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Mi Profundo Azul: Why Latinos Have a Right to Sing the Blues

By

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In the same sense that Columbus “discovered” America, the United States Supreme Court “discovered” Mexican-Americans in *Hernandez v. Texas*.ⁱⁱ More precisely, the Court recognized what had been painfully, and long, obvious to Mexican Americans in the lands forcibly stolen from Mexico over a century before: that Mexican-Americans were subject to extreme, overt white racism. Forcefully, the Court decided that the systematic exclusion of Mexican Americans from Texas juries violated the Equal Protection Clause.

In this chapter, I discuss the historical context of Jim Crow segregation deployed against Mexican Americans in the Southwestern United States. I discuss both the pervasive segregation imposed upon Mexican Americans in all areas of life, and then the particular ways and means of segregation in the jury box. Against this historical background, I discuss the Warren Court's decision in *Hernandez v. Texas*. The Court was clearly correct in deciding that Mexican Americans in Texas were subject to racism and deserved Supreme Court enforcement of equal protection principles. Also assessed against this historical background, the contrary decisions of the lower Texas courts in the *Hernandez* case look like profoundly cynical and self-serving endorsements of white racism.

Significantly, the Warren Court's reasoning in *Hernandez v. Texas* contained language suggesting that the understanding of equal protection could be broadened to encompass any group shown to be subject to shifting community prejudices. Accordingly, the decision can be read to promise an equal protection doctrine responsive to our developing understanding of racism and its deployment against different groups of people. A more recent *Hernandez* decision, *Hernandez v. New York*, put that promise of the earlier decision to the test in a remarkably similar context: again, the exclusion of Latino jurors, but this time because of

language discrimination against their bilingualism. This Rehnquist Court decision shows that the promise of a broader, progressive equal protection doctrine has not been fulfilled. I preface my discussion of the *Hernandez v. New York* case with historical context on language discrimination against Latinos, which, like segregation against Mexican Americans, has a long, demonstrable history with considerable present ramifications. I then discuss *Hernandez v. New York* and its troubling shortcomings. Comparing the two *Hernandez* decisions yields interesting insights into some of the profound differences between the Warren and Rehnquist Courts in their interpretations of equal protection and their respective abilities to recognize discrimination.

I conclude with a few thoughts on why Latinos have a right to sing the blues: given the institutional nature of the Supreme Court and its constituency, the forecast for a meaningful equal protection responsive to Latino particularity is not good.

The Meaning and Historical Context of Segregation against Mexican Americans

I begin by describing the sociological understanding of segregation and providing historical context within which to understand the long deployment of segregation against Mexican Americans in the Southwest. Sociologists define segregation as:

a system of racial etiquette that keeps the oppressed group separate from the oppressor when both are doing equal tasks, like learning the multiplication tables, but allows intimate closeness when the tasks are hierarchical, like cooking or cleaning for white employers.ⁱⁱⁱ

The segregation law challenged, and upheld, in the Supreme Court's most famous endorsement of segregation, *Plessy v. Ferguson*^{iv}, illustrates the definition perfectly. A Louisiana statute required that railroad companies provide "equal but separate accommodations for the white and

colored races,” but provided an exception stating that “nothing in this act shall be construed as applying to nurses attending children of the other race.”^v When Whites and Blacks might otherwise share space on equal terms, riding together in the same railroad cars, the statute commanded separation of the races. When the relationship was clearly hierarchical and Blacks were in a subordinate position to Whites, such as when a Black nursemaid was tending to a White child, then the statute allows proximity and even intimate physical contact between the races. Segregation laws attempt to express an idea and to impute it to their nonwhite targets: that nonwhites are unfit to be in proximity to Whites when the nature of the interaction might suggest equality with Whites.

The segregation imposed upon Mexican Americans by whites is quite comparable to, though much less well known, than the segregation suffered by Blacks in the United States. Jim Crow, enforced against Mexican Americans, was a fact of life throughout the Southwest.^{vi} Carey McWilliams, lawyer and historian of Mexican America, described the pervasive segregation in the California citrus belt:

Throughout the citrus belt, the workers are Spanish-speaking, Catholic, and dark-skinned, the owners are white, Protestant, and English-speaking. The owners occupy the heights, the Mexicans the lowlands. . . . While the towns deny that they practice segregation, nevertheless segregation is the rule. Since the Mexicans all live in jim-town, it has always been easy to effect residential segregation. The omnipresent Mexican school is, of course, an outgrowth of segregated residence. The swimming pools in the towns are usually reserved for ‘whites,’ with an insulting exception being noted in the designation of one day in the week as ‘Mexican Day’ . . . Mexicans attend separate schools and churches, occupy the balcony seats in the motion-picture theaters, and frequent separate places of amusement. . . . The whole system of employment, in fact, is perfectly designed to insulate workers from employers in every walk of life, from the cradle to the grave, from the church to the saloon.^{vii}

By the 1920s, the *de jure* or *de facto* segregation of most public facilities to exclude Mexican

Americans was common in California.^{viii} Throughout the Southwest, segregated schools for Mexican American children were also common.^{ix}

In Texas, Whites established segregation that was no different in its pervasive isolation of Mexicans and Mexican Americans. This segregation “cut across all spheres of rural life, ‘separation in domicile, separation in politics, and separation in education.’”^x One study concluded that 117 Texas towns practiced segregation against Mexican Americans, and most of these towns enacted laws requiring segregation.^{xi} As described by David Montejano,

The modern [Texas] order framed Mexican-Anglo relations in stark “Jim Crow” segregation. Separate quarters for Mexican and Anglo were to be found in the farm towns. Specific rules defined the proper place of Mexicans and regulated intreracial contact. The separation was so complete and seemingly absolute that several observers have described the farm society as “caste-like.”^{xii}

White farm owners, who exerted the greatest influence over rural, agricultural Texas society defined Mexicans as their manual laborers by race, and enforced their status through economic coercion, physical hardship, and the denial of education.^{xiii} Residential segregation was enforced through restrictive racial covenants in property deeds, refusals to sell to Mexicans, and White protests when Mexicans attempted to buy in areas reserved for Whites.^{xiv}

The sheer extent of the segregation against Mexican Americans in Texas is painfully clear from the personal recollections of John J. Herrera, one of the lawyers who represented Pete Hernandez in *Hernandez v. Texas*. In a letter published twenty years after the *Hernandez* decision, Herrera recalled:

The signs in West Texas cafes: NO CHILI! “They mean us, son. Don’t go in there,” dad would admonish me. The rest of Texas was no better. Seguin [Texas]: a public park with the sign, Negros y Mexicanos Afuera! In a Houston personnel office: “No Mexicans hired.” On Washington Ave.: “No Mexicans Allowed in Dance Hall.” In a refinery, all water fountains were painted white, black, or brown. You know where I had to drink.^{xv}

Segregation in the Courtroom: A Historical Overview

Just like segregation in other spheres of life, segregation in the courtroom has a long history. Two of the most significant, visible roles played by the public in the courtroom are the ability to present testimony regarding the events in a trial, and the ability to sit on the jury that determines guilt or innocence. Not surprisingly, given the importance of these responsibilities, racial minority groups have been largely excluded from these public roles in the administration of justice.

The courts became complicit early in skewing the justice system in favor of white defendants and against the interests of victims and defendants of minority races. In *People v. Hall*, decided in 1854, the California Supreme Court interpreted a statute providing that “no Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man.”^{xvi} The court decided that this ban on testimony applied to exclude the testimony of Chinese persons against a white defendant, reasoning that the “intention of the [statute] was to throw around the citizen^{xvii} a protection for life and property, which could only be secured by removing him above the corrupting influences of degraded castes.”^{xviii} In effect, the ban on the testimony of Blacks, Indians and Chinese left these communities unable to defend themselves against crimes committed against their peoples by Whites when the witnesses were non-white.^{xix} The ban on the testimony of non-whites was also enforced against Mexican Americans. In 1857, Manuel Dominguez, a delegate to the California Constitutional convention and signer of the California Constitution in 1849, was dismissed as a witness because of his Indian blood and mestizo appearance.^{xx} Heizer & Almquist described the racist rationale for the ban: “it was

more desirable to release a Caucasian convicted of murder through the testimony of [non-white] witnesses than it was to permit any deviation in the established policy of white supremacy."^{xxi}

This same policy of white supremacy played out in the exclusion of non-whites from juries. The overt statutory exclusion of Blacks from jury service ended in 1871, when the Supreme Court decided *Strauder v. West Virginia*, which struck down a statute allowing only white males to serve on juries.^{xxii} The *Strauder* Court, however, suggested some of the many other ways that States could exclude Blacks from jury service constitutionally, such as by limiting such service to freeholders, or persons having certain educational qualifications. While this ended de jure segregation on juries, de facto segregation continued for many years afterward. In 1935, the Court decided that the systematic exclusion of qualified Black jurors from juries violated the equal protection clause in *Norris v. Alabama*.^{xxiii} Despite these Supreme Court decisions, systematic exclusion of non-white jurors remained persistent.

Mexican Americans were excluded from jury service before, until, and after *Hernandez v. Texas* was decided in 1954. During the 1930s, Mexican Americans in Texas resisted their routine exclusion from jury service, with some success.^{xxiv} However, as the *Hernandez* Court recounted, in Jackson County no Mexican American had served on a jury in twenty-five years. This fact bears witness to the resiliency of discriminatory jury selection practices. Even after *Hernandez v. Texas*, Mexican Americans continued to be excluded routinely from juries. A 1970 report by the United States Commission on Civil Rights found "serious and widespread underrepresentation of Mexican Americans on grand and petit juries in State courts in many areas of the Southwest."^{xxv} The report cited many causes of the underrepresentation studied at that time, some apparently nondiscriminatory, such as limited English-speaking ability (although

it is difficult to credit this explanation for otherwise qualified, citizen or resident potential jurors), and hardship posed by jury service for low-income Mexican Americans.^{xxvi} The report also cited more credible explanatory factors, including peremptory challenges used to remove Mexican Americans, and selection systems that vested excessive discretion in jury commissioners and judges.^{xxvii}

In 1986, the Supreme Court decided that peremptory challenges based explicitly on race violated the Equal Protection Clause in *Batson v. Kentucky*.^{xxviii} Accordingly, it might be tempting to think that the Supreme Court has ended the problem of discriminatory exclusion of Latinos from jury service. As I will discuss below, however, the exclusion of Latino jurors continues apace today in different guises, including language discrimination.

The *Hernandez v. Texas* decision

In *Hernandez*, the Court considered whether Mexican Americans were a “cognizable class” for equal protection purposes, and, if so, whether the systematic exclusion of Mexican Americans from juries violated the Equal Protection Clause. The Court first rejected the State’s theory that the Fourteenth Amendment contemplated only two racial groups, Black and White: “The Fourteenth Amendment is not directed solely against discrimination due to a ‘two-class theory’—that is, based upon differences between ‘white’ and Negro.”^{xxix}

The petitioner, Pete Hernandez, had to establish that Mexican Americans in Jackson County were treated as a separate class, distinct from whites and subject to discrimination. The Court described the attitude of the community towards Mexican Americans:

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 time of the hearing, there were two men’s toilets, one unmarked, and the other marked “Colored Men” and “Hombres Aqui.”^{xxx}

Having recognized the existence of segregated schools for children of Mexican descent, the Court also described the alleged linguistic justification for the segregation: “the reason given by the school superintendent for this segregation was that these children needed special help in learning English.”^{xxxix} The Court appeared mistrustful of this explanation, noting that teachers in the school for Mexican American children taught two grades, compared to teachers in the regular school who taught only one grade.^{xxxix} The Court concluded that the logical inference from all of these facts was that Mexican Americans were considered a distinct class subject to group discrimination in Jackson County, Texas.

Pete Hernandez then had to prove that discrimination existed in jury selection.

According to the Court, Hernandez proved the following facts:

The petitioner established that 14% of the population of Jackson County were persons with Mexican or Latin surnames, and that 11% of the males over 21 bore such names. The County Tax Assessor testified that 6 or 7 percent of the freeholders on the tax rolls of the County were persons of Mexican descent. The State of Texas stipulated that “for the last 25 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.” The parties also stipulated that “there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury.”^{xxxiii}

The state attempted interesting counterarguments throughout the litigation. In lower Texas courts, the State presented two winning arguments. First, the state argued, and the Texas courts accepted, that Mexican-Americans were a “nationality,” not a “race,” and that the Supreme

Court had never treated “nationality” the same as “race” under the equal protection clause.^{xxxiv} Secondly, the Texas courts had interpreted equal protection to apply only to discrimination between two racial groups, Whites and Blacks.^{xxxv} The lower court wrote that “Mexican people * * * are not a separate race but are white people of Spanish descent’. In contemplation of the Fourteenth Amendment, Mexicans are therefore members of and within the classification of the white race, as distinguished from members of the Negro race.”^{xxxvi} Since Mexicans were considered “white” in Texas, the court reasoned that equal protection principles did not apply to distinctions made within the group of “whites.”^{xxxvii} In the alternative, the State also attempted to justify the systematic exclusion of Mexicans. Five jury commissioners testified that they had not discriminated against persons of Mexican descent and that they had merely been trying to select the best qualified jurors.^{xxxviii}

The Warren Court concluded that Pete Hernandez had proved discrimination in the systematic exclusion of Mexican Americans from the jury:

[I]t taxes our credulity to say that mere chance resulted in there being no members of this class 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.^{xxxix}

The Court held that the fraudulent, racist jury selection system in Jackson County, Texas, a system which had excluded all qualified Mexican-American jurors for over twenty-five years, violated the Equal Protection Clause of the Fourteenth Amendment. And so, for the first time in its history, the Supreme Court recognized that Mexican-Americans victimized by state-sponsored racism were entitled to protection and relief under the Constitution.

Assessing the Lower Court Decisions in *Hernandez v. Texas*

The most significant holding in *Hernandez v. Texas* was the Warren Court's conclusion that Mexican-Americans were entitled to protection from government-sponsored racism under the Equal Protection Clause. In reaching this holding, as obvious and correct as it may seem today, the Court reversed decades of precedent from the Texas courts stating the opposite. The plaintiff had argued that the systematic exclusion of qualified Mexican-American-surnamed jurors from grand and petit juries over many years should violate the equal protection clause, just as the same exclusion of qualified Black jurors would.^{x1} Rather than remedy blatant discrimination against Mexican-Americans in jury selection, the Texas courts concluded that neither the principles of equal protection, nor the Equal Protection Clause itself, applied to Mexican-Americans.

The Texas courts gave two reasons for these startling conclusions. First, the courts reasoned that Mexican-Americans were a "nationality," not a "race," and that the Supreme Court had never treated "nationality" the same as "race" under the equal protection clause.^{xli} Secondly, the Texas courts had interpreted equal protection to apply only to discrimination between two racial groups, Whites and Blacks.^{xlii} I shall consider each of these reasons in turn.

The assertion that discrimination because of "nationality" differs from discrimination because of "race" for purposes of equal protection is interesting, but misleading. To a certain, simple extent, the Texas courts are right. Nationality, or national origin, is not commonly understood to be the same as "race." But the courts' reasoning is sophistic. It doesn't matter whether Mexican-Americans are named with a national-origin term rather than a color term like "Black," or "Brown." What mattered, and what should always matter in present contexts, is that

Mexican-Americans were subject to racism, regardless of nomenclature. Racism in the United States developed as the desire and practice of whites to disadvantage and disparage others who are non-white. It is obvious that Mexican-Americans in Texas constituted a “race” subject to white racism and all the excesses of Jim Crow and segregation. The Supreme Court recognized the obvious racism at issue in *Hernandez* and responded appropriately to it.

Interestingly, the Texas courts reached the wrong conclusion regarding Mexican-Americans even based on the constitutional law available at that time. Even if we take seriously the Texas courts’ distinction between “nationality” and “race,” the Supreme Court had already suggested that they could be functional equivalents for equal protection purposes. In *Strauder v. West Virginia*, discussed earlier, the Court’s opinion contained dicta directly relevant to the *Hernandez* case: “Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the [14th] amendment.”^{xliii} As early as the *Strauder* decision, discrimination because of national origin and “race” were understood to be equivalent for equal protection purposes. Later, in *Yick Wo v. Hopkins*, an exceedingly rare victory for the California Chinese, the Supreme Court struck down a San Francisco law that effectively forced only Chinese-owned and operated laundries out of business. Like the classification at issue in *Hernandez*, the targeting of Chinese-owned businesses could be named either “race” or “national origin” discrimination, or both. In *Hernandez v. Texas*, the Warren Court cited *Strauder* and other opinions to rebut the contention of the Texas courts that equal protection had never been extended beyond binary, Black/White meanings.^{xliv}

The Texas courts found further reason for denying equal protection to Mexican-Americans in the history of the equal protection clause. The lower courts fashioned a fascinating

argument that, based on the history of the 14th Amendment, equal protection was meant to apply only to the protection of two groups of people, Whites and Blacks. In part, the courts relied on a kind of framers' intent argument, quoting language in early Supreme Court decisions that described the paramount purpose of the 14th Amendment as securing the rights of the newly freed slaves.^{xlv} In the court's words,

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, comprising one class, and the Negro race, comprising the other class.^{xlvi}

Again, however, an early Supreme Court decision had long ago contradicted the assertions well accepted in the Texas courts. In the *Slaughterhouse Cases*, decided in 1873, the Supreme Court described Mexicans as a distinct "race" and described generality greater than Black/White in the scope of equal protection:

We do not say that no one else but the negro can share in this protection Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth [amendment], it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.^{xlvii}

Defying history, experience, and observation, the Texas courts had decided that "Mexican people . . . are not a separate race but are white people of Spanish descent."^{xlviii} Since, according to the courts, Mexican-Americans were white (and since they were not Black), they could not claim rights of equal protection against their fellow white counterparts.^{xlix} One wonders how Texas judges could reach such conclusions while observing the sign on the

courthouse grounds designating one bathroom “Colored Men” and “Hombres Aqui.”

Assessing the Success of *Hernandez v. Texas*

Though the Warren Court rejected the “two-class” or binary understanding of equal protection in *Hernandez v. Texas*, the Court was still influenced by the history of the equal protection clause with respect to the kind of discrimination that it was able to recognize as race discrimination. In considering the systematic exclusion of Mexican-Americans from Jackson county juries, the Court relied upon its past precedents that recognized the similar exclusion of Black jurors as violations of equal protection.¹ The constellation of facts the Court assembled—the evidence of Jim Crow segregation of Mexican-Americans, the evidence of unequal treatment—was familiar ground. All of the evidence of discrimination mentioned by the Court was discriminatory treatment that the Court had recognized as discriminatory with respect to Blacks.

An interesting question remains. How successfully has the Court expanded its conception of equal protection beyond the “two-class” theory? The Warren Court took a first step (for Latinos) by recognizing that Mexican Americans were entitled to equal protection of the laws. As the Court itself recognized, this was not really a new development; the Court had decided equal protection cases favorably to non-white, non-Black litigants before.

But to what extent can the Court recognize as discriminatory other forms of white racism that are unlike, or less like, the forms of white racism experienced by Blacks? Fifty years after *Hernandez v. Texas*, the Court still lacks understanding and recognition of some of the particular forms of white racism against Latinos even in the same context of discriminatory jury

selection. Even though the Court ostensibly broadened the scope of equal protection in *Hernandez*, the binary understanding of “race” as Black/White color still cramps current understandings of race discrimination and robs equal protection of its relevance for Latinos.

Language discrimination against Latinos is an excellent example of the underinclusive understanding of race discrimination. Language discrimination has a long history as a tool of oppression against Latino people.^{li} The history of language discrimination in public education is well documented and I will briefly recount it here.

Language Discrimination: Some Historical Context

The segregated, inferior schools provided for Mexican American children in the Southwest were intended to teach inferiority and subservience.^{lii} One strategy for teaching the lessons of subservience was to attempt to destroy the language and culture of young Mexican American students. As described by Thomas Carter, “the full force of the educational system in the Southwest [was] directed toward the eradication of both the Spanish language and the Spanish-American or Mexican-American cultures.”^{liii}

Teachers employed, and continue to employ, many language-related reasons to justify the segregation of Mexican American children and to deny them equal education. Mexican American children were retained in first grade for two or three years, allegedly because they lacked linguistic competence in English.^{liv} However, their linguistic competence was often tested hastily and with inconclusive results, if it was tested at all.^{lv} Schools have responded to their Spanish-speaking students by ignoring the Spanish language, prohibiting it altogether, and by punishing Latino students who spoke their native tongue publicly.^{lvi} Punishments included

“Spanish detention,” spanking, suspension, expulsion and other physical abuse and public humiliation.^{lvii} Punishments like these were, and continue to be, inflicted in heavily Mexican-populated schools. Very recently in jurisdictions that have repealed bilingual education by referendum, including Massachusetts, Arizona, and California, some educators enforce the new laws in old, discriminatory ways by prohibiting the use of Spanish among students and on school campuses.^{lviii}

Educators persistently devalue bilingualism and language ability in Spanish. Many teachers, perhaps most, see childhood bilingualism as a deficit and impediment to learning.^{lix} Many teachers also believe that Spanish-speaking or bilingual Mexican American children speak no language at all.^{lx} Regardless of their linguistic abilities, Mexican American children are considered deficient and alingual from the start.^{lxi} It is important to recognize that “no Spanish” rules and disparaging judgments about native Spanish speakers are part of a whole system of behavioral controls intended to banish manifestations of “Mexicanness” or “Latinoness” from the public schools.^{lxii}

This desire to eradicate Spanish was never limited to the educational system and, in forms both conscious and unconscious, it remains evident today. It is evident in state campaigns to eliminate bilingual education, and in the continuing campaign for Official English.^{lxiii} It is also evident in the workplace. The United States Courts of Appeals are currently consistent in holding that Spanish-speaking workers may be fired, without violating Title VII, merely for speaking Spanish in violation of an employer’s English-only rule.^{lxiv} The degree of judicial bias against native Spanish speakers is evident in the fact that the judges in these cases reject the Equal Employment Opportunity Commission’s expert guidelines finding that English-only rules

are presumptively invalid and must be justified by employer proof of business necessity.^{lxv}

There have also been notorious incidents of more obvious judicial bias against Spanish speakers. One Texas judge threatened a Mexican-American mother with the loss of her daughter unless she stopped speaking Spanish to her daughter at home:

[Y]ou're abusing that child and you're relegating her to the position of a housemaid. Now get this straight. You start speaking English to this child because if she doesn't do good in school, then I can remove her because it's not in her best interest to be ignorant. The child will hear only English.^{lxvi}

Similarly, a Nebraska judge threatened to limit a Mexican-American father's rights to visit his daughter if he continued speaking to her in Spanish.^{lxvii} Whether at school, at work, at home, or in the courthouse, Latinos face hostility and discriminatory treatment based on their use of Spanish.

Language Discrimination in the Courtroom

And today, despite the seeming promise of *Hernandez v. Texas*, Latinos still face hostility and discrimination in the jury box based on their Spanish language. Although *Batson* eliminated peremptory challenges based overtly on race, *Batson* is easily circumvented. *Batson* and its progeny require only that litigants articulate a "race-neutral" reason for exercising a peremptory challenge. The flaw in the *Batson* framework was recognized early by Justice Thurgood Marshall, who saw that "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons."^{lxviii} Indeed, because of the ease with which litigants can articulate facially neutral reasons, jury selection is almost as discriminatory today as it was before *Batson*.^{lxix} The justifications for discrimination

have changed, but the discrimination itself has not.

With respect to Latinos, the Supreme Court encountered, but failed to recognize, a palpable case of language discrimination against prospective Latino jurors in *Hernandez v. New York*, decided in 1991.^{lxx} The case involved many Spanish-speakers: the defendant, several witnesses, the courtroom interpreter, and two bilingual jurors were all Spanish speaking. Because several witnesses were Spanish-speaking, their testimony was interpreted into English for the benefit of the court and monolingual English-speaking jurors. The prosecutor asked the bilingual jurors whether they would be able to accept the interpreter's translated version of the Spanish-language testimony. Despite their assurances that they would accept the interpreter's translation, the prosecutor used peremptory challenges to exclude these bilingual jurors. The defense then raised objections to these peremptory challenges under the *Batson* framework.

Under that framework, the prosecutor had to articulate facially neutral reasons for these peremptory challenges against Latino jurors. Here is what he said:

my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter. . . . We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury. . . . I thought they both indicated that they would have trouble, though their final answer was they could do it. I just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it.^{lxxi}

Despite the absence of any finding that these potential jurors were not credible, the prosecutor simply felt uncomfortable with the demeanor of the bilingual jurors and dismissed them. The

trial court heard the prosecutor's reasons and accepted his explanation as "race-neutral." The Supreme Court, too, agreed that the prosecutor's reasons were "race-neutral" and found that these peremptory challenges did not violate the Equal Protection Clause.

The Supreme Court decided wrongly that language discrimination against bilingual Latinos was not race discrimination. While I have critiqued this decision at length elsewhere, here I will focus on two reasons why the Court was wrong.^{lxxii} First, the Court seemed entirely unaware of the history discussed above. Language discrimination has a pervasive past and present in the United States, and there was no reason to assume that the parties peopling the New York courts were immune from what is otherwise a national phenomenon. Although the Court, in an apparent attempt to show sensitivity to the issues raised by language differences, offered citations to sociolinguistic insights on language, its effort was lame and inconsequential.^{lxxiii}

The bottom line was that the Court didn't "get it." The Court did not understand that language discrimination against bilingual Latinos in the United States is race discrimination. As concluded by Guadalupe Valdes, "in the United States language discrimination against bilingual individuals is not subtle."^{lxxiv} Professor Valdes's first example of clear language discrimination was the Court's decision in *Hernandez v. New York*.^{lxxv}

Another prominent flaw was the consistent judicial decision, in all the courts that considered the case, to validate the prosecutor's personal discomfort with the bilingual jurors as credible and "race-neutral." Given the context of national discrimination on the basis of language and the serious misunderstandings that monolingual persons, including judges and prosecutors, have with respect to bilinguals, reliance on a prosecutor's discomfort is simply too thin a reason to accept in excluding qualified individuals from a jury. As I discuss below, the

prosecutor's questions to the bilinguals imposed on them much more difficult conditions than those imposed on monolingual jurors.^{lxxvi} Although the prosecutor may have appeared credible, he was likely sincere and wrong, misinformed and uncomprehending as most monolinguals are with respect to bilinguals.^{lxxvii} Or, given the lengthy history of bias against Spanish speakers in the United States, he may have been sincere and unconsciously biased.^{lxxviii}

In the end, despite some bland, palliative recognition of the harshness and disproportionate impact on Latinos that its decision inflicted,^{lxxix} the Supreme Court decided that a prosecutor's "uncertainty" and mistrust of the bilingual jurors justified their peremptory removal. And here is where an interesting arc can be drawn from *Hernandez v. Texas* to *Hernandez v. New York*. Separated by approximately forty years, both cases concerned the exclusion of Latinos from the jury. How much has changed in these forty years, and how much remains to be changed?

One interesting axis along which to compare the cases is to consider the way each decision treated the role of majoritarian discretion in making determinations about fitness or not to serve on juries. Historically, the vesting of excessive discretion in jury commissioners is well understood to produce discriminatory results, whether or not individuals can be proven to have acted with intent to discriminate.^{lxxx} This was a pattern proven to be true in Texas. Just such a system was at issue in *Hernandez v. Texas*. Despite formally neutral, egalitarian statutes and qualified Mexican Americans, jury commissioners vested with discretion to decide who they felt was best qualified to serve decided in a way that produced the extraordinary result that no Mexican Americans on a Jackson County jury in twenty-five years. The Warren Court did not flinch from the obvious import of that statistic. As the Court wrote, "it taxes our credulity to say

that mere chance resulted in there being no members of this class 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.”^{lxxxix}

Consider now the Court’s stance in *Hernandez v. New York* toward similar discretion that yields disproportionately discriminatory results. Under the *Batson* framework, prosecutors have discretion to advance any credible non-discriminatory reason for a peremptory challenge. Our prosecutor’s stated reason for excluding the bilingual jurors was that he felt “very uncertain that they would be able to listen and follow the interpreter.” The prosecutor’s highly subjective “uncertainty” or distrust of the bilingual jurors seems very similar to the judgments of jury commissioners that qualified Mexican American jury candidates were not the best qualified. Unlike the Warren Court, which was suspicious of unbridled discretion that yielded discriminatory results, here the Rehnquist Court embraces similar discretion with full knowledge of the discriminatory results that will ensue for bilingual Latino jurors. The courts consistently trust the prosecutor’s “uncertainty” and credit the trial court’s determination that the prosecutor was credible. And the courts credit the prosecutor’s “uncertainty” over the uncontradicted and credible testimony of the bilingual jurors themselves, who swore that they would do what the prosecutor asked. Where the history of language discrimination and the pervasive misunderstanding of bilinguals by monolinguals would counsel skepticism with respect to peremptory dismissals of bilingual jurors, today’s courts simply endorse prosecutorial discrimination against bilinguals.

Another axis along which to compare these decisions is to consider their treatment of the particular discrimination faced by the Latinos before the Court. The very cynical and self-

serving conclusion of the lower Texas courts in *Hernandez v. Texas* was that Mexican Americans were considered whites and therefore were ineligible for relief under the Equal Protection Clause. This conclusion flew in the face of all past and present historical evidence of profound, sustained Jim Crow racism and segregation inflicted upon Mexican Americans in all quarters. Texas judges denied or ignored all the obvious evidence of Jim Crow Latino to produce a self-serving, preemptive legal fiction of Mexican American “whiteness.” The Warren Court, at last recognizing the obvious, saw the white racism and understood and dismantled the racist stricture before it. Indeed, the Court first articulated what scholars have developed into a powerful, well-accepted understanding of the socially constructed nature of racism.

In profound contrast, in *Hernandez v. New York*, the Court was entirely unable to understand and respond to the language discrimination against bilingual Latinos that was presented in the case. The Court failed to understand that bilinguals are not the same as monolinguals, nor are they similarly situated with respect to the questions the prosecutor asked of them.^{lxxxii} The prosecutor’s questions imposed much more difficult conditions upon the bilingual jurors than upon monolingual jurors. If the expectation of courts or prosecutors is that bilinguals shut down the portion of their brains that processes one or both of the languages they know, then the expectation is absurd and impossible to fulfill:

From the perspective of bilingual individuals, however, the [prosecutor’s] request itself is absurd if it is understood to mean that they must block or shut down one of their language-processing channels. Research on bilingualism carried out from the psycholinguistic perspective has determined that this is an impossible task.^{lxxxiii}

It is no more possible for a bilingual to not hear what has been heard than it is for a monolingual English speaker to “unhear” something that has already been heard, or to “unread” something that

has already been read. How does anyone remove from consciousness something that has already entered? While it may be possible to disregard information already heard, as jurors are often instructed to do, it is impossible to “unhear” what one has already heard.

If the expectation of courts and prosecutors is that bilingual jurors set aside their own understanding of testimony in a source language and replace that understanding with the official interpreter’s version of the testimony, then bilingual jurors are again being unusually burdened in a way not demanded of monolinguals. The bilingual jurors are asked, in effect, to ignore possible discrepancies between the interpretation and the original and not to use their judgment in evaluating the evidence. Monolinguals, who have no choice but to accept the interpreter’s version of the evidence, right or wrong, are not asked to disregard their understanding of the evidence.^{lxxxiv} This expectation is problematic for another reason. Since it is well known that interpretations are often wrong or incorrect, why should any juror be asked to adhere to a version of the evidence which may well be incorrect? By allowing the peremptory removals of bilingual jurors based on the “uncertainty” expressed by the prosecutor, the courts are preferring adherence to an official, and possibly incorrect, version of the evidence rather than allowing the jury to serve its traditional truth-finding function. This is an odd choice of values for courts, including the Supreme Court, to enforce considering that the whole purpose of the trial is to arrive at some understanding of the truth of the events on trial.

It is possible to conclude that, even if wrongly decided, the conclusion in *Hernandez v. New York*, does not do major damage. Although the Court has sanctioned the peremptory removal of bilingual jurors in cases involving interpreted Spanish-language testimony, in fact this is probably a small proportion of cases faced in the courts. And, presumably, bilingual

jurors will not be subject to peremptory exclusion because of their bilingualism in every other sort of case. In most cases, then, bilingual jurors will still be able to serve. They can be peremptorily excluded only in cases in which bilingual jurors are bilingual in the same language spoken by witnesses whose testimony will be interpreted.

While these aspects of the Court's decision contain truth, I believe that understanding the case as a relatively innocuous mistake would be a grave error. Here's why. First, our changing national demographics are by now well known, and the principal change is the increasing percentage of Latinos in the population. Corresponding to this change, we can reasonably expect an ever-increasing number of trials involving Spanish-language testimony, and increasing numbers of potential bilingual jurors who can easily be stricken from the jury under the Court's current rules. In some cities and areas of the country, such as Miami, Houston, New York, or Los Angeles, which already contain large numbers of Latinos, it is likely that the situation presented in *Hernandez v. New York* arises regularly. The scope of damage done in *Hernandez v. New York* is not small, and that scope is growing steadily because of demographic factors.

Hernandez v. New York wrought more major damage in the decision's refusal to acknowledge meaningfully the linguistic and racial particularity of the Latino community with respect to jury service. The Court denied the particularity of bilingual Latinos and refused to protect bilingual jurors in the important, public role they can play on juries. Under this decision, bilinguals can easily be excluded from precisely those cases in which they share the language spoken by potential witnesses, defendants and victims of crime. Latino bilinguals can most easily be excluded in cases in which they are most likely to share community affiliations and cultural and racial ties to the parties in a case. These are the cases in which the particular

linguistic, racial and community knowledge of bilingual Latino jurors matters the most. But the Court has effectively precluded these jurors' participation in these cases in which their community membership matters most. Unlike the Warren Court, which rejected the possibility that Mexican American jurors could plausibly be excluded from their community, the Rehnquist Court has endorsed just such a result with respect to bilinguals.

When I write that the particular knowledge and experience of bilingual Latino jurors “matters the most” in these cases, I am not describing anything that constitutes “undue influence” of the kind the prosecutor feared. I can illustrate this best with a hypothetical. Suppose we had a criminal trial in a predominantly white, English-speaking, middle class suburb somewhere in the United States. Further suppose that the jury trying the suburban, white middle class defendant, and evaluating the testimony of the white, middle-class suburban witnesses turned out to be virtually all white, English-speaking suburbanites drawn from the relevant jury-service district. Would there be any concern raised about “undue influence” resulting solely from the shared demographic characteristics of the parties and the jury? I don't think so. Most people would understand this as a proper trial conducted before a jury of one's peers, with a cross-section of the community, as it exists, represented on the jury. *The situation is no different with respect to bilingual jurors hearing Spanish-language testimony.* There is no “undue influence” in simply bringing one's experience and understanding of a community into the jury box. As it is for whites, so should it be for Latinos, bilingual and otherwise.

The greatest damage done in *Hernandez v. New York* is the rejection of the racial and linguistic particularity of bilingual Latino jurors, and the relevance of that particularity, within the justice system in the cases in which that particularity is the most relevant. In cases in which

community ties among Spanish-speakers would be the greatest, the Court chose to break those and future ties instead of exercising skepticism about a prosecutor's "uncertainty." The Court effectively decided that the linguistic, racial and cultural particularity of bilingual Latino jurors was either not relevant or, worse, that their particularity was capable of damaging the jury process.

The Rehnquist Court essentially enforced a normative monolingual, English-speaking identity on all jurors. In the future, bilingual jurors will only be allowed to remain on juries on which they will function like monolinguals. Excludable if they understand testimony in a language other than English, bilingual jurors will be entitled to remain only in cases in the testimony is in English or in other languages in which they are not bilingual. In other words, the Constitution will protect their ability to serve as jurors only if they can serve exactly as English-speaking monolinguals. The Court has rejected the relevance of their particularity and has obliterated their ability to represent their community in that famous cross-section of the community that our juries supposedly represent.

Compare the values vindicated in *Hernandez v. New York* with those subverted. The Court vindicated the prosecutor's sense of discomfort with bilingual jurors, a very common discomfort that many people experience in the presence of persons who speak other languages, a discomfort that we could label *prejudice*. The Court vindicated the prosecutor's and the courts' illusory sense of control over the information considered by the jury. On the other hand, the Court subverted the concept of a trial by a jury of one's peers, since the all of the defendant's peers were peremptorily removed from the jury. The Court subverted equal protection by not protecting at all the rights of Spanish-speaking jurors to remain on a jury free from state-

sponsored prejudice. The Court subverted the equal protection principle that seemed to be vindicated in our celebrated case, *Hernandez v. Texas*, the principle that Latinos subject to community prejudices are entitled to relief from discriminatory practices. Considering this balance sheet, the Court enforced Anglocentric comfort and control and threw equal protection and a jury of one's peers out the window for Latino Spanish-speakers.

The legacy of *Hernandez v. Texas* is paradoxical and remains unfulfilled. The Court explicitly rejected the view that “there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment.”^{lxxxv} The Warren Court understood, in its time, the shifting nature of community prejudices and notion that discrimination was not static: Throughout 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.^{lxxxvi}

The “two-class” theory ostensibly rejected in *Hernandez v. Texas* remains alive and well, however, through the refusal to recognize and protect the particularity of Latino bilinguals. The *Hernandez v. New York* court should have paid attention to the history of language discrimination and to the consistent community prejudices against Spanish speakers and

bilinguals. The Court should have used history to inform its understanding of discrimination against bilinguals. The Court should have recognized that language discrimination against Latino bilinguals is race discrimination against Latinos.

Why Latinos Have a Right to Sing the Blues

At this writing it is hard to be optimistic regarding the future possibilities of greater justice for Latino people in the United States with regard to language discrimination. Why has the promise of *Hernandez v. Texas*, a promise of meaningful equal protection for Latinos, remained unfulfilled? Some part of the reason lies in the profound differences between the Warren and Rehnquist courts. The Warren Court looked to context, found racism, and corrected it. The Rehnquist Court, in contrast, applied an equal protection devoid of historical context and failed to recognize the language discrimination squarely facing the Court.

Excellent recent writing on the nature of the Supreme Court, and by extension the lower federal courts, also helps provide an answer.^{lxxxvii} The Supreme Court, rather than being countermajoritarian, is nationalist. The Court is most responsive to national political majorities and national elites.^{lxxxviii} A nationalist Court will enforce a nationalist view of American identity as the norm for equal protection. Additionally, as Jack Balkin writes, “Courts tend to protect minorities just about as much as majorities want them to.”^{lxxxix}

With respect to race, this understanding suggests that the Court will enforce a nationalist view of race rooted in slavery and its constitutional corrections, the Reconstruction Amendments. Thus a nationalist view of race corresponds well to the Black/White paradigm, but less well to the particular needs of non-Black communities becoming more numerically

prominent as our national demographics change.^{xc} Rather than protect minority particularity, in our case the particular linguistic traits of bilingual Spanish speakers, the Court enforces the nationally preferred dominance of English and Anglocentric assimilation. There is little evidence of any majoritarian will for the protection of non-English languages. Indeed, the political results in many jurisdictions suggest exactly the opposite, that national majorities may prefer the extinction, or at least the silencing, of Spanish speakers. While there is ample evidence of majoritarian opposition to linguistic particularity and linguistic equal rights--Official English laws and referenda seeking the abolition of bilingual education are prime examples--there is scant evidence of any equally large countervailing mobilization of advocates favoring linguistic diversity, bilingualism, and linguistic equality. There simply aren't enough of us.

In the end, *Hernandez v. Texas* stands as a distressingly rare moment of Supreme Court acknowledgement of communitarian norms of white racism against Latino people. This now-distant precedential beacon once signalled the enforcement of the possibly majestic, now withered, words of equal protection.

i. I'd like to thank the editor, Michael A. Olivas, for his inspiration, perspiration, courage, humor, and patience in organizing the conference that yielded this book. Over the years, Professor Olivas has demonstrated, time and time again, the importance of planting and nurturing seeds of growth and knowledge in his teaching, his writing, his advocacy and his collegiality. Many thanks to you, Michael, from one who has grown through your efforts and example.

ii. 347 U.S. 475 (1954).

iii. James W. Loewen, *Lies My Teacher Told Me* 162 (1995).

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

v. Statute reproduced in *Plessy*, 163 U.S. at ____.

vi. See, e.g., Paul Schuster Taylor, *An American-Mexican Frontier* 226 (1934) ("The segregation of residence according to race, which is common in the rural areas of the United States where numbers of Mexicans live, exists also in the towns of Nueces County[, Texas]."). Professor Laura Gomez's excellent study demonstrates that, due to the unique demographics in New Mexico, Mexican elites there were able to situate themselves as an "off-white" wedge group, subject to white racism but also exercising sufficient agency to oppress other groups such as Indians and Blacks. See Laura E. Gómez, Ph.D., "Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico," 25 *Chicano-Latino Law Review* 9, 21-24, 41-45 (2005).

vii. Carey McWilliams, *Southern California Country* 219 (1946).

viii. Charles M. Wollenberg, *Segregation and Exclusion in California Schools, 1855-1975*, 113 (1978) [hereinafter Wollenberg]. See, e.g., *Lopez v. Seccombe*, 71 F. Supp. 769 (S.D. Cal. 1944) (Mexican American and Puerto Ricans in San Bernardino, Ca., sued successfully for access to a segregated public park).

ix. See Carey McWilliams, *North from Mexico* 272-73 (1949) [hereinafter McWilliams]. ; Guadalupe San Miguel, Jr., *The Schooling of Mexicanos in the Southwest, 1848-1891*, & Gilbert G. Gonzalez, *Segregation and the Education of Mexican Children, 1900-1940*, in José F. Moreno, ed., *The Elusive Quest for Equality* 36-37, 55-58 (1999). Jorge C. Rangel & Carlos M. Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 *Harv. C.R.-C.L. L. Rev.* 307 (1972) [hereinafter Rangel & Alcalá]; Wollenberg at 108-35.

x. David Montejano, *Anglos and Mexicans in the Making of Texas, 1836-1986* 162 (1987) (quoting Paul Taylor).

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- xi. Martha Menchaca, *Recovering History, Constructing Race* 287 (U. Texas 2001).
- xii. *Id.* At 160 (quoting Leo Grebler, Joan Moore, and Ralph Guzman, *The Mexican-American People* 322-25 ()).
- xiii. Montejano at 191, 197-233.
- xiv. Paul Schuster Taylor, *An American-Mexican Frontier* 226-29 (1934)
- xv. John J. Herrera, Letter to the Editor, *Houston Chron.*, May 31, 1974, at 27, quoted in Laura E. Gómez, “Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico,” 25 *Chicano-Latino L. Rev.* 59 (2005).
- xvi. *People v. Hall*, 4 Cal. 399 (1854).
- xvii. “Citizen” should be read “White Person.” At the time, the Chinese in California were recent immigrants, and only “free white persons” were allowed to become naturalized citizens.
- xviii. *Id.* at ____.
- xix. See Heizer and Almquist; Charles McClain
- xx. Robert F. Heizer & Alan F. Almquist, *The Other Californians* 131 (1971); Leonard Pitt, *Decline of the Californios* 201-02 (1966).
- xxi. Heizer & Almquist. at 129.
- xxii. 100 U.S. 303 (1879).
- xxiii. *Norris v. Alabama*, 294 U.S. 587 (1935).
- xxiv. Paul S. Taylor describes this resistance in *An American-Mexican Frontier* at 246-47 (1934). Taylor reports that requests for Mexican Americans to serve on juries were “acceded to, and those qualified by knowledge of English, etc, for jury service, have been admitted.” *Id.* at 247. Despite such apparent success, this likely did not mean that Mexicans often, or ever, actually served on juries. Through devices such as peremptory challenges, which at the time could be exercised for any reason, including race, Mexicans could easily be excluded from the jury panel actually deciding a case.
- xxv. United States Commission on Civil Rights, *Mexican Americans and the Administration of Justice in the Southwest* 36 (1970) [hereinafter Report].
- xxvi. Report at 40-43.

xxvii. Report at 43-45.

xxviii. *Batson v. Kentucky*, 476 U.S. 79 (1986).

xxix. *Hernandez*, 347 U.S. at 478.

xxx. 347 U.S. at 479-80.

xxxi. 347 U.S. at 479 n.10.

xxxii. 347 U.S. at 479 n.10.

xxxiii. 347 U.S. at 480-81 (internal footnotes omitted).

xxxiv. See *Hernandez v. State*, 251 S.W. 2d 531, 533 (1952); *Sanchez v. State*, 181 S.W. 2d 87, 90 (1944).

xxxv. See, e.g., *Hernandez v. State*, 251 SW2d 531 (1952); *Sanchez v. State*, 243 SW 2d 700 (1951).

xxxvi. *Hernandez v. State*, 251 SW 2d at 535.

xxxvii. *Hernandez v. State*, 251 Sw 2d at 535-36.

xxxviii. 347 U.S. at 481.

xxxix. 347 U.S. at 482.

xl.

xli. See *Hernandez v. State*, 251 S.W. 2d 531, 533 (1952); *Sanchez v. State*, 181 S.W. 2d 87, 90 (1944).

xlii. See, e.g., *Hernandez v. State*, 251 SW2d 531 (1952); *Sanchez v. State*, 243 SW 2d 700 (1951).

xliii. 100 U.S. 303, 308 (1879).

xliv.

xlv. *Slaughterhouse*, 83 U.S. (16 Wall.) 36 (1873); *Strauder*, 100 U.S. 303 (1879).

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

xlvi. 83 U.S. (16 Wall.) 36, 72 (1873).

lviii. *Sanchez v. State*, 243 S.W. 2d at 701.

lix. *Hernandez*, 251 S.W. 2d at 535.

l. Note citing the cases cited in *H v. T*?

li. See, e.g., Juan F. Perea, *Buscando America: Why Integration And Equal Protection Fail To Protect Latinos*, 117 Harv. L. Rev. 1420, 1439-46 (2004). [hereinafter cited as *Buscando America*]

lii. *Id.* At 1439-40.

liii. Thomas P. Carter, *Mexican Americans in School: A History of Educational Neglect* 96 (1970). [hereinafter cited as *Educational Neglect*].

liv. See *Buscando America*, 117 Harv. L. Rev. at 1441.

lv. See *Id.*; *Mendez v. Westminster*, 64 F. Supp. 544, 550 (S.D. Cal. 1946) (“The [language] tests applied to the beginners are shown to have been generally hasty, superficial, and not reliable.”).

lvi. Meyer Weinberg, *A Chance to Learn* 152-53 (1977).

lvii. Carter, *Educational Neglect* at 98. One writer describes the harsh treatment awaiting Latino elementary school children on their first day of school:

Then, suddenly, [the children] were torn from loving arms and put into a room full of strange sounds and harsh voices. Please for help were ignored, and as late as the 1950s children who spoke Spanish in school were made to kneel on upturned bottle caps, forced to hold bricks in outstretched hands in the schoolyard, or told to put their nose in a chalk circle drawn on a blackboard. And this would happen in Texas towns that were 98 percent Spanish-speaking.

Thomas Weyr, *Hispanic U.S.A.* at 51-52. See also Mel Melendez, *Molera Backs District on Its Spanish Ban*, *Arizona Republic*, August 20, 2002, p. 1B (Arizona native describing how he “was paddled every time [he] spoke Spanish, and that was the only language he knew.”)

lviii. See Mel Melendez, “No-Spanish rule vexes students,” *Arizona Republic*, Oct. 16, 2003, p. 1B; Mel Melendez, *Molera Backs District on Its Spanish Ban*, *Arizona Republic*, August 20, 2002, p. 1B; Mary Bustamante, *Playing en Español*, *Tucson Citizen*, August 26, 2002, p.1C (“state school chief’s support of speaking only English to non-English-proficient students even on playgrounds, in cafeterias and on buses has some local educators concerned.”).

lix. Carter, *Educational Neglect* at 51. Carmen Rolón, *Educating Latino Students*, 60 *Educational*

Leadership 40, 41 (2002-2003) (“The deficit view is that [linguistically diverse] students lack English language skills and the sooner they stop speaking their mother tongue and learn English, the sooner they will be able to succeed in school and be better prepared for life. This perspective, pervasive in many school systems, defines Latinos and other linguistically diverse students by what they don’t have rather than by what they bring to the school.”); Cynthia Miguelez, *The Normalization of Minority Languages in Spain*, in Roseann Dueñas González & Ildikó Melis, *Language Ideologies* 346, 348 (2001); Garcia, *Hispanic Education in the United States* 52-57 (2001). See, e.g., Amanda E. Lewis, *Race in the Schoolyard* 82-83 (2003)(negative student and teacher attitudes towards Spanish).

Ix. Carter, *Educational Neglect* at 52.

Ixi. Reporting the results of interviews with teachers, Carter writes:

Many interviewees regard Mexican American Spanish as deficient: “The language spoken at home is pocho, ‘Tex-Mex,’ or ‘wetback Spanish,” really nonstandard dialects.” Such comments as these were commonly encountered: “Their Spanish is of such an inferior quality that it does not warrant classification as a language.” “The child’s Spanish provides a meager base for future learning in even that language.”

Carter, *Educational Neglect* at 52. Cf. Lenore Catalogna, John F. Greene & Perry A. Zirkel, *An Exploratory Examination of Teachers’ Perceptions of Pupils’ Race*, *J. of Negro Education* 370, 379 (1981) (“a significant degree of pro-white and anti-Hispanic prejudice on the part of teachers surfaced in this study.”).

Ixii. Carter, *Educational Neglect* at 98.

Ixiii.

Ixiv. See, e.g., *Garcia v. Gloor*, *Spun Steak*.

Ixv.

Ixvi. Sam Verhovek, *Mother Scolded by Judge for Speaking Spanish*, *N.Y. Times*, Aug. 30, 1995, at A12 (quoting judge Samuel C. Kiser).

Ixvii. See Darryl Fears, *Judge Orders Neb. Father To Not Speak “Hispanic”*, *Wash. Post*, Oct. 17, 2003, at A3.

Ixviii. *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

Ixix. See Melilli

Ixx. 500 U.S. 352 (1991).

Ixxi. *Hernandez v. New York*, 500 U.S. at 356-57 & n.1.

lxxii. For a thorough critique of the decision, see Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 Hofstra L. Rev. 1 (1992).

lxxiii.

lxxiv. See Guadalupe Valdes, *Bilingual Individuals and Language-Based Discrimination: Advancing the State of the Law on Language Rights*, in Roseann Duenas Gonzales with Ildiko Melis, *2 Language Ideologies: Perspectives on the Official English Movement* 140, 142 (NCTE 2001).[hereinafter cited as Valdes].

lxxv. See *id.* at 143-47.

lxxvi. Valdes at 145-47.

lxxvii. Valdes at 144-47.

lxxviii. On unconscious bias, see Charles R. Lawrence, III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," 39 *Stan. L. Rev.* 317 (1987).

lxxix. See *Hernandez v. New York*, 500 U.S. at 363, 370-72..

lxxx. United States Commission on Civil Rights, *Mexican Americans and the Administration of Justice in the Southwest* 43-44 (1970).

lxxxi. 347 U.S. at 482.

lxxxii. Valdes at 145.

lxxxiii. Valdes at 146.

lxxxiv. See Valdes at 146-47.

lxxxv. 347 U.S. at 477.

lxxxvi. 347 U.S. at 478.

lxxxvii. See Jack R. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 *Va. L. Rev.* 1537 (2004).

lxxxviii. *Id.* at 1538-39.

lxxxix. *Id.* at 1551-58. (Capitals removed from quotation).

xc. On the paradigmatic nature of the Black/White understanding of race, see Juan F. Perea, *The Black/White Binary Paradigm of Race: the "Normal Science" of American Racial Thought*, 85

Cal. L. Rev. 1213 (1997).