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U.C. Davis Law Review

Summer, 2000

**LENGTH:** 21012 words

**FORGING OUR IDENTITY: TRANSFORMATIVE RESISTANCE IN THE AREAS OF WORK, CLASS, AND THE LAW: Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education**

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**SUMMARY:** ... In 1998, the California voters, by a sixty-one to thirty-nine percent margin, passed Proposition 227, a ballot initiative innocuously known as "English for the Children." This measure in effect prohibits bilingual education programs for non-English speakers in the state's public school system. ... However, in this instance, there is sufficient evidence to establish that Californians passed Proposition 227 with a discriminatory intent and that it therefore runs afoul of the Equal Protection Clause. ... It contends that Proposition 227 amounts to unlawful racial discrimination by proxy. ... " In the final analysis, it becomes clear after consideration of these factors that Proposition 227 at its core concerns issues of race and racial discrimination. ... State English-only laws were followed by English-only regulations in the workplace and, ultimately, attacks such as Proposition 227, on bilingual education. ... In the "Findings and Declarations," Proposition 227 refers four times to immigrants or immigrant children. ... Among bilingual education teachers who worked directly with immigrant Latina/o children, feelings about Proposition 227 hit especially close to home. ... The district court's cursory analysis of whether the voters passed Proposition 227 with a discriminatory intent deserves careful scrutiny. ... Discriminatory Intent and Proposition 227 ...

**HIGHLIGHT:** It's dump on Latino time again. n1

[\*1227]

Introduction

In 1998, the California voters, by a sixty-one to thirty-nine percent margin, passed Proposition 227, n2 a ballot initiative innocuously known as "English for the Children." n3 This measure in effect prohibits bilingual education programs for non-English speakers in the state's public school system. This Article contends that this pernicious initiative violates the Equal Protection Clause of the [\*1228] Fourteenth Amendment n4 because, by employing language as a proxy for national origin, it discriminates against certain persons of Mexican and Latin American, as well as Asian, ancestry. n5 By attacking non-English speakers, Proposition 227, in light of the historical context and modern circumstances, discriminates on the basis of race n6 by focusing on an element central to the identity of many Latinas/os. n7 [\*1229]

In the face of constitutional and other challenges, the courts upheld the initiative but failed to sufficiently engage the core Equal Protection issue that the case raised. n8 In *Washington v. Davis*, n9 the Supreme Court held that, in order to establish an Equal Protection violation, the plaintiff must prove that the challenged state action was taken with a "discriminatory intent." The conventional wisdom considers this requirement to be unduly stringent because

it fails to fully appreciate the nature of modern racial discrimination in the United States. n10 Much can be said for this argument. However, in this instance, there is sufficient evidence to establish that Californians passed Proposition 227 with a discriminatory intent and that it therefore runs afoul of the Equal Protection Clause. n11 This intent flies in the face of the debatable claim of [\*1230] some supporters that the law would improve educational opportunities for non-English speaking students, a contention that obscures the core racial motivation behind the law's enactment. n12

This Article outlines the arguments supporting the Equal Protection challenge to Proposition 227. It is now an especially appropriate time to analyze the circumstances surrounding the initiative's passage because, as time passes, it becomes more difficult to marshal the evidence necessary to prove discriminatory intent. n13 To place Proposition 227 into its larger historical context, Part I sketches the history of discrimination in education against persons of Mexican ancestry, citizens as well as immigrants, in California and the Southwest. Part II analyzes the racial edge to the initiative campaign, its provisions, and the disparate impact that the law will have on nonEnglish speakers and, under current conditions in California, on racial minorities. It contends that Proposition 227 amounts to unlawful racial discrimination by proxy. n14 Part III ana [\*1231] lyzes the discrimination by proxy concept's relevance to the understanding of discrimination against Mexican Americans and other minority groups in the United States and contends that the Supreme Court should incorporate the concept more fully into its Equal Protection jurisprudence.

Ultimately, Proposition 227 can be seen as part of a general attack on Latinas/os. Unlike the days of old, the antidiscrimination principle that evolved from the Civil Rights movement of the 1960s has tended to drive blatant anti-Mexican animus underground, making it more difficult to identify, isolate, and eliminate. This disturbing trend raises serious legal questions concerning the scope of the Equal Protection Clause of the Fourteenth Amendment. This Article considers how Latinas/os may employ this constitutional provision to protect their civil rights and draws conclusions relevant to minorities generally. In so doing, we take up the challenge of addressing practical problems in a constructive way with the hope of "providing intellectual leadership in a time of serious retrenchment." n15

## I. The History of Discrimination Against Persons of Mexican Ancestry in California Education

A full understanding of Proposition 227 requires consideration of the long history of discrimination against persons of Mexican ancestry in California. Although most of the state was once part of Mexico, California has seen more than its share of racism directed at Mexican Americans and Mexican immigrants. n16 Anti-Mexican sentiment also has pervaded other states in the Southwest, particu [\*1232] larly Texas n17 and Arizona. n18 This Section sketches the impact of antiMexican animus on educational opportunity in the twentieth century and the changes in the California educational system brought about because of the growing Latina/o population in the state.

### A. The Struggle for Equal Educational Opportunity in the Public Schools

Mexican Americans have long struggled to ensure equal access to education. School desegregation and finance litigation, along with a political battle for bilingual education, have been central to the struggle.

#### 1. School Desegregation Litigation

One of the most damaging manifestations of racial discrimination has been the segregation of minorities in the public schools. n19 Mexican Americans in California have faced this obstacle in their effort to become educated citizens. They have been litigating against school segregation at least as far back as the Great Depression.

In 1931 in the town of Lemon Grove, California, the school board decided to construct a separate school for Mexican Americans and begin school segregation. n20 Mexican Americans and Mexican citizens formed the *Comite de Vecinos de Lemon Grove* (the Lemon Grove Neighborhood Committee) and organized a boycott of the school. The committee made public appeals for support in statewide Spanish and English newspapers. With the aid of lawyers provided by the Mexican consul in San Diego, the committee successfully challenged the school segregation in a lawsuit. [\*1233]

Despite the victory in Lemon Grove, by the 1940s the segregation of Mexican Americans was widespread throughout the West and Southwest. n21 In *Westminster School District v. Mendez*, n22 Mexican Americans in Orange County, California, filed an action against school district officials responsible for placing Mexican American children into segregated schools. The trial court found that the segregation violated plaintiffs' Fourteenth Amendment rights. n23 The court of appeals affirmed, distinguishing cases, including *Plessy v. Ferguson*, n24 that

had upheld segregation. n25 The court of appeals distinguished those cases because the California legislature in this instance had not authorized segregation. n26

In so doing, the court in Mendez left open the possibility that the legislature might enact legislation that lawfully could segregate Mexican Americans. n27 Moreover, the court made it clear that, even absent statutory authorization, English language difficulties might justify segregating Mexican American children. n28

Interestingly, the plaintiffs had urged the court to "strike out independently on the whole question of segregation" in light of the fact that the country had just fought and won World War II, n29 in which many Mexican Americans had distinguished themselves on the battle field. n30 Although acknowledging that judges "must keep [\*1234] abreast of the times," the court declined to take an independent course, stating that "judges must ever be on their guard lest they rationalize outright legislation under the too free use of the power to interpret." n31 The court instead chose to simply distinguish the earlier segregation cases.

Seven years after Mendez, the Supreme Court decided the watershed case of *Brown v. Board of Education*. n32 In *Brown*, the Court held that the segregation of African American children in the public schools violated the Equal Protection Clause of the Fourteenth Amendment. n33 In the years following *Brown*, the lower courts struggled to apply that decision. In particular, they faced the question whether *Brown* prohibited only de jure (intentional) segregation or whether it also outlawed de facto (in fact) segregation.

For example, in *Soria v. Oxnard School District*, n34 Mexican Americans brought a desegregation suit against a school district. District Court Judge Harry Pregerson found an illegal racial imbalance within the district resulting from the board's neighborhood school policy. n35 In reaching this conclusion, Judge Pregerson ruled that de facto segregation violated the law regardless of whether there was an intent to segregate. n36 The court of appeals reversed. The court relied on the recently decided Supreme Court case, *Keyes v. School District No. 1*, n37 and held that plaintiffs must establish de jure segregation in order to establish a constitutional violation. n38 *Keyes*, however, never directly addressed the question whether to distinguish between de jure and de facto segregation and never specifically [\*1235] cally decided whether de facto segregation violated the Constitution. n39

The *Soria* case suggests that the ability to achieve social change through litigation may be limited. n40 As *Soria* indicates, litigation led to judicial holdings that de jure segregation was unconstitutional. That litigation effort, however, found it difficult to remedy the de facto segregation that continued to exist in the California schools.

## 2. School Finance Litigation

In addition to segregation in the public schools, Mexican Americans have also suffered from relatively low funding for schools in predominantly Mexican American neighborhoods. Failures in school desegregation litigation led the civil rights community to attack school financing schemes. n41 Mexican Americans challenged school financing in two precedent-setting cases, *Serrano v. Priest*, n42 and *San Antonio School District v. Rodriguez*. n43

In *Serrano*, Mexican Americans brought a class action alleging that the California public school financing scheme violated the Equal Protection Clause of the United States Constitution and the [\*1236] California Constitution. In particular, they alleged that, because the financing plan was based on local property taxes, it created deep inequalities among the various school districts in the money available per student. n44 The California Supreme Court held that California's school financing scheme discriminated on the "basis of the wealth of a district." n45 In addition, the court held that the "priceless function of education in our society" required that it be classified as a "fundamental interest." n46 Given the wealth-based discrimination and the fundamental interest at stake, the court applied the rigorous "strict scrutiny" Equal Protection standard to the school financing plan. n47 Because the plan did not further a compelling state interest, the plan failed the strict scrutiny test and violated the Equal Protection Clause. n48

Two years later, the United States Supreme Court took a contrary position in *Rodriguez*. n49 In *Rodriguez*, Mexican Americans brought a class action alleging that the Texas property tax scheme for public school financing violated the Equal Protection Clause. The Court found that the strict scrutiny standard was not appropriate because education is not a fundamental right under the United States Constitution and distinctions based on wealth do not implicate a suspect class. n50 Applying the lenient "rational basis" Equal Protection test, the Court held that there was no constitutional violation because the financing scheme rationally furthered a legitimate state purpose. n51

Subsequently, the California Supreme Court reaffirmed the validity of *Serrano* under the California Constitution. n52 Thus, *Serrano* survives *Rodriguez* to the extent that it was based on California law. In an effort to satisfy the requirements of *Serrano*, the California legislature in 1977 enacted a new method of school financing. n53 [\*1237]

The new law sought to reduce inequalities among school districts by transferring property taxes raised in affluent districts to poorer districts. n54

However, in 1978, California voters approved Proposition 13, n55 which drastically reduced property taxes in California by more than fifty percent. n56 The impact on public education was devastating. "Most observers agree that Proposition 13 left California school finance in shambles." n57 By dramatically cutting local property taxes, the initiative instantly cut school budgets, with particularly onerous consequences for Latinas/os. n58 California's scheme for financing public schools continues to permit serious funding inequalities between predominantly white schools and those attended by Mexican Americans and other minorities. n59 Ultimately, Serrano created a right without a remedy. n60

Since Serrano, California state financing for education has dropped compared to the spending of most other states. n61 In 1994-95, California ranked forty-first of the fifty states in expenditures on education. n62 Financing takes on greater significance given the perceived need for bilingual education programs. [\*1238]

### 3. Bilingual Education

Limited English proficiency has proven to be an educational obstacle to many Mexican Americans and Mexican immigrants. In addition, they historically have been deprived by the lack of instruction in Latina/o culture and history. In response, Mexican Americans and other minorities have advocated that the public schools provide bilingual and bicultural education.

Over twenty-five years ago, the Supreme Court decided *Lau v. Nichols*. n63 In *Lau*, Chinese students unable to speak English brought an action against the San Francisco School District, alleging that the lack of instruction in their native language violated Title VI of the 1964 Civil Rights Act. The Court held that the school district had violated the law prohibiting race discrimination by failing to provide an appropriate curriculum to resolve the English language difficulties. n64

Following *Lau*, in 1976, the California legislature enacted the Chacon-Moscone-Bilingual-Bicultural Education Act. n65 This Act required that, among other things, California public schools must teach students in kindergarten through high school in a language they could understand. n66 In 1987, however, Governor George Deukmejian ended mandatory bilingual education in California by vetoing a bill that would have continued the Chacon-Moscone Act. n67 Although bilingualbicultural education no longer is mandatory, districts could continue to receive funding for bilingual education if they provided instruction in accordance with the Chacon-Moscone Act. n68 [\*1239]

### B. The Latina/o Population Explosion and the Impact on California's Public School Enrollment

The legal developments in public education in California can only be fully understood by considering the changing demographics of the state. California's population is the country's most diverse and will continue to become more so for the foreseeable future. Although people of every race and national origin are contributing to this demographic shift, the growth of the Latina/o population has been nothing less than explosive. Alarming many Anglo Californians, it contributed to their unwillingness to support the state's public schools and to their embrace of Proposition 227. n69

"If 'demography is destiny,' then California's destiny is becoming decidedly more Latino." n70 Over seven million, or one-third, of the twenty-one million Latinas/os living in the United States reside in the Golden State. n71 Latinas/os jumped from 18% of the state's population in 1980 to 26% in 1990. n72 Current projections have them comprising 25.8% of the state's population in 2000, 31.6% in 2010, and 36.3% in 2020, n73 when they will be poised to become California's "majority minority." n74 Most California Latinas/os are of Mexican origin. In 1990, 80% traced their roots to Mexico, followed by 11% from Central and South America. n75

Nowhere has Latina/o population growth been more apparent than in Southern California. In Los Angeles County, Latinas/os already make up the majority of all residents, which represents a dramatic increase from 1990, when Latinas/os constituted about [\*1240] 38% of the county's population, and 1980, when they amounted to over 27%. n76 Indeed, "Los Angeles County alone contains 44% of California's Latinos." n77 By 2010, Anglo majorities will have disappeared in at least sixteen local jurisdictions, including the high-growth counties of Fresno, Riverside, and San Bernardino. n78

A comparison of the surnames of new home buyers confirms the shift. Nationally, the top four buyers are named Smith, Johnson, Brown, and Jones. Garcia shows up at number seven. But in Los Angeles, the top four buyers are

named Garcia, Hernandez, Martinez, and Gonzalez, all Spanish surnames. The grand "American" name Johnson drops to number seven. n79

Although high birth rates have contributed to Latina/o population growth, the most significant factor continues to be high levels of immigration from Latin America. From 1951 to 1960, a majority of immigrants came from Europe. n80 But from 1992 to 1995, 39% of all immigrants came from Latin America, followed by Asia at 36.2%. Mexico is the leading country of birth for legal immigrants to California. In fiscal year 1995, the state opened its doors to over 33,000 Mexicans, 20% of all documented immigrants. n81

Increased immigration, high birth rates, and "white flight" from urban areas and public schools to suburban areas and private schools, have resulted in Latina/o domination of California's public schools. In 1997-98, of the state's 5.7 million public school students, 2.3 million (40.5%) were Latina/o compared to 2.2 million white (38.8%). African Americans (8.8%) and Asians (8.1%) constituted another million students. n82 [\*1241] Selected Enrollment in California Public School by Ethnic Group, 1981-82 Through 1997-98 n83

Year	Hispanic	White	Black	Asian
1981-82	25.8%	56.4%	9.9%	5.5%
1987-88	30.1%	50.1%	9.1%	7.3%
1991-92	35.3%	44.5%	8.6%	8.0%
1997-98	40.5%	38.8%	8.8%	8.1%

Similar changes have occurred in the enrollment of limited English proficient ("LEP") students, the vast majority of whom are recent immigrants. From 1982 to 1990, there was an increase of over 430,000 LEP students statewide to 1.4 million -- an increase of 226%. n84 LEP students accounted for nearly a quarter of all students enrolled in California public schools. n85 For years, the lion's share of LEP enrollment has been Spanish-speaking students of Latina/o origin. In 1993, 47.3% of Latina/o students were LEP; by 1998, this figure had risen to 49.2%. By contrast, in 1993, 44.1% of Asian students were LEP; by 1998, this figure had dropped to 40.1%. n86

As Latina/o numbers in the schools are increasing, they "are rapidly becoming our largest minority group and have been more segregated than African Americans for several years." n87 Perhaps the best example of this segregation is in Los Angeles, where public school enrollments have long been majority-Latina/o. The Los Angeles Unified School District was sixty-eight percent Latino in 1996-97. n88

Simultaneous with the Latinas/os increase as a percentage of California public school enrollment, California's spending per pu [\*1242] pil fell precipitously as a percentage of the national average. The trends are reflected graphically in Figures 1 and 2. FIGURE 1

[SEE TABLE IN ORIGINAL]

[\*1243] FIGURE 2

[SEE TABLE IN ORIGINAL]

### C. Responses to the Demographic Changes: Disadvantaging Latinas/os and Other Minorities Through Race Neutral Proxies

Many legal and political responses, in addition to decreased funding to the public schools, can be linked to the changing racial [\*1244] demographics of the State of California. n89 As the minority population increased as a proportion of the state's population in the post-World War II period, a variety of laws were passed in response. Consider the last decade.

Passed in 1994, Proposition 187, which if implemented would have barred undocumented immigrant children from the public schools and excluded undocumented immigrants from a variety of public benefits, would have disparately impacted the community of persons of Mexican ancestry in California. n90 The initiative galvanized Latina/o voters in the state; they voted overwhelmingly against a law that Anglo voters decisively supported. n91 Proposition 187 drew the attention of Congress, which in 1996, enacted welfare "reform" that eliminated eligibility of many legal, as well as undocumented, immigrants from various public benefits. n92 Latina/o immigrants subsequently flocked to naturalize and become citizens in order to avoid the potential impacts of the new laws, as well as other onerous laws punishing noncitizens, and to participate in the political process to avoid such attacks in the future. n93

More generally, anti-immigrant sentiment contained a distinctly anti-Mexican tilt as the century came to a close. n94 Drastic immigration reforms in 1996 eliminated judicial review of many immigration decisions of the immigration bureaucracy with devastating [\*1245] consequences for minority communities. n95 Deportations of aliens, especially "criminal aliens," meant the removal of many Mexican and Central American immigrants. n96 In fiscal year 1998, almost ninety percent of those removed from the United States were from Mexico and Central America. n97 At the same historical moment, hate crimes, police harassment, and violence against Latina/o immigrants and citizens increased. n98

Other laws with similar racial bents often speak in facially neutral terms. The ever-popular "tough on crime" laws, such as the "three strikes" law, target minority criminals, as does the claim that certain politicians are "soft" on crime, as driven home by the famous Willie Horton advertisements in the 1988 Presidential election. n99 Welfare "reform," often directed at women of color, long has been an issue polarizing minorities and whites, thereby forming a wedge between racial groups. n100 [\*1246]

Moreover, the political retrenchment with respect to affirmative action directly challenged the status of racial minorities. Proposition 209, dubbed the "California Civil Rights Initiative," in fact dismantled affirmative action programs designed to remedy discrimination against the state's minority population n101 and ensure diversity in employment and education. n102 The electorate passed this law in the face of strong opposition from Latinas/os and African Americans. n103 Coming on the heels of some high profile judicial decisions rolling back affirmative action, n104 underrepresented minorities found it difficult to understand Proposition 209 as anything other than an attack directed at them. n105 [\*1247]

#### D. Summary

In sum, there has been a history of discrimination against Mexican Americans in the California public schools that has evolved with the times. In the later part of the twentieth century, demographic changes in the racial composition of the state, and its schools, have provoked legal and political responses negatively impacting Mexican Americans.

### III. Proposition 227: Discrimination by Proxy

The Supreme Court has acknowledged that a court deciding whether an initiative violates the Equal Protection Clause may consider "the knowledge of the facts and circumstances concerning its passage and potential impact" and "the milieu in which that provision would operate." n106 In the final analysis, it becomes clear after consideration of these factors that Proposition 227 at its core concerns issues of race and racial discrimination.

#### A. Language as an Anglo/Latina/o Racial Wedge Issue

The ability to speak Spanish has long been an issue in California. For much of the state's history, the public schools adhered to an English-only policy, with punishment meted out to children who braved speaking Spanish in the public schools. n107 Sensibilities changed, however, and some school districts eventually began to offer bilingual education. n108 Nonetheless, "the debate over bilingual education has raged since the 1960s." n109 [\*1248]

In *Lau v. Nichols*, n110 the Supreme Court held that a school district violated provisions of the Civil Rights Act of 1964 that barred discrimination on the basis of race, color, or national origin. The school district violated this act because it failed to establish a program for nonEnglish speaking students. Critical to our analysis, the Court treated non-English speaking ability as a substitute for race, color, or national origin. n111 Other cases also have treated language as a proxy for race in certain circumstances. n112 This reasoning makes perfect sense. Consider the impact that English-only rules have on Spanish, Chinese, and other non-English speakers. It is clear at the outset that, under current conditions, such regulations will have racial impacts readily understood by proponents. n113 "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." n114 [\*1249]

The sociological concept of status conflict also helps explain the intensity of the racial divisiveness generated by laws regulating language usage. n115 Anglos and Latinas/os see language as a fight for status in U.S. society. Courts n116 and commentators n117 have analyzed extensively the Latina/o fight against English only laws and regulations. n118 Some vocal critics claim that the alleged demise of the English language in the United States has "splintered" U.S. society. n119 "Unfortunately, the English-only movement . . . hosts an undeniable component of nativism and anti-Latino feeling." n120 Not coincidentally, English-only initiatives have tended to be in states with significant Latina/o, Asian, Native American, or foreign born populations. n121

With race at the core, the modern English-only and bilingual education controversies are closely related. Latinas/os resist the [\*1250] language onslaught as an attack on their identity. "Language minorities

understand English-only initiatives as targeted at them . . . Spanish . . . is related to affective attitudes of self-identity and self-worth. Thus, language symbolizes deeply held feelings about identity and is deeply embedded in how individuals place themselves within society." n122

The intensity of the language debate at times is difficult to comprehend unless one views the laws as symbolic attacks under color of law against minority groups. n123 For example, California voters in 1986 passed an advisory initiative that had no legal impact but to declare English the official language of the state of California. n124

Opponents contended the measure conveyed a symbolic message that culturally and linguistically different groups were unwanted. They alleged that the campaign was a thinly veiled form of racism and derived from anti-immigrant sentiment. . . . Supporters argued that it was a common sense way to ensure that California's population remained politically cohesive. n125

Importantly, symbolic action of this nature can have concrete long-term impacts. In 1990, Professor Julian Eule observed that recent efforts in Arizona, California, and Colorado declaring English the official language were largely "symbolic and offer little opportunity for courts to remedy the gratuitous insult" to non-English speakers. n126 However, he predicted that such measures would be "invoked in efforts to terminate states' bilingual programs" and that "attempts to demonstrate that the initiatives are motivated by racial animus [as required by the Supreme Court's Equal Protection jurisprudence] will encounter . . . proof difficulties. . . ." n127

Unfortunately, this is precisely what has happened. State English-only laws were followed by English-only regulations in the workplace and, ultimately, attacks such as Proposition 227, on bilingual education. n128 And, as we shall see, it proved difficult to establish that states enacted such laws with a discriminatory intent.

## B. The Case of Proposition 227

Following closely upon "the gratuitous insult" to Latinas/os transmitted by voter approval of English-only measures in Arizona, California, and Colorado, proponents unveiled Proposition 227 in July 1997 and it came before the California voters in June 1998. Although not identifying Latinas/os by name, the measure's text and context leave little doubt that a motivating factor behind its passage was to attack educational opportunities for Spanish-speaking Latinas/os, especially Mexican immigrants. n129

### 1. The Language of the Initiative

The people targeted by Proposition 227 are identified in the official title of the measure. This title, English Language Education for Immigrant Children, n130 was shortened by advocates during the campaign to English for the Children. n131 In the "Findings and Declarations," Proposition 227 refers four times to immigrants or immigrant children. Mention is made of "immigrant parents," who "are eager to have their children acquire a good knowledge of Eng [\*1252] lish"; n132 the state's public school system, which has done "a poor job of educating immigrant children"; n133 the "wast[e of] financial resources on costly experimental language programs whose failure . . . is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children"; n134 and the resiliency of "young immigrant children," who "can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language." n135

In a state where Latinas/os dominate the ranks of immigrants, n136 public school children, and non-English speakers, references to immigrants necessarily refer primarily to Latinas/os. From 1992 to 1995, the largest group of legal immigrants to California -almost forty percent -- came from Latin America, n137 with more hailing from Mexico than any other country. n138 In 1998, Latinas/os constituted over forty percent of California public school children enrolled in kindergarten through twelfth grade. n139 According to the 1990 census, among the state's school age children who lived in households where nobody



over age fourteen spoke only English or spoke English well, over seventy percent lived in Spanish-speaking homes. n140 In the California schools, students not fluent in English are classified as "limited English proficient" or "LEP." n141 In 1996, [\*1253] over 1.3 million LEP students attended the state's public schools, n142 with more than a million being Spanish-speakers. n143

In addition to the disparate impact on Latinas/os, the initiative places special burdens on them. First, Proposition 227 proclaims as public policy what every Latina/o immigrant in this country already knows: that English "is the national public language of the United States of America and the State of California . . . and is also the leading world language for science, technology, and international business, thereby being the language of economic opportunity." n144 This statement is curious in light of the fact that Latina/o immigrants and citizens strive to -- and in fact do -- acquire English language skills. n145

Second, the heart of the measure, section 305, eliminates the right of Latina/o parents to choose how their children will acquire English language skills and imposes a one-size-fits-all approach:

All children in California public schools shall be taught English by being taught in English. . . . This shall require that all children be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year. n146

This flies in the face of this nation's firm tradition of protecting fundamental family decisions, such as the type of education the children should receive, from governmental interference. n147 Section 305 denies Latina/o parents the choice of having their children taught English through gradual exposure rather than through mandatory immersion. It also dismisses the views of bilingual education experts, many of whom believe that non-Englishspeaking [\*1254] children generally need years of study in a second language to become proficient enough to succeed in it academically. n148

Finally, section 310, which permits parents to petition for bilingual instruction, requires that the child's parent or guardian provide "written informed consent." n149 Such consent, however, cannot be obtained in the time-tested manner, that is, by having the parent sign a consent form. Section 310 instead requires that a "parent or legal guardian personally visit the school to apply for the waiver." n150 Imagine the reaction of Anglo parents if a provision of the California Education Code effectively required them, but not African American, Asian, or Latina/o parents, to personally visit a school before their children could opt out of mandatory education programs.

## 2. Ballot Arguments

Like the language of the initiative, the Proposition 227 campaign often spoke softly and subtly about race. Most campaign materials did not squarely mention race. Opponents feared raising the claim of racial discrimination because of a possible backlash. n151 The ballot arguments in the voters pamphlet, however, make clear that the initiative singles out Latinas/os. Despite paying homage to "the best of intentions" with which the architects of bilingual programs began their efforts, n152 the proponents sharply criticize those programs and explicitly refer to persons of Latina/o (and no other) descent.

First, the Proposition 227 advocates proclaimed that "for most of California's non-English speaking students, bilingual education actually means monolingual, SPANISH-ONLY education for the first 4 to 7 years of school." n153 No mention is made of the type of education afforded any other group of students, whether African American, Asian, or white. Second, the argument identifies "La [\*1255] tino immigrant children" as "the principal victims of bilingual education," because they have the highest dropout rates and lowest test scores of any group. n154

Third, the proponents of the measure state that "most Latino parents [support the initiative], according to public polls. They know that Spanish-only bilingual education is preventing their children from learning English by segregating them into an educational dead-end." n155 If Proposition 227 were truly race

neutral, it would be unnecessary to invoke the alleged political opinions of Latina/o parents. n156 Similarly, the rebuttal to the argument against Proposition 227 criticized the measure's opponents as the leaders of organizations whose members "receive HUNDREDS OF MILLIONS OF DOLLARS annually from our failed system of SPANISH-ONLY bilingual education." n157

### 3. Statements by Advocates

At first glance, the overt anti-Latina/o sentiments that surfaced during the racially-charged campaigns for Propositions 187 n158 and 209 n159 seemed to be missing from the Proposition 227 campaign. California Governor Pete Wilson campaigned vigorously for passage of these racially-divisive immigration and affirmative action initiatives and gained the reputation as "the greatest bogeyman for Latinos." n160 Quirky Silicon Valley millionaire Ron Unz, who wrote, financed, and directed the campaign for Proposition 227, and had once challenged Pete Wilson for the Republican gubernatorial [\*1256] nomination, took a different tack. Having opposed Proposition 187, Unz distanced himself from Wilson and other kindred spirits. n161

From the outset, the sponsors of Proposition 227 denied any racial animus. Unz claimed to support Latina/o parents who kept their children out of bilingual classes and insisted that they learn English. n162 To unveil Proposition 227, he went to Jean Parker Elementary School in San Francisco, n163 where nearly a quarter-century earlier the family of Kinney Lau, an immigrant Chinese student, had successfully sued the city's school district to secure Lau's right to receive a bilingual public education. n164 In media appearances, Unz asserted that Proposition 227 was neither anti-immigrant nor anti-Latina/o n165 and proclaimed that any victory would be morally hollow without Latina/o support. n166 All of which prompted some Latinas/os, such as California Assembly Speaker Antonio Villaraigosa, to regard Unz as "a decent guy, although we have different views of the world." n167

Three of the four principal spokespersons who joined Unz in sponsoring Proposition 227 were Latinas/os. n168 Nevertheless, many [\*1257] statements made by supporters demonstrated an intent to single out Spanish-speaking Latinas/os in a way that would not be tolerated if aimed at Anglos. Unz, for example, unfavorably compared today's Latina/o immigrants to the European immigrants of the 1920s and 1930s. n169 He acknowledged that the only group of children given large quantities of "so-called bilingual instruction are Latino-Spanish speaking children" n170 and emphasized that Proposition 227 was "something that will benefit, most of all, California's immigrant and Latino population." n171 Responding to the argument that bilingual education helps immigrant pupils learn better by teaching them respect for their culture, he sharply responded that "it isn't the duty of the public schools to help children maintain their native culture." n172

Emphasizing that she was a Latina supporter of Proposition 227, cosponsor Gloria Matta Tuchman played a similar role for Unz that Ward Connerly, an African American, did for Governor Wilson in the Proposition 209 campaign. n173 She exuded the tough-love assimilationism of her father, who taught her that, "Anglos did us a favor by making us learn English. That's why we are so success [\*1258] ful." n174 Although few would question the importance to immigrants of learning English, n175 coerced assimilation, which too often calls upon immigrants to renounce their native language and other ties to their heritage, is another matter. n176

Ron Unz's comments demonstrate the pro-Proposition 227 campaign's efforts to attack Latinas/os by using Latina/o figureheads: "Gloria [Matta Tuchman] is the best possible spokesperson for something like this," Unz said. "Her ethnicity, her gender . . . all those things play an important role." n177 "Unz called Jaime Escalante's support a 'tremendous boost' to his campaign. . . . Having the most prominent Latino educator serving as honorary chairman really just allows more of these Latino public figures to voice their true feelings on the issue,' Unz said." n178 "Unz says he hopes Escalante's support of the campaign will help shake loose support . . . from California's GOP leaders. . . ." n179 Consequently, Latina/o supporters were used to serve anti-Latina/o ends. n180

In the end, it is difficult to state how many Proposition 227 supporters were influenced by race. The web page of One Nation/One California, which helped place Proposition 227 on the ballot, candidly admits that anti-Latina/o sentiment added to support for the measure:

There is a strong public perception that many opponents of "bilingual education" are using the issue as a cover for anti-Latino and anti-immigrant views. Unfortunately, this is often true. Private [\*1259] polling indicates that anger at "bilingual education" is a leading cause of antiimmigrant sentiment among California Anglos. n181

Similarly, Ron Unz "admitted that some of the initiative's supporters are no doubt anti-immigrant." n182

Significant contributors to the pro-Proposition 227 campaign also had racial aims. For example, One Nation/One California, which gave over one million dollars to the campaign, n183 expressed concern with "ethnic nationalism." n184 The California English Campaign, which contributed almost twenty thousand dollars to the supporters of Proposition 227, n185 expressed deep concerns with the emerging racial mix:

We are all American, but in recent years, our country has been losing its sense of cohesiveness, of unity and of an American identity. Among the reasons for these losses are a lack of an official language (which in our country must be English), bilingual education (meaning teaching immigrant children in native languages), foreign language ballots, drivers license tests (in scores of languages), rising ethnic nationalism, multilingualism, multiculturalism. n186

Race was near the surface of the campaign. Linda Chavez, the conservative Reagan Administration official turned syndicated columnist, attacked A. Jerrold Perenchio, the non-Latino television executive of Univision Communications, a Spanish language media outlet, who contributed \$ 1.5 million to defeat Proposition 227. n187 A school activist supporting the initiative accused Oakland school [\*1260] officials of forcing bilingual education on English-speaking African American students. n188

To some extent, the harshest anti-Latina/o sentiments were expressed by Proposition 227's advocates after the election. n189 The head of the restrictionist Federation for American Immigration Reform, responded to a pro-immigration speech by President Clinton a few days after the measure passed, by stating that "rather than revitalize the cities, immigrants have driven Americans out of the cities. Native-born Americans are fleeing cities like Los Angeles because of the impact of excessively high levels of immigration." n190 The president of the restrictionist Voice of Citizens Together, who had campaigned for Proposition 187, in effect predicted a race war and suggested that California's demographic changes themselves were the problem: "[Proposition 227] passed overwhelmingly except for the Mexican and the black vote." n191

#### 4. The Latina/o Reaction

Even if what the advocates of Proposition 227 said could be considered race neutral, what many Latinas/os actually heard was yet another direct attack on them. The initiative inevitably attracted support from Californians uncomfortable with the growing Latina/o population and lost support among Latinas/os who saw the measure as an extension of Propositions 187 and 209. n192 Among bilingual education teachers who worked directly with immigrant Latina/o children, feelings about Proposition 227 hit especially close to home. One first grade teacher said "It's a painful subject. I can't even begin to explain to somebody the pain and fright that children are going to feel if they are thrown into an all-English classroom." n193

Recalling the nasty Propositions 187 and 209 campaigns, one prominent attorney for the Mexican American Legal Defense and Education Fund called Proposition 227 "the third in a chain of [\*1261] anti-immigrant, anti-Latino proposals." n194 The vice president for the National Council of La Raza wondered: "Hasn't the state had enough? Do we need another racially charged, sharp-edged debate about a hotbutton, political wedge issue?" n195 California Congressman Xavier Becerra characterized Proposition 227 as "immigrant-bashing." n196 Speaker of the California Assembly Antonio Villaraigosa called the measure

"divisive and polarizing." n197 State Democratic Party Chair Art Torres called it "another attack" on the Latina/o community. n198

## 5. The Results

At the June 1998 election, Anglos heavily supported Proposition 227 while Latinas/os strongly opposed it. Specifically, although the measure passed by a 61-39% margin, n199 Latinas/os, according to exit polls, opposed the measure by a 63-37%, n200 which was contrary to what the pre-election polls had predicted. n201 The election results are generally consistent with survey results showing that over 80% of Latinas/os supported bilingual education. n202 [\*1262]

In light of what we have detailed above about the anti-Latina/o animus behind Proposition 227, n203 the wide split between Anglo and Latina/o voters should surprise no one. What is surprising is that so many never saw the Latina/o rejection coming. Before the election, nearly every poll reportedly showed strong support for Proposition 227 among Latina/o voters. n204 In November 1997, before the initiative had qualified for the ballot, a Los Angeles Times poll claimed that 84% of Latinas/os, as contrasted with 80% of whites, supported it. n205 Latina/o opposition, claimed U.S. News & World Report, was confined largely to "bilingual-education teachers and Hispanic activists." n206 In March 1998, the Field Poll reported that 61% of Latinas/os and 70% of the general population supported Proposition 227. n207 In April 1998, The Economist reported that various polls showed that 55% to 65% of Latinas/os and 63% of all voters still favored the initiative. n208 Frequent repetition by noted political commentators gave credence to the polls. n209 Indeed, the proponents of Proposition 227 in the voter ballot pamphlet distributed to voters stated unequivocally that "most Latino parents" favored the initiative. n210 Ron Unz went so far as to say that the initiative's broad support might unify Californians with "a vote which cuts across party lines, which crosses ideological lines and which crosses lines of ethnicity." n211

It was only Latina/o media outlets that accurately documented the coming tide of resentment among Latina/o voters toward Proposition 227. In early 1998, La Opinion, Southern California's leading Spanish newspaper, and a Spanish television station com [\*1263] missioned a poll showing that 43% of Latinas/os favored Proposition 227 but 49% opposed it. n212

Despite Latina/o voter rejection of Proposition 227, after the election the media continued to report that Latinas/os supported the measure. For at least two days after the vote, the Associated Press, Washington Post, Chicago Tribune, Christian Science Monitor, and Dallas Morning News, all erroneously reported that Latinas/os voted in favor of the measure by wide margins. n213 These errors before and after the vote demonstrate that Proposition 227 was conceived, debated, and enacted in an atmosphere of obsession with Latinas/os and their views about the measure.

As the campaign and racially-polarized results demonstrate, Proposition 227 exacerbated already existing racial tensions. n214 A horrible attack on a white principal of a predominantly Latina/o school in the Los Angeles area made this point clear. n215 Latina/o students at a number of high schools walked out of class. n216 Within weeks of Proposition 227's passage, a group of men attacked, kicked, and assaulted two Latinos at a convenience store in Lancaster, California, while yelling "What are you wetbacks doing in here?" n217

### C. The Discriminatory Intent Necessary for an Equal Protection Violation?

In *Valeria G. v. Wilson*, n218 the district court rejected all challenges to Proposition 227. The court specifically held against the plaintiffs on an Equal Protection claim based on the argument that the initiative created a political barrier that disadvantaged racial minorities. n219 In so doing, the court emphasized that, even if the [\*1264] measure had a disproportionate impact on a minority group, the plaintiffs failed to establish the necessary discriminatory intent for an Equal Protection challenge. n220 According to the court, the plaintiffs did not attempt to satisfy this "burden [but claimed] that they were not arguing a 'conventional' equal protection claim." n221

An amicus curiae brief submitted in *Valeria G.* contended that Proposition 227 violated international law, including the Convention on the Elimination of All Forms of Racial Discrimination, n222 thereby "implying that Proposition 227 was motivated by racial or national origin discrimination." n223 Finding that the issue was not properly before it, the court simplistically asserted that a better education for limited English proficient children, was the purpose behind the measure. n224

The district court's cursory analysis of whether the voters passed Proposition 227 with a discriminatory intent deserves careful scrutiny.

#### 1. Factors in Discerning a "Discriminatory Intent"

The Supreme Court in *Washington v. Davis* n225 held that a discriminatory intent was necessary to establish an Equal Protection violation. Although upholding a test used in hiring police officers that had a disparate impact on African Americans, the Court emphasized that the "intent" requirement was not rigid:

An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in [\*1265] various circumstances the discrimination is very difficult to explain on nonracial grounds. n226

However, the Court stated unequivocally that impact alone is insufficient to establish an equal protection violation and speculated that such a rule "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." n227

Subsequently, the Supreme Court held that an Equal Protection violation can be established with "proof that a discriminatory purpose has been a motivating factor in the decision." n228 To make this determination requires:

A sensitive inquiry into such circumstantial and direct evidence as may be available. . . . The impact of the action . . . may provide an important starting point. Sometimes a clear pattern, inexplicable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. n229

Among the factors that the Court has found appropriate to consider in evaluating whether state action was motivated by an invidious intent is the "historical background," "the specific sequence of events leading up to the challenged decision," "departures from the normal procedural sequence," and the "legislative or administrative history." n230 Importantly, "historical evidence is relevant to a determination of discriminatory purpose." n231 [\*1266]

The discriminatory intent standard has proven to be a formidable barrier to an Equal Protection claim, although it is not impossible to satisfy. n232 It historically has proven particularly difficult to establish discriminatory motive when an institutional body made the challenged decision. n233 Consequently, some critics claim that initiatives, often legally bullet-proof, are especially damaging to minority rights. n234 History supports this contention. n235 Not only [\*1267] racial minorities, but other minorities may be adversely affected. n236 The initiative process effectively encourages voters to take out aggressions against an array of minority groups in a way that has become increasingly difficult to do in American political and community life. Indeed, one political scientist suggests that the increase in initiatives in California in the 1990s reflects the anxieties of middle class whites and is linked to increasing minority representation in government. n237 Such fear about these sorts of passions swaying the political process help explain why the framers of the Constitution opted for a representative form of government. n238

Because of the rigor of the "discriminatory intent" requirement, some courts and advocates, as suggested by *Valeria G.*, appear to have shied away from Equal Protection challenges to invalidate English-only laws passed by the voters in order to strike them down on less demanding grounds. For example, the Arizona

Supreme Court invalidated an initiative that required government employees to speak only English on the job on First Amendment grounds. n239 Previously, a federal court of appeals had invalidated the same law for similar reasons, n240 only to have the case dismissed by the Supreme Court as moot. n241 In so doing, the court of appeals expressly acknowledged the national origin impacts of the English-only law. n242 [\*1268]

## 2. Discriminatory Intent and Proposition 227

Because the evidence establishes that race was "a motivating factor" n243 behind the passage of Proposition 227, the law violates the Equal Protection Clause of the Fourteenth Amendment. n244 Language was employed as a proxy for race. Race, although not explicitly raised, can be seen by the near exclusive focus on the Spanish language, the history of discrimination against Mexican Americans in California, including the increase in anti-Latina/o and anti-immigrant animus in the 1990s, statements by the advocates of the initiative, and the racially polarized vote. Race obviously was "a motivating factor" behind the passage of Proposition 227.

A judicial finding that Proposition 227 violates the Equal Protection Clause would be consistent with the landmark decision of *Brown v. Board of Education*. n245 In *Brown*, Chief Justice Warren wrote that segregation "generates a feeling of inferiority as to the status [of African Americans] in the community that may affect their hearts and minds in a way unlikely ever to be undone." n246 Proposition 227, by banning teaching in the native language of Spanish speakers, creates a similar stigma for Latinas/os. It suggests that Spanish and other languages are inferior to English and not fit for education. n247 [\*1269]

## III. Mexican Americans and the Fourteenth Amendment

Mexican Americans and Latinas/os historically have suffered intentional discrimination in the state of California, as well as other states. n248 Over the years, discriminators have used a number of proxies, some more transparent than others, to discriminate against Latinas/os. n249

The proxies for different minority groups may vary. n250 For example, the "alien land" laws prevalent in many states early in the twentieth century discriminated against persons of Japanese ancestry in a facially neutral way by prohibiting real property ownership by persons "ineligible to citizenship," at a time when Japanese were the largest nonwhite immigrant group ineligible for naturalization. n251 Opposition to low income housing in certain circumstances may serve as cover for discrimination against African Americans. n252 In both instances, a proxy for race is employed to discriminate on the basis of race. To this point, the Supreme Court has not generally analyzed the issue by utilizing the proxy concept. In applying the antidiscrimination laws,

courts have held that an employer cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination. An example is using gray hair as a proxy for age: there are young people with gray hair (a few), but the fit between age and gray hair is sufficiently close that they would form the basis for invidious classification. n253

### [\*1270]

The Supreme Court has emphasized that an "employer cannot rely on age as a proxy for . . . characteristics such as productivity" and recognized that "pension status may be a proxy for age." n254 Indeed, in *Hunter v. Underwood*, n255 the Court understood that Alabama's constitutional provision disenfranchising persons convicted of "any crime of moral turpitude" in effect served as a proxy for race and therefore was invalid under the Equal Protection Clause.

Immigration status is often used in today's public discourse as a proxy for race. n256 For example, attacks on "illegal aliens" often may be used as a code, particularly in the Southwest, for Mexican immigrants and Mexican American citizens. n257 This is because Mexican immigrants currently constitute about fifty percent of the undocumented population in the United States. n258 Attacks on "illegal aliens" therefore

tend to be directed at Mexican immigrants. Similarly, efforts to deport "criminal aliens" or others who have violated the criminal laws tend to adversely affect minority communities. This is because, in the post-1965 period, most of the lawful immi [\*1271] grants have come from Asia and Latin America. n259 Thus, an attack on the "criminal alien," and, similarly, the "alien" welfare abuser, may translate into attacks on immigrants of color.

In the case of Proposition 227, voters discriminated against Mexican Americans and Mexican immigrants by proxy. Through targeting language when the largest bilingual education programs in California by far were for Spanish speakers, n260 the initiative was able to negatively affect a discrete and insular racial minority. n261 A growing Latina/o population in the California public schools results in reduced financial support, a reduced commitment to bilingual education, and, ultimately to the prohibition of such education. n262 Latinas/os were the known and actual victims. n263 A racially-polarized vote confirmed that the measure used language as a proxy for race. n264

Current Equal Protection doctrine and the discriminatory intent requirement, however, make it difficult for Latinas/os to establish constitutional violations. Mexican Americans historically have found it difficult to protect their rights under the Equal Protection Clause of the Fourteenth Amendment. n265 For example, in *Hernandez v. State*, n266 a Mexican American defendant challenged a murder conviction on the ground that Mexican Americans had been excluded from serving on the jury. Hernandez relied on case law holding that the government violated the Equal Protection Clause by excluding African Americans from serving on juries. The Texas Supreme Court, however, held that the Fourteenth Amendment exclusively protected African Americans. n267 In this regard, the [\*1272] court held that Mexican Americans are "white." n268 Because the juries that indicted and convicted Hernandez were composed of white persons and therefore members of his own race, the court refused to find an Equal Protection violation. n269

The Supreme Court reversed and held in *Hernandez v. Texas* n270 that the Equal Protection Clause covered "persons of Mexican descent." The Court, however, only extended a weak form of protection to Mexican Americans. The Fourteenth Amendment covered Mexican Americans only in areas where they were the targets of local discrimination. n271 Thus, in areas where Mexican Americans could not prove that they suffered from such discrimination, they were not entitled to invoke the Equal Protection Clause. n272 Consequently, Mexican Americans found it difficult to assert rights under the Fourteenth Amendment, in part because they lacked funds to satisfy the evidentiary burden of establishing the existence of local prejudice. n273

The view that the Fourteenth Amendment only limited discrimination against African Americans may well be consistent with the original understanding of its framers. As the Supreme Court in the *Slaughterhouse Cases* explained:

No one can fail to be impressed with the one pervading purpose found in [all the Reconstruction Amendments]; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. . . . The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied . . . . n274

[\*1273]

Indeed, the Court stated that the Fourteenth Amendment dealt exclusively with discrimination against African Americans: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." n275

The idea that the structure of civil rights law historically focused on African Americans and Whites has been termed the "Black-White binary." n276 Although some argue that the Constitution must be

interpreted in accordance with the intent of the Framers, n277 a dualistic approach to antidiscrimination law is clearly outdated. As famous sociologist Nathan Glazer has proclaimed, "we are all multiculturalists now." n278 Justice Oliver Wendell Holmes explained in *Missouri v. Holland* that a constitutional issue "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what the country has become" in interpreting the Constitution. n279 Thus, the [\*1274] courts should interpret the Equal Protection Clause in a way to fully protect Mexican Americans and other minority groups as well as African Americans and whites.

Some contend that efforts to expand beyond the Black-White dichotomy are "reactionary." n280 However, a Black-White view of the Fourteenth Amendment seems to have been the position of its framers. Interpreting the Constitution by focusing on the framers' intent is traditionally viewed as a conservative position. n281 Moving to a multiracial approach to reflect our changing society represents a proper modern interpretation of the Equal Protection Clause.

The expansion of the law's protection raises a number of difficult issues. As we progress historically away from the hey-day of Jim Crow, racial discrimination ordinarily is no longer as blatant and obvious as it once was. n282 With respect to Latinas/os, discrimination is often conducted by proxy -- targeting characteristics such as the Spanish language, as a surrogate for discriminating against Latinas/os. To provide legal protection to Latinas/os, and in order to keep pace with the changing nature of racial discrimination, the Fourteenth Amendment must be interpreted in a way to cover discrimination by proxy.

Ultimately, interpreting the Constitution in a way that is sensitive to discrimination by proxy would benefit all minority groups. Various subordinated peoples -- African Americans, Asian Americans, Native Americans, Latinas/os, women, lesbians, gay men, and others n283 -- are discriminated against through different proxies. As sociologists have recognized, appeals to "law and order" and for a [\*1275] return to "traditional" values can "effectively remarginalize minority cultures without ever expressly invoking issues of race." n284

Once this is considered, to demand that plaintiffs establish discriminatory intent -- that is, some secret racist mental state -- to establish unlawful race discrimination appears incoherent. Legal theorists who have investigated the "grammar" of the term "intent" have shown that when referring to intent, one does not seek to describe a mental event, n285 but is simply asking for a justification for "fishy or untoward actions." n286 The Supreme Court was mistaken to require plaintiffs to establish intent as a prerequisite for proving an Equal Protection violation. In so doing, the Court saddled racial minorities with an incoherent, often impossible task.

Moreover, it was unnecessary for the Supreme Court to establish the intent requirement. As the Court itself emphasized in *Brown v. Board of Education*, "segregation is unconstitutional not because it is intended to hurt blacks but because, whatever its intent, it relegates them as a group to a permanently subservient position." n287 As many have argued, this anticaste principle deserves greater valence in constitutional analysis. n288

#### Conclusion

This Article contends that Proposition 227, and possibly related measures, discriminates against persons of Mexican ancestry in violation of the Equal Protection Clause of the Fourteenth Amendment. California's history, together with the text of the initiative, the arguments of the proponents, the campaign, and the racially polarized election results, all demonstrate this to be true. n289 [\*1276]

If the analysis is less than persuasive, then one must question the "discriminatory intent" requirement itself. Its coherence is far from clear when hundreds of thousands of voters cast ballots and discerning an "intent" is less real than imaginary. Like other discriminatory measures of the past, n290 history books will record Proposition 227's discrimination by proxy as race-based. n291 One worries when legal doctrine requires the difficult efforts at historical reconstruction of "intent" as seen in this Article. Legal doctrine that



obscures social reality ultimately loses credibility. One almost feels like philosopher Ludwig Wittgenstein upon completion of his monumental tract:

My propositions serve as elucidations in the following way: anyone who understands me eventually recognizes them as non-sensical, when he has used them -- as steps -- to climb up beyond them. (He must, so to speak, throw away the ladder after he has climbed up it). . . . He must transcend these propositions and then he will see the world aright. n292

#### FOOTNOTE-1:

n1 Don Terry, Bilingual Education Facing Toughest Test, N.Y. Times, Mar. 10, 1998, at A1 (quoting Antonia Hernandez, Executive Director and General Counsel for the Mexican American Legal Defense and Educational Fund, commenting on Proposition 227).

n2 See Cal. Secretary of State, California Voter Information Guide Primary Election: June 2, 1998 Ballot Pamphlet 75-76 (1998) (reprinting text of initiative) [hereinafter Ballot Pamphlet].

n3 See [Valeria G. v. Wilson](#), 12 F. Supp.2d 1007, 1012 (N.D. Cal. 1998); see also [Doe v. Los Angeles Unified Sch. Dist.](#), 48 F. Supp.2d 1233 (C.D. Cal. 1999) (certifying class action challenging school district's implementation of Proposition 227 on federal statutory grounds); [McLaughlin v. State Bd. of Educ.](#), 75 Cal. App. 4th 196, 89 Cal. Rptr. 2d 295 (1999) (addressing parental waiver requirement under initiative); Ballot Measures, Calif. J., July 1, 1998 (summarizing campaigns over various California initiatives on June 1998 ballot, including Proposition 227).

n4 In [Hernandez v. Texas](#), 347 U.S. 475 (1954), the Supreme Court first squarely held that the Equal Protection Clause's protections may apply to persons of Mexican ancestry. See Ian F. Haney Lopez, Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory, 85 Cal. L. Rev. 1143 (1997) (analyzing significance of Hernandez in showing how persons of Mexican ancestry were treated as separate race); George A. Martinez, The Legal Construction of Race: Mexican Americans and Whiteness, 2 Harv. Latino L. Rev. 321, 332 (1997) (contending that Hernandez imposes artificially high standards on Mexican Americans seeking protection of Equal Protection Clause); see also infra text accompanying notes 265-73 (discussing Hernandez).

n5 See Christopher Edley, Jr., Color at Century's End: Race in Law, Policy, and Politics, 67 Fordham L. Rev. 939, 950, 951 (1998) ("There is lurking just beneath the surface [of the bilingual education debate] a subtext about culture, color, and race."); see also infra text accompanying notes 129-217, 243-47 (analyzing this issue in context of Proposition 227). This Article focuses on how Proposition 227 discriminates against Latinas/os in California. Needless to say, other groups composed in part of non-English speakers, particularly Asian Americans, may be adversely impacted in ways similar to Latinas/os by the elimination of bilingual education. See Symposium, Rethinking Racial Divides -- Panel on Affirmative Action, 4 Mich. J. Race & L. 195, 210-11 (1998) (comments of Marina Hsieh) (noting negative impact that Proposition 227 will likely have on Asian Americans); see also Jim Chen, Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny, 59 Ohio St. L.J. 811, 856-60 (1998) (collecting data showing great language diversity in United States). Indeed, Native Americans in California, often not thought of as linguistic minorities, may be adversely affected. See Scott Ellis Ferrin, Reasserting Language Rights of Native American Students in the Face of Proposition 227 and Other Language-Based Referenda, 28 J.L. & Educ. 1 (1999).

In our analysis, we recognize that the initiative "will not necessarily coincide with color lines" and will affect "white immigrants from Eastern Europe" as well as Latinas/os. Peter J. Spiro, Questioning Barriers to Naturalization, [13 Geo. Immigr. L.J. 479, 492 n.63 \(1999\)](#) (discussing English language requirement for naturalization). However, language, under particular facts and circumstances, can serve as a proxy for race, which we establish in this Article.

n6 We use the term "race" here interchangeably with national origin, based on the view that race, like national origin, is a social construction. See generally Michael Omi & Howard Winant, *Racial Formation in the United States* (2d ed. 1994) (elaborating on theory of social construction of race).

n7 See Christopher David Ruiz Cameron, How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy, [85 Cal. L. Rev. 1347, 1354 \(1998\)](#) ("Spanish language is central to Latino identity."); Deborah A. Ramirez, Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service, [1993 Wis. L. Rev. 761, 763 n.8](#) (stating that "being Latino and speaking Spanish are 'intrinsically interwoven' because in the Latino community, language is an affirmative badge of ethnic identity") (citations omitted); see also [Hernandez v. New York, 500 U.S. 352, 371-72 \(1991\)](#) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."); Berta Esperanza Hernandez-Truyol, Las Olvidadas -Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law, 1 Iowa J. Gender, Race & Justice 353, 379-81 (1998) (analyzing how marginalization of Spanish language in U.S. adversely affects Latinas/os). For this reason, "language rights have been a central issue in LatCrit theory since its inception." Elizabeth M. Iglesias, Foreword: Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evaluation of LatCrit Theory and Community, [53 U. Miami L. Rev. 575, 646 \(1999\)](#) (footnote omitted).

The Article employs the term Latina/o, rather than "Hispanic," because it "conveys an alignment with people of color in [the United States], as well as the embrace of the non-Spanish, or indigenous elements that help to configure our present-day communities." Elizabeth M. Iglesias & Francisco Valdes, Afterword -- Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas, [19 Chicano-Latino L. Rev. 503, 569 \(1998\)](#).

n8 See *infra* text accompanying notes 218-24 (analyzing litigation).

n9 [426 U.S. 229 \(1976\)](#).

n10 See, e.g., Theodore Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36 (1977); Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, [91 Mich. L. Rev. 953 \(1993\)](#); Alan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049, 1114-18 (1978); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, [39 Stan. L. Rev. 317 \(1987\)](#); Daniel R. Ortiz, The Myth of Intent in Equal Protection, [41 Stan. L. Rev. 1105 \(1989\)](#); see also Sheila Foster, Intent and Incoherence, [72 Tul. L. Rev. 1065 \(1998\)](#) (offering a more flexible "intent" standard to be applied by the Court); Andrew D. Leipold, Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law, [73 Chi.-Kent L. Rev. 559, 551-63 \(1998\)](#) (summarizing difficulties of proving discriminatory intent in criminal law enforcement). See generally Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know*

How Legal Standards Work?, [76 Cornell L. Rev. 1151 \(1991\)](#) (studying negative impacts of intent requirement on plaintiffs trying to prove Equal Protection claims). For analysis of the case law and literature in the area with a particular focus on lawmaking by initiative, see Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, [60 Ohio St. L.J. 399 \(1999\)](#) [hereinafter Lazos, *Judicial Review*] and Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, [58 Md. L. Rev. 150, 161-77 \(1999\)](#).

n11 In a similar vein, Professor Girardeau Spann contends that voters passed California Proposition 209, which bars consideration of race and gender in state programs, with a discriminatory intent. See Girardeau A. Spann, *Proposition 209*, [47 Duke L.J. 187, 300-14 \(1997\)](#); see also Erwin Chemerinsky, *The Impact of the Proposed California Civil Rights Initiative*, 23 *Hastings Const. L.Q.* 999 (1996) (explaining legal ramifications of initiative); Neil Gotanda et al., *Legal Implications of Proposition 209 -- The California Civil Rights Initiative*, 24 *W. St. L. Rev.* 1 (1996) (same); Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, [44 UCLA L. Rev. 1335 \(1997\)](#) (same). The courts upheld the measure, which was challenged on another sort of Equal Protection theory. See, e.g., *Coalition for Econ. Equity v. Wilson*, [122 F.3d 692 \(9th Cir. 1997\)](#), cert. denied, [522 U.S. 963 \(1997\)](#); see also Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 *Hastings Const. L.Q.* 1019 (1996) (articulating Equal Protection theory based on *Hunter v. Erickson*, [393 U.S. 385 \(1982\)](#), line of cases that initiative created political structure that racial minorities will find difficult to modify). This Article focuses on the discriminatory intent approach rather than the "political structure" Equal Protection challenge. In making this argument, we necessarily disagree with the characterization that proving that Proposition 227 was passed with a discriminatory intent is "futile." See Nirej Sekhon, *Note, A Birthright Rearticulated: The Politics of Bilingual Education*, [74 N.Y.U. L. Rev. 1407, 1442 \(1999\)](#).

n12 See *infra* text accompanying notes 129-217. Proving a discriminatory intent is made all the more difficult by the fact that two Latina/o intellectuals popularized by the media have ardently advocated the elimination of bilingual education. See Linda Chavez, *Out of the Barrio: Toward a New Politics of Hispanic Assimilation* (1991); Richard Rodriguez, *Hunger for Memory: The Education of Richard Rodriguez* (1981).

n13 See *Smith v. Boyle*, [144 F.3d 1060, 1064-65 \(7th Cir. 1997\)](#) (Posner, C.J.). Such historical research, of course, is not impossible. See, e.g., Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace -- and Denial -- of Equal Opportunity in Higher Education*, [70 U. Colo. L. Rev. 704 \(1999\)](#) (documenting history of discrimination against racial minorities in Colorado to demonstrate the need for remedial affirmative action). Our point is that such research is easier to conduct earlier as opposed to later, after memories have faded and documentary evidence has been lost.

n14 Many commentators discuss discrimination by proxy. See, e.g., Larry Alexander, *What Makes Wrongful Discrimination Wrong? Bias, Preferences, Stereotypes, and Proxies*, [141 U. Pa. L. Rev. 149 \(1992\)](#); Larry Alexander & Kevin Cole, *Discrimination by Proxy*, [14 Const. Commentary 453 \(1997\)](#); Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, [86 Cal. L. Rev. 315 \(1998\)](#); see also Alfredo Mirande, "Now that I Speak English, No Me Dejan Hablar ['I'm Not Allowed to Speak']": The Implications of *Hernandez v. New York*, [18 Chicano-Latino L. Rev. 115, 132 \(1996\)](#) (arguing "that the exclusion of bilingual Latino jurors [at issue in *Hernandez v. New York*, [500 U.S. 352 \(1991\)](#)] is racial discrimination not only because language and race are inextricably linked but because bilingualism is itself an immutable characteristic"); Susan Kiyomi Serrano, *Comment, Rethinking Race for Strict*

Scrutiny Purposes: Yniguez and the Racialization of English Only, [19 Haw. L. Rev. 221 \(1997\)](#) (contending that, under certain circumstances, concept of "race" may include language and that, in those circumstances, courts should strictly scrutinize language regulation).

n15 Richard Delgado & Jean Stefancic, *Critical Race Theory: Past, Present, and Future*, 51 *Current Leg. Probs.* 468, 491 (1998).

n16 See generally Rodolfo F. Acuna, *Occupied America: A History of Chicanos* 107-33 (3d ed. 1988); Tomas Almaguer, *Racial Fault Lines: The Historical Origins of White Supremacy in California* (1994); Leonard Pitt, *The Decline of the Californios: A Social History of the Spanish Speaking Californians, 1846-1890* (1966).

n17 See generally Neil Foley, *The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture* (1997); David Montejano, *Anglos and Mexicans in the Making of Texas, 1836-1986* (1987).

n18 See Acuna, *supra* note 16, at 82-103.

n19 See [Brown v. Board of Educ., 347 U.S. 483, 494 \(1954\)](#) ("[Separating children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.").

n20 Several sources recount these facts. See, e.g., Robert R. Alvarez Jr., *Familia: Migration and Adaptation in Baja and Alta California, 1800-1975*, at 153-55 (1987); Francisco E. Balderrama, *In Defense of La Raza* 58-61 (1982); Robert R. Alvarez, Jr., *The Lemon Grove Incident: The Nation's First Successful Desegregation Case*, 32 *J. San Diego Hist.* 116 (1986); *The Lemon Grove Incident* (The Cinema Guild, 1985).

n21 See generally Jorge C. Rangel & Carlos M. Alcala, *Project Report, De Jure Segregation of Chicanos in Texas Schools*, 7 *Harv. C.R.-C.L. L. Rev.* 307 (1972) (documenting segregation of Mexican Americans in public schools); Guadalupe Salinas, *Mexican Americans and the Desegregation of Schools in the Southwest*, 8 *Hous. L. Rev.* 929 (1971) (same).

n22 [161 F.2d 774 \(9th Cir. 1947\)](#).

n23 [Id. at 776](#).

n24 [163 U.S. 537 \(1896\)](#) (upholding segregation on passenger trains); see also John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 452 (4th ed. 1991) (discussing cases upholding state laws authorizing segregation).

n25 See [Mendez, 161 F.2d at 779-81](#).

n26 See [id. at 780-81](#).

n27 See [id. at 781](#) (noting that California could legislatively authorize this type of segregation).

n28 See [id. at 784](#). The court stated that:

English language deficiencies of some of the children of Mexican ancestry . . . may justify differentiation by public school authorities in the exercise of their reasonable discretion as to the pedagogical methods of instruction to be pursued with different pupils, and foreign language handicaps may be to such a degree in the pupils in elementary schools as to require separate treatment in separate classrooms.

*Id.*

n29 [Id. at 780.](#)

n30 See Julie Leininger Pycior, *LBJ & Mexican Americans* 53 (1997).

n31 [Mendez, 161 F.2d at 780.](#)

n32 [347 U.S. 483 \(1954\)](#); see also Derrick Bell, *Race, Racism and American Law* 544 (3d ed. 1992) ("As with other landmark cases, the Supreme Court's 1954 decision in *Brown v. Board of Education* has taken on a life of its own, with meaning and significance beyond its facts and perhaps greater than its rationale"); Constance Baker Mottley, *The Historical Setting of Brown and Its Impact on the Supreme Court's Decision*, [61 Fordham L. Rev. 9, 13 \(1992\)](#) (stating that Brown's "new approach to attacking segregation, per se, in education had been inspired by Mendez").

n33 See [Brown, 347 U.S. at 495.](#)

n34 [488 F.2d 579 \(9th Cir. 1973\)](#), cert. denied, [416 U.S. 951 \(1974\)](#).

n35 See [id. at 580, 584.](#)

n36 See [id. at 585.](#)

n37 [413 U.S. 189 \(1973\)](#).

n38 [Soria, 488 F.2d at 585](#). On remand, Judge Pregerson found sufficient evidence of intentional segregation to justify relief. See [Soria v. Oxnard Sch. Dist., 386 F. Supp. 539 \(C.D. Cal. 1974\)](#).

n39 See [Keyes, 413 U.S. at 212](#) ("We have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of finding that school authorities have committed acts constituting de jure segregation."); [Arthur v. Nyquist, 415 F. Supp. 904, 912 n.10 \(W.D.N.Y. 1976\)](#) ("Since the plaintiffs in *Keyes* pleaded and proved de jure segregation, the Supreme Court was not forced to decide whether merely proof of de facto segregation constitutes cognizable legal wrong."); The Supreme Court, 1973 Term, 88 Harv. L. Rev. 43, 70 n.58 (1974) (stating "constitutionality of de facto segregation" was "explicitly left open in *Keyes*"); Comment, *Public School Segregation and the Contours of Unconstitutionality: The Denver School Board Case*, 45 U. Colo. L. Rev. 457, 475-76 (1974) ("The questions as to the necessity of proving intent [to segregate] . . . were . . . never at issue in the Supreme Court's consideration of *Keyes* . . . . The distinction between de jure and de facto segregatory conditions was never really at issue in the Court's consideration of *Keyes*. . . ."); see also Rachel F. Moran, *Milo's Miracle*, [29 Conn. L. Rev. 1079, 1085-87 \(1997\)](#) (discussing implications of *Keyes*).

n40 See generally Richard Delgado & Jean Stefancic, *Failed Revolutions: Social Reform and Limits of Legal Imagination* (1994); Gerald N. Rosenberg, *The Hollow Hope: Can the Courts Bring About Social Change?* (1991); Girardeau A. Spann, *Race Against the Court: The Supreme Court and Minorities in Contemporary America* (1993).

n41 See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, [48 Vand. L. Rev. 101, 123-24 \(1995\)](#); see also Martha Minow, *Reforming School Reform*, [68 Fordham L. Rev. 257 \(1999\)](#) (contending that education advocates should rethink various strategies to ensure quality education in public schools). For analysis of the role of race in the success of school finance litigation, see James E. Ryan, *The Influence of Race in School Finance Reform*, [98 Mich. L. Rev. 432 \(1999\)](#).

n42 [5 Cal. 3d 584, 96 Cal. Rptr. 601 \(1971\)](#).

n43 [411 U.S. 1 \(1973\)](#).

n44 See [Serrano, 5 Cal. 3d at 589-90, 96 Cal. Rptr. at 604](#).

n45 [Id. at 604, 96 Cal. Rptr. at 615](#).

n46 [Id. at 608-09, 96 Cal. Rptr. at 618](#).

n47 See [id. at 609-15, 96 Cal. Rptr. at 619-23](#).

n48 See [id. at 614-15, 96 Cal. Rptr. at 623](#).

n49 [411 U.S. 1 \(1973\)](#).

n50 See [id. at 28, 37](#).

n51 See [id. at 55](#). After Rodriguez, efforts shifted to state law to ensure educational opportunity through school finance litigation. See Enrich, *supra* note 41, at 128-93 (analyzing developments in school finance litigation under state law after Rodriguez).

n52 [18 Cal. 3d 728, 135 Cal. Rptr. 345, 374 \(1976\)](#), cert. denied sub nom., [Clowes v. Serrano, 432 U.S. 907 \(1977\)](#).

n53 See William A. Fischel, How Serrano Caused Proposition 13, [12 J.L. & Pol. 607, 611 \(1997\)](#); see also Martha S. West, Equitable Funding of Public Schools Under State Law, 2 Iowa J. Gender, Race & Just. 279, 299-309 (1999) (discussing how Serrano was seriously undermined by Proposition 13 and analyzing developments in other states to same effect).

n54 See Fischel, *supra* note 53, at 611.

n55 Cal. Const. art. XIII A, § § 1-6.

n56 See Fischel, *supra* note 53, at 612. See generally Robert Kuttner, Revolt of the Haves (1980) (discussing genesis of Proposition 13).

n57 Fischel, *supra* note 53, at 613.

n58 See Rodolfo F. Acuna, Anything but Mexican: Chicanos in Contemporary Los Angeles 91-93 (1996).

n59 See generally Hanif S. P. Hirji, Note and Comment, Inequalities in California's Public School System: The Undermining of Serrano v. Priest and the Need for a Minimum Standards System of Education, [32 Loy. L.A. L. Rev. 583 \(1999\)](#) (analyzing how school financing perpetuates educational inequality).

n60 See Note, Unfulfilled Promises: School Finance Remedies and State Courts, [104 Harv. L. Rev. 1072 \(1991\)](#). States other than California have experienced similar difficulties in ensuring equitable public school financing schemes. See, e.g., [Edgewood Ind. Sch. Dist. v. Meno, 893 S.W.2d 450 \(Tex. 1995\)](#) (reviewing efforts of Texas legislature to ensure compliance with finding that school financing system violated various provisions of Texas Constitution).

n61 See Fischel, *supra* note 53, at 613 ("Throughout the 1980s, California was last or near last in the country in terms of the percent of personal income spent on public education. What is not often noticed is that the decline began soon after Serrano.") (footnote omitted); see also *infra* notes 82-88 (providing statistics on rapid decline in California's spending per pupil in public schools as Latina/o percentage of student body increased).

n62 See Hirji, *supra* note 59, at 596 (citing Paul M. Goldfinger, Revenues and Limits: A Guide to School Finance in California 8 tbl.11 (1997)).

n63 [414 U.S. 563 \(1974\)](#). See generally James Crawford, *Bilingual Education: History, Politics, Theory and Practice* (3d ed. 1995) (outlining history of bilingual education in United States); U.S. Comm'n on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and Lau v. Nichols* (1997) (summarizing efforts to enforce *Lau v. Nichols*). It is at best uncertain how effective *Lau v. Nichols* has been in protecting language minorities in public education. See [Flores v. Arizona, 48 F. Supp.2d 937 \(D. Ariz. 1999\)](#) (addressing in 1999 motion in action filed in 1992 based on *Lau*).

n64 See [Lau, 414 U.S. at 568](#).

n65 See Cal. Educ. Code § § 52160-52178 (Deering 1987); see also Rachel F. Moran, *Bilingual Education, Immigration, and the Culture of Disinterest*, 2 *Iowa J. Gender, Race & Just.* 163, 169-75 (1999) (tracing recent history of bilingual education in California and other states).

n66 See [Cal. Educ. Code § 52165](#) (Deering 1987).

n67 See Stuart Biegel, *The Parameters of the Bilingual Education Debate in California Twenty Years After Lau v. Nichols*, 14 *ChicanoLatino L. Rev.* 48, 54 (1994).

n68 See *id.* at 55.

n69 See *Good Morning America* (ABC television broadcast, May 31, 1998)(remarks of Professor Raul Hinojosa-Ojeda) ("Proposition 227 is basically a reaction against the fact that there's a demographic change occurring in the state, and that some people are very anxious about what this demographic change will mean."); cf. Spann, *supra* note 11, at 312 (arguing that demographic changes -- i.e., that "whites will soon cease to be a majority in the state of California" -- strengthened case for finding of discriminatory intent underlying passage of Proposition 209, outlawing various affirmative action programs under state law).

n70 Fredric C. Gey et al., *California Latina/Latino Demographic Data Book 1* (1993).

n71 See *id.*

n72 See *id.* at 1, 7, tbl.1-1.

n73 See RAND California, *Population Projections* <<http://www.ca.rand.org/cgi-bin/annual.cgi>> (visited Apr. 24, 2000) (on file with author).

n74 See generally David E. Hayes-Bautista, *No Longer a Minority: Latinos and Social Policy in California* (1992).

n75 See Gey et al., *supra* note 70, at 9 tbls.1-3 & fig.1-3. Latinas/os, African Americans, and Asians together accounted for 32% of the state's population in 1980 (19% Latina/o, 8% African American, and 5% Asian) and 44% in 1990 (25% Latina/o, 7% African American, and 9% Asian). See *id.* at 8 fig.1-2.

n76 See *id.* at 21 tbl.2-5.

n77 Jon Stiles et al., *California Latino Demographic Databook 2-4* (California Policy Seminar publication 1998).

n78 See RAND California, *supra* note 73.

n79 See *id.* ("New Home Buyers: Most Common Surnames" table).

n80 See *id.* at 2 ("Then and Now: Origins of Legal Immigrants" table).

n81 See Julie Hoang, California Legal Immigrants -- Federal Fiscal Year 1995, Cal. Demographics, Winter 1997, at 1, 6 (Cal. Dep't of Finance newsletter).

n82 See Gey et al., supra note 70, at 8 fig.1-2.

n83 Cal. Dep't of Educ., Enrollment in California Public Schools by Ethnic Group, 1981-82 through 1997-98, at 1, available in <<http://www.cdc.ca.gov/demographics/reports/statewide/ethstud.htm>> (visited Apr. 10, 1999) (on file with author). In 1996-1997, Latinas/os constituted 39.7 % with whites at 39.5% and Asians 11.2 %, of public school enrollments on California. See Gary Orfield & John T. Yun, Resegregation in American Schools 7 tbl.3 (1999).

n84 See Cal. Dep't of Educ., Number of Limited-English-Proficient (LEP) Students and Students Redesignated as Fluent-English-Proficient (LEP) in California Public Schools, 1982 Through 1998, at 1, available in <<http://www.cdc.ca.gov/demographics/reports/statewide/redes98/htm>> (visited Apr. 10, 1999) (on file with author). Portions of this information are reproduced graphically below, in Figures 1 and 2.

n85 See id. at 1 (reporting that in 1998 Hispanic LEP students constituted 24.6% of all enrollment).

n86 Id.

n87 Orfield & Yun, supra note 83, at 2.

n88 See id. at 8 tbl.4.

n89 See supra text accompanying notes 69-88.

n90 See Kevin R. Johnson, Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class, [42 UCLA L. Rev. 1509 \(1995\)](#); 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 \(1995\)](#) [hereinafter Johnson, Immigration Politics]. A district court enjoined this measure's implementation. See [League of United Latin American Citizens v. Wilson, 908 F. Supp. 755 \(C.D. Cal. 1995\)](#). While an appeal was pending, the parties settled the action. See Patrick J. McDonnell, Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles, L.A. Times, July 29, 1999, at A1.

n91 See Johnson, Immigration Politics, supra note 90, at 658-59 & n.143.

n92 See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § § 400-51, 110 Stat. 2105, 2260-77.

n93 See Linda Kelly, Defying Membership: The Evolving Role of Immigration Jurisprudence, [67 U. Cin. L. Rev. 185, 197-209 \(1998\)](#). Not coincidentally, the number of denials of naturalization petitions have risen significantly. See Patrick J. McDonnell, INS Denials of Citizenship Climb Sharply, L.A. Times, June 14, 1999, at A1 (reporting that INS denials rose by 25% during first sixth months of 1998-99 fiscal year, including 1624% increase in Los Angeles INS office).

n94 See Kevin R. Johnson, Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness, [73 Ind. L.J. 1111, 1136-40 \(1998\)](#).

n95 See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § § 501-553, 1010 Stat. 3009, 367081; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § § 423, 502, 110 Stat. 2105, 2260-77.



n96 For analysis of the criminalization of immigration, see Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, [9 \*Hastings Women's L.J.\* 79 \(1998\)](#) and Maria Isabel Media, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, [5 \*Geo. Mason L. Rev.\* 669 \(1997\)](#).

n97 See Patrick J. McDonnell, *Deportations Increase Almost 50% in U.S.*, *L.A. Times*, Jan. 9, 1999, at A17 (reporting on release of latest INS statistical data on removals). Most immigration law scholarship ignores the disparate racial impacts of such strategies. See, e.g., Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, [22 \*Harv. J.L. & Pub. Pol'y\* 368 \(1999\)](#). See generally Special Issue, *Race and Immigration Law? A Paradigm Shift*, 2000 *U. Ill. L. Rev.* (forthcoming) (analyzing failure of mainstream immigration law scholarship to consider race).

n98 See National Council of La Raza, *The Mainstreaming of Hate: A Report on Latinos and Harassment, Hate Violence, and Law Enforcement Abuse in the '90s* (1999).

n99 See Jody D. Armour, *Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America* (1997) (analyzing impact of white fears of Black criminality); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, [105 \*Yale L.J.\* 677 \(1995\)](#) (advocating jury nullification by African American juries in cases involving African American defendants accused of certain non-violent crimes); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, [67 \*Fordham L. Rev.\* 13 \(1998\)](#) (analyzing impact of race on exercise of prosecutorial discretion); David A. Sklansky, *Cocaine, Race, and Equal Protection*, [47 \*Stan. L. Rev.\* 1283 \(1999\)](#) (analyzing significance of racial disparate impact of crack cocaine laws). For an analysis of crime and the African American community, see Randall Kennedy, *Race, Crime and the Law* (1997).

n100 See Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, [105 \*Yale L.J.\* 1563, 1563 \(1996\)](#) ("Racial politics has so dominated welfare reform efforts that it is commonplace to observe that 'welfare' has become a code word for race. When Americans discuss welfare, many have in mind the mythical Black 'welfare queen' or profligate teenager who becomes pregnant at taxpayers' expense to fatten her welfare check. Although most welfare recipients are not Black, Black single mothers do rely on a disproportionate share of Aid to Families with Dependent Children.") (footnote omitted); Sylvia A. Law, *Ending Welfare as We Know It*, [49 \*Stan. L. Rev.\* 471, 493 \(1997\)](#) ("The popular perception is that welfare mothers are black, and while racism has become socially and legally unacceptable, condemning welfare mothers remains as American as apple pie.") (footnote omitted).

n101 Previously, the Board of Regents of the University of California had barred consideration of race in admissions decisions. See Jeffrey B. Wolff, *Comment, Affirmative Action in College and Graduate School Admissions -- The Effects of Hopwood and the Actions of the U.C. Board of Regents*, [50 \*SMU L. Rev.\* 627 \(1997\)](#). In recent years, the state college and university systems in California began charging undocumented persons resident in the state the higher fees charged to nonresidents, which has had predictably negative impacts on persons of Mexican ancestry. See Michael A. Olivas, *Storytelling out of School: Undocumented College Residency, Race, and Reaction*, 22 *Hastings Const. L.Q.* 1019 (1995).

n102 See Spann, *supra* note 11, at 293 ("Proposition 209 is ultimately best understood as an effort to discount the interests of women and racial minorities in order to advance the interests of white males."); see also Deborah Waire Post, *The Salience of Race*, 15 *Touro L. Rev.* 351, 373 (1999) ("The anti-affirmative action movement is fueled by the assumption that blacks are inferior to whites and that they are being given something they do not deserve.").

n103 See Elections '96; State Propositions: A Snapshot of Voters, L.A. Times, Nov. 7, 1996, at A29 (reporting exit poll results showing that 61% of male voters supported Proposition 209 compared to 48% of female voters and that 63% of white voters supported the measure compared to 26% of Black, 24% of Latina/o, and 39% of Asian American voters).

n104 See, e.g., [Adarand Constructors, Inc. v. Pena, 515 U.S. 200 \(1995\)](#) (holding that all racial classifications, including those in federal program designed to foster minority businesses, are subject to strict scrutiny); [Hopwood v. Texas, 78 F.3d 932 \(5th Cir. 1996\)](#) (finding unconstitutional University of Texas law school affirmative action plan), cert. denied sub nom., [518 U.S. 1033 \(1996\)](#).

n105 See David Montejano, On the Future of Anglo-Mexican Relations in the United States, in *Chicano Politics and Society in the Late Twentieth Century* 234, 244 (David Montejano ed., 1999) ("The English-only movement, the anti-immigration campaign, the anti-civil rights sentiment, the reaction to multiculturalism, and so on, all manifest a conservative 'lifeboat' reflex to the changing demographics of the United States, and of the Southwest in particular."); Guadalupe T. Luna, LatCrit Theory, "Don Pepe" and Senora Peralta, [19 Chicano-Latino L. Rev. 339, 349-50 \(1998\)](#) (stating that restrictionist immigration laws, affirmative action rollbacks, Englishonly, and welfare "reform" are propagated by political leaders "who address the public through the use of racial images and stereotypes that are derogatory towards Mexicans and those of Mexican descent") (footnote omitted).

n106 [Reitman v. Mulkey, 387 U.S. 369, 378 \(1967\)](#) (invalidating initiative that effectively offered state approval of private discrimination); see also [Crawford v. Board of Educ., 458 U.S. 527, 543 \(1982\)](#).

n107 See Julian Samora & Patricia Vandel Simon, *A History of the Mexican American People* 162 (rev. ed. 1993). As Professor Cruz Reynoso has described:

I grew up before we had bilingual education. We were punished for speaking Spanish in school. It was well intentioned; the teachers wanted us to learn English. Many of us, however, took it as an attack upon our culture, language, upon everything that we stood for. That educational experience turned negative rather than positive. Proposition 227 . . . has been viewed by the Latino community as an abrasive anti-Latino step taken by the electorate.

Cruz Reynoso, The Role of Assets in Assuring Equity, [21 U. Ark. Little Rock L. Rev. 743, 754-55 \(1999\)](#).

n108 See supra text accompanying notes 63-68.

n109 Rachel F. Moran, Bilingual Education as Status Conflict, [75 Cal. L. Rev. 321, 326 \(1987\)](#) (footnote omitted) [hereinafter Moran, Status Conflict]; see Acuna, supra note 58, at 293-94 (focusing on bilingual education debate in 1980s and 1990s). For analysis of the legal history surrounding bilingual education, see Moran, Status Conflict, supra, at 326-41 and Rachel F. Moran, The Politics of Discretion: Federal Intervention in Bilingual Education, [76 Cal. L. Rev. 1249 \(1988\)](#) (analyzing federal intervention in bilingual education as a fight for control with states for ability to establish educational policy).

n110 [414 U.S. 563 \(1974\)](#); see also supra text accompanying notes 63-68 (discussing Lau in context of history of bilingual education litigation).

n111 See Gloria Sandrino-Glasser, Los Confundidos: De-Conflating Latinas/os' Race and Ethnicity, [19 Chicano-Latino L. Rev. 69, 14748 \(1998\)](#); see also Note, "Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States, [100 Harv. L. Rev. 1345, 1357-59 \(1987\)](#) (contending that "a strong case can be made for the proposition that the designs

of English-only advocates satisfy the intent requirement" for proving Equal Protection violation).

n112 See, e.g., [Yu Cong Eng v. Trinidad, 271 U.S. 500, 524-28 \(1926\)](#) (holding that law prohibiting Chinese merchants from keeping books in Chinese violated their Equal Protection rights); [Sandoval v. Hagan, 197 F.3d 484 \(11th Cir. 1999\)](#) (finding that Alabama policy of offering driver's license examinations only in English discriminates against non-English speakers and national origin minorities); [Olagues v. Russoniello, 797 F.2d 1511 \(9th Cir. 1986\)](#) (finding that investigation of those who requested bilingual ballots, which were printed only in Spanish and Chinese, discriminated on basis of national origin), vacated as moot, [484 U.S. 806 \(1987\)](#); see also [Garcia v. Spun Steak Co., 13 F.3d 296, 298-99 \(9th Cir. 1993\)](#) (Reinhardt, J., dissenting from denial of rehearing en banc) (emphasizing that language regulation can mask impermissible race discrimination); [Gutierrez v. Municipal Court, 838 F.2d 1031, 1038-40 \(9th Cir. 1988\)](#) (same), vacated as moot, [490 U.S. 1016 \(1989\)](#).

n113 Indeed, evidence suggests that racism is at the core of certain English only organizations. One well-known group, for example, was publicly embarrassed when a racist, anti-Latina/o document came to light that forced a prominent Latina leader to resign. See Chavez, supra note 12, at 91-92 (describing incident).

n114 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 \(1993\)](#); see e. christi cunningham, The "Racing" Cause of Action and the Identity Formerly Known as Race: The Road to Tamazunchale, [30 Rutgers L.J. 707, 709-10 \(1999\)](#) (discussing connection between culture and race).

n115 See Moran, Status Conflict, supra note 109, at 341-45.

n116 See, e.g., [Garcia v. Spun Steak Co., 998 F.2d 1480 \(9th Cir. 1993\)](#), cert. denied, [512 U.S. 1228 \(1994\)](#) (holding that employer's English only rule did not violate Title VII); [Gutierrez, 838 F.2d at 1031](#) (enjoining enforcement of English-only rule); [Long v. Baeza, 894 F. Supp. 933 \(E.D. Va. 1995\)](#) (finding that similar policy did not violate Title VII); [Garcia v. Gloor, 618 F.2d 264 \(5th Cir. 1980\)](#) (upholding employers English-only rule); [EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 2d 911 \(N.D. Ill. 1999\)](#) (holding that EEOC had stated valid claim based on employer's English-only rule).

n117 See, e.g., Bill Piatt, "Only English?" Law and Language Policy in the United States (1990); Mark L. Adams, Fear of Foreigners: Nativism and Workplace Language Restrictions, [74 Or. L. Rev. 849 \(1995\)](#); Stephen W. Bender, Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience, [2 Harv. Latino L. Rev. 145 \(1997\)](#); Antonio J. Califa, Declaring English the Official Language: Prejudice Spoken Here, 24 Harv. C.R.-C.L. L. Rev. 293 (1989); Cameron, supra note 7; Drucilla Cornell & William W. Bratton, Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish, [84 Cornell L. Rev. 585 \(1999\)](#); see also Lazos, Judicial Review, supra note 10, at 399, 433-47, 551-52 (listing English-only and bilingual education initiatives passed by states in recent years).

n118 See Michael W. Valente, Comment, One Nation Divisible by Language: An Analysis of Official English Laws in the Wake of Yniguez v. Arizonans for Official English, [8 Seton Hall Const. L.J. 205, 209-10 \(1997\)](#) (compiling various English only laws proposed in Congress and those enacted by states). Discrimination on the basis of accent is a related concern. See Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, [100 Yale L.J. 1325 \(1991\)](#); see also [Fragante v. City of Honolulu, 888 F.2d](#)

[591 \(9th Cir. 1989\)](#) (addressing Title VII claim alleging accent discrimination); [Carino v. University of Oklahoma, 750 F.2d 815, 819 \(10th Cir. 1984\)](#) ("A foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions."); [Forsythe v. Board of Education, 956 F. Supp. 927 \(D. Kan. 1997\)](#) (quoting Carino).

n119 See, e.g., Arthur M. Schlesinger, Jr., *The Disuniting of America* (1992).

n120 Lazos, *Judicial Review*, supra note 10, at 442.

n121 See id. at 435-40.

n122 Id. at 445. As Professor Rachel Moran has observed:

Participants in the debate over bilingual education have often responded in deeply emotional ways that seem to transcend immediate concerns with the allocation of scarce resources. Some have openly acknowledged that more than pedagogy is at stake because government support of bilingual education signals acceptance of and respect for the Hispanic community.

Moran, *Status Conflict*, supra note 109, at 341 (emphasis added) (footnote omitted).

n123 See T. Alexander Aleinikoff & Ruben G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, [13 Geo. Immigr. L.J. 1, 14 \(1998\)](#) (stating that, in light of strong empirical evidence that immigrants learn English, initiatives like Proposition 227 "seem aimed less at pursuing the intended goal (teaching English) than at tightening the circle of membership"); Terry, supra note 1 ("Proposition 227 is about much more than what is printed in the initiative. It is about race, class, culture, shifting demographics, politics, fear and sometimes even education.").

n124 See Cal Const. art. III, § 6; see also Moran, *Status Conflict*, supra note 109, at 332 n.63 (reporting survey results reflecting racially polarized vote).

n125 Moran, *Status Conflict*, supra note 109, at 332 (footnote omitted). One complicating factor was that the measure was supported by a Japanese American, U.S. Senator S.I. Hayakawa. See id. at 331-32. Oddly enough, Hayakawa wrote that, although he supported the proposition, he was "a firm believer in effective bilingual education." See S.I. Hayakawa, *A Common Language, So All Can Pursue Common Goals*, *L.A. Times*, Oct. 29, 1986, at B5.

n126 Julian N. Eule, *Judicial Review of Direct Democracy*, [99 Yale L.J. 1503, 1567 \(1990\)](#) (footnotes omitted).

n127 Id.

n128 See infra text accompanying notes 129-217.

n129 See infra text accompanying notes 130-217.

n130 See Cal. Prop. 227, § 1, codified at Cal. Educ. Code ch. 3 (West Supp. 1999).

n131 "English for the Children" was also the name of the principal group advocating passage of Proposition 227. Its chairman was Ron Unz, who drafted the initiative. See, e.g., *Ballot Pamphlet*, supra note 2, at 34 (*Argument in Favor of Proposition 227*).

n132 Cal. Prop. 227, § 300(b), codified at Cal. Educ. Code ch. 3 (West Supp. 1999) (emphasis added).

n133 Id. § 300(d) (emphasis added).

n134 Id. (emphasis added).

n135 Id. § 300(e) (emphasis added).

n136 See supra text accompanying notes 80-81.

n137 See supra text accompanying notes 80-81. This does not include undocumented immigrants. In October 1996, the estimated undocumented population in California was about two million with immigrants from Mexico constituting roughly 54% of the total undocumented population. See U.S. Dep't of Justice, 1997 Statistical Yearbook of the Immigration and Naturalization Service 200 tbl.N (1999) [hereinafter INS Statistical Yearbook].

n138 See Hoang, supra note 81, at 1, 6 (reporting that, in 1995, 20% of all legal immigrants intending to settle in California were born in Mexico).

n139 See California Basic Educational Data System, Public School Summary Statistics, 1998-99, at 3, available online at <<http://www.cdc.ca.gov/demographics/reports/statewide/sums98.htm>> (visited Aug. 3, 1999) (K-12 enrollment, by ethnic group).

n140 See Gey et al., supra note 70, at 34 tbls.3-5. Almost onefourth lived in Asian-language-speaking homes and five percent in other-language-speaking homes. See id.

n141 See, e.g., [Valeria G. v. Wilson, 12 F. Supp. 1007, 1011 \(N.D. Cal. 1998\)](#); see also supra text accompanying notes 84-86 (discussing increased numbers of Latina/o limited English proficient students in California schools).

n142 See Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, at 51 n.86 (relying on Exhibit B to Declaration of Christopher Ho), Valeria G. v. Wilson, Case No. C 98-2252 CAL (N.D. Cal. 1998).

n143 See id.

n144 [Cal. Educ. Code § 300\(a\)](#) (West Supp. 1999).

n145 See Aleinikoff & Rumbaut, supra note 123, at 11-14 (reviewing empirical data).

n146 [Cal. Educ. Code § 305](#) (West Supp. 1999).

n147 See, e.g., [Pierce v. Society of Sisters, 268 U.S. 510 \(1925\)](#) (invalidating state law requiring all children to attend public school).

n148 See, e.g., Betsy Streisand, Is It Hasta la Vista for Bilingual Ed?, U.S. News & World Rep., Nov. 24, 1997, at 36, 38 (quoting University of California, Davis Professor Patricia Gandara, who has conducted extensive research on subject).

n149 [Cal. Educ. Code § 310](#) (West Supp. 1999).

n150 Id. (emphasis added). For discussion of various issues that have arisen concerning waivers, see Thomas F. Felton, Comment, Sink or Swim? The State of Bilingual Education in the Wake of California's Proposition 227, [48 Cath. U.L. Rev. 843, 871-73 \(1999\)](#) and supra note 3, citing cases involving Proposition 227, including one that involved parental waivers.

n151 See Gregory Rodriguez, English Lesson in California, Nation, Apr. 20, 1998, at 15.

n152 Ballot Pamphlet, supra note 2, at 34 (Argument in Favor of Proposition 227).

n153 Id..

n154 Id.

n155 Id.

n156 As it turned out, the polling was inaccurate; Latinas/os voted against the initiative by a margin of nearly two to one. See *infra* text accompanying notes 199-217.

n157 Ballot Pamphlet, *supra* note 2, at 35 (Rebuttal to Argument Against Proposition 227). Along similar lines, Proposition 227 proponents argued that California lacked the financial resources to effectively implement bilingual education, which long had been criticized from many fronts. See Amy S. Zabetakis, Note, Proposition 227: Death for Bilingual Education, [13 Geo. Immigr. L.J. 105, 120-22 \(1998\)](#); see also *supra* text accompanying notes 41-62 (analyzing inequality in California public schools caused by school finance system).

n158 See Johnson, Immigration Politics, *supra* note 90, at 654-58 (documenting disturbing anti-Latina/o statements made by drafters Ron Prince and Barbara Coe and by elected public officials).

n159 See Benjamin A. Doherty, Comment, Creative Advocacy in Defense of Affirmative Action: A Comparative Institutional Analysis of Proposition 209, [1999 Wis. L. Rev. 91, 103-07](#) (describing racial messages in Proposition 209 campaign, including David Duke's racist appeals in support of the initiative).

n160 John Marelius, Wilson Bristles at Claims He's Playing Racial Politics, Copley News Serv., May 20, 1998, at 1 (quoting Professor Fernando Guerra).

n161 See *id.*; see also Lou Cannon, Bilingual Education Under Attack, Wash. Post, July 21, 1997, at A15 (quoting Unz as calling Governor Wilson's campaign for Proposition 187 "despicable" and as saying no one associated with that campaign, or others with "antiimmigrant views," would be permitted to join Proposition 227 campaign).

n162 See Zabetakis, *supra* note 157, at 111.

n163 See Nanette Asimov, Bilingual Education Gets Foe, S.F. Chron., July 18, 1997, at A17.

n164 See [Lau v. Nichols, 414 U.S. 563 \(1974\)](#); see also *supra* text accompanying notes 63-68, 110-14 (discussing *Lau v. Nichols*).

n165 See Morning Edition (National Public Radio broadcast, Jan. 8, 1998) (transcript no. 98010806-210) (quoting Unz: "This is in no way an anti-Latino initiative or an anti-immigrant initiative or anything other than something that will benefit, most of all, California's immigrant and Latino population."); Cannon, *supra* note 161 (quoting Unz: "It would be a disaster if this initiative was perceived as anti-immigrant because it is not.>").

n166 See Rodriguez, English Lesson in California, *supra* note 151, at 15 (quoting Unz to this effect).

n167 Gregory Rodriguez, Speaking in Tongues: Divining Why California Latinos Voted as They Did on Proposition 227, New Democrat, July-Aug. 1998, at 18 (quoting Villaraigosa). Villaraigosa later touched off a firestorm of controversy among Latinas/os when he appointed Unz to a high-profile California panel on government finance. See Mark Gladstone, Speaker Urged to Rescind Unz Appointment, L.A. Times, Feb. 2, 1999, at A3.

n168 They were: Gloria Matta Tuchman, a Mexican American school teacher, see Nick Anderson, Latina Teacher Pushes Fight Against Bilingual Education, L.A. Times, Oct. 20, 1997, at B2 [hereinafter Anderson, Latina Teacher Pushes] (describing Matta Tuchman), Jaime Escalante, an East Los Angeles high school teacher who served as honorary campaign chairman, see Phil Garcia, Noted Teacher Backs Initiative, L.A. Daily News, Oct. 19, 1997, at N10 (describing Escalante), made famous by the movie *Stand and Deliver* (Warner Bros. 1987) starring Edward James Olmos as Escalante, and Fernando Vega, a Democratic Party activist

and former school board member who became honorary chairman of the Northern California campaign, see Ballot Pamphlet, *supra* note 2, at 34. The fact that certain supporters were Latina/o does not undermine the discriminatory intent analysis. See *infra* text accompanying notes 173-80. Minorities, as African American businessman Ward Connerly demonstrated in being the anti-affirmative action point person in California, frequently are placed in high-profile roles in defending discriminatory measures. See *infra* note 180 (referring to "racial mascot" phenomenon).

n169 See Mark S. Barabak, GOP Bid to Mend Rift with Latinos Still Strained, *L.A. Times*, Aug. 31, 1997, at B8 (quoting campaign letter sent by Unz for Proposition 227 -- "Poor European immigrants [earlier this century] came here to WORK and become successful . . . not sit back and be a burden on those who were already here!" -- and mentioning only one group, Latinas/os, and one non-English language, Spanish, as problematic).

n170 CNN Talkback Live (CNN television broadcast, May 29, 1998) (transcript no. 98052900V14) (remarks of Ron Unz) (emphasis added).

n171 Morning Edition (National Public Radio broadcast, Jan. 8, 1998) (transcript no. 98010806-210) (emphasis added). The fact that Unz and some supporters may have wanted to benefit Latinas/os should not make a legal difference so long as it is clear that language was used as a proxy for race. See *infra* text accompanying notes 250-64. Under current Supreme Court precedent, all racial classifications, even if arguably benign, receive strict scrutiny. See, e.g., [Adarand Constructors, Inc. v. Peña, 515 U.S. 200 \(1995\)](#). Such intentions, however, may be relevant to the discriminatory intent analysis. See *infra* text accompanying notes 225-42.

n172 Asimov, *supra* note 163 (quoting Unz). Furthermore, Unz told one journalist that bilingual education "is a bizarre government program," see Cannon, *supra* note 161, at A15, and another that even the respectable academic research supporting it was "garbage," see Nick Anderson, Debate Loud as Vote Nears on Bilingual Ban, *L.A. Times*, Mar. 23, 1998, at A1 [hereinafter Anderson, Debate Loud].

n173 See Nick Anderson, Latina Teacher Pushes Fight Against Bilingual Education, *L.A. Times*, Oct. 20, 1997 at B2 [hereinafter Anderson, Latina Teacher Pushes Fight].

n174 English-Only Candidate, *City News Serv.*, Feb. 12, 1998, at 1 (quoting Tuchman).

n175 See *supra* text accompany note 145 (discussing English language acquisition by Latinas/os).

n176 See generally Kevin R. Johnson, "Melting Pot" or "Ring of Fire"? Assimilation and the Mexican-American Experience, [85 Cal. L. Rev. 1259 \(1997\)](#) (analyzing history of assimilation of Mexican Americans into U.S. society).

n177 [Nick Anderson, Latina Teacher Pushes Fight](#), *supra* note 173 (quoting Unz).

n178 Phil Garcia, Noted Teacher Backs Initiative, *L.A. Daily News*, Oct. 19, 1997, at N10 (quoting Unz).

n179 Gayle M.B. Hansen, When Bilingualism Is a Dirty Word, *Insight on the News*, Dec. 22 1997, at 18.

n180 Minorities frequently find themselves employed as visible supporters for political ends considered by many to be antiminority. 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, 121 \(1998\)](#) (referring to "increasing use of people of color as spokespersons or 'racial mascots' for racially regressive policies").

n181 The 1998 California "English of the Children" Initiative, <<http://www.onenation.org/facts.html>> (visited April 6, 1999) (emphasis added).

n182 Terry, *supra* note 1. Long after the election, Unz wrote an article analyzing the racially-charged campaigns over Propositions 187, 209, and 227 and attributed the divisiveness in part to demographic changes brought by immigration. "Terrified of social decay and violence, and trapped by collapsed property values, many whites felt they could neither run nor hide. Under these circumstances, attention inevitably began to focus on the tidal force of foreign immigration." Ron Unz, *California and the End of White America*, Commentary, Nov. 1999, at 17.

n183 See Laura M. Padilla, *Internalized Oppression, Latinos and Law*, at 44 (Unpublished manuscript on file with author).

n184 See One Nation/One California, <[http://www. Onenation.org/aboutonoc.html](http://www.Onenation.org/aboutonoc.html)>.

n185 See Padilla, *supra* note 183, at 45.

n186 National English Campaign and California English Campaign <<http://www.peoplesadvocate.org/ord/bmprimary98/prop227.html>> (on file with author).

n187 Linda Chavez, *Keeping Bilingual-Education Programs Intact Makes for Lucrative Business*, Chi. Trib., May 27, 1998, Commentary, at 21, at A4.

n188 See Hansen, *supra* note 179.

n189 See *infra* text accompanying notes 190-91, 199-217.

n190 Doyle McManus, *Clinton Hails Benefits of Legal Migration to America*, L.A. Times, June 14, 1998, at A1 (quoting Dan Stein).

n191 Ralph Z. Hallow, *California Steeped in Identity Politics*, Wash. Times, June 15, 1998, at A1 (quoting Glenn Spencer).

n192 See Cannon, *supra* note 161.

n193 Anderson, *Debate Loud*, *supra* note 172 (quoting Eliana Escobar).

n194 Streisand, *supra* note 148 (quoting Joseph Jaramillo); see also [Anderson, Latina Teacher Pushes Fight](#), *supra* note 173 (quoting MALDEF attorney Theresa Fe Bustillos to same effect).

n195 Anderson, *Debate Loud*, *supra* note 172 (quoting Charles Kamasaki).

n196 Ron Unz, *Swimming Instructor, Economist*, May 2, 1998, at 32 (quoting Becerra).

n197 Marelius, *supra* note 160 (quoting Villaraigosa).

n198 Unz, *supra* note 196 (quoting Torres).

n199 See *supra* note 3 (citing authority). The official vote was 3.6 million (60.88%) for and slightly less than 2.3 million (39.12%) against. See Bill Jones, [Cal.] Secretary of State, *Statement of Vote: Primary Election June 2, 1998*, at 86 (1998).

n200 See Los Angeles Times Exit Poll, *California Primary Election, June 2, 1998*, at 1 (showing that whites supported the measure by 67-33% and Asian Americans supported it by 57-43% while Latinas/os opposed it by 63-37% and African Americans by 52-48%); see also Rodriguez, *supra* note 167 (analyzing why Latinas/os voted against Proposition 227). Interestingly, 6% of the supporters recognized that Proposition 227 "discriminates against non-



English speaking students" compared to 32% of the opponents. See Los Angeles Times Exit Poll, *supra*, at 3.

n201 See Ramon G. McLeod & Mara Alicia Gaura, Proposition 227 Got Few Latino Votes: Early Polls Had Claimed More Minority Support, *S.F. Chron.*, June 5, 1998, at A19. According to polling data, Latina/o support for Proposition 227 eroded as election day neared. See Field Poll, Voters Moving to the No Side on Props. 226 (Union Dues) and 223 (School Spending Limits) 4 (May 29, 1998).

n202 See Gerald P. Lopez, Learning About Latinos, [19 ChicanoLatino L. Rev. 363, 391 \(1998\)](#) (summarizing survey data to this effect); see also Peter Skerry, Mexican Americans: The Ambivalent Minority 283-91 (1993) (summarizing survey data indicating general support of Mexican Americans for bilingual education).

n203 See *supra* text accompanying notes 129-98.

n204 See McLeod & Guara, *supra* note 201.

n205 See, e.g., Streisand, *supra* note 148 (reporting results of L.A. Times poll).

n206 *Id.*

n207 See Deroy Murdock, Bye Bye Bilingualism, *Wash. Times*, Apr. 8, 1998, at A17.

n208 See Unz, *supra* note 196 (reporting results of unidentified polls of Latinas/os and L.A. Times poll for all voters).

n209 See, e.g., Gregory Rodriguez, The Bilingualism Debate Remakes California Politics, *Wash. Post*, Feb. 8, 1998, at C2 ("Surprisingly to some, early surveys by the Los Angeles Times and the Field Poll showed that Latino registered voters supported the initiative by a wide margin.") Rodriguez also reported that "early polls" showed registered Latina/o voters supporting Prop. 227 "by as big a margin as 66 percent to 30 percent." See *id.*

n210 Ballot Pamphlet, *supra* note 2, at 334 (Argument in Favor of Proposition 227).

n211 Nick Anderson & Peter M. Warren, English-Immersion Initiative Makes Ballot, *L.A. Times*, Dec. 24, 1997, at B1 (quoting Unz).

n212 See, e.g., Leonel Sanchez, Latino Views Differ Sharply on Question of Bilingual Education, *San Diego Union-Trib.*, Mar. 15, 1998, at B1 (reporting poll results).

n213 See Charlie Ericksen, Media Misleading About Hispanic Vote on Prop. 227, *Houston Chron.*, June 11, 1998, at A33.

n214 See Louis Sahagun, Diversity Challenges Schools to Preserve Racial Harmony, *L.A. Times*, Feb. 14, 1999, at A1 (reporting on racial tensions at Los Angeles public schools).

n215 See Andrew Blankstein & Michael Luo, Principal, 65, Badly Beaten in Alleged Hate Crime, *L.A. Times*, Feb. 3, 1999, at B1.

n216 See Jennifer Hamm, Oxnard Students Leave Class for 2nd Day in 227 Protest, *L.A. Times* (Ventura County ed.), June 9, 1998, at B1.

n217 National Council of La Raza, *supra* note 98, at 5. Analysis of this incident is complicated by that fact that the attackers were Asian American. See *id.*

n218 [12 F. Supp. 2d 1007 \(N.D. Cal. 1998\)](#).

n219 See [id. at 1023-24](#). The court of appeals rejected a similar challenge to Proposition 209. See supra note 11 (discussing nature of unsuccessful challenge).

n220 See [Valeria G., 12 F. Supp. 2d at 1025](#).

n221 Id.

n222 660 U.N.T.S. 195, entered into force Jan. 4, 1969, ratified by the United States June 24, 1994; see Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, [46 UCLA L. Rev. 1, 60-61 \(1998\)](#) (arguing that Convention bars racial discrimination against "aliens" in immigration laws); Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform", [71 S. Cal. L. Rev. 547, 568-72 \(1998\)](#) (discussing how various immigration and welfare "reform" laws violate Convention and other international law).

n223 [Valeria G., 12 F. Supp. 2d at 1027](#).

n224 See id. ("As this court has already stated, the objective of both sides in this dispute is the same -- to educate all [limited English proficient] children.").

n225 [426 U.S. 229 \(1976\)](#).

n226 [Id. at 242](#) (emphasis added); see [Reno v. Bossier, 520 U.S. 471, 489 \(1997\)](#) ("The important starting point for assessing discriminatory intent . . . is the impact of the official action whether it bears more heavily on one race than another.") (citations omitted) (quotation marks in original deleted).

n227 [Washington, 426 U.S. at 248](#).

n228 [Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 \(1977\)](#) (emphasis added) (footnote omitted); see [Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 \(1979\)](#) (stating that discriminatory intent "implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (footnote & citation omitted).

n229 [Arlington Heights, 429 U.S. at 266](#) (citing, inter alia, [Yick Wo v. Hopkins, 118 U.S. 356 \(1886\)](#) and [Gomillion v. Lightfoot, 364 U.S. 339 \(1960\)](#)).

n230 [Arlington Heights, 429 U.S. at 267, 269](#); see [United States v. Fordice, 505 U.S. 717, 747 \(1992\)](#); see also [Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 819 \(4th Cir. 1995\)](#) (exploring such circumstances before finding that zoning decision was made without discriminatory intent); Todd Rakoff, Washington v. Davis and the Objective Theory of Contracts, [29 Harv. C.R.-C.L. L. Rev. 63 \(1994\)](#) (advocating objective test of social meaning of discrimination that considers multitude of factors).

n231 [Garza v. County of Los Angeles, 756 F. Supp. 1298, 1349 \(C.D. Cal. 1990\)](#) (citing [Rogers v. Lodge, 458 U.S. 613, 625 \(1982\)](#)) (holding that Los Angeles County Board of Supervisors intended to discriminate against Hispanics in adopting redistricting scheme), aff'd in part, vacated in part, [918 F.2d 763 \(9th Cir. 1990\)](#), cert. denied, [498 U.S. 1028 \(1991\)](#).

n232 See, e.g., [Hunter v. Underwood, 471 U.S. 222 \(1985\)](#) (invalidating Alabama constitutional provision disenfranchising certain convicted criminals because it was designed with racial animus); [Rogers v. Lodge, 458 U.S. 613 \(1982\)](#) (finding that at-large electoral scheme in Burke County, Georgia was maintained for discriminatory purposes); [Castaneda v.](#)

[Partida](#), 430 U.S. 482 (1977) (holding that "key man" system for selection of grand juries proved prima facie case of race discrimination in violation of Equal Protection Clause); [United States v. Yonkers Bd. of Educ.](#), 837 F.2d 1181, 1226 (2d Cir. 1987) (finding that "racial animus was a significant factor motivating" white residents who opposed low income housing project), cert. denied, 486 U.S. 1055 (1988); [Smith v. Town of Clarkton](#), 682 F.2d 1055 (4th Cir. 1982) (finding that city decision to effectively bar low income housing facility was motivated by discriminatory intent); see also [Goosby v. Town of Hempstead](#), 180 F.3d 476 (2d Cir. 1999) (holding that town maintained at-large voting scheme with discriminatory intent in violation of Voting Rights Act and Equal Protection Clause); cf. [State v. Russell](#), 477 N.W.2d 886 (Minn. 1991) (invalidating state sentencing scheme under Minnesota Constitution because of stark racial disparities in sentencing that resulted).

n233 See Johnson, Immigration Politics, *supra* note 90, at 664-67; see also Alan E. Brownstein, Illicit Legislative Motive in the Municipal Land Use Regulation Process, [57 U. Cin. L. Rev.](#) 1, 46-47 (1988) (analyzing problems with determining "the motive of an institutional body comprising numerous decision makers"). See generally Jane S. Schacter, The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy, [105 Yale L.J.](#) 107 (1995) (analyzing special difficulties discerning intent of voters in enacting initiatives).

n234 See, e.g., Derrick A. Bell, Jr., The Referendum: Democracy's Barrier to Racial Equality, 54 Wash. L. Rev. 1 (1978); Eule, *supra* note 126, at 1553; Lazos, Judicial Review, *supra* note 10; see also Sherman J. Clark, A Populist Critique of Direct Democracy, [112 Harv. L. Rev.](#) 434 (1998) (questioning whether initiatives, as popularly believed, allow voters to clearly express views); Hans A. Linde, When Is Initiative Lawmaking Not "Republican Government"?, 17 Hastings Const. L.Q. 159 (1989) (contending that initiative lawmaking violates constitutional guarantee of republican form of government). For analysis of the initiative process, see Philip L. Dubois & Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons* (1998).

n235 See, e.g., [Oyama v. California](#), 332 U.S. 633 (1948) (invalidating as applied "alien land law" passed by California voters designed to limit rights of persons of Japanese ancestry); [Pierce v. Society of Sisters](#), 268 U.S. 510 (1925) (finding unconstitutional initiative responding to immigration into Oregon of Catholics, who frequently attended parochial schools, by requiring all children to attend public schools); [Truax v. Raich](#), 239 U.S. 33 (1915) (striking down law passed by Arizona voters barring certain employers from employing fewer than 80% "qualified electors or native born citizens").

n236 See, e.g., [Romer v. Evans](#), 517 U.S. 670 (1996) (invalidating Colorado state constitutional amendment adopted by voters effectively repealing state and local provisions barring discrimination on basis of sexual orientation); [Equality Found. v. City of Cincinnati](#), 128 F.3d 289 (6th Cir. 1997) (rejecting challenge to voter-enacted city charter amendment barring "preferential treatment" for gays, lesbians, and bisexuals); see also Walter E. Adams, Jr., Is It Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures, [34 Willamette L. Rev.](#) 449 (1998) (analyzing adverse impact of initiative process on lesbians and gay men).

n237 See Bruce Cain, The Contemporary Context of Ethnic and Racial Politics in California, in *Racial and Ethnic Politics in California* 9, 23-24 (Bryan O. Jackson & Michael B. Preston eds., 1991).

n238 See The Federalist No. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1961); see also Hans A. Linde, Who Is Responsible for Republican Government?, [65 U. Colo. L. Rev.](#) 709, 723 (1994) (analyzing Madison's concerns in this regard).

n239 See [Ruiz v. Hall, 191 Ariz. 441, 957 P.2d 984 \(1998\)](#) (invalidating Arizona English-only law on First Amendment grounds).

n240 See [Yniguez v. Arizonans for Official English, 69 F.3d 920 \(9th Cir. 1995\)](#) (en banc).

n241 See [Arizonans for Official English v. Arizona, 520 U.S. 43 \(1997\)](#); see also Cecilia Wong, Comment, Language Is Speech: The Illegitimacy of Official English After Yniguez v. Arizonans for Official English, [30 U.C. Davis L. Rev. 277 \(1996\)](#) (analyzing First Amendment reasoning of Ninth Circuit in Yniguez).

n242 See Johnson, Immigration Politics, *supra* note 90, at 670-71 (reviewing language in panel opinion in Yniguez, which was never published after it was vacated, that "since language is a close and meaningful proxy for national origin, restrictions on the use of language may mask discrimination against specific national origin groups or, more generally, nativist sentiment.") (footnote omitted); Karla C. Robertson, Note, Out of Many, One: Fundamental Rights, Diversity, and Arizona's English-Only Law, [74 Denv. U.L. Rev. 311, 329-32 \(1996\)](#) (contending that Ninth Circuit should have invalidated Arizona law on Equal Protection, not First Amendment grounds, because it discriminated on the basis of national origin).

n243 [Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 252 \(1977\)](#).

n244 See *supra* text accompanying notes 106-217. Similar arguments have been made with respect to other state action that disparately affects racial minorities. See, e.g., Jill E. Evans, Challenging the Racism in Environmental Racism: Redefining the Concept of Intent, [40 Ariz. L. Rev. 1219, 1277-87 \(1998\)](#) (stating how intent is difficult to prove in environmental racism cases).

n245 [347 U.S. 483 \(1954\)](#).

n246 *Id.* at 494; see Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 8-12 (1976) (discussing harmful effects of discrimination and segregation, including stigmatization of racial minorities).

n247 See Yxta Maya Murray, The Latino-American Crisis of Citizenship, [31 UC Davis L. Rev. 503, 546-59 \(1998\)](#) (contending that English-only movement and rules stigmatize Latinas/os in the United States and help to ensure that they remain second class citizens); see also [29 C.F.R. § 1606.7\(a\)](#) (1998) (stating, in regulation under Title VII of Civil Rights Act of 1964, that "the primary language of an individual is often an essential national origin characteristic" and that suppression of language may "create an atmosphere of inferiority, isolation and intimidation"); Jeffrey D. Kirtner, Comment, English-Only Rules and the Role of Perspective in Title VII Claims, [73 Tex. L. Rev. 871, 893-98 \(1995\)](#) (identifying various harms to Latinas/os, including stigmatization, flowing from English-only rules in workplace).

In addition, Proposition 227 may ultimately have gender impacts that have been largely ignored. Because women often are the primary childcare providers, they may have to deal with children, who drop out of school due to the elimination of bilingual education. This may exacerbate the poverty that currently exists among many single Latina mothers. See Laura M. Padilla, Single-Parent Latinas on the Margin: Seeking a Room with a View, Meals, and Built-In Community, [13 Wis. Women's L.J. 179, 197-206 \(1998\)](#).

n248 See *supra* text accompanying notes 16-105.

n249 See, e.g., [People v. Naglee, 1 Cal. 232 \(1850\)](#) (rejecting claim that "foreign miners tax" imposed on persons of Mexican ancestry violated the Treaty of Guadalupe Hidalgo).

n250 See *infra* text accompanying notes 251-59.

n251 See, e.g., [Cockrill v. California, 268 U.S. 258 \(1925\)](#) (upholding California law); [Terrace v. Thompson, 263 U.S. 197 \(1923\)](#) (upholding Washington law). See generally Keith Aoki, No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment, [40 B.C. L. Rev. 37 \(1998\)](#) (analyzing history behind these laws and how they blazed a trail for Japanese internment during World War II).

n252 See, e.g., [Arlington Heights, 429 U.S. at 252](#).

n253 [McWright v. Alexander, 982 F.2d 222, 228 \(7th Cir. 1992\)](#); see e.g., [Slather v. Sather Trucking Corp., 78 F.3d 415, 418-19 \(8th Cir. 1996\)](#) ("Age discrimination may exist when an employer terminates an employee based on a factor as a proxy for age.") (citation omitted); [Metz v. Transmit Mix, Inc., 828 F.2d 1202 \(7th Cir. 1987\)](#) (holding that salary savings that employers sought to realize by discharging older employee and replacing him with younger one constituted age discrimination); [Gustovich v. AT&T Communications, Inc. 972 F. 2d 845, 851 \(7th Cir. 1972\)](#) ("Wage discrimination can be a proxy for age discrimination, so that lopping off high salaried workers can violate the" Age Discrimination in Employment Act). Discrimination by proxy has been recognized in the scholarly literature. See *supra* note 14 (citing authorities). One difficulty in application concerns the fact that some "classifications that correlate with race . . . may further permissible objectives because of that correlation rather than despite it. Alexander & Cole, *supra* note 14, at 463. However, "irrational proxy discrimination, based upon inaccurate stereotypes or generalizations is morally troublesome because it imposes unnecessary social costs." [Alexander, supra](#) note 14, at 169; see also *id.* at 193 ("Proxy discrimination based upon inaccurate and usually bias-driven stereotyping are intrinsically immoral for the same reasons as are the biases with which they are intimately linked.").

n254 [Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 \(1993\)](#); see also Toni J. Querry, Note, A Rose by Any Other Name No Longer Smells as Sweet": Disparate Treatment Discrimination and the Age Proxy Doctrine After Hazen Paper Co. v. Biggins, [81 Cornell L. Rev. 530 \(1996\)](#) (analyzing case law on age proxy doctrine).

n255 [471 U.S. 222 \(1985\)](#).

n256 See *infra* text accompanying notes 257-59.

n257 See Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, [28 U. Miami Inter-Am. L. Rev. 263 \(1996-97\)](#); see also Ibrahim J. Gassama et al., Foreword: Citizenship and its Discontents: Centering the Immigrant in the Inter/National Imagination (Part II), [76 Or. L. Rev. 207, 217-19 \(1997\)](#) (describing "nativistic racism" encountered by immigrants of color in United States).

n258 See INS Statistical Yearbook, *supra* note 137, at 199 (estimating that Mexico is country of origin of 54% of undocumented immigrants in United States).

n259 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 \(1996\)](#) (noting that, since 1965, 75% of immigrants to U.S. have come from Africa, Asia, and Latin America).

n260 See *supra* text accompanying notes 84-86.

n261 See [United States v. Carolene Prods. Co., 304 U.S. 144, 15253 n.4 \(1938\)](#) ("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.").

n262 See supra text accompanying notes 63-88.

n263 See supra text accompanying notes 106-217.

n264 See supra text accompanying notes 199-217.

n265 See Richard Delgado, Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino Critical Scholarship, and the Black-White Binary, [75 Tex. L. Rev. 1181, 1189-92 \(1997\)](#) (contending that current interpretation of Equal Protection Clause produces inequality for Latinas/os); Martinez, supra note 4 (to same effect).

n266 [251 S.W. 2d 531 \(Tex. 1952\)](#).

n267 See [id. at 535](#).

n268 Id.; see George A. Martinez, Philosophical Considerations and the Use of Narrative in Law, [30 Rutgers L.J. 683, 686 \(1999\)](#) (stating that Texas Supreme Court in Hernandez failed to "recognize harm [Mexican Americans] suffered from having no Mexican Americans on juries.").

n269 See [Hernandez, 251 S.W. at 535](#).

n270 [347 U.S. 475 \(1954\)](#).

n271 See [id. at 477-79](#).

n272 See 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, 395 (1975).

n273 See [id. at 400-01](#).

n274 [83 U.S.\(16 Wall.\) 36, 71-80 \(1872\)](#).

n275 [Id. at 81](#).

n276 See, e.g., Delgado, supra note 265; see also Kevin R. Johnson & George A. Martinez, Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship, [53 U. Miami L. Rev., 1143, 1157-59 \(1999\)](#) (contending that studies of subordination of various racial minority groups has long been established in ethnic studies scholarship); Mary Romero, Introduction, in *Challenging Fronteras: Structuring Latina and Latino Lives in the U.S.* xiv (Mary Romero et al. eds., 1997) (criticizing "binary thinking of race relations in this country that is so ingrained in the dominant culture that it continues to shape what we see.").

n277 See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 159 (1990).

n278 See Nathan Glazer, *We Are All Multiculturalists Now* (1997); see also Kevin R. Johnson, Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century, 8 *La Raza L.J.* 42, 64-66 (1995) (analyzing complexities of modern race relations, including many groups besides African Americans and whites); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Praxis in Post-Civil Rights America*, [95 Mich. L. Rev. 821 \(1997\)](#) (analyzing interracial conflict arising in impact litigation).

n279 [252 U.S. 416, 433-34 \(1920\)](#). Holmes, viewed by many as "a legal icon in the history of American legal thought," Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell to Holmes to Posner and Schlag*, 28 *Ind. L. Rev.* 353, 361 (1994), rejected formalistic approaches to law in favor of a jurisprudence that took account of human experience and social

need. See Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881) ("The felt necessities . . . and the intuitions of public policy . . . have had a good deal more to do . . . in determining the rules by which men should be governed."). Professor Paul Brest wrote that:

According to the political theory most deeply rooted in the American tradition, the authority of the Constitution derives from the consent of its adopters. Even if the adopters freely consented to the Constitution, however, this is not an adequate basis for continuing fidelity to the founding document, for their consent alone cannot bind succeeding generations. We did not adopt the Constitution and those who did are dead and gone.

Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. Rev.* 204, 224 (1980).

n280 Anthony Paul Farley, *All Flesh Shall See It Together*, [19 \*Chicano-Latino L. Rev.\* 163, 171 \(1998\)](#).

n281 See, e.g., Bork, *supra* note 277, at 143 ("In the legal academies in particular, the philosophy of original understanding is usually viewed as thoroughly passe, probably reactionary, and certainly the most dreaded indictment of all -- outside the mainstream").

n282 See John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, [52 \*U. Miami L. Rev.\* 1067, 1073 \(1998\)](#) ("Racism introduces itself anew and covertly to the breadth of contemporary institutions, culture, and society. This advanced, insidious racism operates so effectively that we seldom distinguish serious racist harms from a variety of other harms that categorically run from 'bad luck' to 'natural catastrophes.'").

n283 See, e.g., Darren L. Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, [29 \*Conn. L. Rev.\* 561, 636-41 \(1999\)](#) (discussing connections between race, gender, and sexuality); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, [83 \*Cal. L. Rev.\* 1 \(1995\)](#).

n284 Omi & Winant, *supra* note 6, at 123-128.

n285 See Daniel Yeager, *A Plea for "A Plea for Excuses": Exculpation and the Explication of Responsibility* 14-15 (unpublished manuscript on file with authors); see also Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, [70 \*Tex. L. Rev.\* 17, 80, 84-85 \(1991\)](#); note 10 (citing authorities criticizing discriminatory intent standard).

n286 Yeager, *supra* note 285, at 15-16.

n287 Louis M. Seidman & Mark V. Tushnet, *Remnants of Belie: Contemporary Constitutional Issues* 105 (1996); see also Owen Fiss, *A Community of Equals: The Constitutional Protection of New Americans* 3-21 (1999) (contending that judiciary should invalidate laws, such as limits on benefit eligibility, making immigrants "pariahs"); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, [13 \*Const. Commentary\* 257 \(1996\)](#); Cass R. Sunstein, *The Anti-Caste Principle*, [92 \*Mich. L. Rev.\* 2410 \(1994\)](#).

n288 See Sunstein, *supra* note 287.

n289 See *supra* text accompanying notes 16-228.

n290 See generally Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, [77 \*Cornell L. Rev.\* 1258 \(1992\)](#).

n291 History already is recording the many initiatives passed by California voters as a response to the increased minority population in the state. See generally Peter Schrag, *Paradise Lost, California's Experience, America's Future* (1998) (making this argument).

n292 Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* 74 (trans. D.F. Pears & B.F. McGuinness, 1961).