.⁴ Mexican Americans as a group were well aware that the United States had conquered Mexico's northern territories in a war of aggression,⁵ and that persons of Mexican ancestry had suffered mass deportations during the Great Depression,⁶ were beaten on the streets of Los Angeles by members of the armed forces in the infamous "Zoot Suit" riots during World War II,⁷ experienced exploitation and abuse through the Bracero Program that brought temporary workers from Mexico to the United States from the 1940s to the 1960s,⁸ and lived through raids and mass deportations in "Operation Wetback" in 1954,⁹ the very same year that *Hernandez* was decided.¹⁰

³ See, e.g., RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (3d ed. 1988); TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994); MARIO BARRERA, RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY (1979); LEONARD PITT, THE DECLINE OF THE CALIFORNIOS: A SOCIAL HISTORY OF THE SPANISH-SPEAKING CALIFORNIANS, 1846-1890 (1966).

⁴ See *Hernandez v. Texas*, 347 U.S. at 471, 481.

⁵ See REGINALD HORSMAN, RACE AND MANIFEST DESTINY 208-14 (1981).

⁶ See FRANCISCO E. BALDERRAMA & FRANCISCO RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (1995); CAMILLE GUERIN-GONZALES, MEXICAN WORKERS AND THE AMERICAN DREAM: IMMIGRATION, REPATRIATION, AND CALIFORNIA FARM LABOR, 1900-1939 (1994); ABRAHAM HOFFMAN, UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION: REPATRIATION PRESSURES, 1929-1939 (1974).

⁷ See EDWIN J. ESCOBAR, RACE, POLICE, AND THE MAKING OF A POLITICAL IDENTITY: MEXICAN AMERICANS AND THE LOS ANGELES POLICE DEPARTMENT, 1900-1945, at 84-90 (1999); *infra* text accompanying notes 67-81.

⁸ See KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S. (1992); ERNEST GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY (1964).

⁹ See generally JUAN RAMON GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980) (analyzing federal government's deportation campaign directed at immigrants from Mexico).

¹⁰ Moreover, Mexican immigrants long have suffered from violence along the U.S./Mexico border at the hands of immigration enforcement authorities. See, e.g., ALFREDO MIRANDÉ, GRINGO JUSTICE (1987); AMNESTY INT'L, UNITED STATES OF AMERICA: HUMAN RIGHTS CONCERNS IN THE BORDER REGION WITH MEXICO (1998); AMERICAN FRIENDS SERVICE COMM., HUMAN AND CIVIL RIGHTS VIOLATIONS ON THE U.S. MEXICO BORDER 1995-97 (1998). For analysis of the impacts of the dramatic increase in border enforcement operations along the United States's southern border with Mexico in the 1990s, which has resulted in the deaths of thousands of Mexican nationals, see Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy, 1993-2000*, 27 POPULATION & DEV. REV. 661 (2001); Karl Eschbach et al., *Death at the Border*,

33 INTERNATIONAL MIGRATION REV. 430 (1999); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121 (2001). Personal accounts of the deaths of migrants caused by the enforcement operations can be found in KEN ELLINGWOOD, *HARD LINE: LIFE AND DEATH ON THE U.S.-MEXICO BORDER* (2004); LUIS ALBERTO URREA, *THE DEVIL'S HIGHWAY: A TRUE STORY* (2004).

Although not alone among the states in discriminating against persons of Mexican ancestry, Texas had earned a reputation for its rigid multiracial caste system.¹¹ Indeed, in negotiating the agreements with the United States creating the Bracero Program, the Mexican government initially insisted on barring temporary workers from Texas because of the notorious discrimination against persons of Mexican ancestry in the Lone Star state.¹²

With *Hernandez v. Texas*, the law began to recognize the social reality of Mexican Americans in the United States, a development that occurred somewhat later than it did for other minority groups.¹³ A unanimous Supreme Court, in an opinion by Chief Justice Earl Warren, who also authored the unanimous opinion in *Brown v. Board of Education*,¹⁴ ruled that the Equal Protection Clause of the Fourteenth Amendment barred the systematic exclusion of persons of Mexican ancestry from juries, one of the institutions often identified as exemplifying the United States's commitment to democracy.¹⁵ As a legal matter, the Court only found that Mexican American citizens could not be barred as a group from jury service. However, the Court's decision meant much more than that.

This paper highlights two important legacies of *Hernandez v. Texas*. First, as other commentators have observed, the Court's decision represented a critical inroad on the commonly-understood view that the Equal Protection Clause of the Fourteenth Amendment only

¹¹ See generally NEIL FOLEY, *THE WHITE SCOURGE: MEXICANS, BLACKS AND POOR WHITES IN TEXAS COTTON CULTURE* (1999) (analyzing discrimination against different groups in Texas); DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986* (1987) (documenting history of discrimination against persons of Mexican ancestry in Texas); ARNOLDO DE LEÓN, *THEY CALL THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821-1900* (1983) (reviewing history of negative attitudes toward Mexican Americans by Anglos); GUADALUPE SAN MIGUEL, JR., "LET ALL OF THEM TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981 (1987) (analyzing Mexican American fight for educational equity in Texas); Thomas D. Russell, *Law School Affirmative Action: An Empirical Study – The Shape of the Michigan River as Viewed from the Land of Sweatt v. Painter and Hopwood*, 25 *LAW & SOC. INQUIRY* 507 (2000) (studying affirmative action from perspective of history of racial discrimination in Texas); *The Texas Assessment of Academic Skills Exit Test – "Driver of Equity" or "Ticket to Nowhere?"*, 2 *THE SCHOLAR: ST. MARY'S REVIEW ON MINORITY ISSUES* 187, 193, 195-96 (2000) (Report of Professor Amilcar Shabazz) (summarizing racial discrimination in Texas education); Jorge Rangel & Carlos M. Alcala, *De Jure Segregation of Chicanos in Texas Schools*, 7 *HARV. C.R.-C.L. L. REV.* 307 (1972) (reviewing segregation of students of Mexican ancestry in Texas public schools); Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 *CAL. L. REV.* 662 (1975) (discussing racial discrimination against Mexican Americans).

¹² See CALAVITA, *supra* note 8, at 20, 23-24.

¹³ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁴ 347 U.S. 483 (1954).

¹⁵ See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252 (Jacob Peter Mayer & Max Lerner eds., 1969 ed.).

protected African Americans.¹⁶ Until 1954, this narrow understanding had worked to the detriment of Mexican Americans seeking to vindicate their constitutional rights.¹⁷ The legal challenge to the Black/white paradigm of civil rights ultimately triumphed, with the Equal Protection guarantee now protecting all (including whites), not just some, races from invidious discrimination.¹⁸ The Court in *Hernandez v. Texas* thus continued the gradual expansion of the Equal Protection Clause.

¹⁶ See *infra* text accompanying notes 87-105.

¹⁷ See *infra* text accompanying notes 98-101, 111-13.

¹⁸ See *infra* text accompanying notes 87-105.

Although this important aspect of *Hernandez v. Texas* is well recognized, not much attention has been paid to why the Supreme Court made such an important ruling at this time in U.S. history. Chief Justice Earl Warren wrote the opinion for the Supreme Court. A native son of California, Warren knew well from personal and professional experience of the discrimination against Mexican Americans, as well as Asian Americans, Native Americans, and African Americans, in the Golden State.¹⁹ Indeed, the World War II period – when Earl Warren was California’s Attorney General and later Governor – was one of the most concentrated and well-publicized periods of anti-Mexican violence in California in the entire twentieth century.²⁰ The Mexican American community reacted with outrage to what it perceived as a racially biased law enforcement and criminal justice system. Earl Warren’s experience with the Mexican American civil rights struggle undoubtedly contributed to the timing of the Court’s decision in *Hernandez v. Texas*.

Appointed as Chief Justice of the Supreme Court in 1953, Earl Warren previously had served as Attorney General and Governor of California, an incredibly diverse state that had experienced more than its share of racial tensions during his life. His experience as a political leader no doubt allowed him to have a better fundamental understanding of the complexities of racial discrimination. This experience supports the theory that a judiciary reflecting diversity in many respects – race, gender, class, life experiences – may improve the judicial process.²¹ It also helps explain how Chief Justice Earl Warren could write an informed opinion like *Hernandez v. Texas*.

Second, the paper considers *Hernandez v. Texas*’s important unfinished business. The Supreme Court concluded that the systematic exclusion of Mexican Americans from petit and grand juries violated the Equal Protection Clause of the Fourteenth Amendment, which logically extended previous caselaw dating back to the nineteenth century that prohibited the exclusion of African Americans from juries.²²

¹⁹ See *infra* text accompanying notes 32-86.

²⁰ See *infra* text accompanying notes 32-86.

²¹ See Theresa M. Beiner, *The Elusive (But Worthwhile) Quest For a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597 (2003). For analysis of the importance of racial diversity on the judiciary, see Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. (forthcoming 2004).

²² See *infra* text accompanying notes 159-248.

The jury systems in place throughout the United States, however, include a variety of color-blind – and, to this point, entirely legal – mechanisms that in operation limit the number of Latina/o jurors and ensure that juries in localities across the country fail to represent a cross section of the community.²³ Citizenship and English language requirements for jury service, as well as the disqualification of felons, bar disproportionate numbers of Latina/os from serving on juries.²⁴ In addition, the Supreme Court has sanctioned the use of peremptory challenges to strike bilingual jurors, thus allowing parties to remove bilingual Latina/os from juries on ostensibly race neutral grounds.²⁵

The end result is that Latina/os are significantly underrepresented on juries. Unfortunately, racially skewed juries undermine the perceived impartiality of the justice system and the rule of law. Cynicism about the law and its enforcement, already a problem among Latina/os and other minority communities, creates the potential for domestic unrest. The violence following the Rodney King verdict in May 1992 in South Central Los Angeles exemplifies the potentially explosive impacts of a justice system viewed by minorities as racially-biased.²⁶

In sum, the promise of full representation of Mexican Americans on juries in *Hernandez v. Texas* has yet to be realized.²⁷ In that way, the legacy of *Hernandez v. Texas* resembles that of *Brown v. Board of Education*,²⁸ perhaps the leading civil rights Supreme Court decision of the

²³ See *infra* text accompanying notes 159-248.

²⁴ See *infra* text accompanying notes 180-220.

²⁵ See *infra* text accompanying notes 221-35.

²⁶ See *infra* text accompanying notes 236-48.

²⁷ See *infra* text accompanying notes 159-248.

²⁸ 347 U.S. 483 (1954). By some accounts, the public schools remain just as segregated today as they were in 1954. See GARY ORFIELD & JOHN T. YUN, RESEGREGATION IN AMERICAN SCHOOLS (1999), available at www.law.harvard.edu/groups/civilrights/publications/resegregation99.html

twentieth century – the mandate in both path-breaking cases remains to be achieved. Racially disparate results continue despite the legal prohibition of de jure discrimination.

I. LEGACY OF JUSTICE: RECOGNITION OF THE MEXICAN “RACE”

(June 1999); GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996).

The Equal Protection Clause of the Fourteenth Amendment long has been the protector of African American civil rights, which makes sense given that it was ratified as part of a package of Reconstruction Amendments designed in no small part to end the institution of slavery and its vestiges.²⁹ Over the last few decades, critical theorists have contended that this Black/white paradigm of civil rights must be expanded to account for the status of other racial minority groups to allow for a fuller understanding of race relations and civil rights in the United States.³⁰ The growing awareness of the increasingly multiracial America required this shift in the view of civil rights law.³¹

This section demonstrates how *Hernandez v. Texas* came to the U.S. Supreme Court at an opportune time for civil rights advocates, with Chief Justice Earl Warren – who had been confirmed just one year before the decision was handed down – well aware of the discrimination against Mexican Americans in California. Moreover, the Court already had held in several cases that various non-African American racial minorities were protected by the U.S. Constitution. The section then analyzes the Court’s treatment of Mexicans as a discrete and insular minority in Texas and the Supreme Court’s subsequent general acceptance of the racialization of Latinas/os in other states and localities to a point where today the group identity of, and discrimination against, Latina/os is assumed without much question or inquiry.

A. *California’s Native Son: Earl Warren*

²⁹ See *The Slaughterhouse Cases*, 83 U.S. 36 (1873); JACOBUS TENBROEK, *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951).

³⁰ See, e.g., Richard Delgado, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

³¹ See Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and the New Civil Rights Law*, 49 UCLA L. REV. 1481 (2002).

California has had a rich, if not altogether laudatory, racial history.³² The state championed exclusion of Chinese immigrants in the late 1800s³³ and the “alien” land laws restricting ownership of land by noncitizens that targeted Japanese immigrants in the early 1900s.³⁴ Although California may not have been the center of the civil rights struggle of African Americans, the struggles of other racial minorities had been going on there for decades.³⁵

Against this historical backdrop, Chief Justice Earl Warren could not have been ignorant of the many different racial minorities besides African Americans subject to discrimination in American social life. In fact, as we will see, he was an active participant in what turned out to be one of the most regrettable chapters of racial discrimination against a non-African American racial minority in modern U.S. history.³⁶

Born in Los Angeles,³⁷ Earl Warren’s personal and professional life had been deeply immersed in the “sticky mess of race”³⁸ of a rapidly changing United States. Growing up in a working class family in Bakersfield, California, Warren had lived in rural town that segregated Chinese workers³⁹ and saw “minority groups brought into the country for cheap labor paid a

³² See generally ALMAGUER, *supra* note 3 (analyzing history of discrimination against different racial minority groups in California); Richard Delgado & Jean Stefancic, *California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000) (summarizing California’s history of discrimination against racial minorities and attempting to use it to justify remedial affirmative action in higher education).

³³ See, e.g., *The Chinese Exclusion Case* (Chae Chan Ping v. United States), 130 U.S. 581 (1889) (upholding one of series of laws designed to bar immigration of Chinese to United States). See generally LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995) (analyzing impact of Chinese exclusion laws on development of U.S. immigration law); BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990* (1993) (documenting how U.S. immigration law and policy shaped the formation of Asian American communities).

³⁴ See Keith Aoki, *No Right to Own?: The Early Twentieth Century “Alien Land Laws” as a Prelude to Internment*, 40 B.C. L. REV. 37, 19 B.C. THIRD WORLD L.J. 37 (1998); see, e.g., *Oyama v. California*, 323 U.S. 633 (1948); *Cockrill v. California*, 268 U.S. 258 (1925); *Frick v. Webb*, 263 U.S. 326 (1923); *Webb v. O’Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923).

³⁵ See Neil Gotanda, “Other Non-Whites” in *American Legal History*, 85 COLUM.L. REV. 1186 (1985) (book review); see, e.g., CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH CENTURY CALIFORNIA* (1994).

³⁶ See *infra* text accompanying notes 48-52.

³⁷ In his autobiography, Warren waxed fondly about the Mexican and Spanish influences on Los Angeles. See EARL WARREN, *THE MEMOIRS OF EARL WARREN* 11 (1977).

³⁸ This phrase is borrowed from Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby – LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585 (1997).

³⁹ See WARREN, *supra* note 37, at 17; see also *id.* at 55 (noting that Warren learned , in the

dollar a day for ten hours of work only to be fleeced out of much of that at the company store where they were obliged to trade.”⁴⁰

Alameda County District Attorney’s office that “there were many people in California who were anti-Oriental and who looked with favor on any restrictions upon the Chinese. The resurgence of the Ku Klux Klan contributed greatly to this spirit, and the Legislature itself gave evidence of condoning it.”); *id.* at 147-48 (mentioning anti-Japanese sentiment in California that grew in the wake of the attack on Pearl Harbor).

⁴⁰ *Id.* at 30.

Politics – the lifeblood of any politician – shaped Warren’s stance on civil rights before his appointment to the Supreme Court. As Attorney General of California in the early 1940s, he supported the internment of persons of Japanese ancestry but sought to vindicate the rights of Indian tribes under treaties.⁴¹ The Attorney General’s office under his leadership advocated against the rights of Latino criminal defendants.⁴² But he will be forever remembered for forging the unanimous opinion in the constitutional law landmark of the twentieth century – *Brown v. Board of Education*.

As a District Attorney in Northern California, Warren encountered the Ku Klux Klan in law enforcement, grand juries, and the judiciary.⁴³ He thus knew of the racism that influenced the justice system, and this knowledge influenced his public decisions. As Governor, Warren commuted a death sentence to life imprisonment imposed on an African American defendant when convinced, after consulting with the trial judge and having the jury interviewed, that the defendant would not have been sentenced to death if he were white.⁴⁴

Specifically, Warren was familiar with discrimination against persons of Mexican

⁴¹ *See id.* at 153-55.

⁴² *See, e.g.,* *People v. Gonzalez*, 20 Cal. 2d 165, 124 P.2d 44 (rejecting exclusionary rule in case of improper search), *cert. denied*, 317 U.S. 652 (1942), *overruled*, *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955); *People v. Chavez*, 41 Cal. App. 2d 428, 106 P.2d 922 (1940) (affirming conviction of Latino in robbery case).

⁴³ *See* WARREN, *supra* note 37, at 85, 87, 99, 100-01.

⁴⁴ *See id.* at 212.

ancestry. He was a young attorney when state and local officials in Los Angeles County had assisted in the “repatriation” of thousands of persons of Mexican ancestry – U.S. citizens and immigrants – to reduce the welfare rolls and “save” jobs for Americans.⁴⁵ “The raids [during this deportation campaign] fostered an anti-immigrant fervor in Los Angeles that makes the days of Proposition 187 in the 1990s seem like a marathon Cinco de Mayo dance.”⁴⁶ The repatriation laid the groundwork for the anti-Mexican hysteria that gripped Southern California during World War II and garnered the attention of the entire nation.⁴⁷

1. *Japanese Internment*

⁴⁵ See *supra* note 6 (citing authorities).

⁴⁶ Antonio Olivo, *Ghosts of a 1931 Raid*, L.A. TIMES, Feb. 25, 2001, at B1. Proposition 187 was an anti-immigrant law passed by the California voters in 1994, over the opposition of the vast majority of Latina/o voters, after a bitter racially divisive campaign. See Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995); Ruben J. García, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995).

⁴⁷ See *infra* text accompanying notes 53-86.

A critical period during Earl Warren's early professional career had long term consequences on the nation and his view of race and racial discrimination. As Attorney General of California and gubernatorial candidate, Warren played a central role in advocating for the internment of persons of Japanese ancestry during World War II; indeed, he was no less than an anti-Japanese agitator during this time, working closely with the Native Sons of the Golden West, a fraternal society of which he was a member.⁴⁸ This regrettable period of Warren's professional life, which has been overshadowed in popular accounts of his career by his civil rights landmark of *Brown v. Board of Education*, has been ably documented and analyzed by Professor Sumi Cho.⁴⁹ The gravity of the mistake was understood shortly after the Supreme Court's upholding of the internment,⁵⁰ with sharp criticism almost immediately following the decision.⁵¹

Years later, Warren admitted guilt and remorse about his role in the internment:

I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens. Whenever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience-stricken. It was wrong to react so impulsively, without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state. It demonstrates the cruelty of war when fear, get tough military psychology, propaganda, and racial antagonism combine with one's responsibility for public security to produce such acts. I have always believed that I had no prejudice against the Japanese as such except that directly spawned by Pearl Harbor and its aftermath.⁵²

⁴⁸ For critical analysis of Earl Warren's involvement as California Attorney General in supporting Japanese internment, see Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 19 B.C. THIRD WORLD L.J. 73 (1998). Professor Cho contends that Warren's later civil rights decisions on the Supreme Court amounted to an effort at "racial redemption" for his discriminatory past. This rationale might help explain *Hernandez v. Texas*, as well as many of the Warren Court's civil rights decisions.

⁴⁹ See Cho, *supra* note 48.

⁵⁰ See *Korematsu v. United States*, 323 U.S. 214 (1944).

⁵¹ See Eugene V. Rostow, *The Japanese American Cases – A Disaster*, 54 YALE L.J. 489 (1945).

⁵² WARREN, *supra* note 37, at 149. In many respects, Warren's concerns with the anti-Japanese hysteria that swept California after Pearl Harbor is reminiscent of the United States government's treatment of Arabs and Muslims after the tragic events of September 11, 2001. See, e.g., Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 48 ANN. SURVEY AM. LAW 377, 351-55 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUMAN RIGHTS L. REV. 1 (2002). See generally MIGRATION POLICY INSTITUTE,

2. *The Sleepy Lagoon Murder Case*

AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11 (2003) (documenting civil rights abuses by federal government); U.S. OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003) (same); U.S. OFFICE OF THE INSPECTOR GENERAL, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT (2003) (same). *But see* MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR RACIAL PROFILING IN WORLD WAR II AND THE WAR ON TERROR (2004) (defending the decision to intern persons of Japanese ancestry during World War II and racial profiling in the war on terror).

The internment of the Japanese was just the beginning of the racial turmoil in California during World War II. A series of nationally publicized events gripped the nation and revealed the depth of racial discrimination against persons of Mexican ancestry.⁵³

Long before World War II, the Los Angeles Police Department had a history of discriminating against persons of Mexican ancestry.⁵⁴ Mexican Americans, who often were unfairly blamed for crime and membership in gangs, feared the police. The fear grew worse after the Sleepy Lagoon murder case.

In 1942, a young Mexican American man was found dead at a local Los Angeles lake known as Sleepy Lagoon. In response, Los Angeles police rounded up hundreds of Mexican American youth. The dragnet produced scores of arrests and beatings, and ultimately resulted in the wrongful conviction of a group of Mexican Americans.⁵⁵

⁵³ For a discussion on the Sleepy Lagoon case and subsequent events during that era of Southern California history as Mexican Americans resisted violations of their civil rights, see Ricardo Romo, *Southern California and the Origins of Latino Civil-Rights Activism*, 3 W. LEG. HIST. 379 (1990).

⁵⁴ See Theodore W. Maya, Comment, *To Serve and Protect or to Betray and Neglect?: The LAPD and Undocumented Immigrants*, 49 UCLA L. REV. 1611, 1614-20 (2002).

⁵⁵ See CAREY MCWILLIAMS, NORTH FROM MEXICO 227-43 (1948). See generally EDUARDO OBREGÓN PAGÁN, MURDER AT THE SLEEPY LAGOON: ZOOT SUITS, RACE, & RIOT IN WARTIME L.A. (2003) (chronicling Sleepy Lagoon case and connection with subsequent Zoot Suit riots).

The judicial proceedings were flawed from the outset. A Los Angeles County Sheriff, with his superior's written concurrence, testified before a special session of the Los Angeles County Grand Jury (which probably failed to include many, if any, persons of Mexican ancestry),⁵⁶ about the biological propensity of Mexicans toward crime, which caused the "Mexican gang" problem.⁵⁷ The Los Angeles Sheriff's office stated succinctly that, because of their Indian roots, Mexicans had a "total disregard for human life [that] has always been universal throughout the Americas among the Indian population, which of course is well known to everyone"⁵⁸; this character flaw could not be remedied because "*one cannot change the spots of a leopard.*"⁵⁹ Not surprisingly, the grand jury indicted a group of Mexican American youths for the Sleepy Lagoon murder.

Even given the alleged criminal propensity, the Sheriff's office acknowledged that persons of Mexican ancestry suffered discrimination in Los Angeles County:

Discrimination and segregation as evidenced by public signs and rules such as appear in certain restaurants, public swimming plunges, public parks, theatres and even in schools, cause[] resentment among the Mexican people. There are certain parks in the state in which a Mexican may not appear, or else only on a certain day of the week. There are certain plunges where they are not allowed to swim or else only a certain day of the week, and it is made evident by signs reading to that effect; for instance, "Tuesdays reserved for Negroes and Mexicans." Certain theatres in certain towns either do not allow the Mexicans to enter or else segregate them in a certain section. Some restaurants absolutely refuse to serve them a meal and so state by public signs. The Mexicans take the attitude that they pay taxes for the maintenance of public institutions the same as anyone else. Certain court actions have been brought by them to force the admittance of their children into certain public schools.⁶⁰

Despite the discrimination, the official position of law enforcement was that the cause of the Mexican American crime "problem" was a biological propensity toward criminality.

The Sleepy Lagoon murder trial was later described as "a travesty"⁶¹ and "outrageously

⁵⁶ See *infra* text accompanying note 173 (discussing underrepresentation of Mexican Americans on Los Angeles County grand jury).

⁵⁷ See SOLOMON JAMES JONES, *THE GOVERNMENT RIOTS OF LOS ANGELES, JUNE 1943*, at 14-15, 85-95 (1969); MCWILLIAMS, *supra* note 55, at 232-35; Robert S. Chang, *Policing the Criminal Justice System: Los Angeles as a Single-Celled Organism*, 34 *LOY. L.A. L. REV.* 843, 847-49 (2001).

⁵⁸ Foreign Relations Bureau of Los Angeles, Sheriff's Office Statistics, in JONES, *supra* note 57, at 86.

⁵⁹ *Id.* at 87 (emphasis added).

⁶⁰ *Id.* at 85.

⁶¹ ESCOBAR, *supra* note 7, at 225.

biased.”⁶² The judge had it in for the defendants and refused to allow them to have their hair cut or change their clothes during the lengthy trial because, in his estimation, their appearance and attire was relevant to the determination of their guilt; during the trial, he denied them the right of effective representation by counsel by separating the defendants from their attorneys in the courtroom, which along with other improprieties ultimately resulted in reversal of the convictions.⁶³ The jury convicted a group of more than twenty Mexican American men in a mass trial riddled with errors.

⁶² KEVIN STARR, *EMBATTLED DREAMS: CALIFORNIA IN WAR AND PEACE, 1940-1950*, at 102 (2002)

⁶³ *See People v. Zammora*, 66 Cal. App. 2d 166, 152 P.2d 180 (1944).

The firm conviction among some influential Angelenos was that the defendants had been railroaded. The Sleepy Lagoon Defense Committee built a broad base of political and financial support for release of the Sleepy Lagoon defendants. Supporters included labor, minority groups, and entertainers, such as Orson Welles, Will Rogers, Nat King Cole, Rita Hayworth, Anthony Quinn, Elia Kazan, Vincent Price, Gene Kelly, and Lena Horne.⁶⁴ Among other activities, the committee presented a petition to Governor Warren asking him to free the young Mexican American defendants.⁶⁵ Although it failed to trigger Warren to act, the petition, and the accompanying political pressure and press attention given the case, put the Governor on notice of claims of racial bias against persons of Mexican ancestry in the criminal justice system.

As in the Sleepy Lagoon murder case, unfairness with the grand jury, and the appearance of a deeply biased, anti-Mexican justice system, later was at issue in *Hernandez v. Texas*.⁶⁶ The controversy of the much-publicized case necessarily sensitized the public and Governor Warren to the civil right issues facing Mexican Americans.

3. *The “Zoot Suit” Race Riots*

The stage was set for a more concentrated, and violent, outburst of anti-Mexican sentiment in Southern California. In June 1943, Los Angeles saw the mass deprivation of civil rights of Mexican Americans as, over a period of days, Anglo servicemen beat Mexican Americans on the city streets while police watched.⁶⁷

⁶⁴ See ESCOBAR, *supra* note 7, at 276-78; PAGÁN, *supra* note 55, at 205.

⁶⁵ See ESCOBAR, *supra* note 7, at 275-76; *see also* Chang, *supra* note 57, 845-49 (analyzing anti-Mexican frenzy in greater Los Angeles area during time of Zoot Suit riots and Sleepy Lagoon Murder trial).

⁶⁶ See *infra* text accompanying notes 106-38.

⁶⁷ See MCWILLIAMS, *supra* note 55, at 255; STARR, *supra* note 62, at 104-11. *See generally* MAURICIO MAZÓN, *THE ZOOT-SUIT RIOTS: THE PSYCHOLOGY OF SYMBOLIC ANNIHILATION* (1984) (documenting the events giving rise to the Zoot Suit riots and analyzing their meaning).

The “Zoot Suit” riots were named after the fashionable attire worn by Mexican American and African American youth of the time; the clothes were a sign of the jazz counterculture of the day. Despite the naming of the violence after the clothing of the victims, the events, however, were most appropriately classified as a race riot, with Anglo servicemen beating and stripping Mexican Americans of their zoot suits in the streets, with police in many instances watching and, if arresting anyone, only arresting the Mexican American victims. By virtually all accounts, the press sensationalized the threat of the “zoot suiters” and fomented racial hatred.

The Zoot Suit riots attracted national attention,⁶⁸ including that of the nation’s First Lady, Eleanor Roosevelt. In a syndicated national column, Roosevelt equated the violence to race riots that had recently occurred across the country, from Beaumont, Texas to Detroit, Michigan.⁶⁹

⁶⁸ See ESCOBAR, *supra* note 7, at 233-53; MCWILLIAMS, *supra* note 55, at 228-33.

⁶⁹ See ESCOBAR, *supra* note 7, at 245; MCWILLIAMS, *supra* note 55, at 256.

Worried about the impacts of the political controversy on his national political ambitions,⁷⁰ Governor Earl Warren quickly appointed a committee to investigate the violence.⁷¹ The report of the California Citizens Committee on Civil Disturbances in Los Angeles, chaired by a Catholic Bishop, Joseph T. McGucken, and including as a member Mexican American actor Leo Carrillo, criticized the police, the newspapers, and the climate of anti-Mexican prejudice surrounding the riots.⁷² McGucken's cover letter addressed to Governor Warren accompanying the report stated that "[t]here are many reported instances of police and sheriff indifference, neglect of duty, and discrimination against members of minority groups"; the committee concluded "that the situation on the East side, where Los Angeles has the largest concentration of persons of Mexican and Negro ancestry, *is a potential powder keg . . .*."⁷³

The committee report observed that nearly a quarter million persons of Mexican ancestry lived in Los Angeles County and that "[l]iving conditions among the majority of these people are far below the general level of the community. *Housing is inadequate; sanitation is bad and made worse by congestion. Recreational facilities for children are very poor; and there is insufficient supervision of the playgrounds, swimming pools and other youth centers.*"⁷⁴

The report added that

⁷⁰ See STARR, *supra* note 62, at 111.

⁷¹ See ACUÑA, *supra* note 3, at 59; Lupe S. Salinas, *Gus Garcia and Thurgood Marshall: Two Legal Giants Fighting for Justice*, 28 T. MARSHALL L. REV. 145, 151-52 (2003).

⁷² See ESCOBAR, *supra* note 7, at 244-45.

⁷³ Letter from Joseph T. McGucken, Auxiliary Bishop of Los Angeles, to Governor Earl Warren dated June 21, 1943, in Earl Warren Papers – Administrative Files – Department of Justice, Attorney General, Law Enforcement (3640:2624), Sacramento, California (emphasis added).

⁷⁴ Report and Recommendations of the California Citizens Committee on Civil Disturbances in Los Angeles 3 (June 12, 1943) (emphasis added).

*Most of the persons mistreated during the recent incidents in Los Angeles were either persons of Mexican descent or Negroes. In undertaking to deal with the cause of these outbreaks, the existence of race prejudice cannot be ignored. . . . Any solution of the problems involves, among other things, an educational program throughout the community designed to combat race prejudice in all its forms.*⁷⁵

⁷⁵

Id. at 4 (emphasis added).

The committee made a number of recommendations, including not focusing law enforcement activities exclusively on minority communities, better police training, and hiring officers who speak Spanish.⁷⁶ To improve the racial sensibilities of the Los Angeles Police Department, various groups advocated the hiring of more Mexican American police officers, a recommendation that appealed to Governor Warren.⁷⁷ Most generally, the committee recommended that “[d]iscrimination against any race in the provision or use of public facilities should be abolished” and that educational programs “should be undertaken to make the entire community understand the problems and background of the minority group.”⁷⁸

The charges of racial discrimination could not have been missed by Earl Warren. Nor was the context in which the violence occurred. In responding to an inquiry about the riots by U.S. Attorney General Francis Biddle, Governor Warren wrote that the African American and Mexican American populations had increased dramatically in Los Angeles during the war and that “[t]he housing situation, particularly for minority groups is deplorable. Recreational facilities are inadequate. Juvenile crime and delinquency has increased, although not in excess of other sections of the country”: Warren further admitted that the newspapers had incited hatred of “the Mexican boys” and that “[t]here had been bad feeling between some of Los Angeles police force and youthful Mexicans, and *I am sorry to report that some of the police officers were derelict in their duty in failing to stop the rioting promptly.*”⁷⁹

⁷⁶ See *id.* at 5-6.

⁷⁷ See ESCOBAR, *supra* note 7, at 263.

⁷⁸ Report and Recommendations of the California Citizens Committee on Civil Disturbances in Los Angeles, *supra* note 74, at 7 (emphasis added).

⁷⁹ Letter to the Honorable Francis Biddle, Attorney General of the United States, from Governor Earl Warren dated Oct. 14, 1943, in Earl Warren Papers – Administrative Files – Department of Justice, Attorney General, Law Enforcement - McGucken Committee (F3640:2627) Sacramento, California (emphasis added).

The violence of those few days of June 1943 remain an important part of the collective memory of the Mexican American community in Southern California and has been the subject of a popular play and movie, as well as a documentary.⁸⁰ Along with the deportation campaign of the 1930s, the Zoot Suit riots pressured on the Mexican American community in Southern California to assimilate and conform to Anglo ways and have served as a reminder of the outsider status of persons of Mexican ancestry.⁸¹

4. *Mexican American Desegregation Litigation: Westminster School District v. Mendez* (1947)

⁸⁰ See LUIS VALDEZ, *ZOOT SUIT AND OTHER PLAYS* (1992); Susan King, *A City at War With Itself*, L.A. TIMES, Feb. 10, 2002, Calendar, at 3.

⁸¹ See *infra* text accompanying notes 102-05.

A few years later, national attention focused on a successful Mexican American school desegregation case involving the Westminister School District in Orange County in Southern California.⁸² In that case, Thurgood Marshall and Robert Carter on behalf of the NAACP filed an *amicus curiae* brief in support of the Mexican American plaintiffs.⁸³ *Mendez* was a critical milestone on the road to *Brown v. Board of Education* as well as *Hernandez v. Texas*.

In *Mendez*, a federal court of appeals held that the California law in question, which permitted the segregation of Chinese, Japanese, and persons of “Mongolian” ancestry, failed to authorize the segregation of Mexican Americans.⁸⁴ Although the court did not find that segregation was per se unconstitutional, it ruled that the segregation of Mexican Americans was invalid in this case because the law failed to authorize it. The court did not address the constitutionality of the segregation of Asians, which the California law in fact authorized.

Rather than amend the law to authorize the segregation of persons of Mexican ancestry, the California legislature repealed the law in its entirety. After being advised that all racial segregation might well be unlawful, Governor Warren signed the law repealing the authorization for all racial segregation in the California public schools.⁸⁵

⁸² See *Westminister School Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947); *infra* text accompanying notes 120-22 (discussing the reliance on the *Westminister* case in *Hernandez v. Texas*). The *Mendez* case attracted national attention. See Note, *Segregation in the Public Schools -- A Violation of “Equal Protection of the Laws”*, 56 YALE L.J. 1059 (1947); Note, *Segregation in Schools as a Violation of the XIVth Amendment*, 47 COLUM. L. REV. 325 (1947).

⁸³ See RICHARD KLUGER, *SIMPLE JUSTICE* 399-400 (sp. ed. 1994); see also Perea, *supra* note 30, at 1246-47 (describing how *Mendez* was an important case in NAACP’s strategy to dismantle school segregation); George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555, 574-78 (1994) (discussing importance of *Mendez*); Margaret E. Montoya, *A Brief History of Chicana/o School Segregation*, 12 LA RAZA L.J. 159, 166-70 (2001) (same). For analysis of the history of the litigation, as well as difficulties that arose in the efforts among groups to formulate a consistent legal strategy, see Toni Robinson & Greg Robinson, *Mendez v. Westminister: Asian-Latino Coalition Triumphant?*, 10 ASIAN L.J. 161 (2003); Charles Wollenberg, *Mendez v. Westminister: Race, Nationality and Segregation in California Schools*, 53 CAL. HIST. Q. 317, 329 (1974).

⁸⁴ See *Westminister School Dist. v. Mendez*, 161 F.2d at 780-81.

⁸⁵ See CHARLES WOLLENBERG, *ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS, 1855-1975*, at 132-33 (1976); Wollenberg, *supra* note 83, at 329. (1974).

Not long after *Mendez*, the California Supreme Court invalidated the state’s anti-miscegenation law that had been enforced to bar the marriage between a Mexican American woman and an African American man. See *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948). California law prohibited marriages of white persons with “Negroes, Mongolians, members of the Malay race, or mulattoes.” Cal. Civ. Code § 60 (repealed) (quoted in *Perez v. Sharp*, 32 Cal.2d at 712). As in *Mendez*, the law in question enumerated several different races – not just African American and white – as separate, distinct, and inferior from whites. For analysis of *Perez v. Sharp*, see Kevin R. Johnson & Kristina L. Burrows, *Struck by Lightning? Interracial Intimacy and Racial Justice*, 25 HUM. RTS. Q. 528, 531-42 (2003). Almost twenty years later, Chief Justice Warren in an opinion for a unanimous Supreme Court invalidated

5. *Summary*

The tumultuous 1940s had seen much publicized racial tension – marred by sporadic outbursts of violence – between Mexican Americans and Anglos in California. Mexican Americans consistently claimed that their civil rights had been violated by law enforcement and the justice system.

Virginia's antimiscegenation law in *Loving v. Virginia*, 388 U.S. 1 (1967).

High profile events, such as the Sleepy Lagoon Murder Trial, Zoot Suit race riots, and the *Mendez* school desegregation case, all made the national news. Each of these politically charged matters landed on Governor Warren's desk. One simply could not have lived in California during that time – much less have been governor of the state – and not understood the racial tensions between Anglos and Mexican Americans and the discrimination against persons of Mexican ancestry that prevailed. Thus, Chief Justice Warren should not be given too much credit for having an appreciation of the civil rights struggles of Mexican Americans that he wrote about for the Supreme Court in *Hernandez v. Texas*⁸⁶; what he read about in the briefs of the treatment of Mexican Americans in Texas was not that different from what he knew about from personal experience about the discrimination against them in California.

As the Governor of California, Earl Warren had lived through a momentous time for Mexican Americans. He saw race influence the enforcement of the criminal laws and result in a violent outburst. He also had seen how the appearances of a racially biased justice system could poison race relations and contribute to the potential for violence.

B. *The Multiracial Equal Protection Clause*

As some have acknowledged,⁸⁷ the Supreme Court in *Hernandez v. Texas*, decided two weeks before *Brown v. Board of Education*, was ahead of its time in recognizing Mexicans as a race in the United States and moving beyond the Black/white paradigm. However, in many respects, the opinion merely reflects the rich life experiences of its author. Moreover, for the Court to have held otherwise would have been to ignore much recent history about discrimination against persons of Mexican ancestry in the United States and to deviate from the general trajectory of the Court's Equal Protection jurisprudence.

The Supreme Court's 1954 decision in *Brown v. Board of Education* with its focus on the segregation of African Americans, the central issue of dispute in the case, could be read as reinforcing the Black/white paradigm.⁸⁸ However, the Court's civil rights opinions of this era must be considered as a whole to gain a full understanding of the Court's understanding of race relations in U.S. social life.

⁸⁶ See *infra* text accompanying notes 106-38.

⁸⁷ See *infra* note 114 (citing authorities).

⁸⁸ See *supra* text accompanying notes 16-18.

Chief Justice Earl Warren’s appreciation of the complexities of race relations in the United States is seen through reading *Brown* in tandem with *Hernandez v. Texas*. Indeed, from his experiences as Governor of California, he had to have been well aware that school segregation and exclusion from juries had been directed at other groups – especially persons of Japanese and Mexican ancestry – besides African Americans.⁸⁹

Perhaps more importantly, the time was right for a more inclusive reading of the Equal Protection Clause of the Fourteenth Amendment. By 1954, the Supreme Court had effectively rejected the idea that the Equal Protection Clause only protected African Americans. The Court had found that the Constitution’s protections extended to several different minority groups and stated that it protected the general category of “discrete and insular minorities.”

This extension of the Equal Protection Clause in *Hernandez v. Texas* culminated a series of decisions. In the 1886 case of *Yick Wo v. Hopkins*,⁹⁰ the Court held that the discriminatory enforcement of a local ordinance against persons of Chinese ancestry violated the Equal Protection Clause of the Fourteenth Amendment. More than fifty years later in the famous footnote four of *Carolene Products* case,⁹¹ the Court used general language to describe the groups protected by the Equal Protection Clause and further stated that the Court may have to inquire to determine

whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

⁸⁹ See *supra* text accompanying notes 32-86.

⁹⁰ 118 U.S. 356 (1886); see Thomas Wuil Joo, *New “Conspiracy Theory” of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353 (1995).

⁹¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (citations omitted). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (offering a theory of judicial review based on *Carolene Products*). For analysis on the limitations of *Carolene Products* in addressing modern discrimination, see Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

In *Korematsu v. United States*,⁹² the Court, without question, utilized the Equal Protection Clause to evaluate whether the internment of persons of Japanese ancestry was unconstitutional. Although the Court committed grave error in finding that military necessity justified the extreme action,⁹³ it understood that the Fourteenth Amendment in theory protected persons of Japanese ancestry. Continuing the expansion of the Equal Protection Clause, the 1954 decision of *Brown v. Board of Education*⁹⁴ vindicated the rights of African American school children and held that racial segregation of the public schools was unconstitutional.

Brown, when read in combination with *Yick Wo*, *Carolene Products*, and *Korematsu*, made it clear that the protections of the Fourteenth Amendment extended well beyond African Americans. It was not much of a leap to hold that Mexican Americans deserved the same constitutional protections as other racial minorities, which was the precise question posed by *Hernandez v. Texas*. Indeed, it would have contradicted the general trajectory of the law to hold otherwise. As Chief Justice Warren later explained,

[a]ll of the various segregation case decisions went hand-in-hand with the principle of *Brown v. Board of Education*. Those decisions related not only to blacks but equally to all racial groups that were discriminated against. In fact, I reported a case of jury discrimination against Mexican Americans . . . two weeks before the *Brown* case in *Hernandez v. Texas* The state contended that [the] acts of discrimination did not violate the Constitution because the Fourteenth Amendment bore only on the relationship between blacks and whites. We hold that it applied to “any delineated class” and

⁹² 323 U.S. 214 (1944); *supra* text accompanying notes 48-52. Before *Korematsu*, the Supreme Court had held that Japanese immigrants were not “white” and thus were not eligible for citizenship under the naturalization laws then in effect. See *Ozawa v. United States*, 260 U.S. 178 (1922).

⁹³ See, e.g., ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001); Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. REV. 1, 19 B.C. THIRD WORLD L.J. 1 (1998).

⁹⁴ 347 U.S. 483 (1954).

reversed the conviction. And so it must go with any such cases. *They apply to any class that is singled out for discrimination.* Most of our cases have involved blacks, but that is because there are more of them; they are more widespread and have been the most discriminated against.⁹⁵

However, recognition of Mexican Americans as distinct from Anglos a “race” deserving of constitutional protections, which the Court effectively did in *Hernandez v. Texas* was complicated. Mexican Americans in reality are a complex mixture of races, with a great variation of physical appearances. This racial complexity is captured in the Spanish word *mestizaje*.⁹⁶

⁹⁵ WARREN, *supra* note 37, at 299 (emphasis added).

⁹⁶ See CLAUDIO ESTEVA-FABREGAT, *MESTIZAJE IN IBERO-AMERICA* (1995); JULIAN SAMORA, *MESTIZAJE: THE FORMATION OF CHICANOS* (1996).

To further complicate matters, Mexican Americans frequently embraced a “white” identity as a way of avoiding social discrimination and, in some cases, as a litigation strategy.⁹⁷ Before *Hernandez v. Texas*, Mexican American litigants found it difficult to prevail in cases seeking to vindicate their civil rights because of the law’s classification of Mexicans as white.⁹⁸ At times, Mexican Americans claimed to be “white” to avoid the discrimination suffered by African Americans and accrue the benefits of whiteness secured by law.⁹⁹ Courts often did not know how to classify persons of Mexican ancestry, as a “race” or an ethnic or national origin group¹⁰⁰ and frequently concluded that Mexican Americans were white, not Black, and denied them the protections of the Equal Protection Clause, which were said to be reserved for African Americans.¹⁰¹

Because Mexican Americans frequently adopted a white identity defensively,¹⁰² the statement that “[u]ntil the late 1960s, the Mexican community in the United States thought of itself as racially white,”¹⁰³ does not fully reflect the complex realities of the Mexican American experience. Events long before 1960, including the 1930’s repatriation campaign, the Sleepy Lagoon murder case, and the Zoot Suit riots, contributed to the formation of a group identity among persons of Mexican ancestry in Southern California, just as rampant discrimination against persons of Mexican ancestry in much of Texas had.¹⁰⁴ Influential historian Ricardo Romo documented Mexican Americans in Los Angeles from 1900 to 1930 formed institutions in

⁹⁷ See George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 336-39 (1997); Kevin R. Johnson, “Melting Pot” or “Ring of Fire”?: Assimilation and the Mexican-American Experience, 85 CAL. L. REV. 1259, 1269-77 (1997). See generally RODOLFO ACUÑA, ANYTHING BUT MEXICAN: CHICANOS IN CONTEMPORARY LOS ANGELES (1995) (analyzing critically efforts by Mexican Americans to embrace Spanish as opposed to Mexican identity in greater Los Angeles in the twentieth century).

⁹⁸ See generally Martínez, *supra* note 83 (reviewing Mexican American civil rights litigation over a 50 year period).

⁹⁹ See *infra* text accompanying notes 100-02.

¹⁰⁰ See, e.g., *Westminister School Dist. v. Mendez*, 161 F.2d 774, 780-81 (9th Cir. 1947) (noting that persons of Mexican descent are not one of the “great races” and that California law did not permit their segregation in public schools).

¹⁰¹ See Martínez, *supra* note 97.

¹⁰² See Neil Foley, *Becoming Hispanic: Mexican Americans and the Faustian Pact With Whiteness*, in REFLEXIONES 1997: NEW DIRECTIONS IN MEXICAN AMERICAN STUDIES 53, 53 (Neil Foley ed., 1967).

¹⁰³ Ian Haney Lopez, *Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205, 205 (2001) (footnote omitted).

¹⁰⁴ See *supra* text accompanying notes 11-12; *infra* text accompanying notes 100-02.

response to racial hostility directed toward them by Anglos.¹⁰⁵ A nonwhite group identity was common among Latina/os across the United States even if it was not thought of in terms of “race” as popularly understood.

C. *The Racialization of Mexicans in Jackson County, Texas*

The Supreme Court decided *Hernandez v. Texas* within days of *Brown v. Board of Education*. Both were written by Chief Justice Earl Warren and reflected consistent views of the Equal Protection Clause.

¹⁰⁵ See RICARDO ROMO, *EAST LOS ANGELES: HISTORY OF A BARRIO* 129-62 (1983).

At a most fundamental level, the Supreme Court recognized the unmistakable racialization of Mexicans and the reality that race is socially constructed, changing with place, time, and economic circumstance.¹⁰⁶ The Court did so even without using the modern language of race and racialization. As a matter of law, the Court reasoned that the Equal Protection Clause applied to discrimination against all groups suffering discrimination: “The State of Texas would have us hold that there are only two classes – white and Negro – within the contemplation of the Fourteenth Amendment. The decisions of this Court do not support that view.”¹⁰⁷ To

¹⁰⁶ See generally MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1994) (analyzing social construction of race in United States); Christine B. Hickman, *The Devil and the One Drop Rule Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997) (studying impacts of “one drop” of blood rule for definition of African American in United States); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (same).

¹⁰⁷ *Hernandez v. Texas*, 347 U.S. at 477-78 (footnote citing *Truax v. Raich*, 239 U.S. 33 (1915); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); see, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that discriminatory enforcement of local ordinance against persons of Chinese ancestry violated the Equal Protection Clause).

emphasize its rejection of the state's argument, the Court quoted from *Strauder v. West Virginia*¹⁰⁸: “Nor if a law should be passed excluding all naturalized Celtic Irishmen [from jury service], would there be any doubt of its inconsistency with the spirit of the amendment.” Besides obliquely acknowledging that the Irish at one time had been treated as non-white in the United States,¹⁰⁹ this statement suggests an understanding that race is a social construction, as well as presaging the careful interrogation of whiteness as a race.¹¹⁰

¹⁰⁸ 100 U.S. 303, 308 (1880). *Strauder v. West Virginia*, which held that African Americans could not be excluded from juries, in this way appeared to take a color blind approach to the Equal Protection Clause. *See infra* text accompanying note & note 235. Not long after the case was decided, the Court recognized the existence of other races. *See, e.g., The Chinese Exclusion Case* (Chae Chan Ping v. United States), 130 U.S. 581, 606-07 (1889) (upholding exclusion of Chinese immigrants from United States under immigration laws and referring to them as “foreigners of a different race”); *Plessy v. Ferguson*, 163 U.S. 537, 552, 561 (1896) (Harlan, J., dissenting) (noting different social treatment of African Americans and Chinese); *see also supra* text accompanying notes 87-105 (discussing Court's recognition of various races).

¹⁰⁹ For analysis of the transformation of the Irish from non-white to white, see NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995).

¹¹⁰ *See, e.g., CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* (Richard Delgado & Jean Stefancic eds., 1997) (collecting readings on the subject construction of whites as a race).

The Supreme Court expressly rejected the lower court's holding that Mexicans were white and that, because the Fourteenth Amendment only recognized Blacks and whites, Mexicans did not enjoy its protections.¹¹¹ The Texas Criminal Appeals Court had emphasized that "it is conclusive that, in so far as the question of discrimination in the organization of juries in state courts is concerned, the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race . . . , as distinguished from members of the Negro race."¹¹² Other Texas cases had reached similar conclusions, which permitted discrimination against Mexicans to go unchecked by the courts.¹¹³

In the end, the Supreme Court's decision in *Hernandez v. Texas* helped seal the doom of the Black/white paradigm in the Supreme Court's jurisprudence and ensure that the protections of the U.S. Constitution were afforded to Mexican Americans. As might be expected given Chief Justice Warren's experiences in California, his unanimous opinion for the Court reflected an understanding of the variable, and sometimes volatile, nature of racial discrimination:

[t]hroughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. *But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact.* When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. *The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory" – that is, based upon differences between "white" and Negro.*¹¹⁴

¹¹¹ *Hernandez v. State*, 251 S.W.2d 531, 535 (Tex. Crim. App. 1952); see Martinez, *supra* note 97, at 328; Leti Volpp, *Righting Wrongs*, 47 UCLA L. REV. 1815, 1823 & n.24 (2000).

¹¹² *Hernandez v. State*, 251 S.W. 2d at 535.

¹¹³ See *Sanchez v. State*, 243 S.W.2d 700, 701 (Tex. Crim. App. 1951) ("[Mexican people] are not a separate race but are white people of Spanish descent"); *Independent School Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930) (classifying Mexican Americans as "white" for purposes of school segregation litigation and finding that schools with predominantly African American and Mexican American school children were integrated); see also Martínez, *supra* note 97 (analyzing these and other cases in which courts concluded that persons of Mexican ancestry were "white" to their detriment); In re Rodriguez, 81 F. 337 (W.D. Tex. 1897) (holding that Mexicans were "white" for purposes of naturalization).

¹¹⁴ *Hernandez v. Texas*, 347 U.S. 475, 478 (1954) (emphasis added). For analysis of the importance of *Hernandez v. Texas* in recognizing the construction of Mexicans as a race, see Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1164-66 (1997); Ian F. Haney Lopez, *Retaining Race: LatCrit Theory and Mexican Identity in Hernandez v. Texas*, 2 HARV. LATINO L. REV. 279 (1997) [hereinafter Lopez, *Retaining Race*]; Perea, *supra* note 30, at 1248-50; Claire Sheridan, "Another White Race": *Mexican Americans and the Paradox of Whiteness in Jury Selection*, 21 LAW & HIST. REV. 109 (2003); Steven H. Wilson, *Brown Over "Other White"*:

Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits, 21 LAW & HIST. REV. 145, 160-64 (2003).

The Court in *Hernandez v. Texas* can be understood as repudiating reliance on the “framers’ intent” in the interpretation of the Fourteenth Amendment. See Robert C. Post, *The Supreme Court, 2002 Term: Foreword – Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 52 (2003) (observing that Supreme Court found that the Equal Protection Clause barred racial and gender discrimination “not because of changes in the intent of the framers of the Fourteenth Amendment, but because American constitutional culture evolved in such a way as to render these practices intolerable”) (footnote omitted). Even assuming that the framers of the amendment only envisioned African Americans as those protected by its mandate, time has made it clear that a broader scope is necessary to eliminate the scourge of invidious discrimination from U.S. social life. See *supra* text accompanying note 91 (analyzing significance of *Carolene Products*).

In recognizing the variability of racial discrimination by time and place, the Court's opinion in *Hernandez v. Texas* has been characterized as “offer[ing] a sophisticated insight into racial formation: whether a racial group exists . . . is a local question that can be answered only in terms of community attitudes. To translate this insight into broader language, race is social, not biological; it is a matter of what people believe, rather than of natural decree.”¹¹⁵ Although the view of racial formation of Mexican Americans may be sophisticated, it follows naturally from what Earl Warren personally experienced in California during World War II.¹¹⁶

The Court's conclusion was ahead of its time in effectively identifying the fluidity of race and races¹¹⁷ and acknowledging that “community prejudices are not static,” a position hard to dispute in light of the treatment of persons of Japanese ancestry during World War II, a not-too-distant memory in the nation's collective consciousness, as well as the Zoot Suit riots.¹¹⁸ The case of discrimination outlined for the Supreme Court in *Hernandez v. Texas* must have resonated in important ways with Earl Warren's experiences in California. He had seen the surge of anti-Japanese animus and anti-Mexican sentiment, as well as the human misery caused by government's swift, harsh responses.¹¹⁹

¹¹⁵ Lopez, *Retaining Race*, *supra* note 114, at 288.

¹¹⁶ See *supra* text accompanying notes 32-86.

¹¹⁷ See *infra* note 114 (citing authorities).

¹¹⁸ See *supra* text accompanying notes 67-81.

¹¹⁹ See *supra* text accompanying notes 32-86.

Pete Hernandez in his brief in *Hernandez v. Texas* relied on *Westminister School District v. Mendez*,¹²⁰ the Ninth Circuit decision barring school segregation of Mexican Americans, to contend that Mexican Americans were protected by the Equal Protection Clause.¹²¹ Again, Chief Justice Warren was familiar with *Mendez*, having signed into law the California law responding to the decision and ending de jure segregation in the California public schools.¹²²

More generally, the briefing in the case painted a picture of discriminatory treatment of Mexican Americans in Texas that mirrored that which existed in California. In an appendix to the main brief entitled “Status of Persons of Mexican Descent in Texas,” a sort of “Brandeis brief” on discrimination against Mexicans in Texas, Hernandez succinctly summarized in five pages the discrimination against Mexican Americans in that state.¹²³ This discrimination included the segregation of Mexican Americans in the public schools and accommodations and racially restrictive covenants ensuring housing segregation, which tended to establish that Mexican Americans were viewed by Anglos in Texas as an inferior class of people. This discrimination resembled that facing African Americans,¹²⁴ some of which the Court grappled with in *Brown v. Board of Education*, as well as that which Mexican Americans faced in California.¹²⁵

Pete Hernandez, charged with the murder of Joe Espinosa, argued that, in Jackson County, Texas, the state had systematically excluded persons of Mexican descent from jury commissions and petit and grand juries.¹²⁶ The record showed that, for the county, more than 14 percent of the population, and 11 percent of the people over age 21, had Spanish surnames.¹²⁷ The state of Texas admitted that there were eligible jurors of Mexican ancestry in the community.¹²⁸ However, the state conceded that “*for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County.*”¹²⁹ The Court declared that “it taxes

¹²⁰ 161 F.2d 774 (9th Cir. 1947); *see supra* text accompanying notes 82-85.

¹²¹ *See* Brief for Petitioner, *Hernandez v. Texas*, 347 U.S. 475 (1954) (Case No. 406), at 10.

¹²² *See supra* text accompanying notes 82-85.

¹²³ *See* Brief for Petitioner, *Hernandez v. Texas*, 347 U.S. 475 (1954) (Case No. 406), at 37-41 (Appendix B).

¹²⁴ *See, e.g.,* *Brown v. Board of Education*, 347 U.S. 483 (1954); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹²⁵ *See supra* text accompanying note 32-86.

¹²⁶ *See Hernandez v. Texas*, 347 U.S. at 476-77.

¹²⁷ *See id.* at 471.

¹²⁸ *See id.* at 481.

¹²⁹ *Id.* (emphasis added) (footnote omitted).

our credulity to say that mere chance resulted in there being no [Mexicans] among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, *whether or not* it was a conscious decision on the part of any individual jury commissioner.”¹³⁰

¹³⁰ *Id.* at 482 (emphasis added). The Court later quoted this language and found that the evidence supported the claim that the prosecutor had considered race in exercising peremptory challenges. *See Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003); *see infra* text accompanying notes 221-24 (discussing prohibition on race-based peremptory challenges).

In analyzing the racial discrimination at work against Mexican Americans, the Supreme Court appreciated the racial dynamics at work. In this passage, the Court alludes to the possibility that racial discrimination may be intentional or unconscious.¹³¹ *Hernandez v. Texas* thus appears inconsistent with the Court's subsequent decisions in *Washington v. Davis*,¹³² which held that proof of a "discriminatory intent" was necessary to establish a violation of the Equal Protection Clause.

In considering community attitudes in Jackson County toward persons of Mexican ancestry and the pervasive discrimination against them, the Supreme Court observed that

the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between "white" and "Mexican." The participation of persons of Mexican descent in business and community groups was shown to be slight. *Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades.* At least one restaurant in town prominently displayed a sign announcing "No Mexicans served." On the courthouse grounds at the

¹³¹ See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065 (1998); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

¹³² 426 U.S. 229 (1976); see, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting overwhelming statistical evidence of the disparate application of the death penalty as establishing an Equal Protection violation); *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that discovery based on selective prosecution claim could not be required absent a showing that similarly situated whites had not been prosecuted under crack cocaine law, even though African Americans were disproportionately affected by strict criminal penalties for crack cocaine compared to more lenient penalties for powder cocaine).

time of the hearing, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here").¹³³

¹³³ *Hernandez v. Texas*, 347 U.S. at 479-80 (emphasis added) (footnote omitted).

This description again resembles the events in California in the 1940s and is not that different from the description of the conditions of the lives of Mexican Americans in Los Angeles during World War II.¹³⁴ Recall the rampant discrimination against persons of Mexican ancestry in Los Angeles and the school desegregation litigation decided by the court of appeals in 1947.¹³⁵

Nor is it any great surprise that the Supreme Court's first recognition of discrimination against Mexican Americans occurred in a case involving Texas, a former slave state with a long history of subordination of African Americans and Mexican Americans, as well as poor whites.¹³⁶ Indeed, the state was rather infamous for violating the rights of its minorities, and offers perhaps one of the starkest examples of the racialization of Mexican Americans.

In summary, Chief Justice Earl Warren, often credited with his ability to grow and learn,¹³⁷ had learned a great deal from his experiences with the racialization of Mexican Americans in California and could easily appreciate similar racial animosities in Texas. Moreover, he understood the importance of the appearance of impartial juries in keeping the peace and maintaining public (especially minority) confidence in the justice system. As it was in California in the 1940s, this was an issue in Texas in the 1950s and clearly would remain an issue in the future. The racial composition of juries long had been an issue for African Americans,¹³⁸ and there was no reason to think it would be any different for persons of Mexican

¹³⁴ See *supra* text accompanying notes 32-86.

¹³⁵ See *supra* text accompanying notes 82-85.

¹³⁶ See *supra* text accompanying notes 11-12.

¹³⁷ See Carey McWilliams, *The Education of Earl Warren*, NATION, Oct. 12, 1974, at 325.

¹³⁸ See, e.g., *Norris v. Alabama*, 294 U.S. 587 (1935); *Carter v. Texas*, 177 U.S. 442 (1900); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). Warren was well aware of the racial exclusion of African Americans from juries and understood that it remained a problem long after the Supreme Court ruled that such exclusion was unconstitutional. See WARREN, *supra* note 37, at 292, 295.

ancestry.

D. *The Court's General Acceptance of Hernandez v. Texas's Racial Teachings*

After the breakthrough of *Hernandez v. Texas*, the analysis of Mexicans as a separate and distinct class – a race – took hold relatively quickly in the Supreme Court's jurisprudence. It no doubt was facilitated by the growth of a racial consciousness among Chicana/os and the Chicana/o movement of the 1960s,¹³⁹ as well as the growing national awareness of the emerging Latina/o population.

¹³⁹ See ACUÑA, *supra* note 3, at 307-62. For analysis of the emergence of the Chicana/o movement, see IGNACIO M. GARCIA, *CHICANISMO: THE FORGING OF A MILITANT ETHOS AMONG MEXICAN AMERICANS* (1997).

Hernandez v. Texas suggested that whether a group had been the subject of prejudice against particular groups was a question of fact.¹⁴⁰ Commentators criticized the suggestion that the racialization of Latina/os must be established on a case-by-case basis.¹⁴¹ In later cases, however, the Supreme Court never really required a fact specific analysis in the case at hand to determine whether Latina/os were a separate class for Equal Protection purposes. Rather, the Court simply assumed that they were.¹⁴² For example, less than two decades after the Court decided *Hernandez v. Texas*, in *Keyes v. School District No.1*,¹⁴³ the Court in a school

¹⁴⁰ See *Hernandez v. Texas*, 347 U.S. at 479-80; *supra* text accompanying note 114.

¹⁴¹ See Richard Delgado & Vicky Palacios, *Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME LAW. 293, 395-96 (1975).

¹⁴² See *infra* text accompanying notes 143-58.

¹⁴³ 413 U.S. 189, 197 (1973) (citing, inter alia, *Hernandez v. Texas*, 347 U.S. 475 (1954)); see *United States v. Texas Education Agency*, 467 F.2d 848, 861-62 (5th Cir. 1972) (reaching similar conclusion in school desegregation case based on *Hernandez v. Texas*). The transformation of Mexicans into a distinctive class in civil rights litigation did not come about quite as smoothly in the lower federal courts and state courts. For example, the lower court in the much-publicized decision of *Tijerina v. Henry*, 48 F.R.D. 274 (D.N.M. 1969) (per curiam), *appeal dismissed*, 398 U.S. 922 (1970), refused to certify a class of Mexican Americans because the members of the class were not readily identifiable, see

desegregation case involving the public schools in Denver stated matter of factly that “Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment.”

In 1977, the Court in *Castenada v. Partida*¹⁴⁴ reviewed another criminal case in which a defendant claimed that Mexican Americans were underrepresented on Texas juries and emphasized that “it is no longer open to dispute that Mexican Americans are a clearly identifiable class.” In light of *Hernandez v. Texas*, the Texas Court of Criminal Appeals in *Castenada v. Partida* could not deny that Mexican Americans were protected by the Equal Protection Clause of the Fourteenth Amendment; rather, the court questioned the statistical evidence of Mexican underrepresentation on juries in part because it was uncertain how many “were so-called ‘wet backs’ from the south side of the Rio Grande.”¹⁴⁵ Today, reading the epithet “wetbacks” in a judicial opinion is striking, suggesting the depth, and general social acceptance, of the antipathy toward persons of Mexican ancestry in Texas at that time. It also reflects the general perception that Latina/os are “foreigners” who deserve less in terms of rights than U.S. citizens.¹⁴⁶

Tijerina v. Henry, 398 U.S. 922 (1970) (Douglas, J., dissenting from dismissal of appeal). *See also* United States v. Duran de Amesquita, 582 F. Supp. 1326,1328-29 (S.D. Fla. 1984) (refusing to recognize Hispanics as a cognizable group because of the great diversity among various Latina/o national origin groups); Florida v. Alen, 616 So.2d 452, 455-56 (Fla. 1993) (reversing caselaw holding that Hispanics were not a recognized class for purposes of jury selection).

¹⁴⁴ 430 U.S. 482, 495 (1977); *see* Garcia v. Texas, 919 S.W.2d 370, 392-93 (Tex. Crim. App. 1994); Hernandez v. Texas, 24 S.W.3d 846 (Tex. App. 2000); Flores v. Texas, 783 S.W.2d 793 (1990).

¹⁴⁵ Partida v. Texas, 506 S.W.2d 209, 211 (Tex. Ct. Crim. App. 1974).

¹⁴⁶ *See infra* text accompanying notes 196-98.

In *Castenada v. Partida*, the Supreme Court relied upon *Hernandez v. Texas* and *White v. Regester*¹⁴⁷ to support its statement that Mexican Americans were a cognizable group for Equal Protection purposes. In *White v. Regester*, the Court in a voting rights case considered the discrimination against Mexican Americans in Texas, which included poll taxes and restrictive voter registration procedures.¹⁴⁸ By 1991, in the case of *Hernandez v. New York*,¹⁴⁹ the Court simply assumed that Latina/os were protected by the Equal Protection Clause and did not discuss the issue.¹⁵⁰

Consequently, *Hernandez v. Texas* represents an important chapter in the transformation of persons of Mexican ancestry, as well as Latina/os generally, into a cognizable “race” for purposes of anti-discrimination law and its enforcement. During the same general period of the twentieth century, persons of Mexican ancestry organized politically along racial lines in their struggle for equality.¹⁵¹ The governmental classification of all Latina/os – a heterogeneous

¹⁴⁷ 412 U.S. 755 (1973).

¹⁴⁸ *See id.* at 767-71.

¹⁴⁹ 500 U.S. 352 (1991).

¹⁵⁰ *See infra* text accompanying notes 223-25 (analyzing *Hernandez v. New York*); *see also* *United States v. Pion*, 25 F.3d 18, 22-24 (1st Cir. 1994) (evaluating claim of underrepresentation of Hispanics on jury in Massachusetts); *United States v. Espinoza*, 641 F.2d 153, 168 (4th Cir. 1981) (addressing claim that Hispanic jurors were excluded from jury pool in West Virginia).

¹⁵¹ *See generally* ESCOBAR, *supra* note 7 (analyzing emergence of Mexican political and racial identity resulting from conduct of law enforcement authorities in Los Angeles); IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003) (analyzing racial consciousness of Chicana/o activism in 1960s).

group – in the category “Hispanic” for Census purposes helped encouraged a pan-Latina/o identity attempting to combat discrimination.¹⁵² This reinforced the understanding expressed in *Hernandez v. Texas* that persons of Mexican ancestry were protected by the Constitution.

¹⁵² See Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 117-29 (1997). For criticism of the Hispanic classification, see Luis Angel Toro, “A People Distinct from Others”: *Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219 (1995).

The Supreme Court did not stop with extending the protections of anti-discrimination law to persons of Mexican ancestry. Indeed, the Court later (but well before the United State’s recent war in Iraq) held that the civil rights laws barred racial discrimination against Iraqis, even if they ordinarily are classified as white, and recognized that “some, but not all scientists [have] conclude[d] that racial classifications are for the most part sociopolitical, rather than biological, in nature.”¹⁵³ In *Plyler v. Doe*,¹⁵⁴ the Court held that undocumented immigrant children in Texas, many of whom are of Mexican descent, came within the purview of the Equal Protection Clause and could not constitutionally be barred from the public schools. One influential commentator has contended that the reasoning of *Hernandez v. Texas* justifies a constitutional bar on discrimination against homosexuals.¹⁵⁵

Interestingly, the slow but steady expansion of the protections of the Fourteenth Amendment, and the embrace of color blindness, had an unexpected consequence. It opened the door to subsequent claims of “reverse discrimination” by whites.¹⁵⁶ Ultimately, discrimination – under the rubric of “reverse discrimination” – came to be understood as something that could happen to whites.¹⁵⁷ In the famous *Bakke* case, Justice Powell relied on *Hernandez v. Texas* for the proposition that the Equal Protection Clause “extended to all ethnic groups” and rejected the claim that Alan Bakke’s claim of racial discrimination should be subject to anything less than strict constitutional scrutiny.¹⁵⁸

¹⁵³ Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (citations omitted). The Court cited *Hernandez v. Texas* as one of the cases recognizing that discrimination based on “ancestry” violates the Fourteenth Amendment. *See id.* at 613 n.5; *see also* McCleskey v. Kemp, 481 U.S. 279, 317 n.39 (1987) (citing *Hernandez v. Texas* for the proposition that racial discrimination may be directed at a variety of groups).

¹⁵⁴ 457 U.S. 202, 215-23 (1982).

¹⁵⁵ *See* MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 149-50 (1999); *see also* Duren v. Missouri, 439 U.S. 357 (1979) (applying fair cross section of the community requirement to include women); Barber v. Ponte, 772 F.2d 982, 997-1000 (1st Cir. 1985) (addressing claim of exclusion of young people from jury pool).

¹⁵⁶ *See infra* note 157 (citing cases).

¹⁵⁷ *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003) (evaluating undergraduate affirmative action program challenged by prospective white applicants); Grutter v. Bollinger, 539 U.S. 306 (2003) (same for law school applicants); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (holding that all racial classifications, including those in federal program to increase government contracting with minority businesses, are subject to strict scrutiny); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (to the same effect); Hopwood v. Texas, 78 F.3d 932 (5th Cir.) (invalidating University of Texas law school’s race conscious affirmative action admissions system in lawsuit brought by white applicant), *cert. denied sub nom.*, 518 U.S. 1033 (1996); *see also* Fulliove v. Klutznick, 448 U.S. 448, 522, 526 (1980) (Stewart, J., dissenting) (citing *Hernandez v. Texas* in contending that minority business contracting program violated Equal Protection Clause).

¹⁵⁸ *See* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 293 (1978) (Powell, J.).

Thus, besides serving as an important bridge in ensuring that Mexican Americans, and Latina/os generally, enjoyed protections against racial discrimination, *Hernandez v. Texas* in some ways contributed to a general broadening of the Court's approach to Equal Protection challenges.

II. LEGACY OF INJUSTICE: THE PERSISTENT UNDERREPRESENTATION OF LATINA/OS ON JURIES

As *Hernandez v. Texas* exemplifies, institutional racism in the selection of petit and grand juries has long plagued Mexican Americans in the United States.¹⁵⁹ Exclusion of Latina/os from jury service denoted the subordinated status of Latina/os in American social life.¹⁶⁰ Moreover, racially skewed juries almost unquestionably affected the outcomes of cases.

The Supreme Court's decision in *Hernandez v. Texas* was the first to expressly acknowledge such discrimination. However, it was not the last time that the courts found it necessary to address claims of the exclusion of Latina/os from juries. Lower courts regularly rely on *Hernandez v. Texas* to challenge the exclusion of Latina/os, African Americans, and other groups from the jury pool.¹⁶¹ By removing a bar to Latina/o jury participation and allowing for more racially diverse juries, the Court's decision offers the appearance of greater

¹⁵⁹ See, e.g., Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (analyzing racial discrimination against Mexican Americans in selecting grand juries in Los Angeles County); Hiroshi Fukurai, *Critical Evaluations of Hispanic Participation on the Grand Jury: Key-Man Selection, Jurymaning, Language, and Representative Quotas*, 5 TEX. HISP. J.L. & POL'Y 7 (2001) [hereinafter Fukurai, *Critical Evaluations*] (studying exclusion of Latina/os from juries); see also Hiroshi Fukurai, *Social De-Construction of Race and Affirmative Action in Jury Selection*, 11 LA RAZA L.J. 17 (1999) (offering proposals designed to improve representation of racial minorities on juries); Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 SO. CAL. L. REV. 659, 678-701 (2002) (explaining importance of cultural diversity on juries to juror deliberations). See generally HIROSHI FUKURAI, EDGAR W. BUTLER, & RICHARD KROOTH, *RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE* (1993) (discussing generally the representation of racial minorities on juries).

¹⁶⁰ See generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) (analyzing quest of various groups to achieve full membership in U.S. society).

¹⁶¹ See, e.g., *United States v. Raszkiewicz*, 169 F.3d 459, 463 (7th Cir. 1999) (reservation Indians); *United States v. Pion*, 25 F.3d 18, 27 (1st Cir. 1994) (Torruela, J., concurring) (Hispanics); *United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989) (Hispanics); *Anaya v. Hansen*, 781 F.2d 1, 6-7 (1st Cir. 1986) (blue collar workers, less educated, and young adults); *Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners*, 622 F.2d 807, 810 (5th Cir. 1980) (Mexican Americans, women, young people, and the poor), *cert. denied*, 450 U.S. 964 (1981); *Muniz v. Beto*, 434 F.2d 697, 701 (5th Cir. 1970) (Mexican Americans); *United States v. Duran de Amesquita*, 582 F. Supp. 1326, 1328 (S.D. Fla. 1984) (Hispanics); *Dumont v. Estelle*, 377 F. Supp. 374, 375, 376 (S.D. Tex. 1974) (freeholder or householder), *aff'd*, 513 F.2d 793 (5th Cir. 1975); *Bokulich v. Jury Comm'n*, 298 F. Supp. 181, 190 n.11 (N.D. Ala. 1968), *aff'd*, 396 U.S. 320 (1970) (African Americans).

impartiality and provides greater legitimacy to juries and the decisions that they reach.¹⁶²

¹⁶² See JON M. VAN DYKE, *JURY SELECTION PROCEDURES* 32, 45 (1977); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 *VAND. L. REV.* 353, 362-64 (1999).

The official policy today is that petit juries should be pulled from a cross-section of the community.¹⁶³ In this way, juries symbolize the nation's commitment to democracy in the U.S. justice system and protect against the arbitrary use of judicial power.¹⁶⁴ No racial prerequisites for jury service exist in the United States today and racial exclusions are prohibited.

However, juries did not immediately become integrated with the Supreme Court's decision in *Hernandez v. Texas*, just as the segregation of the public schools did not end instantly after *Brown v. Board of Education*. True, Latina/os served on juries in greater numbers in the years following the Court's decision in *Hernandez v. Texas* than before 1954. However, representation of Latina/os on grand juries continued to lag significantly behind their percentage of the population.¹⁶⁵

¹⁶³ See 28 U.S.C. § 1861 (2000) (declaring policy that juries be "selected at random from a fair cross section of the community in the district or division wherein the court convenes"); see also *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 221 (1946) (emphasizing that "[t]he American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community.") (citations omitted).

¹⁶⁴ See, e.g., *Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1874).

¹⁶⁵ See U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE 36-46 (1970); Lorenzo Arredondo & Donato Tapia, Comment, *El Chicano y the Constitution: The Legacy of Hernandez v. Texas Grand Jury Discrimination*, 6 U.S.F. L. REV. 129 (1971-72); Edward A. Villalobos, Comment, *Grand Jury Discrimination and the Mexican American*, 5 LOY. L.A. L. REV. 125 (1972).

In the 1960s, Chicano activist attorney Oscar “Zeta” Acosta challenged the grand jury system in Los Angeles County, just as the League of United Latin American Citizens did on behalf of Pete Hernandez and Mexican Americans in *Hernandez v. Texas*,¹⁶⁶ in defending Chicana/o political activists charged with criminal offenses.¹⁶⁷ The unstated hope was that the outcomes would change if Latina/os served on grand juries, which finds support in the empirical evidence.¹⁶⁸ At a minimum, the parties sought a more impartial jury that would not hold the defendants’ Mexican ancestry against them.¹⁶⁹

For example, in the 1977 case of *Castaneda v. Partida*,¹⁷⁰ the Supreme Court addressed a case in which Mexican Americans constituted about 80 percent of Hidalgo County – a county in south Texas along the U.S./Mexico border – but, from 1962-72, averaged less than 40 percent of the grand jurors. As in *Hernandez v. Texas*, a Mexican American criminal defendant, Rodrigo Partida, successfully challenged the constitutionality of the system for impaneling the grand jury. This case was decided over twenty years after the Court decided *Hernandez v. Texas*.

Challenges to Latina/o jury participation continue to the present, fifty years after the Supreme Court’s decision.¹⁷¹ The challenges to jury systems have not been limited to Texas but

¹⁶⁶ See LÓPEZ, *supra* note 151, at 76-77; *Montez v. Superior Court*, 10 Cal. App. 3d 343, 88 Cal. Rptr. 736 (1970).

¹⁶⁷ See Lopez, *supra* note 103, at 238-42; Michael A. Olivas, “*Breaking the Law*” on *Principle: An Essay on Lawyers’ Dilemmas, Unpopular Causes, and Legal Remedies*, 52 U. PITT. L. REV. 815, 846-54 (1991).

¹⁶⁸ See Laura E. Gomez, *Race, Colonization, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 LAW & SOC’Y REV. 1129 (2000) (analyzing historically role of persons of Mexican ancestry in criminal justice system, including as jurors, in territorial New Mexico); see also Pugliano v. United States, 315 F. Supp.2d 197 (D. Conn. 2004) (ruling against admission of expert testimony that a racially diverse jury is less likely to convict a criminal defendant).

¹⁶⁹ See Forde-Mazrui, *supra* note 162, at 362-64; Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177 (1994).

¹⁷⁰ 430 U.S. 482, 485, 487 & n.7, 495 (1977); see *supra* text accompanying notes 144-46.

¹⁷¹ See, e.g., *Sanders v. Woodford*, 373 F.3d 1054, 1068-70 (9th Cir. 2004); *United States v. Esquivel*, 88 F.3d 722 (9th Cir. 1996); *Cuidadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners*, 622 F.2d 807 (5th Cir. 1980), *cert. denied*, 450 U.S. 964 (1981); *United States v. Rodriguez*, 588 F.2d 1003 (5th Cir. 1979); *In the Matter of the Special February 1975 Grand Jury*, 565 F.2d 407 (7th Cir. 1977); *Muniz v. Beto*, 434 F.2d 697 (5th Cir. 1970); *United States ex rel. Martinez v. Hinlsey*, 2004 U.S. Dist. LEXIS 11238, *10*18 (E.D. Ill. June 21, 2004); *Sosa v. Dretke*, 2004 U.S. Dist. LEXIS 9143, *146-*209 (W.D. Tex. May 20, 2004); *Anderson v. Hickman*, 2004 U.S. Dist. LEXIS 7001, *15-*32 (N.D. Cal. Apr. 23, 2004); *United States v. Gerena*, 677 F. Supp. 1266 (D. Conn. 1987); *Villafane v. Manson*, 504 F. Supp. 78 (D. Conn. 1980); *Connecticut v. Gibbs*, 254 Conn. 578, 758 A.2d 327 (2000); *Hernandez v. Texas*, 24 S.W.3d 846 (Tex. App. 2000); *Florida v. Alen*, 616 So.2d 452 (Fla. 1993); *Colorado v. Goetz*, 854 P.2d 178 (Colo. 1993).

have been made in states across the country.¹⁷²

As Professor Ian Haney Lopez summarized in looking at grand juries in Los Angeles County in an important study of legal strategies used by political activists in challenging the institutional racism in grand jury selection,

¹⁷² See, e.g., *People v. Morales*, 48 Cal. 3d 527, 541-49, 770 P.2d 244, 250-55, 257 Cal. Rptr. 64, 70-75, *cert. denied*, 493 U.S. 984 (1989); *Connecticut v. Villafane*, 164 Conn. 637, 325 A.2d 251 (1975); *Idaho v. Paz*, 118 Idaho 542, 547-52, 798 P.2d 1, 6-11 (1990), *cert. denied*, 501 U.S. 1259 (1991); *Illinois v. Flores*, 193 Ill. App. 3d 501, 549 N.E.2d 1342 (1990); *Kansas v. Lopez*, 18 Kan. 46, 50-51, 318 P.2d 662, 665-66 (1957); *New York v. Guzman*, 60 N.Y.2d 403, 457 N.E.2d 1143, 469 N.Y.S. 2d 916 (1983), *cert. denied*, 466 U.S. 951 (1984); *Ohio v. Esparza*, 39 Ohio St. 3d 8, 13, 529 N.E.2d 192, 197-98 (1988), *cert. denied*, 490 U.S. 1012 (1989); *Washington v. Salina*, 87 Wash. 2d 112, 549 P.2d 712 (1976).

The number of Mexicans actually seated [in Los Angeles County] as grand jurors [not long after the 1954 decision in *Hernandez v. Texas*] was . . . dismal. Between 1959 and 1969, Mexicans comprised only 4 of 233 grand jurors – no more than 1.7 percent of all grand jurors. If one assumes Mexicans on average constituted 14 percent of Los Angeles County’s population during this period, Mexicans were under-represented on Los Angeles grand juries by a ratio of 8 to 1. During the 1960s, Mexicans counted for 1 of every 7 persons in Los Angeles, but only 1 of every 36 nominees and 1 of every 58 grand jurors. Prior to the 1960s the exclusion of Mexicans was no doubt even greater. A study of Los Angeles grand juries published in 1945 noted that “as far as the writer was able to discover no Mexicans have ever been chosen for jury duty.”¹⁷³

Los Angeles County was not alone in California in the underrepresentation of Latina/os on juries. In the early 1990s, Santa Cruz County in California, with a large and growing Latina/o population, also saw the underrepresentation of Latina/os on grand juries.¹⁷⁴ Citizenship, language requirements, economic circumstances, and selection procedures all contributed to this lack of representation.¹⁷⁵

In light of the prohibition of racial exclusions to jury service and the increase in the Latina/o population, the persistence of the low representation of Latina/os on juries at first glance may appear puzzling. Although the Court in *Hernandez v. Texas* barred systematic exclusion of persons of Mexican ancestry, a variety of race neutral mechanisms are employed in the selection of jury pools today that result in the underrepresentation of Mexican Americans, and Latina/os generally, on juries in this country.¹⁷⁶

¹⁷³ See LÓPEZ, *supra* note 151, at 100-01 (footnote omitted).

¹⁷⁴ See Fukurai, *Critical Evaluations*, *supra* note 159, at 25; Hiroshi Fukurai, *Where Do Hispanic Jurors Go? Racial and Ethnic Discrimination in the Grand Jury and the Search for Justice*, 2 WEST. CRIM. REV. (2000) (online), available at <http://wcr.sonoma.edu/v2n2/fukurai.html>, last visited September 13, 2004.

¹⁷⁵ See Fukurai, *Critical Evaluations*, *supra* note 159, at 32-34.

¹⁷⁶ See Berta Esperanza Hernandez-Truyol, *Las Olvidadas – Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER, RACE, & JUST. 354, 373-74 (1998).

Socioeconomic class differences contribute to lower representation on juries by poor and working class people.¹⁷⁷ Latina/os are in the aggregate more likely than Anglos to be in the lower end of the socioeconomic spectrum.¹⁷⁸ Financial considerations make it more difficult for Latina/os to serve on juries and reduce Latina/o representation, just as they also tend to do with respect to African Americans.¹⁷⁹

Besides class barriers to jury participation, other facially neutral juror qualifications tend to diminish Latina/o jury participation rates. Given their anti-democratic tendencies and racially disparate impact, the necessity of such qualifications warrant careful scrutiny.

A. *The Citizenship Requirement*

All noncitizens, even those who have lawfully lived in the United States for many years, are excluded from jury service.¹⁸⁰ Courts have upheld this requirement in the face of claims that it denies a criminal defendant the right to an impartial jury.¹⁸¹ The often-unstated assumption is that noncitizens cannot be expected to be loyal to the United States – and the greater community in serving on juries.¹⁸²

The citizenship requirement has significant impacts on the pool of eligible jurors in some regions of the country, such as Los Angeles, New York City, San Francisco, Chicago, and Miami.¹⁸³ The impacts are not limited to large urban centers, however. Large immigrant

¹⁷⁷ See Mitchell S. Zuklie, Comment, *Rethinking the Fair Cross-Section Requirement*, 84 CALIF. L. REV. 101, 103 n.18 (1996) (citing studies); see also Joanna Sobol, Note, *Hardship Excuses and Occupational Exemptions: The Impairment of the “Fair Cross-Section of the Community”*, 69 S. CAL. L. REV. 155 (1995) (analyzing how excuse of jurors for “hardship” and certain occupational exemptions, render juries less representative of a cross section of the community).

¹⁷⁸ See Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1098-1103 (1999); Spencer Overton, *Voices From the Past: Race, Privilege, and Campaign Finance*, 79 N.C. L. REV. 1541, 1548-50 (2001).

¹⁷⁹ See, e.g., Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y. U. L. REV. 707, 712-19 (1993).

¹⁸⁰ See *Carter v. Jury Comm’n*, 396 U.S. 320, 333 (1970) (“Nearly every State requires that its jurors be citizens of the United States”) (footnote omitted); see, e.g., 28 U.S.C. § 1865(b)(1) (providing that person who “is not a citizen of the United States” is not eligible for jury service).

¹⁸¹ See, e.g., *U.S. v. Toner*, 728 F.2d 115, 129-30 (2d Cir. 1984); *United States v. Avalos*, 541 F.2d 1100, 1118 (5th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977).

¹⁸² See VAN DYKE, *supra* note 162, 132-33. *But cf.* Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411 (1997) (rejecting similar concerns as a reason for the refusal to recognize dual nationality).

¹⁸³ See *Developments in the Law – Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1564 (1988) (“The citizenship requirement . . . may be unnecessary and inappropriate in areas with large

populations have emerged, and continue to grow, in more suburban and rural parts of the country, including in the South and Midwest.¹⁸⁴

resident alien populations, such as Miami, where at least thirty percent of the population are resident aliens.”) (footnote omitted).

¹⁸⁴ See Johnson, *supra* note 31, at 1492-96 (discussing Mexican diaspora across the United States); Bill Ong Hing, *Answering Challenges of the New Immigrant-Driven Diversity: Considering Integration Strategies*, 40 BRANDEIS L.J. 861, 864-68 (2002) (same); Sylvia R. Lazos Vargas, “*Latina/o-ization*” of the Midwest: *Cambio de Colores (Change of Colors) as Agromaquilas Expand into the Heartland*, 13 BERKELEY LA RAZA L.J. 343 (2002) (same).

Given the demographics of the immigrant stream, the citizenship requirement for jury service has racial impacts. According to Census 2000, almost thirty percent of the Hispanics in the United States are *not* U.S. citizens,¹⁸⁵ and thus are ineligible for jury service. More than one-third of all residents of Los Angeles County were foreign born, including many natives of Mexico who are noncitizens excluded from the jury pool.¹⁸⁶ Because “[t]he vast majority of today’s immigrants are people of color,”¹⁸⁷ immigration status in modern times serves as a rough proxy for race.

The exclusion of immigrants from juries impacts the representativeness of juries and the extent to which they reflect a true cross-section of the community living in a jurisdiction. For several reasons, this is a much more significant issue since the Supreme Court decided *Hernandez v. Texas* in 1954. Immigration rates have increased significantly since then; in addition, Congress removed racially exclusionary provisions in the immigration laws in 1965, thereby increasing substantially the number of immigrants of color coming to the United States.¹⁸⁸

¹⁸⁵ See U.S. Census Bureau, Place of Birth by Citizenship Status (Hispanic or Latino), http://factfinder.census.gov/servlet/DDTable?_bm=y&geo_id=D&ds_name=D&_lang=en&mt_name_, last visited on July 24, 2004.

¹⁸⁶ See California Quick Facts (Los Angeles County), U.S. Census Bureau, at <http://quickfacts.census.gov/qfd/states/06/06037.html>, last visited September 13, 2004.

¹⁸⁷ Johnson, *supra* note 31, at 1505.

¹⁸⁸ See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996).

Put simply, noncitizens have disputes, civil and criminal, resolved in a justice system in which they are not represented among the jurors who will decide their cases.¹⁸⁹ This has not always been the rule in the United States. In the past, noncitizens were permitted to vote and serve on juries, with disenfranchisement only becoming common in the states with the nativist outburst in the early twentieth century.¹⁹⁰ Indeed, for centuries, in order to ensure fairness to noncitizens, English law authorized juries *de medietate linguae* – juries of half citizens and half noncitizens – in cases involving a noncitizen.¹⁹¹ This procedure reflects the understanding of the need for representation of noncitizens on the jury in order to offer the appearance of impartiality.

A few commentators have advocated the extension of the franchise to noncitizens,¹⁹² which would have a dramatic impact on Latina/o voting power.¹⁹³ Along those lines, one could advocate allowing noncitizens, perhaps only those who have fulfilled a residency requirement by living in a jurisdiction for a certain length of time, to serve on juries. This would allow for the possibility of a more representative cross section of the community, including a larger

¹⁸⁹ See Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998) (contending that the right to jury trial, as well as voting, has group, as well as individual, rights dimension that involves minority representation). Noncitizens in certain circumstances can have their disputes resolved in federal, rather than state, courts, the assumption being that federal courts will less likely be biased against foreigner because the judges have life tenure and are more immune from political pressures than elected state court judges. See 28 U.S.C. § 1332. See generally Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1 (1996) (analyzing reasons for alienage jurisdiction). However, noncitizens cannot sit on juries in federal court.

¹⁹⁰ See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397-1417 (1993) (summarizing history of alienage suffrage in the United States); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093-1100 (1977) (same); Gabriela Evia, Note, *Consent By All the Governed: Reenfranchising Noncitizens as Partner's in America's Democracy*, 77 S. CAL. L. REV. 151 (2003); see also Sandra Guerra, Note, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419 (1988) (contending that failure to assist non-English proficient speakers in voting in effect disenfranchised them in violation of the law). See generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (3d ed. 1992) (analyzing nativist sentiment at this time in U.S. history).

¹⁹¹ See Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and A Proposal for Change*, 74 B.U. L. REV. 777 (1994).

¹⁹² See *supra* note 190 (citing authorities).

¹⁹³ See JOAQUIN AVILA, *POLITICAL APARTHEID IN CALIFORNIA: CONSEQUENCES OF EXCLUDING A GROWING NONCITIZEN POPULATION* (2003) (UCLA Chicano Studies Research Center, Latino Policy and Issues Brief, 2003), available at <http://www.sscnet.ucla.edu/csrc/> (last visited March 22, 2004). Recently, immigrants have been pushing for voting rights in local elections and several jurisdictions have been weighing such proposals. See Rachel L. Swarns, *Immigrants Raise Call for Right to be Voters*, N.Y. TIMES, Aug. 9, 2004, at A13.

percentage of Latina/os, to participate. By making juries appear more representative and impartial, noncitizen service on juries would allow their decisions to carry more legitimacy with the greater Latina/o community.

By barring a portion of the community from the voting booths and the jury rooms, citizenship requirements limit the ability to have political processes that fully represent the larger community and deny input from a discrete segment of the community. Consequently, at the individual level, noncitizens with criminal or civil disputes must have them decided by a jury unquestionably *not* of their peers. In this way, the citizenship requirement for jury service tests the nation's true commitment to a trial before a jury pulled from a cross section of the community. Today, noncitizens in the community are not full members of, or participants in, social life.

The increase in naturalization rates among Latina/os in the 1990s may reduce the underrepresentation of Mexican immigrants on juries.¹⁹⁴ It is too early to tell. However, because of a variety of other factors, including class, language, and other factors,¹⁹⁵ that development alone is unlikely to increase Latina/o jury participation to a level that would reflect the percentage of Latina/os in the general community.

The citizenship requirement for jury service must be placed in its larger social and political context. Historically, citizenship status often has been used to rationalize discrimination against, and the mistreatment of, Latina/os.¹⁹⁶ The citizen/noncitizen distinction helps legitimate the protections afforded Mexican Americans in *Hernandez v. Texas* in 1954 with the "repatriation" of Mexican immigrants and U.S. citizens of Mexican ancestry during the Great Depression, the harsh deportation campaign that same year directed at persons of Mexican ancestry in Operation Wetback, and the deadly border enforcement measures pursued today.¹⁹⁷

Given the lessons of history, we should be leery of differential treatment of Latina/os based on citizenship status.¹⁹⁸ Ultimately, as a community, we should consider whether the benefits of the citizenship requirement for jury service outweigh the costs to the perceived impartiality and legitimacy of juries by diminishing Latina/o representation on juries.

B. *The English Language Requirement*

Under federal law, to be eligible for jury service, a person must be able to read, write,

¹⁹⁴ See Kevin R. Johnson, *Latina/os and the Political Process: The Need for Critical Inquiry*, 81 OR. L. REV. 917, 930-31 (2002).

¹⁹⁵ See *supra* text accompanying notes 177-79.

¹⁹⁶ See *supra* text accompanying notes 144-46.

¹⁹⁷ See *supra* text accompanying notes 3-10.

¹⁹⁸ Cf. Ruben J. García, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511 (2003) (arguing that Congress should amend anti-discrimination laws to prohibit discrimination based on immigration status).

understand and speak English.¹⁹⁹ Many states have similar English language proficiency requirements.²⁰⁰ In the days before *Hernandez v. Texas*, English language ability had been used to justify the lack of representation of persons of Mexican ancestry on juries,²⁰¹ even though many Mexican Americans speak English fluently.

¹⁹⁹ See 28 U.S.C. § 1865(b)(2), (3) (2000).

²⁰⁰ See, e.g., ALA. CODE § 12-16-60(a)(a)(2); N.Y. JUD. CODE § 510(4); COLO. REV. STATS. 13-71-105 (2)(b).

²⁰¹ See, e.g., *Lugo v. Texas*, 136 Tex. Crim. 226, 232, 124 S.W. 344,348 (1939).

In the modern United States, with its high levels of immigration from non-English speaking nations,²⁰² English language requirements have disparate racial impacts on jury pools. A substantial percentage of Latina/os in this country are primarily Spanish speakers.²⁰³ Similar issues arise for Asian immigrants, as well as Native Americans in areas of the country where indigenous languages are the primary languages spoken by significant portions of the local population.²⁰⁴

In U.S. society today, with large scale immigration and a large immigrant population, language proficiency may serve as a proxy for race. “Given the huge numbers of immigrants who enter this country from Asian and Latin American countries whose citizens are not White and who in most cases do not speak English, criticism of the inability to speak English coincides neatly with race.”²⁰⁵ Language, like citizenship, requirements for jury service have disparate impacts on minority communities, particularly Latin American and Asian immigrant communities. They tend to reduce the representation of significant populations of the community and restrict the degree to which the jury will be pulled from a representative cross section of the community. Like the citizenship requirement for jury service, English language requirements make juries less, not more, representative of the greater community.

The English language requirement for jury service has predictable impacts on the Latina/o community. It dilutes Latina/o jury service and moves jury pools further away from the ideal of representing a fair cross section of the community.

If truly committed to juries representing a cross-section of the community, we should re-evaluate whether limiting juror eligibility to English speakers costs more than it benefits the system as a whole. The fact that the English language requirement has racially disparate impacts makes it problematic. This is particularly true at a time in U.S. history when immigration has made the nation increasingly diverse linguistically as well as racially.²⁰⁶

Various logistical difficulties obviously would arise if the law was changed to permit non-English speaking persons to serve on juries. The costs of accommodating non-English speakers are not inconsequential. Translation and interpreters necessary for a mixed language jury would cost money, not an inconsequential matter because the courts perennially face funding problems. An important question would be how jury deliberations might work if all

²⁰² See *supra* text accompanying notes 180-87.

²⁰³ See Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as a Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1364-67 (1997) (analyzing importance of Spanish language to Latina/o identity).

²⁰⁴ See Allison M. Dussias, *Waging War With Words: Native Americans’ Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901 (1999).

²⁰⁵ Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 874 (1995).

²⁰⁶ See *supra* text accompanying notes 202-04.

jurors did not speak English.²⁰⁷ However, the racial impacts of the English language requirement have significant costs to the racial demographics of the jury that deserve consideration and may well outweigh any other costs.

C. *The Exclusion of Felons*

²⁰⁷ I thank Nancy Marder for raising this issue to me.

Under federal law, convicted felons whose civil rights have not been restored, and persons with felony charges pending, are excluded from jury service.²⁰⁸ Several states have similar laws. The racially disparate impacts of the criminal justice system in the United States are well-documented,²⁰⁹ as is the dramatic expansion of the crimes that constitute felonies.²¹⁰ Consequently, minority groups are over-represented among those excluded from jury service by the bar on convicted felons.

²⁰⁸ See 28 U.S.C. § 1865(b)(5) (2000). The disenfranchisement of convicted felons by the states was most recently upheld by the Supreme Court in *Richardson v. Ramirez*, 418 U.S. 24 (1974).

²⁰⁹ See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN JUSTICE SYSTEM* (1999); RANDALL KENNEDY, *RACE, CRIME AND THE LAW* (1998); Cruz Reynoso, *Hispanics and the Criminal Justice System*, in *HISPANICS IN THE UNITED STATES: AN AGENDA FOR THE TWENTY-FIRST CENTURY* 277 (Pastora San Juan Cafferty & David W. Engstrom eds., 2000); Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality*, 78 DEN. U.L. REV. 1081, 1088-98 (2001).

²¹⁰ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

For example, more than thirty percent of the potentially eligible African American men in Florida and Alabama are denied the right to serve on juries, as well as the right to vote.²¹¹ “Fourteen percent of African-American men are ineligible to vote because of criminal convictions. In seven states, one in four black men is permanently barred from voting because of their criminal records.”²¹² Far smaller percentages of whites are declared ineligible for jury service by this rule. The end result of the prohibition of felons from jury service is racially skewed jury pools, which tend to produce juries that deviate substantially from a cross section of the community.

²¹¹ See John O. Calmore, *Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. REV. 1253, 1277-80 & nn.115-16 (2001); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895 (1999); see also *Developments in the Law -- The Law of Prisons*, 115 HARV. L. REV. 1939, 1945 (2002) (“Florida has disqualified 31.2% of its black voting-age population – the second highest rate in the nation [Alabama’s rate was 31.5%] – based on felony convictions.”) (footnote omitted).

²¹² George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1900 (1999) (footnotes omitted). For critical analysis of the prohibition of felons from serving on juries, see Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 AM. U.L. REV. 65 (2003); see also Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045 (questioning state laws that bar convicted felons from voting); Carlos M. Portugal, Comment, *Democracy Frozen in Devonian Amber: The Racial Impact of Permanent Felon Disenfranchisement in Florida*, 57 U. MIAMI L. REV. 1317 (2003) (same).

Like African Americans, Latina/os are disparately affected by the exclusion of felons from juries. Over-represented in the criminal justice system compared to their proportion of the population, they can be expected to be excluded from jury service in disproportionate numbers by the bar on felons serving as jurors.²¹³ This unquestionably is the case in states such as California, Arizona, New York, Florida, and Texas, with large Latina/o populations and even larger percentages of Latina/os in prison.²¹⁴

In certain circumstances, disenfranchisement laws can be successfully challenged under the Equal Protection Clause of the Fourteenth Amendment.²¹⁵ Proving that state laws were enacted with a discriminatory intent is difficult,²¹⁶ although possible in certain circumstances.²¹⁷

²¹³ See Reynoso, *supra* note 209.

²¹⁴ See MARISA J. DEMEO & STEVEN A. OCHOA, DIMINISHED VOTING POWER IN THE LATINO COMMUNITY: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN TEN TARGETED STATES (Mexican American Legal Defense and Education Fund, 2003).

²¹⁵ See *Washington v. Davis*, 426 U.S. 229 (1976).

²¹⁶ See Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (providing empirical data showing difficulties imposed on plaintiffs by discriminatory intent standard); see *also supra* note 132 (citing authorities criticizing the discriminatory intent requirement).

However, a facially neutral explanation exists for the rule – that convicted felons cannot be relied upon to uphold the law – that is difficult to prove is not the true intent for the rule.²¹⁸

It may seem eminently reasonable to deny persons convicted of serious crimes from jury service. However, the racial overlay to the criminal justice system in the United States strongly suggests that the criminal laws are unevenly enforced.²¹⁹ Race-based law enforcement has plagued the nation for centuries and continues to do so, as the recent flap over the phenomenon of “driving while Black” starkly reminds us.²²⁰

Attention should be given to whether barring felons from jury service continues to make sense in light of what we suspect, and know, about unequal operation of the modern criminal justice system. The racially skewed impacts of the criminal justice system have ripple effects on jury service and tends to diminish Latina/o representation on civil and criminal juries, thus undermining the legitimacy of the judicial system in the eyes of the Latina/o community.

It may be the case that convicted felons, as well as those charged with felonies, may be biased against the government, an important consideration in any criminal prosecution, or the justice system generally. However, it seems appropriate to reconsider the exclusion and, as done with respect to other life experiences, allow parties to strike “for cause” jurors on an individual basis who cannot impartially weigh the evidence in a specific case.

D. *The Use of Peremptory Challenges to Strike Latina/os By Proxy*

²¹⁷ See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding that Alabama constitutional provision that disenfranchised any person convicted of, among other crimes, “any . . . involving moral turpitude” had been adopted with the intent to discriminate against African Americans).

²¹⁸ See *Fletcher*, *supra* note 212, at 1899; Kalt, *supra* note 212, at 122-28.

²¹⁹ See *supra* note 209 (citing authorities).

²²⁰ See, e.g., David A. Harris, *The Stories, The Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 275-88 (1999); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342-62 (1998); Kathryn K. Russell, “*Driving While Black*”: *Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717, 718-19 (1999);

The use of peremptory challenges to strike jurors also tends to reduce Latina/o representation on juries, although not in as systematic a fashion as various jury qualifications. This is the case even though the Supreme Court has barred the reliance on race in the exercise of peremptories.²²¹ Language proficiency, which the Court has permitted parties to rely upon in exercising a peremptory challenge to strike a juror from the venire, serves as a convenient proxy for race.

In 1986, the U.S. Supreme Court held that a prosecutor could not exercise a peremptory challenge on the basis of race to strike African Americans, a practice that previously had been permitted.²²² Reflecting the triumph of *Hernandez v. Texas*,²²³ this bar on the use of peremptories to strike racial minorities was routinely extended to Latina/os by the lower courts.²²⁴ The prohibition to a certain extent protects Latina/os from blatant exclusion from jury

²²¹ See *infra* text accompanying notes 222-24.

²²² See *Batson v. Kentucky*, 476 U.S. 79 (1986); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (extending *Batson* to civil case); *J. E. B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that exercise of peremptory challenge based on sender violated Constitution); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995) (analyzing continuing usefulness of peremptory challenges after ban on consideration of race and gender in their exercise). In *Batson*, the Court repeatedly relied on *Hernandez v. Texas* and its holding that juries could not be excluded because of their race. See *Batson*, 476 U.S. at 84 n.3, 86 n.5, 86 n.7, 88, 90, 94, 100.

²²³ See *supra* text accompanying notes 106-38.

²²⁴ See, e.g., *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000) (“Under the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely

service on account of their race.

on the basis of the juror's gender, ethnic origin, or race.”) (citations omitted); *Fernandez v. Roe*, 286 F.3d 1073, 1077 (9th Cir.) (“Both Hispanics and African-Americans constitute ‘cognizable groups’ for” purposes of evaluation whether peremptory challenges were based on race.”), *cert. denied*, 537 U.S. 1000 (2002); *Galarza v. Keane*, 252 F.3d 630 (2d Cir. 2001) (applying *Batson* to claim by Hispanic defendant claiming that prosecutor used peremptory challenges to strike Hispanics); *United States v. Novaton*, 271 F.3d 968, 1000-04 (11th Cir. 2001) (same), *cert. denied*, 535 U.S. 1120 (2002).

However, peremptory challenges based on certain so-called race neutral reasons can have racially disparate impacts to the detriment of Latina/os. The Supreme Court opened the door to this possibility in *Hernandez v. New York*.²²⁵ In that case, the prosecutor, claiming that the prospective jurors might disregard official translations, used peremptory challenges to strike two bilingual Spanish speaking Latina/os in a criminal case involving a Latino defendant.²²⁶ Consistent with *Hernandez v. Texas*, the Court assumed that Hispanics were a racial group deserving the protections of the Equal Protection Clause.²²⁷ Spanish speaking ability, however, was treated as a “race neutral” explanation for using peremptory challenges to strike jurors, even though there is a connection between language and Latina/o identity.²²⁸ Despite the clear racial impacts, the Court found that, absent a finding of a discriminatory intent, reliance on peremptories to strike bilingual Spanish/English speakers was permissible.²²⁹ *Hernandez* has been followed in the lower courts to authorize the use of peremptories to strike bilingual Spanish

²²⁵ 500 U.S. 352 (1991).

²²⁶ See *People v. Hernandez*, 75 N.Y.2d 350, 353, 552 N.E.2d 621, 621 (1990). The dissent in the Court of Appeals for the State of New York observed that “[w]hile the people emphasize their interest in excluding Spanish-speaking jurors because of the presence of an interpreter, there is no indication that any other members of the panel were also asked if they spoke Spanish.” See *id.* at 363-628 (Kaye, J., dissenting).

²²⁷ See *supra* text accompanying notes 139-58.

²²⁸ See *supra* text accompanying note 205.

²²⁹ See *Hernandez v. New York*, 500 U.S. at 369-70. A plurality of the Court, however, acknowledged the importance of language to personal identity and group membership and that, in certain circumstances, language may be relied on as a pretext for race. See *id.* at 370-72; cf. Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000) (contending that political campaign culminating in the passage of law ending bilingual education in California employed language as a proxy for race).

The Court’s holding in *Hernandez v. New York* has been the subject of considerable academic criticism. See, e.g., Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 600-05 (1994); Marina Hsieh, “Language-Qualifying” Juries to Exclude Bilingual Speakers, 66 BROOKLYN L. REV. 1181 (2001); Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 74-76 (1995); Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 52-59 (1993); Miguel A. Mendez, *Hernandez: The Wrong Message at the Wrong Time*, 4 STAN. L. & POL’Y REV. 193 (1993); Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors and the Fear of Spanish*, 21 HOFSTRA L. REV. 1 (1992); Deborah Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761. Over a decade ago, over twenty states had a bilingual population of more than five percent of their overall population. See *id.* at 807.

speakers.²³⁰

²³⁰ See, e.g., *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir.), *cert. denied*, 513 U.S. 969 (1994); *United States v. Munoz*, 15 F.3d 395 (5th Cir.), *cert. denied*, 511 U.S. 1134 (1994); *United States v. Changco*, 1 F.3d 837 (9th Cir.), *cert. denied*, 510 U.S. 1019 (1993).

The racial impacts of *Hernandez v. New York* bear similarities to the exclusion of Mexican American jurors at issue in *Hernandez v. Texas*. Both involve the exclusion of Latina/os from jury service. In one, the Court looked beyond the denial of discrimination by the state and demanded an explanation.²³¹ In the other case, the Court reflexively accepted the race neutral explanation, suspect as it was under the circumstances. In certain respects, the Supreme Court in 1954 seemed to have a more sophisticated view of the workings of racial discrimination than the 1991 Court.

Ultimately, because of the overlap between language and race,²³² with increased bilingualism resulting from immigration, the use of peremptories based on language will decrease the representativeness of Latina/os on juries. Moreover, because fluency in the Spanish language has been used to strike jurors in cases involving the translation of Spanish (and likely minority parties), Latina/os are more likely to be stricken in precisely those cases, such as *Hernandez v. New York*, in which Latina/o representation generally is thought to be most necessary.

The bar on the consideration of race in jury selection may adversely affect racial minorities in another, less obvious way. As Justice Clarence Thomas has emphasized,²³³ racial minorities may “rue the day” that race was barred from consideration in the use of peremptory challenges. One could see a minority striking white jurors in the hopes of securing a more

²³¹ See *supra* text accompanying notes 106-38.

²³² See *supra* text accompanying note 205.

²³³ See *Georgia v. McCollum*, 505 U.S. 42, 60 (1992) (Thomas, J., concurring in judgment). For discussion of these issues, see Arielle Siebert, *Batson v. Kentucky: Application to Whites and the Effect on the Peremptory Challenge System*, 32 COLUM. J. L. & SOC. PROBS. 307 (1999); Tanya E. Coke, Note, *Lady Justice May be Blind, But is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327 (1994).

racially diverse jury, especially given the skewed pool rendered by the current set of rules.²³⁴ This represents an example of the perceived problem with the Supreme Court's "color blind" approach to the interpretation and application of the Equal Protection Clause.²³⁵ Color-blind reasoning may be invoked by the Court to bar a Latina/o from striking white jurors in an effort to impanel a diverse jury.

As we have seen, juror eligibility requirements tend to decrease the racial diversity of the jury pool. Minority litigants are denied the opportunity to use peremptories or any other device that might allow for the impaneling of a more diverse jury.

E. *The Dangers of Racially Skewed Juries in a Multiracial Society*

Despite the promise of *Hernandez v. Texas*, Latina/os remain seriously underrepresented on juries. Systematic exclusion has been replaced by facially neutral juror eligibility requirements and other devices. Jury eligibility requirements tend to reduce, not improve, Latina/o representation on juries.

²³⁴ See *supra* text accompanying notes 180-220 (reviewing reasons for underrepresentation of Latina/os on juries).

²³⁵ For more general criticism of the Court's color-blindness jurisprudence, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991); cf. Daria Roitmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449 (1997) (analyzing how facially neutral concept of "merit" used in law school admissions allows for racial discrimination).

By excluding certain perspectives from the jury room, the underrepresentation of Latina/os on grand and petit juries threatens to allow for poorer decisionmaking and to undermine the impartiality of the jury system, as well as the civil and criminal justice systems as a whole.²³⁶ Underrepresentation of Latina/os on juries, as well as on the judiciary, dampens the belief among Latina/os in the fairness and impartiality of the justice system and promotes cynicism and distrust of the system and its outcomes

Over time, the underrepresentation and correlated problems have gotten worse, not better. After an initial increase in representation after the Court decided *Hernandez v. Texas*, the underrepresentation of Latina/os on juries has grown over the years. Once again, the trajectory of *Hernandez* resembles that of *Brown v. Board of Education*. The “war on drugs” has vastly expanded the number of Latina/os incarcerated and barred an ever-growing percentage of the community from jury service.²³⁷ Immigration has increased as well, with a growing Mexican immigrant population in the United States.²³⁸ There are more noncitizens living in the United States today than in 1954; more noncitizens are involved in the criminal and civil justice systems, and more are barred from jury service. More languages are being spoken, with Spanish the primary language spoken by many Latina/os. As a result, we face a near-crisis with respect to a justice system that denies ever-larger segments of the Latina/o community from jury service and subjects Latina/os to a justice system that appears to look much like that which existed in Texas and California before 1954.

This is not simply a theoretical problem of democracy and community membership, but instead may have dramatic practical consequences. Before our eyes, we can see a recipe for mass unrest and violence. Consider that a significant minority community is denied the right to vote²³⁹ and to serve on juries, the two centerpieces of U.S. democracy. This group may question the legitimacy of the political process and government. The legitimacy of the justice system and the outcomes it produces is fostered by having diverse juries; conversely, the legitimacy of the process is seriously undercut by having homogeneous juries that lack meaningful representation of certain segments of the community:

²³⁶ See *supra* text accompanying notes 159-79.

²³⁷ See *supra* text accompanying notes 208-09.

²³⁸ See *supra* text accompanying notes 183-87.

²³⁹ See *supra* text accompanying notes 180-235.

The jury system is supposed to establish the legitimacy of the justice rendered – to prevent . . . mistrust and hostility from occurring. But racially connected misconceptions and prejudice can imperil the impartiality of a jury. Only by balancing this prejudice – which jurors of all kinds feel about issues and people – through a jury composed of a cross-section of the community can impartiality be fostered.²⁴⁰

Put differently, being locked out of the political process, Latina/os can be expected to lack faith in that process, as well as its outcomes, and to consider political and legal decisions lacking legitimacy. They may seek relief from means outside the formal processes.

Consider an example. The reaction to a racially-mixed jury’s conviction of a minority defendant differs substantially from the public perception of the criminal conviction of an African American by “an all-white jury.”²⁴¹ Indeed, the mere reference to an “all-white jury” amounts to a strong rebuke of the jury verdict, in no small part because it taps into a notorious history of racism in the criminal justice system in the United States. The riots following the all-white jury’s acquittal of the Los Angeles police officers videotaped beating African American Rodney King,²⁴² serve as a ready reminder of the incendiary potential of such perceptions.

²⁴⁰ VAN DYKE, *supra* note 162, at 32.

²⁴¹ See Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 704 (1995) (“Few statements are more likely to evoke disturbing images of American criminal justice than this one: ‘The defendant was tried by an all-white jury.’”); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895 (2004) (stating that one of the goals of Reconstruction Amendments was “to protect[] black victims from all-white juries”); Coke, *supra* note 233, at 327-31 (offering examples of controversial verdicts rendered by all-white juries); see also *Carter v. Jury Comm’n*, 396 U.S. 320, 341, 342-43 (1970) (Douglas, J., dissenting in part) (“[W]here there exists a pattern of discrimination, an all-white or all-black jury commission in these times probably means that the race in power retains authority to control the community’s official life, and that no jury will likely be selected that is a true cross-section of the community.”).

²⁴² See generally *READING RODNEY KING, READING URBAN UPRISING* (Robert Gooding-

In the Rodney King case, the African American community believed that because the jury did not represent the community as a whole (especially the African American community primarily affected by the police brutality at the core of the case), its verdict was illegitimate. This widespread perception spurred on, if not justified, the mass uprising that followed the acquittal in May 1992. The teachings of the Rodney King violence have been grimly summarized as follows:

Williams ed., 1993). In the Rodney King case, the trial was moved from downtown Los Angeles to Simi Valley, a white suburb, with an all-white jury ultimately hearing the case.

Many lessons may be learned from the embers of burned homes and storefronts in South Central Los Angeles. Among the most important is that America's failure to include minorities in judicial decisions that affect their lives is a prescription for chaos. . . . The lesson is not new. *Violent reactions to miscarriages of justice by white judges and all-white juries are an all-too-common signpost of American history.*²⁴³

Latina/os participated in the unrest and comprised a large percentage of the people arrested and injured during the violence.²⁴⁴ As this suggests, social anomie, and deep dissatisfaction with the criminal justice system, is not limited to African Americans. Such distrust continues to this day. Over the last few years, signs of Latina/o resistance have begun to emerge.²⁴⁵

Currently, racial minorities see the courts in the United States that are predominantly white, with white lawyers and judges as the norm.²⁴⁶ "Nonwhites are underrepresented on juries in the vast majority of courts in the country."²⁴⁷ The decisions meted out by the justice system

²⁴³ Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 516 (emphasis added) (footnote omitted).

²⁴⁴ See Johnson, *supra* note 229, at 64-65.

²⁴⁵ See, e.g., David G. Gutiérrez, *Migration, Emergent Ethnicity, and the "Third Space": The Shifting Politics of Nationalism in Greater Mexico*, 86 J. AM. HIST. 481 (1999) (analyzing significance of mass protests by persons of Mexican ancestry waving Mexican flags opposing California's anti-immigrant Proposition 187); Cameron, *supra* note 178, at 1089-93 (discussing recent efforts of Latina/os to organize into labor unions); Johnson, *supra* note 194, at 930-31 (noting increase in naturalization of immigrants in wake of anti-immigrant legislation of the 1990s).

²⁴⁶ See Hernandez-Truyol, *supra* note 176, at 373-75.

²⁴⁷ VAN DYKE, *supra* note 162, at 28.

are viewed as having racially disparate impacts, with “justice” in cases involving people of color being dispensed, and defined, by white people. This is not healthy for a society that extolls its democratic institutions and preaches equality under the law.

Hernandez v. Texas promised to improve the operation of the justice system. It ended racial bars on jury participation by Mexican Americans but has yet to fulfill the promise of integrated juries. Reforms must be considered and implemented to ensure that juries do not exclude large portions of certain minority communities. If such steps are not taken, or are not successful, it is only a matter of time until a racially-charged case will cause national controversy and political protest, if not mass violence, like that seen in Los Angeles during World War II and 1992.²⁴⁸ In sum, the wholesale political disenfranchisement of large segments of the Latina/o community is a recipe for civil unrest and social disaster.

CONCLUSION

²⁴⁸ See *supra* text accompanying notes 53-66 (analyzing Sleepy Lagoon murder case).

Hernandez v. Texas was a momentous decision, whose 50th birthday merits the serious scholarly attention and celebration that it has been given. The Court's decision in *Hernandez v. Texas* deserves much praise. It helped expand the protections of the Fourteenth Amendment to include Latina/os, "neither Black nor White,"²⁴⁹ and for the first time in a Supreme Court decision recognized the discrimination against Mexican Americans in American social life.

In later cases, the Court made clear that Latina/os were a protected class under the Equal Protection Clause. In addition, the Court's finding in *Hernandez v. Texas* that persons of Mexican ancestry were racialized in Texas was later extended to apply to localities across the United States. The decision thus contributed to greater civil rights protections for Latina/os nationwide.

The case came at an opportune time in the nation's history. At the helm of the Supreme Court, Chief Justice Earl Warren had seen first hand discrimination against persons of Mexican ancestry in California and could easily accept its existence as described in Texas, which was not all that different from that in the Golden State. Racial segregation against African Americans was under scrutiny, as exemplified by *Brown v. Board of Education*, and it was difficult to justify prohibiting discrimination against one victimized group while permitting it against another.

However, the nation has a long way to go before it realizes the promise of *Hernandez v. Texas*. Race neutral requirements for jury service that correlate with race in U.S. society – citizenship and language requirements as well as the disqualification of felons – have resulted in the serious underrepresentation of Latina/os on juries. Peremptory challenges based on bilingual proficiency also allow certain Latina/os to be struck from juries.

Just as the promise of *Brown v. Board of Education* has yet to be achieved with respect to racially integrated public schools, the promise of *Hernandez v. Texas* has not yet been fulfilled. And just as we have grappled mightily with how to integrate our schools, we will need to struggle to ensure that our juries are in fact representative of U.S. society as a whole.

²⁴⁹ Rachel F. Moran, *Neither Black Nor White*, 2 HARV. LATINO L. REV. 61 (1997).