HERNANDEZ V. TEXAS: LEGACIES OF JUSTICE AND INJUSTICE

KEVIN R. JOHNSON*

* 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) at the University of Houston Law Center in November 2004. Participants in the conference, especially Richard Delgado, Ian Haney López, and Juan Perea, offered helpful comments. Olivas' generous support and mentorship throughout my professional career have been invaluable to me. 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Peg Durkin, Susan Llano, Aaron Dailey, and Elizabeth McKechnie, was extraordinarily helpful in patiently locating historical documents and other materials for this paper. The able research and editorial assistance of law student Jeff Finucane is much appreciated. Michael Olivas, Ralph Armbruster-Sandoval, Miroslava Chavez-Garcia, Mary Romero, and Nancy Marder offered insightful comments on a draft of this paper. I also received helpful feedback from participants, especially John R. Chavez and David Gutiérrez, in a discussion of this paper at the Western History Association 2004 annual conference.

INTRODUCTION

The Supreme Court's 1954 decision in *Hernandez v. Texas*[1] was a legal landmark[2] 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. Even though Mexicans comprised more than ten percent of the adult population, no person of Mexican ancestry had served on a jury in that county in the previous twenty-five years.[3] 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.[4] Housing and job segregation was common.[5] Mexican Americans as a group were well aware that the United States had conquered Mexico's northern territories in a war of aggression,[6] that persons of Mexican ancestry had suffered mass deportations during the Great Depression,[7] that Mexican Americans were beaten on the streets of Los Angeles by members of the armed

1. 347 U.S. 475 (1954).

2. To characterize the decision as a landmark does not mean to suggest that the promise of the case has been fully realized. *See infra* text accompanying notes 160-251. At the same time, however, *Hernandez v. Texas* is an important case that has been the subject of considerable attention. *See, e.g.*, JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 517 (2000) (excerpting decision in chapter on race and developing notions of equality); Richard Delgado & Vicky Palacios, *Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME L. REV. 393 (1975) (analyzing *Hernandez v. Texas* and its implications on civil rights class actions).

3. *See infra* text accompanying notes 107-39.

4. *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).

5. *See Hernandez*, 347 U.S. at 471, 481.

6. *See* REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 208-14 (1981).

7. *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); EDWIN J. ESCOBAR, RACE, POLICE, AND THE MAK-

forces in the infamous "Zoot Suit" riots during World War II,[8] that Mexican immigrants experienced exploitation and abuse through the Bracero Program that brought temporary workers from Mexico to the United States from the 1940s to the 1960s,[9] and that they lived through raids and mass deportations in "Operation Wetback" in 1954,[10] the very same year that *Hernandez* was decided.[11]

Although not alone among the states in discriminating against persons of Mexican ancestry, Texas earned a reputation for its multiracial caste system.[12] Indeed, in negotiating the

---

ING OF A POLITICAL IDENTITY: MEXICAN AMERICANS AND THE LOS ANGELES POLICE DEPARTMENT, 1900-1945, at 84-90 (1999).

8. *See* ESCOBAR, *supra* note 7, at 233-55; *infra* text accompanying notes 68-82.

9. *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S. (1992); ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY, AN ACCOUNT OF THE MANAGED MIGRATION OF MEXICAN FARM WORKERS IN CALIFORNIA, 1942-1960 (1964).

10. *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).

11. 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 State'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*, 27 POPULATION & DEV. REV. 661 (2001); Karl Eschbach et al., *Death at the Border*, 33 INT'L 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).

12. *See generally* NEIL FOLEY, THE WHITE SCOURGE: MEXICANS, BLACKS AND POOR WHITES IN TEXAS COTTON CULTURE (1997) (analyzing discrimination against different groups in Texas); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986 (1987) (documenting a 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 a 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 the 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 the perspective of a 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, *DeJure 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.,

agreements with the United States creating the Bracero Program, the Mexican government initially insisted on barring temporary workers from employment in Texas because of the notorious discrimination against persons of Mexican ancestry in the Lone Star state.[13]

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.[14] A unanimous Supreme Court, in an opinion by Chief Justice Earl Warren, who also authored the unanimous opinion in *Brown v. Board of Education*,[15] 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' commitment to democracy.[16] As a legal matter, the Court held only 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 into the commonly-understood view that the Equal Protection Clause of the Fourteenth Amendment only protected African Americans.[17] Until 1954, this narrow understanding had worked to the detriment of Mexican Americans seeking to vindicate their constitutional rights.[18] 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.[19] The Court in *Hernandez v. Texas* thus continued the gradual expansion of the Equal Protection Clause.

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. The author of the opinion for the Court, Chief Justice Earl Warren, a native son of California, knew well from personal and professional experience of the discrimination against Mexi-

---

Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866, 63 CAL. L. REV. 662 (1975) (discussing racial discrimination against Mexican Americans).

13. *See* CALAVITA, *supra* note 9, at 20, 23-24.

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

15. 347 U.S. 483 (1954).

16. *See, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 252 (Jacob P. Mayer ed., George Lawrence trans., 1st Perennial Library ed. 1969).

17. *See infra* text accompanying notes 88-106.

18. *See infra* text accompanying notes 98-102, 112-14.

19. *See infra* text accompanying notes 88-106.

can Americans in the Golden State.[20] 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.[21] 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, a racially diverse state that had experienced more than its share of racial tensions during his life. His experience as a political leader at the center of several high profile racial controversies no doubt allowed him to have a better fundamental understanding of the complexities, as well as the political repercussions, of racial discrimination against Mexican Americans. This experience helps explain how Chief Justice Earl Warren could write an informed opinion like *Hernandez v. Texas.*[22]

Second, this paper analyzes *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 case law dating back to the nineteenth-century that prohibited the exclusion of African Americans from juries.[23]

The jury systems in place throughout the United States, however, include a variety of color-blind — and, to this point,

20. *See infra* text accompanying notes 33-87. Commentators have contended that Cold War foreign policy concerns may have converged with African American interests to culminate in Brown v. Board of Education, 347 U.S. 483 (1954). *See* MARY L. DUDZIAK, RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2002); Derrick Bell, Brown v. Board of Education *and the Interest Convergence Dilemma,*" 93 HARV. L. REV. 518 (1980). One possibility, not squarely addressed in this paper, is that the Supreme Court's decision in *Hernandez v. Texas* was the product of a similar interest convergence with the United States feeling pressure from the Mexican government to more fairly treat persons of Mexican ancestry in the United States.

21. *See infra* text accompanying notes 33-87.

22. The impact of Earl Warren on the Supreme Court's decisions suggests the importance to the judicial process of judges with diverse life experiences. *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. 5 (forthcoming 2005).

23. *See infra* text accompanying notes 160-251.

entirely legal — mechanisms that operate to 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.[24] 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.[25] 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.[26]

The end result is that Latina/os are significantly underrepresented on juries. Racially skewed juries undermine the perceived impartiality of the justice system and, at the most fundamental level, 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.[27]

In sum, the promise of full representation of Mexican Americans on juries in *Hernandez v. Texas* has yet to be realized.[28] The legacy of *Hernandez v. Texas* resembles that of *Brown v. Board of Education*,[29] perhaps the most heralded Supreme Court decision of the twentieth-century, in that the mandate in both path-breaking cases remains to be achieved because racially disparate results continue despite the legal prohibition against de jure discrimination.

I. LEGACY OF JUSTICE: RECOGNITION OF THE MEXICAN "RACE"

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 the package of Reconstruction Amendments that ended the institution of

24. *See infra* text accompanying notes 160-251.

25. *See infra* text accompanying notes 182-223.

26. *See infra* text accompanying notes 224-38.

27. *See infra* text accompanying notes 239-51.

28. *See infra* text accompanying notes 160-251.

29. 347 U.S. 483 (1954). By some accounts, 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* http://www.civilrightsproject.harvard.edu/research/deseg/Resegregation_American_Schools99.pdf (June 1999); GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (1996).

slavery.[30] 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.[31] The growing awareness of an increasingly multiracial America required this shift in the view of civil rights law.[32]

This section demonstrates how *Hernandez v. Texas* came to the U.S. Supreme Court at an opportune time for civil rights advocates, just one year after Chief Justice Earl Warren — who was familiar with the discrimination against Mexican Americans in California — had been confirmed. 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 Latina/os 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*

California has had a rich, if not altogether laudatory, racial history.[33] The state championed exclusion of Chinese immigrants in the late 1800s[34] and the "alien" land laws restricting ownership of land by noncitizens, which targeted Japanese immigrants in the early 1900s.[35] Although California may not have been the

30. *See* The Slaughterhouse Cases, 83 U.S. 36, 67-78 (1873); JACOBUS TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).

31. *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) (book review); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

32. *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, 1491-1510 (2002).

33. *See generally* ALMAGUER, *supra* note 4 (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).

34. *See, e.g.*, The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889) (upholding one of a series of laws designed to bar immigration of Chinese to the United States). *See generally* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995) (analyzing the 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).

35. *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 (1998); *see, e.g.*, Oyama

center of the civil rights struggle of African Americans, other racial minorities have sought for generations to vindicate their rights in the state.[36]

Against this historical backdrop, Chief Justice Earl Warren could not have been ignorant of the many different 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 in modern U.S. history.[37]

Born in Los Angeles,[38] Earl Warren's personal and professional life had been deeply immersed in the "sticky mess of race"[39] of a rapidly changing United States. Growing up in a working class family in Bakersfield, California, Warren had lived in a rural town that segregated Chinese workers[40] and saw "minority groups brought into the country for cheap labor paid a 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."[41]

As a District Attorney in Northern California, Warren had encountered the Ku Klux Klan in law enforcement, grand juries, and the judiciary.[42] 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 in the case of 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.[43]

---

v. California, 332 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).

36. *See* Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of Justice at War*, 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).

37. *See infra* text accompanying notes 49-53.

38. 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).

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

40. *See* WARREN, *supra* note 38, at 17; *see also id.* at 55 (noting that Warren learned in the 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).

41. *Id.* at 30.

42. *See* WARREN, *supra* note 38, at 85, 87, 99, 100-01.

43. *See id.* at 212.

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.[44] The Attorney General's office under his leadership advocated against the rights of Latino criminal defendants.[45]

Earl Warren was familiar with discrimination against persons of Mexican 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.[46] "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."[47] The repatriation laid the groundwork for the anti-Mexican hysteria that later gripped Southern California during World War II and attracted the attention of the entire nation.[48]

1. *Japanese Internment*

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 a 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.[49] This regrettable period of Warren's professional life,

---

44. *See id.* at 153-55.

45. *See, e.g.*, People v. Gonzalez, 20 Cal. 2d 165 (1942) (rejecting exclusionary rule in case of improper search), *cert. denied*, 317 U.S. 657 (1942); People v. Chavez, 41 Cal. App. 2d 428 (1940) (affirming conviction of Latino in robbery case).

46. *See supra* note 7.

47. Antonio Olivo, *Ghosts of a 1931 Raid*, L.A. TIMES, Feb. 25, 2001, at B1. Proposition 187 was an anti-immigrant law passed overwhelmingly 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, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995).

48. *See infra* text accompanying notes 54-87.

49. For a 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 (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.

which has been overshadowed by his civil rights landmark decision of *Brown v. Board of Education*, has been ably analyzed by Professor Sumi Cho.[50] The gravity of the mistake was understood shortly after the Supreme Court's upholding of the internment,[51] with sharp criticism immediately following the decision.[52]

Years later, Warren admitted remorse about his important 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.[53]

2. *The Sleepy Lagoon Murder Case*

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

---

50. *See* Cho, *supra* note 49.

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

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

53. WARREN, *supra* note 38, at 149. In many respects, the United States government's treatment of Arabs and Muslims after the tragic events of September 11, 2001, is reminiscent of Warren's concerns with the anti-Japanese hysteria that swept California after Pearl Harbor. *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. SURV. AM. L. 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. HUM. RTS L. REV. 1 (2002). *See generally* MIGRATION POLICY INSTITUTE, 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).

depth of racial discrimination against persons of Mexican ancestry.[54]

Long before World War II, the Los Angeles Police Department had a history of discriminating against persons of Mexican ancestry.[55] Mexican Americans, who often were unfairly blamed for crime and membership in gangs, feared the police. That fear grew substantially after the Sleepy Lagoon murder case.

In August 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.[56]

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 in all likelihood failed to include many, if any, persons of Mexican ancestry),[57] about the biological propensity of Mexicans toward crime, which caused the "Mexican gang" problem.[58] A representative of 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";[59] this character flaw could not be remedied because "*one cannot change the spots of a leopard.*"[60] Not surprisingly, the grand jury indicted a group of Mexican American youths for the Sleepy Lagoon murder.

---

54. 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. LEGAL. HIST. 379 (1990).

55. *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).

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

57. *See infra* text accompanying note 175 (discussing underrepresentation of Mexican Americans on Los Angeles County Grand Jury).

58. *See* SOLOMON J. JONES, THE GOVERNMENT RIOTS OF LOS ANGELES, JUNE 1943, at 14-15, 85-95 (1969); MCWILLIAMS, *supra* note 56, 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).

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

60. *Id.* at 87 (emphasis added).

Even given their 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, causes 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.[61]

Despite this widespread 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,"[62] with the courts "outrageously biased" against the Mexican American defendants.[63] 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.[64]

Some influential Angelenos believed 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 and minority groups, and entertainers, such as Orson Wells, Will Rogers, Nat King Cole, Rita Hayworth, Anthony Quinn, Elia Kazan, Vincent Price, Gene Kelly, and Lena Horne.[65] Among other activities, the committee presented a petition to Governor

61. *Id.* at 85.

62. ESCOBAR, *supra* note 7, at 225.

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

64. *See* People v. Zammora, 66 Cal. App. 2d 166 (1944).

65. *See* ESCOBAR, *supra* note 7, at 276-78; PAGÁN, *supra* note 56, at 205.

Warren asking him to free the young Mexican American defendants.[66] 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, was at issue in *Hernandez v. Texas*.[67] The controversy of the much-publicized case necessarily sensitized Governor Warren to the civil right issues facing Mexican Americans.

3. *The "Zoot Suit" Race Riots*

After the Sleepy Lagoon trial, 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.[68]

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 race riots, with Anglo serviceman 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 victims. The press sensationalized the threat of the "zoot suiters," further fomenting racial hatred.

The Zoot Suit riots attracted national attention,[69] 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, including in Beaumont, Texas and Detroit, Michigan as racial minorities migrated to urban areas to fill jobs in the war industries.[70]

---

66. *See* ESCOBAR, *supra* note 7, at 275-76; *see also* Chang, *supra* note 58, 845-49 (analyzing anti-Mexican frenzy in greater Los Angeles area during time of Zoot Suit riots and Sleepy Lagoon Murder trial).

67. *See infra* text accompanying notes 107-39.

68. *See* MCWILLIAMS, *supra* note 56, at 255; STARR, *supra* note 63, 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).

69. *See* ESCOBAR, *supra* note 7, at 233-53; MCWILLIAMS, *supra* note 56, at 228-33.

70. See ESCOBAR, *supra* note 7, at 245; MCWILLIAMS, *supra* note 56, at 256.

Worried about the impacts of the political controversy on his national political ambitions,[71] Governor Earl Warren quickly appointed a committee to investigate the violence.[72] The report of the California Citizens Committee on Civil Disturbances in Los Angeles, chaired by a Catholic Bishop, Joseph T. McGucken and including Mexican American actor Leo Carrillo, criticized the police, the newspapers, and the climate of anti-Mexican prejudice surrounding the riots.[73] McGucken's cover letter, addressed to Governor Warren, 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 . . . .*"[74]

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.*"[75]

The report added that:

> *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.[76]

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.[77] To improve the racial sensibilities of the Los

71. *See* STARR, *supra* note 63, at 111.

72. *See* ACUÑA, *supra* note 4, 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).

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

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

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

76. *Id.* at 4 (emphasis added).

77. *See id.* at 5-6.

Angeles Police Department, various groups advocated the hiring of more Mexican American police officers, a recommendation that appealed to Governor Warren.[78] 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."[79]

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[s] 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.*"[80]

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.[81] Along with the deportation campaign of the 1930s, the Zoot Suit riots placed pressure on the Mexican American community in Southern California to conform to Anglo ways and have served as a reminder of the outsider status of persons of Mexican ancestry in the United States.[82]

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

A few years after the Zoot Suit riots, national attention focused on a successful Mexican American school desegregation

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

79. Report and Recommendations of the California Citizens Committee on Civil Disturbances in Los Angeles, *supra* note 75, at 7 (emphasis added).

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

81. *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 TV 3.

82. *See infra* text accompanying notes 103-06.

case involving the Westminster School District in Orange County in Southern California.[83] 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.[84] *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.[85] 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 unconstitutional, Governor Warren signed the law repealing the authorization for all racial segregation in the California public schools.[86] This episode helped prepare Warren

83. *See* Westminster Sch. Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1947); *infra* text accompanying notes 121-23 (discussing the reliance on the *Mendez* 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).

84. *See* RICHARD KLUGER, SIMPLE JUSTICE 399-400 (sp. ed. 1994); *see also* Perea, *supra* note 31, 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. Westminster: *Asian-Latino Coalition Triumphant?*, 10 ASIAN L.J. 161 (2003); Charles Wollenberg, Mendez v. Westminster: *Race, Nationality and Segregation in California Schools*, 53 CAL. HIST. Q. 317, 329 (1974).

85. *See Westminster Sch. Dist v. Mendez*, 161 F.2d at 780-81.

86. *See* CHARLES WOLLENBERG, ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS, 1855-1975, at 132-33 (1976); Wollenberg, *supra* note 84, 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 (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*, 32 Cal.2d at 712). As in *Mendez*, the law in question enumerated several different races – not just African Americans – 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

for his subsequent work on the Supreme Court in *Brown v. Board of Education.*

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.

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 prevailing discrimination against persons of Mexican ancestry. 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 in *Hernandez v. Texas*;[87] what he read about in the briefs of the treatment of Mexican Americans in Texas must have resonated with his personal experiences in California and informed the way that he looked at the case.

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. Warren 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,[88] the Supreme Court in *Hernandez v. Texas*, decided two weeks before *Brown v. Board of Education*, was ahead of its time in recognizing the discrimination against Mexicans in Texas 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.

Justice Warren in an opinion for a unanimous Supreme Court invalidated Virginia's antimiscegenation law in Loving v. Virginia, 388 U.S. 1 (1967).

87. *See infra* text accompanying notes 107-39.

88. *See infra* note 115.

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.[89] 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.

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 Asian and Mexican ancestry — besides African Americans.[90]

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 had proclaimed that it protected all "discrete and insular minorities."

This extension of the Equal Protection Clause in *Hernandez v. Texas* was a culmination of a series of decisions. In the 1886 case of *Yick Wo v. Hopkins*,[91] 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, the Court used general language to describe the groups protected by the Equal Protection Clause and famously proclaimed 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."[92]

---

89. *See supra* text accompanying notes 17-19.

90. *See supra* text accompanying notes 33-87.

91. 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).

92. 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*,[93] the Court addressed whether the internment of persons of Japanese ancestry was unconstitutional. Although the Court committed a grave error in finding that military necessity justified the extreme action,[94] it understood that the equal protection guarantee in theory protected persons of Japanese ancestry. The 1954 decision of *Brown v. Board of Education*[95] 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 Earl 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 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.[96]

However, recognition of Mexican Americans as a group distinct from Anglos and deserving of constitutional protection, which the Court did in *Hernandez v. Texas*, is complicated. Mexican Americans in reality are a complex mixture of biological

93. 323 U.S. 214 (1944); *supra* text accompanying notes 49-53. 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).

94. *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 (1998).

95. 347 U.S. 483 (1954).

96. WARREN, *supra* note 38, at 299 (emphasis added).

races, with a great variation of physical appearances. This racial complexity is captured in the Spanish word *mestizaje*.[97]

Nonetheless, Mexican Americans frequently embraced a "white" identity as a way of attempting to avoid social discrimination and, in some cases, as a litigation strategy.[98] Mexican Americans at times claimed to be "white" to avoid the discrimination suffered by African Americans and to accrue the benefits of whiteness secured by law.[99] 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.[100] Courts often did not know how to classify persons of Mexican ancestry, as a "race" or an ethnic or national origin group[101] 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.[102]

Because Mexican Americans frequently adopted a white identity defensively,[103] the statement that "[u]ntil the late 1960s, the Mexican community in the United States thought of itself as racially white,"[104] does not fully capture the complex realities of the Mexican American experience. Events long before 1960, including the 1930s 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.[105] Influential historian Ricardo Romo documented how Mexican Americans in Los Angeles from 1900 to 1930 formed institutions in response to hostil-

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

98. *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).

99. *See infra* text accompanying notes 100-06.

100. *See generally* Martínez, *supra* note 84 (reviewing Mexican American civil rights litigation over a fifty-year period).

101. *See, e.g.*, Westminster Sch. 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).

102. *See* Martínez, *supra* note 98.

103. *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).

104. Ian Haney López, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205, 205 (2001) (footnote omitted).

105. *See supra* text accompanying notes 4-11, 54-87.

ity directed toward them by Anglos.[106] Even if not thought of as a "race" in biological terms, Latina/os across the United States have long embraced a non-Anglo group identity. This was true in Jackson County, Texas, where the case of *Hernandez v. Texas* arose.

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

Within days of *Brown v. Board of Education*, the Supreme Court decided *Hernandez v. Texas*. Both were written by Chief Justice Earl Warren and reflected consistent interpretation of the Equal Protection Clause. At a most fundamental level, the Court in *Hernandez v. Texas* implicitly recognized the unmistakable racialization of Mexicans and the reality that race is socially constructed, changing with place, time, and economic circumstance.[107] 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."[108] To emphasize its rejection of the state's argument, the Court quoted from *Strauder v. West Virginia*,[109] which held that African Americans could not be excluded from juries: "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

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

107. *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1994) (analyzing the 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 the impacts of the "one drop" of blood rule in defining African Americans in the United States); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (same).

108. Hernandez v. Texas, 347 U.S. 475, 477-78 n.4 (1954) (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).

109. 100 U.S. 303, 308 (1880). *Strauder v. West Virginia* in this way took a color blind approach to the Equal Protection Clause. *See infra* text accompanying note 238. Not long after the case was decided, the Court recognized the existence of races other than African American. *See, e.g.*, The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 606-07 (1889) (upholding the 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 88-106 (discussing Court's recognition of various races).

been treated as non-white in the United States,[110] this statement suggests an understanding that race is a social construction, and presages the careful interrogation of whites as a race.[111]

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.[112] The Texas Criminal Appeals Court had emphasized that:

> [I]t 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.[113]

Other Texas cases had reached similar conclusions, which permitted discrimination against Mexicans to go unchecked by the courts.[114]

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, sometimes volatile, nature of discrimination:

> 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*

110. For an analysis of the transformation of the Irish from non-white to white, see NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995); *see also* Karen Brodkin Sacks, *How Did Jews Become White Folks?, in* RACE 78 (Steven Gregory & Roger Sanjek eds., 1994) (analyzing a similar transformation for Jews).

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

112. Hernandez v. State, 251 S.W.2d 531, 535 (Tex. Crim. App. 1952); *see* Martínez, *supra* note 98, at 328; Leti Volpp, *Righting Wrongs*, 47 UCLA L. REV. 1815, 1823 & n.24 (2000).

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

114. *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."); Indep. Sch. 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 98 (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).

> *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.*[115]

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."[116] Although the view of racial formation of Mexican Americans may be "sophisticated," it follows almost naturally from what Earl Warren personally saw first hand in California during World War II.[117]

The Court's conclusion was ahead of its time in effectively identifying the fluidity of race and races[118] 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, as well as the Zoot Suit race riots.[119] The

---

115. 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 López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1164-66 (1997); Ian F. Haney López, *Retaining Race: LatCrit Theory and Mexican Identity in* Hernandez v. Texas, 2 HARV. LATINO L. REV. 279 (1997) [hereinafter López, *Retaining Race*]; Perea, *supra* note 31, at 1248-50; Clare 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 the "framers' intent" 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 the 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 92 (analyzing the significance of *Carolene Products*).

116. López, *Retaining Race*, *supra* note 115, at 288.

117. *See supra* text accompanying notes 33-87.

118. *See supra* note 115.

119. *See supra* text accompanying notes 68-82.

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.[120]

In his brief in *Hernandez v. Texas*, Pete Hernández relied on *Westminster School District v. Mendez*,[121] the Ninth Circuit decision barring school segregation of Mexican Americans, to contend that Mexican Americans were protected by the Equal Protection Clause.[122] 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.[123]

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, Hernández succinctly summarized in five pages the discrimination against Mexican Americans in that state.[124] 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 Anglos in Texas viewed Mexican Americans as an inferior class of people. This discrimination resembled that facing African Americans,[125] some of which the Court grappled with in *Brown v. Board of Education*, as well as that which Mexican Americans faced in California.[126]

Pete Hernández, 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.[127] The record showed that, for the county, more than fourteen percent of the population, and eleven percent of the people over age twenty-one, had Spanish

120. *See supra* text accompanying notes 33-87.

121. 161 F.2d 774 (9th Cir. 1947); *see supra* text accompanying notes 83-86. The *Mendez* case may have influenced Chief Justice Warren's later thinking in Brown v. Bd. of Educ., 347 U.S. 483 (1954).

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

123. *See supra* text accompanying notes 83-86.

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

125. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Shelley v. Kraemer, 334 U.S. 1 (1948).

126. *See supra* text accompanying note 33-87.

127. *See* Hernandez v. Texas, 347 U.S. 475, 476-77 (1954).

surnames.[128] The state of Texas admitted that there were eligible jurors of Mexican ancestry in the community.[129] 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."[130] The Court declared that "it taxes our credulity to say that mere chance resulted in there being no members of this class [Mexicans] among the over six thousand jurors called in the past twenty-five years. The result bespeaks discrimination, *whether or not* it was a conscious decision on the part of any individual jury commissioner."[131]

In analyzing the racial discrimination at work against Mexican Americans, the Supreme Court appreciated the racial dynamics. In this passage, the Court alludes to the possibility that racial discrimination may be intentional or unconscious.[132] *Hernandez v. Texas* thus appears inconsistent with the Court's subsequent decision in *Washington v. Davis*,[133] 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*

128. *See id.* at 480.

129. *See id.* at 481.

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

131. *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, 346-47 (2003); *see infra* text accompanying notes 224-38 (discussing the prohibition on race-based peremptory challenges).

132. *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).

133. 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).

> *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" ("Men Here").[134]

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.[135] Recall the widespread discrimination against persons of Mexican ancestry in Los Angeles and the school desegregation litigation decided by the court of appeals in 1947.[136]

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.[137] 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,[138] had learned from his experiences with the discrimination against Mexican Americans in California and could 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,[139] and there was no reason to think it would be any different for persons of Mexican ancestry.

---

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

135. *See supra* text accompanying notes 33-87.

136. *See supra* text accompanying notes 83-86.

137. *See supra* text accompanying notes 12-13.

138. *See* Carey McWilliams, *The Education of Earl Warren*, NATION, Oct. 12, 1974, at 325-26.

139. *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 years after the Supreme Court ruled that such exclusion was unconstitutional. *See* WARREN, *supra* note 38, at 292, 295.

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 took hold relatively quickly in the Supreme Court's jurisprudence. This development no doubt was facilitated by the growth of a racial consciousness among Chicana/os and the Chicana/o movement of the 1960s,[140] as well as the growing national awareness of the emerging Latina/o population.

Hernandez v. Texas suggested that whether a group had been the subject of prejudice was a question of fact to be determined on a case-by-case basis.[141] Commentators criticized that suggestion.[142] In later cases, however, the Supreme Court never really required a fact specific analysis to determine whether Latina/os were a separate class for Equal Protection purposes. Rather, the Court simply assumed that they were.[143] For example, less than two decades after the Court decided *Hernandez v. Texas*, in *Keyes v. School District No. 1*, the Court, in a school desegregation case involving the public schools in Denver, stated matter of factly that "Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment."[144]

In 1977, the Court in *Castaneda v. Partida* 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

140. *See* ACUÑA, *supra* note 4, at 307-62. For analysis of the emergence of the Chicana/o movement, see IGNACIO M. GARCÍA, CHICANISMO: THE FORGING OF A MILITANT ETHOS AMONG MEXICAN AMERICANS (1997).

141. *See* Hernandez v. Texas, 347 U.S. 475, 479-80 (1954); *supra* text accompanying note 115.

142. Delgado & Palacios, *supra* note 2, at 395-96.

143. *See id.* at 395; *infra* text accompanying notes 144-59.

144. 413 U.S. 189, 197 (1973) (citing, inter alia, Hernandez v. Texas, 347 U.S. 475 (1954)); *see* United States v. Texas Educ. 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 and state courts. For example, the lower court in the much-publicized decision of Lopez Tijerina v. Henry, 48 F.R.D. 274 (D.N.M. 1969) (per curiam), *appeal dismissed sub nom.* Tijerina v. Henry 398 U.S. 922 (1970), refused to certify a class of Mexican Americans because the members of the class were not readily identifiable, see 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); State v. Alen, 616 So. 2d 452, 455-56 (Fla. 1993) (reversing case law holding that Hispanics were not a recognized class for purposes of jury selection).

clearly identifiable class."[145] In light of *Hernandez v. Texas*, the Texas Court of Criminal Appeals in *Castaneda 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 American underrepresentation on juries in part because it was uncertain how many "were so-called 'wet backs' from the south side of the Rio Grande."[146] Today, reading the epithet "wetbacks" in a judicial opinion is jarring, suggesting the social acceptance of the deep antipathy toward persons of Mexican ancestry in Texas at that time. It also reflects the general presumption that Latina/os are "foreigners" who deserve less in terms of rights than U.S. citizens.[147]

In *Castaneda v. Partida*, the Supreme Court relied upon *Hernandez v. Texas* and *White v. Regester*[148] 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 the political process in Texas, which included a history of poll taxes and restrictive voter registration practices.[149] By 1991, in the case of *Hernandez v. New York*,[150] the Court simply assumed that Latina/os were protected by the Equal Protection Clause and did not discuss the issue.[151]

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.[152] The governmental classification of all Latina/os — a heterogeneous group — in the category "Hispanic" for Census

145. 430 U.S. 482, 495 (1977); *see* Garcia v. State, 919 S.W.2d 370, 392-93 (Tex. Crim. App. 1994) (en banc); Hernandez v. State, 24 S.W.3d 846 (Tex. App. 2000); Flores v. State, 783 S.W.2d 793 (Tex. App. 1990).

146. Partida v. State, 506 S.W.2d 209, 211 (Tex. Crim. App. 1974).

147. *See infra* text accompanying notes 199-200.

148. 412 U.S. 755 (1973).

149. *See id.* at 767-71.

150. 500 U.S. 352 (1991).

151. *See infra* text accompanying notes 228-35 (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).

152. *See generally* ESCOBAR, *supra* note 7 (analyzing the emergence of Mexican political and racial identity resulting from the 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 the 1960s).

purposes helped encourage a pan-Latina/o identity and facilitated group attempts to combat discrimination.[153]

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 are ordinarily 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."[154] In *Plyler v. Doe*,[155] the Court held that undocumented immigrant children in Texas, many of whom were 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.[156]

Interestingly, the slow but steady expansion of the protections of the Fourteenth Amendment, and the embrace of color blindness, resulted in the unexpected consequence of opening the door to subsequent claims of "reverse discrimination" by whites.[157] Ultimately, discrimination came to be understood as something that could happen to whites.[158] In the famous *Bakke*

153. *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).

154. Saint Francis Coll. 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, 316 n.39 (1987) (citing *Hernandez v. Texas* for the proposition that racial discrimination may be directed at a variety of groups).

155. 457 U.S. 202, 215-23 (1982).

156. *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).

157. *See infra* note 158.

158. *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. 1996) (invalidating University of Texas law school's race conscious affirmative action admissions system in lawsuit brought by white applicant), *cert. denied sub nom.* Thurgood Marshall Legal Soc'y v. Hopwood, 518 U.S. 1033 (1996); *see also* Fullilove v. Klutznick, 448 U.S. 448, 522, 526 (1980) (Stewart, J., dissenting) (citing *Hernandez v.*

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.[159]

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 broadening of Equal Protection challenges.

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

As *Hernandez v. Texas* exemplifies, discrimination in the selection of petit and grand juries has long plagued Mexican Americans in the United States.[160] Exclusion of Latina/os from jury service historically has denoted the subordinated status of Latina/os in American social life.[161]

Latina/o underrepresentation on juries can be expected to have substantive impacts. In the 1960s, Chicano activist attorney Oscar "Zeta" Acosta challenged the grand jury system in Los Angeles County by defending Chicana/o political activists charged with criminal offenses,[162] just as the League of United Latin American Citizens did on behalf of Pete Hernández and Mexican Americans in *Hernandez v. Texas*.[163] The unstated hope

---

Texas in contending that minority business contracting program violated Equal Protection Clause).

159. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292-93 (1978) (Powell, J.).

160. *See, e.g.*, Ian F. Haney López, *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, Jurymandering, 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) [hereinafter Fukurai, *Social De-Construction*] (offering proposals designed to improve representation of racial minorities on juries); Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. 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).

161. *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).

162. *See* LÓPEZ, *supra* note 152, at 76-77; Montez v. Superior Court, 10 Cal. App. 3d 343 (1970).

163. *See* López, *supra* note 104, 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).

was that the inclusion of Latina/os on grand juries would affect the outcomes of cases.[164] At a minimum, the parties sought a more impartial jury that would not hold Mexican ancestry against Mexican defendants.[165]

Hernandez v. Texas was the Supreme Court's first decision to expressly acknowledge discrimination against Mexican Americans. However, it was not the last time that the courts found it necessary to address claims of Latina/o exclusion 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.[166] By removing a bar to Latina/o jury participation and allowing for more racially diverse juries, the Court's decision offers the promise of greater impartiality and provides the appearance of greater legitimacy to juries and the decisions that they reach.[167]

Consistent with this promise, the official policy today is that petit juries should be pulled from a cross-section of the community.[168] In this way, juries symbolize the nation's commitment to democracy in the U.S. justice system and protect against the arbi-

164. *See* Laura E. Gómez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 LAW & SOC'Y REV. 1129 (2000) (analyzing, historically, the role of persons of Mexican ancestry in the 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).

165. *See* Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 362-64 (1999); 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).

166. *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 Comm'r, 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, 375-76 (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 sub nom.* Carter v. Jury Comm'n, 396 U.S. 320 (1970) (African Americans).

167. *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES 32, 45 (1977); Forde-Mazrui, *supra* note 165, at 362-64.

168. *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. S. Pac. Co., 328 U.S. 217, 220 (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).

trary use of judicial power.[169] No racial prerequisites for jury service exist in the United States; racial exclusions are prohibited.

However, just as the segregation of public schools did not end instantly with the ruling in *Brown v. Board of Education*, juries did not immediately become integrated with the Supreme Court's decision in *Hernandez v. Texas*. True, Latina/os served on juries in greater numbers in the years following the Court's decision than before 1954. However, representation of Latina/os on juries continues to lag significantly behind their percentage of the population.[170]

For example, over twenty years after the Court decided *Hernandez v. Texas*, in the 1977 case of *Castaneda v. Partida*,[171] the Supreme Court addressed a case in which Mexican Americans constituted about eighty percent of Hidalgo County — a county in south Texas along the U.S./Mexico border — but from 1962 to 1972, averaged less than forty 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.[172]

In states across the country, challenges to Latina/o jury participation continue to the present.[173] They are not limited to Texas.[174] As Professor Ian Haney López summarized in an article

169. *See, e.g.*, R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657, 664 (1873).

170. *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); Edward A. Villalobos, Comment, *Grand Jury Discrimination and the Mexican American*, 5 LOY. L.A. L. REV. 87 (1972).

171. 430 U.S. 482, 485, 487 & n.7, 495 (1977); *see supra* text accompanying notes 145-47.

172. Such underrepresentation of Latina/os exists today on Texas grand juries. *See* Larry Karson, Choosing Justice: The Implications of a Key-Man System for Selecting a Grand Jury (Oct. 2004) (unpublished manuscript, on file with author) (analyzing grand jury selection process in Harris County, Texas).

173. *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); Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'r, 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 re* Special Feb. 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 to *18 (N.D. Ill. June 21, 2004); Sosa v. Dretke, 2004 U.S. Dist. LEXIS 9143, *146 to *209 (W.D. Tex. May 20, 2004); Anderson v. Hickman, 2004 U.S. Dist. LEXIS 7001, *15 to *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); State v. Gibbs, 758 A.2d 327 (Conn. 2000); Hernandez v. State, 24 S.W.3d 846 (Tex. App. 2000); State v. Alen, 616 So.2d 452 (Fla. 1993); People v. Cerrone, 854 P.2d 178 (Colo. 1993).

174. *See, e.g.*, People v. Morales, 48 Cal. 3d 527, 541-49 (1989), *cert. denied*, 493 U.S. 984 (1989); State v. Villafane, 164 Conn. 637 (1973); State v. Paz, 118 Idaho 542, 547-52 (1990), *cert. denied*, 501 U.S. 1259 (1991); People v. Flores, 193 Ill. App. 3d 501 (1990); State v. Lopez, 182 Kan. 46, 50-51 (1957); People v. Guzman, 60 N.Y.2d

studying legal strategies used by political activists challenging the institutional racism in grand jury selection:

> 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."*[175]

Los Angeles County was not alone 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, experienced the underrepresentation of Latina/os on grand juries.[176] There is no reason to believe that Latina/os are underrepresented on juries in only these counties.

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]

---

403 (1983), *cert. denied*, 466 U.S. 951 (1984); State v. Esparza, 39 Ohio St. 3d 8, 13 (1988), *cert. denied*, 490 U.S. 1012 (1989); State v. Salinas, 87 Wash. 2d 112 (1976).

175. *See* LÓPEZ, *supra* note 152, at 100-01 (emphasis added) (footnote omitted).

176. *See* Fukurai, *Critical Evaluations*, *supra* note 160, at 25; Hiroshi Fukurai, *Where Did Hispanic Jurors Go? Racial and Ethnic Discrimination in the Grand Jury and the Search for Justice*, 2 W. CRIM. REV. 2 (2000), *available at* http://wcr.sonoma.edu/v2n2/fukurai.html (last visited Apr. 25, 2005).

177. *See* Mitchell S. Zuklie, Comment, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. 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 D. Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI. L. REV. 1089, 1098-03 (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 Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y. U. L. REV. 707, 712-19 (1993).

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.[180] Citizenship, language requirements, economic circumstances, and selection procedures all contribute to this lack of representation.[181]

A. *The Citizenship Requirement*

All noncitizems, even those who have lawfully lived in the United States for many years, are excluded from jury service.[182] Courts have upheld this requirement in the face of claims that it denies a criminal defendant the right to an impartial jury.[183] 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.[184]

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.[185] The impacts are not limited to large urban centers, however. Large immigrant populations have emerged, and continue to grow, in suburban and rural parts of the country, including in the South and Midwest.[186]

---

180. *See* Berta Esperanza Hernández-Truyol, *Las Olvidadas – Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER RACE & JUST. 353, 373-74 (1998).

181. *See* Fukurai, *Critical Evaluations*, *supra* note 160, at 32-34.

182. *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).

183. *See, e.g.*, United States 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).

184. *See* VAN DYKE, *supra* note 167, 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).

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

186. *See* Johnson, *supra* note 32, 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*

Given the demographics of the immigrant stream, the citizenship requirement for jury service has racial impacts. According to the 2000 U.S. Census, almost thirty percent of Hispanics in the United States are *not* U.S. citizens,[187] 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, and thus excluded from the jury pool.[188] Because "[t]he vast majority of today's immigrants are people of color,"[189] 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 has become a more significant issue since *Hernandez v. Texas* was decided in 1954. Since then, the number of immigrants in the United States has increased. This is explained, in part, by Congress's removal of racially exclusionary provisions in the immigration laws in 1965, leading to a substantial increase in the number of immigrants of color coming to the United States.[190]

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.[191] This has not always been the rule in the United States. Until nativism emerged with a vengeance early in the twentieth-century,[192] noncitizens

---

Colores (Change of Colors) as Agromaquilas Expand into the Heartland, 13 LA RAZA L.J. 343 (2002) (same).

187. *See* U.S. Census Bureau, Census 2000, PCT63H. Place of Birth by Citizenship Status (Hispanic or Latino), *available at* http://factfinder.census.gov (last visited Apr. 25, 2005).

188. *See* California Quick Facts (Los Angeles County), U.S. Census Bureau, *available at* http://quickfacts.census.gov/qfd/states/06/06037.html (last visited Apr. 25, 2005).

189. Johnson, *supra* note 32, at 1505.

190. *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, 276 (1996).

191. *See* Vikram D. Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998) (contending that the right to a jury trial, as well as voting, has group, as well as individual, rights dimension that involve 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.

192. *See* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925, at 158-330 (3d ed. 1994).

were permitted to vote and serve on juries in many states.[193] 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.[194] This procedure reflected 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,[195] which would have a dramatic impact on Latina/o voting power.[196] 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 percentage of Latina/os, to participate. By making juries appear more representative and impartial, noncitizen service on juries would allow 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 deny input from a segment of the community and limit our ability to have political processes that fully represent the larger community. Consequently, at the individual level, noncitizens with criminal or civil disputes must have them decided by a jury *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

193. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397-17 (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 Partners 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* HIGHAM, *supra* note 192 (analyzing nativist sentiment at this time in U.S. history).

194. *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).

195. *See supra* note 193.

196. *See* Joaquin Avila, *Political Apartheid in California: Consequences of Excluding a Growing Noncitizen Population* (UCLA Chicano Studies Research Center, Latino Policy and Issues Brief, L.A., Cal.), Dec. 2003, *available at* http://www.chicano.ucla.edu/press/siteart/LPIB_09Dec2003.pdf (last visited Apr. 25, 2005). 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.

community are not full members of, or participants in, American society.

The increase in naturalization rates among Latina/os in the 1990s may reduce the underrepresentation of Mexican immigrants on juries.[197] However, because of a variety of considerations, including class, language, and other factors,[198] 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 should 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.[199] The citizen/noncitizen distinction helps legitimate not only the protections afforded Mexican Americans in *Hernandez v. Texas* but also the "repatriation" of Mexican immigrants and U.S. citizens of Mexican ancestry during the Great Depression, the mass deportation campaign that same year directed at persons of Mexican ancestry in Operation "Wetback," and the deadly border enforcement measures pursued by the U.S. government today.[200]

Given the lessons of history, we should be leery of differential treatment of Latina/os based on citizenship status.[201] Ultimately, the social benefits of the citizenship requirement for jury service may 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, understand and speak English.[202] Many states have similar English language proficiency requirements.[203] In the days before *Hernandez v. Texas*, English language ability had been used to justify the lack of representation

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

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

199. *See supra* text accompanying notes 145-47.

200. *See supra* text accompanying notes 4-11.

201. *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).

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

203. *See, e.g.*, ALA. CODE § 12-16-60(a)(2) (1978); N.Y. JUD. CODE § 510(4) (Consol. 1983); COLO. REV. STAT. 13-71-105 (2)(b) (2000).

of persons of Mexican ancestry on juries[204] even though many Mexican Americans spoke English fluently.

In the modern United States, with its high levels of immigration from non-English speaking nations,[205] English language requirements have disparate racial impacts on jury pools. A substantial percentage of Latina/os in this country are native Spanish speakers.[206] Many 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, also do not speak English as a first language.[207]

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."[208] 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 English language requirement has racially disparate impacts, especially at a time in U.S. history when immigra-

204. *See, e.g.*, Lugo v. Texas, 124 S.W. 344, 348 (1938).

205. *See supra* text accompanying notes 182-89.

206. *See* Christopher D. 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).

207. *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).

208. 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 (1993).

tion has made the nation increasingly diverse, linguistically as well as racially.[209]

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 would not be inconsequential. The translations and interpreters necessary for a mixed language jury would cost money, not a trivial matter because the courts perennially face serious funding problems. An important question would be how jury deliberations might work if all jurors did not speak English.[210] However, the racial impacts of the English language requirement have significant costs to the racial demographics of the jury that deserve consideration and might well outweigh the associated costs.

C. *The Exclusion of Felons*

Under federal law, convicted felons whose civil rights have not been restored, and persons with felony charges pending, are excluded from jury service.[211] The racially disparate impacts of the criminal justice system in the United States are well-documented,[212] as is the dramatic expansion of the crimes that constitute felonies.[213] Consequently, minority groups are overrepresented among those excluded from jury service by the bar on convicted felons.

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.[214] "Fourteen percent of African-American men are ineligible to vote because of criminal convictions. In seven states, one in four black

209. *See supra* text accompanying notes 205-07.

210. I thank Nancy Marder for bringing this issue to my attention.

211. *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).

212. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL 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: From El Bandido to Gang Member*, 78 DEN. U. L. REV. 1081, 1088-98 (2001).

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

214. *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. 1839, 1845 (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).

men is permanently barred from voting because of their [sic] criminal records."[215] Far smaller percentages of whites are declared ineligible to vote and 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.

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, Latina/os can be expected to be excluded from jury service in disproportionate numbers by the bar on felons serving as jurors.[216] This is the case in states with large Latina/o populations and large numbers of Latina/os in prison, such as California, Arizona, New York, Florida, and Texas. .[217]

In certain circumstances, disenfranchisement laws can be successfully challenged under the Equal Protection Clause of the Fourteenth Amendment.[218] Proving that state laws were enacted with a discriminatory intent is difficult,[219] although possible in certain circumstances.[220] However, a facially neutral explanation exists for the rule that convicted felons cannot be relied upon to uphold the law; it is difficult to prove that this is not the true intent for barring convicts from jury service.[221]

Some convicted felons, as well as those charged with felonies, may be biased against the government, an important consideration in any criminal prosecution. However, it seems appropriate to reconsider the blanket exclusion based on group

---

215. 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).

216. *See* Reynoso, *supra* note 212.

217. *See* MARISA J. DEMEO & STEVEN A. OCHOA, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, DIMINISHED VOTING POWER IN THE LATINO COMMUNITY: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN TEN TARGETED STATES (2003).

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

219. *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).

220. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 223 (1985) (holding that an 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).

221. *See* Fletcher, *supra* note 215, at 1899; Kalt, *supra* note 215, at 122-28.

membership and, as done with respect to other life experiences, allow parties to strike "for cause" jurors on an individual basis in a specific case when they cannot impartially weigh the evidence.

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.[222] 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.[223]

Attention should be given to whether barring felons from jury service continues to make sense in light of what we suspect 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.

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

The use of peremptory challenges to strike jurors tends to reduce Latina/o representation on juries, although not in as systematic a fashion as certain jury qualifications. This is the case even though the Supreme Court has barred the consideration of race in the exercise of peremptories.[224] Language proficiency, which the Court has permitted parties to rely upon in exercising a peremptory challenge to strike a juror, may serve 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.[225] Reflecting the triumph of *Hernandez v. Texas*,[226] the lower courts extended this bar on the use of peremptory chal-

222. *See supra* note 212 (citing authorities).

223. *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); Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717, 718-19 (1999).

224. *See infra* text accompanying notes 225-27.

225. *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 gender 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 *Her-*

lenges to strike Latina/os from juries.[227] The prohibition protects Latina/os from the most flagrant exclusion from jury service on account of their race.

However, peremptory challenges based on certain so-called race neutral reasons are permitted and can have racially disparate impacts. The Supreme Court expanded such possibilities to the detriment of Latina/os in *Hernandez v. New York*.[228] 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.[229] Consistent with *Hernandez v. Texas*, the Court assumed that Hispanics were a racial group deserving the protections of the Equal Protection Clause.[230] Spanish speaking ability, however, was treated as a "race neutral" explanation for the exercise of peremptory challenges to strike jurors, despite the correlation between language and Latina/o identity.[231] The Court found that, absent a finding of a discriminatory intent, reliance on peremptories to strike bilingual Spanish/English speakers was permissible.[232] *Hernandez v. New York*

---

nandez 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.

226. *See supra* text accompanying notes 107-39.

227. *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 on the basis of the juror's gender, ethnic origin, or race.") (citations omitted); Fernandez v. Roe, 286 F.3d 1073, 1077 (9th Cir. 2002) ("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).

228. 500 U.S. 352 (1991).

229. *See* People v. Hernandez, 75 N.Y.2d 350, 353 (1990). The dissent in the Court of Appeals for the State of New York observed that "While 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 (Kaye, J., dissenting). For criticism of the Court's decisions on peremptory challenges, see Sandra Guerra Thompson, *The Non-Discrimination Ideal of* Hernandez v. Texas *Confronts a "Culture" of Discrimination: The Amazing Story of* Miller-El v. Texas, CHICANO-LATINO L. REV. (forthcoming 2005); Clare Sheridan, *Peremptory Challenges: Lessons From* Hernandez v. Texas, CHICANO-LATINO L. REV. (forthcoming 2005).

230. *See supra* text accompanying notes 140-59.

231. *See supra* text accompanying note 208.

232. *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 (but not those in the case before it), 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 a political campaign culminating in the passage of a law ending bilingual education in California employed language as a proxy for race).

has been followed in the lower courts to authorize the use of peremptories to strike bilingual Spanish speakers.[233]

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.[234] 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 had a more sophisticated view of the workings of racial discrimination than the 1991 Court.

Because of the overlap between language and race,[235] and increased bilingualism resulting from immigration, the use of peremptories based on language will decrease Latina/o representation on juries. Moreover, because fluency in the Spanish language has been used to strike jurors in cases involving the translation of Spanish, 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 considered 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,[236] racial minorities may "rue the day" that race was barred from consideration in the use of peremptory challenges. One could see a minority striking

---

The Court's holding in *Hernandez v. New York* has been the subject of sustained 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 BROOK. 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 L. 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, Prosecutor's 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 (1993). Over a decade ago, more than twenty states had a bilingual population of more than five percent of their overall population. *See id.* at 807.

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

234. *See supra* text accompanying notes 107-39.

235. *See supra* text accompanying note 208.

236. *See* Georgia v. McCollum, 505 U.S. 42, 60 (1992) (Thomas, J., concurring in the 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).

white jurors in the hopes of securing a more racially diverse jury, especially given the skewed pool rendered by the current set of juror eligibility rules.[237] This illustrates the perceived problem with the Supreme Court's "color blind" approach to the interpretation and application of the Equal Protection Clause.[238] Such 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. Litigants are denied the opportunity to use peremptory challenges 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.

The underrepresentation of Latina/os on grand and petit juries threatens to undermine the impartiality of the jury system, as well as the civil and criminal justice systems as a whole.[239] It dampens the belief among Latina/os in the fairness and impartiality of the justice system and promotes distrust of the system and its outcomes

After an initial increase in representation after the Court decided *Hernandez v. Texas*, Latina/os have become less, not more, represented on juries. 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.[240] Immigration has increased as well, with a growing Latina/o immigrant population in the United States.[241] More noncitizens live 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. Many languages other

237. *See supra* text accompanying notes 182-223 (reviewing race-neutral reasons for underrepresentation of Latina/os on juries).

238. For a 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 Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449 (1997) (analyzing how a facially neutral concept of "merit" used in law school admissions allows for racial discrimination).

239. *See supra* text accompanying notes 160-81 (reviewing the persistent underrepresentation of Latina/os on juries).

240. *See supra* text accompanying notes 211-13.

241. *See supra* text accompanying notes 185-89.

than English are spoken in this country, with Spanish as 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 much like that of Texas 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 vote[242] and to serve on juries, the two cornerstones of U.S. democracy. This group may question the legitimacy of the political process and the operation of 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:

> 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.[243]

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 rendered by a non-democratic process as lacking legitimacy. As a result, they may seek relief through 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."[244] Indeed, the mere reference to an

242. *See supra* text accompanying notes 182-38.

243. VAN DYKE, *supra* note 167, at 32.

244. *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 236, 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.").

"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,[245] serve as a ready reminder of the incendiary potential of such perceptions.

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), 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:

> 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.*[246]

Latina/os participated in the unrest and comprised a large percentage of the people arrested and injured during the violence.[247] 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.[248]

Currently, racial minorities see the courts in the United States that are predominantly white, with white lawyers and judges as the norm.[249] "Nonwhites are underrepresented on juries in the vast majority of courts in the country."[250] The decisions meted out by the justice system are viewed as having

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

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

247. *See* Johnson, *supra* note 232, at 64-65.

248. *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 197, at 930-31 (noting increase in naturalization of immigrants in wake of anti-immigrant legislation of the 1990s).

249. *See* Hernández-Truyol, *supra* note 180, at 373-75.

250. VAN DYKE, *supra* note 167, at 28.

racially disparate impacts, with "justice" being dispensed, and defined, by white people. This is not healthy for a society that extols its democratic institutions, embraces diversity, and preaches equality under the law.

Hernandez v. Texas promised to improve the operation of the justice system for Latina/os. 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, including the Latina/o community. 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 in May 1992.[251] In sum, the wholesale political disenfranchisement of large segments of the Latina/o community is a recipe for civil unrest and social disaster.

CONCLUSION

Hernandez v. Texas was a momentous decision, whose 50th birthday merits the scholarly attention that it has been given. The Court's decision helped expand the protections of the Fourteenth Amendment to include Latina/os — "neither Black nor White"[252] — 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 in fact were generally protected 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, the discrimination against persons of Mexican ancestry in California and could appreciate the claim of discrimination being made about the justice system 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

251. *See supra* text accompanying notes 54-67 (analyzing Sleepy Lagoon murder case).

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

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.