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**RACE, ETHNICITY & NATIONHOOD:** ARTICLE: Race, Ethnicity, Erasure:

The Salience of Race to LatCrit Theory

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**BIO:**

\* Acting Professor, University of California School of Law (Boalt Hall). This Essay builds upon a talk I gave at the First Annual LatCrit Conference in La Jolla, California, in May, 1996. It also served as a basis for a talk I delivered as part of the James Thomas Lecture at Yale Law School in April, 1997. The comments and questions generated in response to both talks greatly assisted me in the writing of this Essay. For a revised version of the LatCrit talk, see Ian F. Haney Lopez, *Retaining Race: LatCrit Theory and Mexican American Identity in Hernandez v. Texas*, 1 Harv. Latino L. Rev. (forthcoming 1997). I am also indebted to many of my colleagues here at Boalt, particularly Rachel Moran, Daniel Rodriguez, Angela Harris, Bill Simon, Robert Post, and the members of the Junior Faculty Workshop. Several Boalt students also deserve thanks for assistance above and beyond the call of law journal duty, including Pilar Ossorio, Joseph Hahn, Sean Pager, Daniel Johnson, and Jessica Delgado.

**SUMMARY:** ... in so far as the question of discrimination in the organization of juries in state courts is concerned, the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race, comprising one class, and the Negro race, comprising the other class. ... For Klor de Alva, stressing a Latino/a cultural, as opposed to racial, identity can be an important step toward defeating racial beliefs altogether. ... General arguments against the use of a racial idiom aside, Latinos/as are often urged to supplant race with ethnicity as a means of constructing and understanding their identity. ... Although racial victimization has been instrumental in the cultural formation of group identity (this is, to be sure, one of the central themes to emerge in recent studies of Mexican-American group formation), this is not the same thing as suggesting that racial group identities are solely determined by the negative forces of invidious racial discrimination. ... Unfortunately, the construction of Latino/a identity in non-racial terms continues as a basis for arguing that the remedies fashioned to redress racial discrimination should not be available to Latino/a communities. ... In the end, at stake is not just an adequate understanding of Latino/a lives, but the persistence of, and the necessity of committed responses to, race and racism. Latino/a identity need not be, and should not be, constructed or construed solely in racial terms. ...

[\*1143]

Introduction

On September 20, 1951, an all-White grand jury in Jackson County, Texas indicted twenty-six-year-old Pete Hernandez for the murder of another farm worker, Joe Espinosa. n1 Gus Garcia and John [\*1144] Herrera, lawyers with the League of United Latin American Citizens (LULAC), a Mexican-American civil rights organization, took up Hernandez's case, hoping to use it to attack the systematic exclusion of Mexican Americans from jury service in Texas. n2 Garcia and Herrera moved to quash Hernandez's

indictment on Fourteenth Amendment grounds, arguing that people of Mexican descent were purposefully excluded from the indicting grand jury. The lawyers pointed out, and the State of Texas stipulated, that no Mexican American had served on any jury commission, grand jury, or petit jury in Jackson County in the previous quarter century. n3 Despite this stipulation regarding a county fifteen percent Mexican American, the trial court denied the motion. n4 After two days of trial and three-and-a-half hours of deliberation, the jury convicted Hernandez and sentenced him to life in prison. n5

On appeal, Garcia and Herrera renewed the Fourteenth Amendment challenge, but it was again rejected. The Texas Court of Criminal Appeals held that

in so far as the question of discrimination in the organization of juries in state courts is concerned, the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race, comprising one class, and the Negro race, comprising the other class. n6

The Texas court construed the Fourteenth Amendment to prohibit racial discrimination against two races, the White and the Black. In effect, the [\*1145] court held that the Fourteenth Amendment did not cover Mexican Americans in cases of jury discrimination. n7

With the additional assistance of Carlos Cadena, a law professor at St. Mary's University in San Antonio, Garcia and Herrera took the case to the United States Supreme Court. n8 On May 3, 1954, Chief Justice Earl Warren delivered the unanimous opinion of the Court in *Hernandez v. Texas*, extending the aegis of equal protection to Pete Hernandez and reversing his conviction. n9 The Court did not do so, however, on the ground that Mexican Americans constituted a protected racial group. Although the Court noted that the equal protection clause served primarily to protect groups marked by "differences in race or color," it also noted that "from time to time other differences from the community norm" might define groups needing the same protection. n10 Pursuing this approach, the Court held that the Fourteenth Amendment protected Hernandez because he belonged to a class distinguishable on some basis "other than race or color" that nevertheless suffered discrimination as measured by "the attitude of the community" in Jackson County, Texas. n11

For the emergent genre of Latino/a Critical Theory - LatCrit for short n12 - Hernandez must be understood as a central case. Hernandez is the first Supreme Court case to extend the protections of the Fourteenth Amendment to Latinos/as, and it is among the great early triumphs in the Latino/a struggle for civil rights. n13 As such, this case falls squarely in [\*1146] the middle of LatCrit's intended area of inquiry, the relationship between laws and legal institutions on the one hand and Latino/a communities on the other. However, this case is central not simply because of its constitutional and historical prominence. Hernandez attains increased significance because it is the principal case in which the Supreme Court addresses the racial identity of a Latino/a group, in this instance, Mexican Americans. No Supreme Court case has dealt so squarely with this question, before n14 or since. n15 This point is all the more striking, and Hernandez all the more exceptional, because at least on the surface the Court refused to consider Mexican Americans as a group defined by race or color. If LatCrit theorists intend, as I believe we should, to use race as a lens and language through which to assess the [\*1147] Latino/a experience in the United States, we must come to terms with the elision of race in Hernandez.

This joint issue of the *La Raza Law Journal* and the *California Law Review* brings together a range of articles setting out the incipient themes of LatCrit scholarship. It is my privilege to introduce the section of this joint issue dedicated to questions of racial identity, presenting articles by Professors Kevin Johnson and Juan Perea. A Professor at the University of California at Davis School of Law, Kevin Johnson has published over a dozen articles, most focusing on the pronounced role of race and xenophobia in immigration law and policy. n16 In his contribution to this Symposium, Johnson draws on his own mixed-

race origins as he narrates the painful experiences of family members in their quest to assimilate a White identity in place of a Mexican-American one. His article powerfully details the complexities of racial identity and racial genealogy. n17 Juan Perea, a Professor at the University of Florida College of Law, has written extensively on language policy, nativism, and ethnic identity. n18 In this piece, he convincingly demonstrates the dominance of a Black/White racial paradigm and explores how this paradigm operates to the detriment of Latinos/as. n19 Both of these articles compellingly examine some facet of an intricately wrought Latino/a racial identity, and both fully reward the careful reader. [\*1148]

Significantly, however, both articles take as a given that Latinos/as possess a distinct racial identity. This Essay agrees that conceptualizing Latinos/as in racial terms is warranted. Nevertheless, it is clear that in the United States there exists no widespread consensus that Latinos/as share a separate identity that can be specified in terms of race, as opposed to, say, ethnicity, national origin, or culture. Indeed, if anything, the consensus seems to run the other way, rejecting any notion of racial distinctiveness and positing that while Latinos/as may constitute an ethnic group, individuals of this heritage are of every race. This is the view of Latino/a identity currently employed by the United States Census. Although in 1930 the census counted "Mexicans" as a separate race, since then it has categorized Mexican Americans and other Latino/a groups alternately as White (1940-1970), as members of the "other" racial designation (1980), or as part of a racially unspecified Hispanic ethnic group (1990-present). n20 Under what currently reigns as the semi-official conception of Latino/a identity, identity and race are separate and divorced.

The non-racial conception of Latino/a identity finds reflection in some legal scholarship. Recently, several legal articles have appeared subscribing to or promoting a raceless conception of Latino/a identity. Perhaps the two most prominent were published in a 1995 Stanford Law Review symposium on the future of race-based remedies in an increasingly multiracial society. n21 Implicitly adopting a non-racial understanding in an article assessing whom should benefit from affirmative action, Paul Brest and Miranda Oshige ask and answer the question "Who are the Latinos?" almost exclusively in terms of ethnicity, [\*1149] national origin, and immigrant status, but with scant reference to race. n22 In a separate article in that issue asserting that "racial classifications are no longer appropriate for our multicultural society," n23 Deborah Ramirez suggests viewing "Hispanics as an ethnic group with multiracial origins." n24 Though less prominent, other articles have been more pointed in rejecting racial conceptions of Latinos/as. For example, Luther Wright, Jr.'s 1995 Vanderbilt Law Review article calls for a new racial scheme in which "the Hispanic classification is eliminated," on the grounds that it "gives no treatment at all to the notion of color and utterly destroys the necessary distinction between race and national origin." n25 A year earlier, Lisette Simon used the pages of the University of Cincinnati Law Review to condemn courtroom use of the "unnatural" Hispanic grouping, in part because "the term Hispanic encompasses all races, [and so] Hispanics are not readily identifiable by race." n26 These arguments may reflect frustration with "Latino/a" or "Hispanic" as overarching categories, as well as perhaps a larger disenchantment with the manner in which laws, legal institutions, and legal actors conceptualize race. n27 Even so, however, they also indicate a pronounced [\*1150] resistance in the legal academy to racial conceptualizations of Latinos/as and Latino/a subgroups. n28

Such resistance echoes a more general call currently being issued across a broad spectrum of American intellectual life to abandon conceiving of groups in racial terms altogether. Not simply a neo-conservative crusade, leading liberal scholars have also been outspoken recently in calling for an end to the use of the language of race to describe social groups. Citing its weighty baggage, prominent race scholars such as Anthony Appiah, David Hollinger, and Orlando Patterson argue that where other terms such as "culture," "ethno-racial blocs," or "ethnicity" sufficiently capture the underlying social practices referred to by "race," the language of race ought to be rejected. n29 To be clear, such arguments do not deny that some groups have been treated as if they were races, or that such treatment bears special consequences for racialized groups. Rather, while acknowledging past and even on-going racialization, such arguments posit rejecting entirely a racial vocabulary for fear of legitimizing innate notions of race. A recent New York Times

editorial by Orlando Patterson exemplifies such calls. n30 Patterson argues for repudiating the use of race as a means of conceptualizing communities commonly thought of as racial in the United States, arguing for the use of the rhetoric of ethnicity instead. n31 According to Patterson, [\*1151] "ethnic categorization is a far more accurate measure of our population, and it is one that doesn't reinforce racial tensions or prejudices. Moreover, getting rid of racial categorization helps rid America of our biggest myth: that race is a meaningful, valid classification." n32 As exemplified by Patterson, this call is not for cultural or ethnicity-based evaluations of minority communities in addition to racial ones. Instead, it is an argument for the complete substitution of racial language by some other terminology - in Patterson's case, ethnicity. In this sense, The Houston Chronicle succinctly summarized Patterson's point when it republished his New York Times editorial under the title Erase Race: End our misguided obsession with racial categories. n33

In light of the resistance in legal circles to thinking of Latinos/as in racial terms as well as the broader call to eschew racial language, Hernandez serves as a fitting vehicle for introducing this Symposium section on LatCrit Theory and race. Hernandez offers a striking study in the construction and erasure of Latino/a racial identity. On one level, the case provides a plethora of evidence detailing widespread, invidious discrimination against Mexican Americans in Texas through the first half of this century, discrimination of a sort most often associated with racist antipathies. In this way, the facts of the case document some of the manners in which Mexican Americans have been constructed as racially different. On another level, the Supreme Court refuses to treat Hernandez as a case involving racial discrimination, implicitly rejecting a conceptualization of Mexican Americans as a group defined in racial terms. On this plane, the Court's treatment of the case erases the racial aspects of Mexican-American identity upon which the hard facts seem to insist. This introductory Essay uses Hernandez to highlight the salience of race to Latino/a identity. Focusing on the facts of the case as well as the rhetorical approaches of the various courts, this Essay uses Mexican-American identity in mid-century Texas to argue that LatCrit [\*1152] Theory should retain the language of race in explicating the relationship between Latinos/as and law.

This Essay pursues this argument in two parts. The first uses Hernandez to outline a social constructionist understanding of Latino/a racial identity. The second uses Hernandez to consider, and ultimately reject, calls for abandoning the vocabulary of race in contemporary discussions of group identity in the United States.

Race, until recently, has been widely understood as something rooted in the biology of human differentiation, a view which seems to inform the Court's approach in Hernandez. Under a biological view of race, Hernandez seems to pose a paradox, for on the one hand the facts document discrimination of a sort typically associated with race, while on the other the case involves a group not consistently considered a racial minority in the United States. Perhaps this paradox contributed to the Court's reticence to treat Hernandez as a racial case. This paradox dissolves, however, if one shifts to a social conception of race. This Essay posits that all racial identities, not least those of Mexican Americans and Latinos/as more generally, are intelligible only as social constructions. Race is best understood as a process of social differentiation rooted in culturally contingent beliefs in the biological division of humans. n34 Part I explores the Hernandez decision as one instance in which a Latino/a group has been racialized. It does so in part to substantiate the claim that race is socially constructed, but primarily in order to sketch what a social theory of race looks like as applied to Latinos/as, or more particularly in this case, Mexican Americans in Texas in the 1950s.

The second part addresses questions clearly implied in the first. To the extent that Latino/a groups such as Mexican Americans have been racialized, ought LatCrit theorists to use the language of race regarding such groups? Put in the context of this Symposium, do Johnson and Perea appropriately rely on the rhetoric of race as a means of discussing Latinos/as? On one side, using such language contributes to analytic accuracy and insight. On the other, however, the use of a racial vocabulary tends to legitimate and entrench social beliefs in innate differences, exactly the beliefs LatCrit theorists in general, and Johnson and Perea in

particular, seek to dismantle. In the face of this trade-off, [\*1153] should scholars investigating the relationship between Latinos/as and law use racial nomenclature as a core part of that project?

Arguably, the Court's approach in Hernandez suggests that the answer should be no. It does so by implicitly rejecting the terms of the trade-off identified above. Hernandez demonstrates that one need not speak in racial terms to engage social structures of racial oppression. Despite failing to frame the issue as turning on race or racism, the Court correctly understood that the case involved group subordination. The Court's decision emphatically rejected long established patterns of jury exclusion practiced against Mexican Americans in Texas, even if it did not condemn such practices as racist. In effect, the Court in Hernandez looked beyond the word "race" to address directly the social ills associated with practices of racialization, thus doing so in a manner that apparently avoided legitimizing racial beliefs. In this way, Hernandez seems to suggest that no balance need be struck between fully engaging the social reality of race and racialization on the one hand and risking the entrenchment of racial beliefs on the other, since such engagement can be managed without racial language. Hernandez thereby provides support for contemporary arguments in favor of moving toward "non-racial" conceptions of minority groups in general and Latinos/as in particular.

Nevertheless, the second part of this Essay responds that the elimination of race as a language for understanding Latino/a identity should be avoided. Put differently, this Essay objects to the Court's evasion of race in Hernandez even as it applauds the result in that case. It does so not because in the individual case one cannot fully engage the social reality of race without using a racial vocabulary; as Hernandez demonstrates, with care one can largely do so. Rather, the objection is rooted in the firm sense that the general abandonment of racial language and its replacement with substitute vocabularies, in particular that of ethnicity, will obfuscate key aspects of Latino/a lives.

The evaluation of whether or not the language of race is appropriate regarding any particular group must turn not simply on whether that group has been subject to a demonstrable history of racialization, but on a careful balancing of the benefits of such language compared to its costs. Clearly, such balancing will depend on many factors, but among them the most important will be the context and the purposes of racial categorization. For example, it matters to how one characterizes communities whether one intends to participate in a scholarly exchange, a policy discussion, a political debate, or a legal case; it matters also whether one's audience draws already on a social understanding of race [\*1154] or subscribes still to more innate conceptions. This Essay considers first and foremost the appropriateness of assessing Latino/a groups in explicitly racial terms in the context of legal scholarship. In this context, the benefits of employing a racial vocabulary seem to far outweigh the potential costs of reifying notions of innate difference. Patterson and others are correct in arguing that employing terms like "race" and "racial group" to describe contemporary communities lends at least a certain amount of credence to the myth of real biological differences between groups historically considered races. This is so even among scholars. Yet it is exactly such terms, and additional ones like "racism," "racialization," and "racialized," that most fully draw critical attention to the conditions and experiences confronting groups which have been and continue to be subject to the dynamics of race. In contrast, to commit to understanding and discussing racialized communities without using the language of race is to risk losing sight of central facets of the origins, experiences, and on-going construction of such groups. The risk is all the more pronounced when one uses a vocabulary such as that of ethnicity, which purports to explain group origins not in terms of racialization but in terms of cultural affinities. n35 Part II argues that the vocabulary of race, not just a commitment to fathoming group differentiation, should be retained by LatCrit theorists and other scholars who hope to understand and engage in debates concerning Latino/a communities. [\*1155]

Several caveats are in order. To begin with, this Essay does not present a generalized claim that in all settings and for all purposes, race should be the preferred language for describing Latinos/as. Even in the limited context of legal scholarship, this Essay does not argue for an exclusively racial understanding of Latino/a identity, for example as opposed to one rooted in status, ethnicity, or nationality. LatCrit theorists should select as their basis or bases of analysis whatever sociological or legal models most effectively

further their insights. Racial language may offer a more or less helpful route that should not be wholly rejected; but this is not to argue that it is the one true analytic way.

Along these same lines, this Essay of course does not argue that Latinos/as are physically distinct; indeed, just the opposite. Nor does it argue, as some have, that in some fundamental sense Latinos/as share a similar history of racialization - share, that is, a socially constructed racial identity if not a similar morphology. n36 Clearly the racial identities of Mexican Americans and other Latino/a groups such as Puerto Ricans, Cubans, Central Americans, and so on vary greatly, for reasons of national and regional culture, but also at least in part because of the wide variety of physical appearances within and among these groups. For example, the racial identity of Mexican Americans is significantly different than that of Cubans, just as within the Mexican-American and Cuban communities racial identities also diverge and conflict (compare the identity of Chicanos in East Los Angeles with Hispanos in northern New Mexico, or of Generation of '59 Cubanos with the more recently arrived Marielitos). n37 The diversity of identities among Latinos/as does not defeat the argument presented here, but rather enhances it. By virtue of their social construction within the context of the United States, Latinos/as have been subject in different ways and with divergent results to various processes of racialization. This Essay seeks not to deny but [\*1156] to draw attention to this complex social reality. This Essay advocates using racial language to highlight ideas of fundamental Latino/a difference, and the way those ideas have been socially and legally structured; it urges such language in order to repudiate, not to imply, the existence of a distinct Latino/a nature. n38

Although this Essay seeks to focus attention on ideas of innate Latino/a difference, this should not be taken to mean that it is concerned solely with constructions of Latino/a identity wrought in exclusively physical terms. The dynamics of racialization increasingly involve not explicit biological references but more culturally acceptable allusions to ethnicity, national origin, alienage, accent, cultures of poverty, criminality, and so on. n39 Nevertheless, such forms of discourse very often draw upon and at any rate consistently intersect with the structuring of Latino/a racial identity. In this context, witness the Texas appellate decision in *Hernandez*, which arguably denied a distinct Mexican-American racial identity in order to facilitate the seemingly race-based exclusion of Mexican Americans from jury service. n40 Advocating the use of racial language here "is a way of urging attention to the arrangement of power and disadvantage at stake rather than an inquiry into the allegedly immutable nature of some people injured by that arrangement of power and disadvantage." n41 To focus on race is to focus on the myriad forms of racial construction; this must include the structuring of racial power arrangements not plainly invoking ideas of innate difference. As Martha Minow explains "perception and mistreatment are and should be the focus of attention, not the naturalness of the categories," n42 or, this Essay would add, the naturalness of the terms used to reinforce the categories.

A final caveat: Despite its reliance on *Hernandez*, this Essay does not address developments in equal protection doctrine. Nevertheless, LatCrit Theory must eventually grapple with the conflicting implications of *Hernandez* for the use of racial categories in antidiscrimination law. On one side, the justification for equal protection review advanced in *Hernandez*, protecting groups subject to social subordination, seems far superior to the contemporary strict scrutiny approach to racial equal [\*1157] protection jurisprudence. As currently applied, this approach refuses to differentiate uses of race intended to remedy racism from those intended to further it, thereby losing sight of the fundamental insight regarding equal protection offered in *Hernandez*. n43 On this level, *Hernandez* implies that equal protection doctrine ought to move in a less formal direction, away from an undue emphasis on the legal significance of race and toward a more ad hoc antisubordination position. On the other side, *Hernandez* presents us with one version of what such a doctrinal move might look like, one where practices of subordination are treated as highly localized and for the most part disconnected from larger social patterns, one where those seeking protection must constantly meet anew high burdens of proof regarding "community attitudes." On this level, *Hernandez* warns against ad hoc inquiries into social inequality, and implies the importance of taking group identity into generalized legal account. These two implications of *Hernandez* - the importance of moving toward a

highly contextual anti-subordination stance and the need to give legal significance to group identities - suggest that at root, the fundamental issue is how best to conceptualize race. n44 Ultimately, notions of the appropriate justification for legal intervention in race relations cannot be separated from conceptions of race. Although this relationship cannot be explored here, it is one to which LatCrit Theory must soon turn careful attention.

This Essay directly concerns racial language - the way we talk about, and hence think about, the particular set of social practices constituting race. "Race" thus seems to demand, at the close of this introductory section, a precise definition. However, none is forthcoming. This Essay actively seeks to redefine "race," to move it from conjuring biologically distinct groups to instead connoting the complex social myths regarding such groups. This effort at redefinition introduces deep tensions into the meaning of "race" as employed here. One involves treating race as both myth and reality: even as this Essay insists that there are no (biologically distinct) races, its principal focus is race (socially supposed). A second plays out in analytic and normative [\*1158] terms: the basic claim that retaining a racial vocabulary contributes to analytic accuracy regarding racialized groups depends on, at least as much as it contributes to, normative concern for the heightened recognition and remediation of social practices peculiar to racial subordination. Accepting these definitional tensions, suffice it to say that at every turn this Essay employs a social constructionist conception of race, one that denies the existence of real biological difference even as it insists on the importance of socially defined races, one that embraces the mantle of accuracy and insight in the same instance that it draws upon a normative racialized conception of the way the world is and the way it ought to be. This Essay seeks to provide a basis as well as an argument for discussing Latinos/as in racial terms. Race is offered here only as a social identity, to be sure; but it is a form of identity both salient and indispensable to Latinos/as, one that should be explicitly reflected in the language we use.

## I

### Race and Erasure

In the United States Reports, Hernandez immediately precedes *Brown v. Board of Education*, n45 having been decided just two weeks before that watershed decision. These cases are virtually of a piece, not only in terms of when they were decided and in their decisional location, but insofar as both form a part of a body of antisegregation cases revitalizing and extending the reach of the Fourteenth Amendment. Nevertheless, *Brown* and *Hernandez* differ in a dramatic respect. In *Brown*, the Court grappled with the harm caused by segregation but considered the applicability of the Equal Protection Clause to African Americans a foregone conclusion. In *Hernandez*, the reverse was true. The Court took for granted that the Equal Protection Clause would prohibit the state conduct in question, but wrestled with whether the Fourteenth Amendment protected Mexican Americans. *Hernandez* presented the Court with a paradox: although the case arose out of patterns of discrimination most commonly and easily understood as manifestations of racial animosity, the victim group was not uniformly considered a separate race. This Part argues for resolving this paradox by shifting from a biological to a social conception of race, and explores what such a conception of race would look like as applied to Mexican-American identity. [\*1159]

#### A. The Paradox of Race

When the Texas Court of Criminal Appeals rejected Hernandez's claim of jury discrimination, it did so not directly by finding a lack of discrimination, but indirectly by concluding that the Fourteenth Amendment did not protect Mexican Americans as a group, contemplating instead only the White and Black races. In responding to this two-race theory of equal protection, the Court could have ruled that the Fourteenth Amendment protected other races as well, but it did not. The Court acknowledged that "throughout our history differences in race and color have defined easily identifiable groups which have at times required

the aid of the courts in securing equal treatment under the laws." n46 However, the Court went on to say that "from time to time other differences from the community norm may define other groups which need the same protection." n47 According to the Court, to prevail on his claim Hernandez had to show that he was discriminated against not as a member of a group defined by race or color but as a member of a group marked by inchoate "other differences." Explaining this requirement, the Court suggested that "whether such a group exists within a community is a question of fact," n48 one that "may be demonstrated by showing the attitude of the community." n49

In an effort to assess the community attitudes toward Mexican Americans in Jackson County, the Court catalogued the evidence adduced by Hernandez regarding the treatment of Mexican Americans there. The evidence revealed the following: First, people in Jackson County, Texas, routinely distinguished between "white" and "Mexican" persons. n50 Second, business and community groups largely [\*1160] excluded Mexican Americans from participation. n51 Third, until just a few years earlier, children of Mexican descent were required to attend a segregated school for the first four grades, and most children of Mexican descent left school by the fifth or sixth grade. n52 Fourth, at least one restaurant in the county seat prominently displayed a sign announcing "No Mexicans Served." n53 Fifth, on the Jackson County courthouse grounds at the time of the underlying trial, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here"). n54 And finally, with respect to jury selection itself, there was the stipulation that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County," a county fifteen percent Mexican American. n55 On the basis of this evidence, the Court held equal protection to encompass Hernandez. Thus, the Court's finding that Hernandez met the other-difference/community-attitude test rested squarely on detailed evidence of what may be fairly characterized as widespread racial discrimination. n56

In the face of the Court's heavy reliance on evidence of racial discrimination, the Court's refusal to treat Mexican Americans as a race seems surprising. It seems all the more startling in light of evidence of possible racist antipathies toward Mexican Americans on the Supreme [\*1161] Court itself, n57 and also when one recalls that at the time the Court decided Hernandez, national hysteria regarding Mexican immigration was running high. n58 In part, the Court's reticence to acknowledge the case as involving racial discrimination may have stemmed from the fact that each of the various participants in the case characterized Mexican Americans as racially White. The Texas Attorney General, Hernandez's lawyers, and the Texas courts all insisted Mexican Americans were members of the White race, thus significantly increasing the difficulty for the Court of treating Hernandez as a case concerning racial discrimination.

Putting aside for now this remarkable consensus, however, the Court's assessment of Hernandez was also no doubt informed by the contemporary conception of race as an immutable natural phenomenon. Under the predominant view of race held at the time, and to an extent still today, race was a matter of biology - Black, White, Yellow, or Red, races were considered natural, physically distinct groupings. n59 [\*1162] Races, the Court no doubt supposed, were stable and objective, their boundaries a matter of physical fact and common knowledge, consistent the world over and across history. Under such a conception of race, however, the Court could not help but be perplexed by the picture of Mexican-American identity presented in Hernandez. All concerned agreed Mexican Americans were White, yet they were also clearly the object of pernicious prejudice of the sort usually understood as racism. Though the victims of apparent racism, Mexican Americans were counted in the censuses of 1940 and 1950 as White. n60 Though officially White, the dark skin and features among some Mexican Americans seemingly demonstrated that they were non-White. A biological view of race positing that each person possesses an obvious and fixed racial identity cannot account for, or accept, these contradictions. On some level, the force of these contradictions must have served for the Court as evidence that Mexican Americans did not constitute a separate race. Thus, despite viscerally moving evidence to the contrary, the Court structured its opinion as if the exclusion of Mexican Americans from juries in Jackson County, Texas, involved neither race nor color.

Nevertheless, notwithstanding the Court's evasion of race, the facts of Hernandez insist that when Pete Hernandez was indicted for murder in 1951, an inferior racial identity defined Mexican Americans in Texas. The racialized identity of Mexican Americans there developed over the course of more than a century of Anglo-Mexican conflict. In the early years of the nineteenth century, White settlers from the United States moving westward into what was then Spain, and after 1821, Mexico, clashed with the local people, eventually giving rise to war between Mexico and the United States in 1846. During this period, Whites in Texas and across the nation elaborated a Mexican identity in terms of innate, insuperable racial inferiority. According to historian Reginald Horsman,

By the time of the Mexican War, America had placed the Mexicans firmly within the rapidly emerging hierarchy of superior and inferior races. While the Anglo-Saxons were depicted as the purest of the pure - the finest Caucasians - the Mexicans who stood in the way of southwestern expansion were depicted [\*1163] as a mongrel race, adulterated by extensive intermarriage with an inferior [Native American] race. n61

These views continued, and were institutionalized, over the remainder of the last century and well into this one. According to another historian, Arnolde de Leon,

In different parts of [Texas], and deep into the 1900s, Anglos were more or less still parroting the comments of their forbears....They regarded Mexicans as a colored people, discerned the Indian ancestry in them, identified them socially with blacks. In principle and fact, Mexicans were regarded not as a nationality related to whites, but as a race apart. n62

The facts underlying Hernandez stand as evidence of the racialization of Mexican Americans in Texas. It is in the attitudes toward and the treatment of Mexican Americans, rather than in human biology, that one must locate Mexican-American racial identity.

In this sense, ironically, the solution to the racial paradox posed in Hernandez lies within the "community attitudes" test advanced by the Court. The Court propounded this test as a measure of whether Mexican Americans exist as a distinct, though non-racial group. In fact, no more accurate test could be fashioned to establish whether Mexican Americans, or any group, constitute a race. Race is not biological or fixed by nature; it is instead a question of social belief. Thus, albeit unwittingly, the Hernandez opinion offered a sophisticated insight into the nature of race: whether a racial group exists is always a local question to be answered in terms of community attitudes. To be sure, race is constructed through the interactions of a range of overlapping, fragmented communities, from local to national, ensuring that divergent and conflicting conceptions of racial identity exist within and among communities. Nevertheless, understanding race as "a question of community attitude" emphasizes that race is not biological but social. Therein lies the irony of the Court's position: Avoiding a racial understanding of Hernandez, in part due to a biological conception of race, the Court nevertheless correctly understood that the existence of Mexican Americans as a (racial) group in Jackson County turned, as race does, not on biology but on community attitudes. [\*1164]

#### B. Mexican-American Racial Identity: White, Then, and There

The biological view of race posits that group differences are deeply embedded in nature and highly determinative of group character; under this approach, racial identity is both fixed and easily known. In contrast, a social conception of race posits a virtually antithetical vision wherein both races and their associated characteristics are the products of social practices. Rather than suggesting, as a biological

conception does, that racial identities are relatively homogenous and readily apparent and that race is somehow objective and indifferent to viewpoint, the social understanding of race suggests racial identities are complex creations understood and experienced in vastly dissimilar, competing, irreducibly subjective manners. This Section further explores the racial identity of Mexican Americans in Hernandez, using as a starting point the consensus among the parties that Mexican Americans were White. It does so in order to explore the particular dynamics of Mexican-American racialization in Texas.

### 1. Consensus

When the Texas Court of Criminal Appeals heard Hernandez, it did so in the context of a long line of decisions affirming the exclusion of Mexican Americans from juries. When LULAC undertook to defend Pete Hernandez, it too was operating along a specific historical trajectory, participating in a continuing effort to secure Mexican-American civil rights from Texas courts. Remarkably, however, in Hernandez both the Texas court and the LULAC lawyers insisted that Mexican Americans were White. The Court of Criminal Appeals proclaimed, for example, that "Mexican people ... are not a separate race but are white people of Spanish descent." n63 The attorneys for Hernandez agreed, but protested that "while legally white...frequently the term 'white' excludes the Mexican and is reserved for the rest of the non-Negro population." n64 How is it that the Texas courts and the LULAC lawyers both agreed Mexican Americans were White?

For LULAC, the racial identity of Mexican Americans had long been a troubling question. Founded in 1929 in Texas by members of [\*1165] the small Mexican-American middle class, this organization stressed both cultural pride and assimilation. n65 These twin goals were not without their tensions, however, particularly with respect to the question of racial identity. Emphasizing the former often led LULAC to identify Mexican Americans as a distinct race. For example, LULAC's first code admonished members to "love the men of your race, take pride in your origins and keep it immaculate; respect your glorious past and help to vindicate your people"; its constitution announced, "we solemnly declare once and for all to maintain a sincere and respectful reverence for our racial origin of which we are proud." n66 In contrast, focusing on assimilation and the right to be free of widespread discrimination, LULAC often emphasized that Mexican Americans were White. According to historian Mario Garcia, "as descendants of Latins and Spaniards, Lulacers also claimed 'whiteness.' Mexican Americans as 'whites' believed no substantive racial factor existed to justify racial discrimination against them." n67 To a certain extent, LULAC resolved the tension between seeking both difference and sameness by pursuing these on distinct planes: difference in terms of culture and heritage, but sameness regarding civil rights and civic participation. However, this resolution could not be maintained neatly using the notion of race as then constituted. The contemporary ideology of race inseparably conflated biology, culture, heritage, civil rights, and civic participation. In racial terms, to be Mexican and different was irreconcilable with being White and the same.

This tension notwithstanding, the decision to defend Pete Hernandez constituted part of LULAC's strategy of fighting discrimination against Mexican Americans through the Texas courts. This strategy dictated the decision of Hernandez's lawyers to argue that Mexican Americans were White. Again, Mario Garcia: "In [its] antisegregation efforts, LULAC rejected any attempt to segregate Mexican Americans as a nonwhite population....Lulacers consistently argued that Mexicans were legally recognized members of the white race and that no legal or physical basis existed for legal discrimination." n68 For Hernandez's attorneys, the decision to cast Mexican Americans as White was a tactical one, in the sense that it reflected the legal and social terrain [\*1166] on which they sought to gain civil rights for their community. On this terrain, being White was strategically key. n69

While Hernandez's lawyers characterized Mexican Americans as White in order to combat discrimination and promote integration, the Texas appellate court likely did not share those motives in assigning Mexican

Americans the same racial identity. The characterization of Mexican Americans as White by the Texas Court of Criminal Appeals must be viewed in light of that court's prior decisions addressing discrimination against Mexican Americans in the selection of juries. The criminal court had addressed this question on at least seven previous occasions between 1931 and its decision in *Hernandez* in 1952, consistently ruling against the Mexican-American defendant. n70 The court had not, however, been consistent in its racial characterization of Mexican Americans.

In its initial decisions, and as late as 1948, the court construed Mexican-American challenges to jury exclusion as involving discrimination against members of the "Mexican race." For example, *Ramirez v. State* (1931) involved, according to the court, a challenge to "unjust discrimination against the Mexican race in Menard county," n71 while *Carrasco v. State* (1936) raised a question of "alleged discrimination against the Mexican race on the part of the jury commission." n72 In each of these initial cases, the court denied that racial discrimination had occurred. Instead, the court concluded that the absence of Mexican [\*1167] Americans on local juries reflected a lack of Mexican Americans qualified for jury service under Texas law. n73

However, this line of reasoning eventually proved troublesome for the courts. Often, the evidence relied on by the courts to demonstrate the lack of qualified Mexican Americans seemed to demonstrate instead the prevalence of racial prejudice. In *Ramirez*, for example, the court cited the testimony of several local officials to substantiate the lack of qualified Mexican Americans. First, the county attorney:

Joe Flack testified that he had been county attorney for about four years and practiced law in Menard county and had resided there for more than fourteen years; that during his residence there he had not known of a person of the Mexican race...having been chosen as a grand juror or as a petit juror; that he knew that there had been none since he had been county attorney; [and] that he did not think they were qualified to sit on the jury, as those in the county did not know English well enough and were otherwise ignorant. n74

Next, the sheriff:

The sheriff and tax collector of Menard county testified that ...he did not remember that any Mexicans had ever been chosen on the grand jury list or the petit jury list since he had resided in the county; that he had never summoned a Mexican on the jury when it became his duty upon direction of the court to go out and summon jurors, and that he did not think the Mexicans of Menard county were intelligent enough or spoke English well enough or knew enough about the law to make good jurors, besides their customs and ways were different from ours, and that for that reason he did not consider them well enough qualified to serve as jurors. n75

And finally, a jury commissioner:

Albert Nauwald testified that he was in the jury commission appointed by the district court that drew the grand jurors who [\*1168] indicted the appellant; that he would not select a negro to sit on the grand jury or petit jury while acting in the capacity of jury commissioner, even though the negro was as well qualified in every way to serve as a juror as any white man; that he was opposed to Mexicans serving on the jury; that he did not consider any individual Mexican's name in connection with making up the jury list; [and] that he did not consider the Mexicans in Menard county as being intelligent enough to make good jurors, so that the jury commission just disregarded the whole Mexican list and did not consider any of them when making up their jury list. n76

On the basis of this evidence, the appellate court concurred in the trial court's conclusion that "the proof did not show that there had been discrimination against the Mexican race...there was no evidence that there was any Mexican in the County who possessed the statutory qualifications of a juror." n77

The court in Ramirez distinguished between exclusion on the basis of racial prejudice and non-inclusion because of ignorance, insufficient intelligence, different customs and ways, and poor English. According to the court, the former was prohibited but not found in the record, while the latter was permissible and borne out by the weight of evidence. After the United States Supreme Court denied certiorari without comment in Ramirez, n78 the Texas appellate court three times more relied on the distinction between impermissible exclusion and permissible non-inclusion in dismissing Mexican-American challenges to "racial" discrimination in jury selection. n79 In each of these decisions, however, the evidence concerning the lack of qualified Mexican Americans seemed not to establish this lack, but rather the complained of racial discrimination. n80 [\*1169]

In sharp contrast to these four decisions, one decision by the appellate court in 1946 and two others handed down in 1951 characterized Mexican Americans as White, construing jury exclusion challenges not in terms of race but in terms of nationality. n81 In these decisions, heralding the approach in Hernandez in 1952, the court quickly rejected the defendants' claims of discrimination in jury selection by noting their supposed membership in the White race. For example, in *Salazar v. State* (1946), the court wrote:

The complaint is made of discrimination against nationality, not race. The Mexican people are of the same race as the grand jurors. We see no question presented for our discussion under the Fourteenth Amendment to the Constitution of the United States and the decisions relied upon by appellant, dealing with discrimination against race. n82

Similarly, in *Sanchez v. State* (1951), the court responded to "an exhaustive brief" on the question of discrimination against "Mexican-Americans as a race" in the following terse manner:"They are not a separate race but are white people of Spanish descent, as has often been said by this court. We find no ground for discussing the question further and the complaint raised by this bill will not be sustained." n83 With [\*1170] these quick comments, the court dismissed the defendants' Fourteenth Amendment challenges, dispensing not only with the question of whether there had been discrimination, but also with its previous reformulation of that same question, whether there were qualified Mexican Americans. These were questions the Texas court no longer felt compelled to answer. n84 Instead, it relied solely on the assertion that Mexican Americans were White in order to reject contentions of impermissible discrimination in jury selection. This is the approach the court again took in *Hernandez*. n85

One cannot know the exact motivations behind the appellate court's decision in *Hernandez* or the preceding cases to categorize Mexican Americans as White. Certainly, precedent existed for such a racial determination. As early as 1897, a federal district court in Texas recognized persons of Mexican descent as "white persons," though in the context of federal naturalization law, under which Whiteness was a prerequisite for citizenship. n86 Closer in time and doctrine, the Supreme Court of Colorado had held in 1937 that Mexican Americans were White, apparently as a basis for denying Fourteenth Amendment relief. n87 Beyond case law, during the period when *Hernandez* was decided, both the national and Texas governments moved to officially qualify Mexican Americans as White. Thus, in contrast to the 1930 census, which [\*1171] catalogued "Mexicans" as a distinct race, in 1940 the U.S. census classified "persons of Mexican birth or ancestry who were not definitely Indian or of other nonwhite race...as white." n88 In Texas, Governor Stevenson in 1946 initiated a "Good Neighbor Policy" in response to the Mexican Ministry of Labor's decision to restrict the migration of bracero workers to Texas "because of the number of cases of extreme, intolerable racial discrimination" arising there. n89 That policy proclaimed Mexican Americans valued state citizens, as well as "members of the Caucasian race" against whom no

discrimination was warranted. n90 The Texas Court of Criminal Appeals did not specifically cite these factors in its decisions characterizing Mexican Americans as White. Nevertheless, this larger trend toward according White status to Mexican Americans, of which the LULAC campaign was a contributing part, may well have added to the court's growing sense between 1946 and 1952 that Mexican Americans were White persons.

It seems quite likely, however, that the desire of the court to find some basis for neatly disposing of Mexican-American jury discrimination claims partially if not wholly motivated it to construct Mexican Americans as White. This seems probable given the progression of the cases. At the time the appellate court in *Hernandez* adopted a White conceptualization of Mexican Americans, judicial rationales for rejecting claims of racial discrimination against members of that community were fast wearing thin. By 1952, persons challenging the exclusion of Mexican Americans from juries could point, as *Hernandez*'s lawyers did, to research indicating that in at least fifty Texas counties with large Mexican-American populations, no Mexican American had ever been called for jury service. n91 They could also demonstrate convincingly that many Mexican Americans qualified for jury service, a point the state stipulated to in *Hernandez*. n92 Finally, a full panoply of Supreme Court cases held that the Fourteenth Amendment prohibited racial jury discrimination of the sorts apparently practiced against Mexican Americans - a roll call of cases on which, as the LULAC lawyers noted [\*1172] in their brief to the Court, "the State of Texas is more than proportionately represented." n93 Against this backdrop of massive discrimination, purposeful and directed litigation, fast accumulating evidence, and increasingly clear constitutional law, the local practices of jury exclusion in Texas counties were ever more difficult to uphold. Declaring that the Fourteenth Amendment did not protect Mexican Americans in the context of jury selection because they were White may have been the most expedient manner by which the appellate court could immunize local discriminatory practices, an episode of what Reva Siegel terms "preservation through transformation." n94 This may not have been the court's sole motivation in re-racing Mexican Americans as White, but even so, it was likely the principal one. n95

## 2. Race as Process

The consensus in *Hernandez* that Mexican Americans were White is surprising. After all, this case revolved around long standing practices of invidious discrimination aimed at emphasizing group differences. Perhaps exactly because it is so surprising, however, this consensus indicates dramatically the extent to which racial identities are not fixed by nature but rather evolve through social contestation, with high stakes, winners, and losers. The origins of the consensus regarding Mexican-American Whiteness in *Hernandez* demonstrates that racialization is an on-going process, and race a constantly evolving identity. It demonstrates as well the extent to which volition does, and does not, play a significant role in the elaboration of racial identities. [\*1173]

Under the rubric of "racial formation," Michael Omi and Howard Winant have been instrumental in formulating a social construction theory of race. n96 In elaborating that theory, they center the importance of process: "We use the term racial formation," Omi and Winant write, "to refer to the process by which social, economic and political forces determine the content and importance of racial categories, and by which they are in turn shaped by racial meanings." n97 This multidirectional process operates on a macrosocial level, involving the interplay between economic interests, government institutions, labor, religions, ideologies, and so on, as well as on a microsocal level, shaping and in turn being shaped by the formation of individual and group identities and by local practices of differentiation and discrimination. The racial consensus in *Hernandez* evidences the complexity of the process of racial formation. For Mexican Americans in Texas at mid-century, this process implicated the interplay of local prejudices as well as resistance to such prejudice, state practices of jury exclusion and evolving federal constitutional law, the Second World War and the bracero labor program, domestic politics in Texas and the changing national mood regarding race relations, and on and on. As the racialization of Mexican Americans

demonstrates, while race turns on notions of innate group differences, it nevertheless involves almost every aspect of culture, broadly understood as the things we do as a community and society. n98

Describing race as a product of social contestation should not be taken to suggest, however, that racial identities are opportunistic, consciously chosen in pursuit of particular advantages. To a certain extent, they may seem so. For example, the decision of LULAC to adopt an other-White legal strategy seems opportunistic insofar as it was obviously carefully crafted in response to particular causes, an almost predictable response to identifiable pressures. The degree to which decisions about racial identity are self-consciously undertaken will, of course, vary. Nevertheless, race rarely constitutes a weapon, in the sense [\*1174] of being understood as fully manipulable, to be deployed, remade or discarded at will. Rather, to pursue the analogy, race serves most often as the terrain on which social conflicts rage, in the sense that even as its contours and features are fought over and around, race is nevertheless treated as something natural and substantial. Though decisions about racial identity are often made in response to identifiable pressures, this is very far from saying that such decisions are self-consciously understood as cynical manipulations of a construct one is at liberty to remake or reject. Instead, such decisions occur in the United States within a cultural context that stresses the fundamentally fixed nature of racial identity.

Returning to Hernandez, though it is possible to identify some of the forces pushing LULAC members toward a White conception of Mexican-American identity, this should not lead one to conclude that that identity was superficially held, perceived as a temporary convenience disconnected from essential aspects of identity. Instead, the Whiteness of Mexican Americans was deeply felt within segments of that community. In the wake of Hernandez, criticism of the decision developed among Mexican Americans because, though it helped to reduce discrimination against them, some found it threatening to their White identity. n99 Gus Garcia responded angrily to such criticism, insisting in strident terms that Mexican Americans were typical White ethnics, even to the extent they were a disfavored group. n100 Carlos Cadena also insisted on a White ethnic identity in responding to the critics: "It must be remembered that this decision is based strictly on a question of national origin - not race. Those of Mexican descent who decry it as classifying 'our people' as non-white should keep this in mind." n101 The criticism of the decision as well as the responses of Garcia and Cadena demonstrate that for LULAC and many middle-class Mexican Americans in the 1950s, claiming a White identity was much more than [\*1175] a question of legal strategy. Though driven by legal considerations, this racial "choice" reflected the weight of social history more generally and was firmly perceived not as an act of volition but as reality. Racial decisions, whether regarding one's self or others, take place within the domain of a powerful ideology stressing the innate rather than fashioned nature of race. Although it is possible to identify particular forces compelling certain racial choices, and in this sense possible to describe racial self-categorization as opportunistic, it remains so as part of and deeply subject to the on-going process of racial formation. Central to this process has been the belief that race is not chosen, but fixed and natural.

### 3. Race as Contingency

The consensus regarding Mexican-American Whiteness highlights the extent to which racial identity is a process. Closely related to this, it also demonstrates that race is contingent on a multitude of factors, such as time, place, and other forms of identity. Briefly exploring these contingencies assists in understanding the constructedness of Mexican-American racial identity in Texas. Recognizing the role of contingency in racial fabrication encourages attention to the historical and cultural particularities giving rise to racial identities and stresses the diversity rather than homogeneity of identities within racialized groups.

To begin with, racial identity is always a function of historical moment - a question of what point in the three-hundred year history of race one is examining. In the sweeping language of Howard Winant, "The social construction of race is a millennial phenomenon whose origins lie in an immense historical rupture encompassing the rise of Europe, the onset of African enslavement, the conquista and colonization of the

Western Hemisphere, and the subjugation of much of Asia." n102 The meanings of race - what it denotes, what it encompasses - depend on where in this time-line one finds oneself. Historians locate the racialization of Mexican Americans in terms of Anglo expansion westward across North America and the rise of an ideology of White supremacy and White providentialism, demonstrating the historical contingency of racial identities in general, and Mexican-American racial [\*1176] identity specifically. n103 More particularly, it matters to the racial identity of Mexican Americans in Hernandez that the case arose in 1951, during a time of increasing agitation in Texas and across the nation by those constructed as non-White to remake their racially inferior identities. It matters also that this effort came just after a war fought in part to oppose virulent racism, and thus in the midst of an ascendant universalism stressing the essential sameness of humans and powerfully repudiating state-sponsored racial distinctions. n104 To claim that race is historical is not to suggest that it is a necessary result of determinate preconditions. Rather, it is to insist that race is a manifestation of temporally specific cultures and beliefs, social institutions and practices. n105

Race is also geographically contingent. Racial identity varies according to where one is, whether in places delineated as public or private, or in terms of spatial markers such as inner city and suburb, or across the imagined but real lines running between jurisdictions and countries. n106 For Mexican Americans, racial identity reveals itself as primarily a matter of region, where region encompasses both actual and constructed space. The geography of the Southwest provides the literal backdrop to Mexican-American racialization, but it does so also as a wildly contested, figurative terrain. For some, the Southwest is Aztlan, the mythical homeland for those of Aztec descent and a powerful symbol of Chicano identity and resistance; n107 for others, it is the final site of triumphant American expansion, a place imbued with both pioneer spirit and romantic traces of Spanish culture, defeated but vestigially represented in the Alamo and California's missions. n108 Reflecting the [\*1177] significance of region, it is no accident that Hernandez originated in Texas, where perhaps more than anywhere else Mexican Americans have been unyieldingly constructed as innately and irremediably inferior. n109 Race is often a matter of place, but place itself is never independent of culture (or race). Perhaps for that reason, *la frontera* or "the borderlands" has emerged as the preeminent contemporary metaphor of Mexican-American identity. n110

What race entails is determined not only by time and place, but also in relation to other aspects of identity: in general, in terms of other social constructs, such as nation, religion, class, gender, and sexuality; for individuals, as well with regard to idiosyncratic features. The process of social construction insures that forms of identity evolve in relation to each other. All socially constructed identities are indissolubly intertwined, and no single one of them can be comprehended except through the concomitant exploration of the others. n111 In Mexican- [\*1178] American scholarship, this is most dramatically evidenced by work closely examining the diverse interactions of race and gender. n112 In addition to race turning generally on other social identities, racial ideology gives salience to an array of personal factors, primarily physical features and ancestry, but also culturally specific practices such as language, diet, and dress. With respect to physical features, these vary dramatically for persons with Mexican antecedents, ranging from dark to fair. This range in turn significantly alters the racialization of individual Mexican Americans. n113 As Jorge Klor de Alva explains, "In the extremely race-conscious environment of the United States...different shades of humanity translate into different experiences of reality. Light-skinned Mexicans face fewer obstacles than their darker compatriots; they are less likely to be conscious of discrimination and more likely to look favorably upon American society." n114 Whether of a group or an [\*1179] individual, a given racial identity cannot be specified in the abstract, but is instead contingent on other key forms of social differentiation as well as on the vagaries of personal identity.

Combining various contingencies of identity, Hernandez may have evolved as it did in part because the case was litigated by middle-class Mexican Americans of generally lighter skin color. As a function of those factors, LULAC members may have been more able than most to embrace the notion of a White identity as the price and reward of assimilation into American society. Middle-class and fair-featured,

assimilation as Whites was for them simply more plausible than for others in the Mexican-American community. n115 In seeking to understand Mexican-American and Latino/a identities, we must come to terms with the ways in which various communities and individuals have been racialized. In doing so, however, we must reject any search for an essential racial character. To suggest that Latino/a communities have been racialized is not to posit that they have been homogenized. Rather, it is to claim that some Latino/a groups, in varying ways and to varying degrees, have been subject in the United States to complex processes of racialization. As a process, race is always constructed through the contingencies of time, place, and identity; racial identity, it follows, always encompasses remarkable heterogeneity.

## II

### Ethnicity and the Salience of Race

The Court in *Hernandez* rejected a racial understanding of Mexican Americans in part because it subscribed to a conception of race as something natural and therefore stable, fixed, and immutable. As the above discussion reveals, however, race is none of these. Nevertheless, it may seem that given the harms wreaked in the name race, in that case as well as in society as a whole, the Court ultimately did [\*1180] well in deciding *Hernandez* on a non-racial basis. That is, one might argue that even had the Court understood race to be a social construction and thus been in a position to approach this case on a racial basis, it may still have been the wiser course to decide *Hernandez* without reference to race. After all, the Court decried the social subordination of Mexican Americans in Jackson County, Texas, and struck down the challenged discriminatory practices just as it would have under a racial approach, but it did so without risking the further inscription of the myth that races are real.

For those who would attempt this reading, *Hernandez* would stand not only for the proposition that race is a social construction, but also for the proposal that, having recognized this, the concept of race be dispensed with as a current means of conceptualizing groups. This would not be to argue against the fact that some groups have been racialized. Rather, it would be to argue that although attention should be given to processes of racial differentiation and their consequences, racialized groups should no longer be discussed in racial terms. *Hernandez* would symbolize the benefits of looking to underlying social practices without reliance on the dangerous language of race. Such a reading of *Hernandez* would not be without proponents. This is, in effect, the argument Orlando Patterson makes in his recent editorial.

Patterson's argument against racial rhetoric and in favor of the idiom of ethnicity proceeds in essentially three steps. First, Patterson notes that race is not real. As he writes, "Let's start with the obvious. Nearly all social scientists, except for those on the fringes, reject the view that 'racial' differences have any objective or scientific foundation. In other words, a 'white' person is no different biologically than a 'black' person." n116 For Patterson, the very fact that race is not biologically real becomes part of the argument for repudiating race as a manner for describing current groups. Second, Patterson cites the dangers potentially posed by reliance on racial categories. Reference to such categories, he suggests, "perpetuates the idea that there is such a thing as racial purity and that people in the United States have essential biological differences." n117 Their use, he warns, "only adds to the country's racial fragmentation." n118 Finally, Patterson argues that whatever it is that the language of race seeks to capture can instead be as effectively understood and discussed using a different vocabulary, in his suggestion, that [\*1181] of ethnicity. He asks rhetorically: "So why measure both racial and ethnic prejudice? Isn't that redundant? ... Why can't...ethnic data...tell us about demographic trends instead?" n119 For Patterson, race talk must come to an end: Race is not real; references to race dangerously suggest otherwise; and ethnicity serves equally well for discussing the nature and consequences of social divisions currently considered racial. Other thoughtful scholars, such as Anthony Appiah and David Hollinger, share Patterson's concerns and conclusions regarding the importance of moving away from racial language, if not necessarily his exact prescription for ethnicity as a replacement vocabulary. n120

On a general level, arguments against the recognition of social differences in terms of race also abound in the legal arena. In a sense, the Supreme Court's evolving jurisprudence of colorblindness can be understood in this way. n121 In addition, some legal scholars have begun to [\*1182] move toward the argument that racial categories should be jettisoned altogether. This is, after all, Deborah Ramirez's underlying argument in her Stanford symposium piece. n122 It is also the implicit drift of Christopher Ford's recent articles on efforts at racial categorization. In an article published in 1994 concerning legally recognized racial classifications, Ford warned "that there is something profoundly wrong with an "anti-discrimination' ethic which calls forth such jurisprudential segregation and brands badges of racial identity onto the face of public life." n123 Although in that piece Ford stopped short of explicitly endorsing the abandonment of legally mediated racial taxonomies, he moves closer to that position in a more recent article, where he warns that

without at least some adjustment of principle and priority in the way we administer identity in contemporary America, we may face an increasingly bitter spiral of competitive Balkanization, the results of which are by no means likely to favor the minority groups in whose name it will all have been undertaken. n124

[\*1183] If there are good reasons to repudiate the contemporary use of racial terminology, such reasons may apply more forcefully with respect to Latinos/as. To start with, Latino/a groups have not been as consistently racialized as others, for example Whites or African Americans. The Hispanic category, for example, is of particularly recent vintage. n125 Perhaps the arguments against racial language apply more strongly as arguments against contributing to the further racialization of groups not already primarily constructed in racial terms. For such groups, racial terminology may come closer to establishing, rather than simply possibly reinforcing, ideas of biological difference. In addition, Latinos/as are routinely characterized as being of every race. Perhaps communities whose members are customarily considered to span the racial spectrum can transcend and thus most effectively rebut notions of race. Jorge Klor de Alva forcefully argues this point in his recent colloquy with Cornel West, theorizing that Latinos/as are in a unique position to assist the country in overcoming racial beliefs. n126 Arguing "against the utility of the concept of race" and for "a different kind of language," Klor de Alva suggests viewing Latinos/as as "homologous with the totality of the United States. That is, like Americans, Latinos can be of [\*1184] any race." n127 For Klor de Alva, this understanding of Latinos/as shifts notions of difference in a desirable way: "What distinguishes them from all other Americans [becomes] culture, not race." n128 For Klor de Alva, stressing a Latino/a cultural, as opposed to racial, identity can be an important step toward defeating racial beliefs altogether.

Contemporary calls for rejecting racial language, general and legal, seem to apply with particular force to Latinos/as. These arguments also dovetail with those within the legal academy earlier recorded for a non-racial conception of Latino/a identity. n129 Should LatCrit theory heed those calls, and eschew the use of racial language? More particularly, would LatCrit theory be well served by describing and conceptualizing Latinos/as in exclusively ethnic terms? This Part argues no to both.

Although not intended to serve as a direct response to Orlando Patterson's editorial, this Part effectively traces and responds to the elements of his argument. It first rejects two common constructionist arguments for abandoning racial language. One elides the difference between recognizing that race is cultural and concluding that it is ephemeral - a version of this argument can be seen in Patterson's point that talk of race should be avoided simply because race is not real. The other conflates the potential of racial terminology to do harm with the conclusion that racial rhetoric is harmful on balance - for example, Patterson's argument, without more, for jettisoning race because it potentially perpetuates dangerous myths of difference. Having rejected these arguments, this Part then uses Hernandez to evaluate at some length the claim that racial terminology can be effectively supplanted by references to ethnicity, a position advocated in general by

Patterson [\*1185] and one frequently urged in particular with respect to Latinos/as. While acknowledging that great care must be taken when talking in terms of race, this Part argues that to exclusively employ the rhetoric of ethnicity too easily leads to a failure to grasp important aspects of Latino/a life in this country, sometimes as a function of oversight, and sometimes through willful blindness.

#### A. Two Common Arguments

The notion that race is biological is now widely recognized as a patent falsehood, an injurious myth deserving emphatic repudiation. The repudiation of biological race, however, has often shaded into a rejection of the notion that races exist at all. The call for discontinuing the use of racial language because race is not biological but cultural confuses the conclusion that race is cultural with the position that it is ephemeral. Henry Louis Gates notes this tendency, suggesting that "there's a treacherous non sequitur here, from 'socially constructed' to essentially unreal." n130 Kimberle Crenshaw labels this cultural/ephemeral confusion "the vulgarized social construction thesis": the claim "that since all categories are socially constructed, there is no such thing as, say, blacks or women, and thus it makes no sense to continue reproducing those categories by organizing around them." n131 That race is constructed, however, does not diminish in any way its social power or permanence. Works such as Douglas Massey and Nancy Denton's *American Apartheid* and Andrew Hacker's *Two Nations* demonstrate that race persists as one of the principal lines of division in contemporary America, the perhaps impending demise of popular biological [\*1186] ideas of race notwithstanding. n132 Indeed, if anything, it may be that in the last decade race has grown in significance. n133 The decline of biological race does not herald the eradication of racial beliefs precisely because the power of race does not and never has depended on its factual accuracy. In the United States, race and racism remain deeply embedded phenomena because of, rather than despite, their invented nature.

The argument for abandoning racial terms because race is not "real" gravely errs. Put in terms of *Hernandez*, to suggest that it would be inappropriate to discuss Mexican Americans in Texas in racial terms because they were not "really a race" - that is, because not biologically a race - is to miss the significance of that case. *Hernandez* demonstrates as clearly as any case does that the social stratification of superior and inferior groups along racial lines traces not biology but community opinion. Chief Justice Warren understood this, in a fashion. Though the Court did not believe Mexican Americans constituted a race, it nevertheless focused on the underlying social subordination evident in Jackson County as something no less dire for not being racial in a biological sense. Though a social construction, race is real. Its reality lies in social practices, including beliefs in natural group divisions and their significance, not in the abstract "truth" of such beliefs. Recognizing the falsehood of physical conceptions of race cannot serve in and of itself to establish that race is unreal. Nor can it support without more the conclusion that racial rhetoric is inappropriate for discussing groups that have been racialized. The "reality" encountered by such groups does not change in the least with the recognition that race is not biologically real.

Often, however, the call for rejecting racial terminology is grounded not only on the claim that race is not real, but also, and more persuasively, on the argument that such terminology potentially [\*1187] legitimates injurious beliefs in innate difference. The underlying argument, that continued reliance on racial language potentially reifies biological conceptions of race, is clearly correct. However, the conclusion that this compels an end to such reliance does not necessarily follow. To be persuasive, the claim must be not simply that racial terminology may be harmful, but that on the whole it does more harm than good. This last is a much more contestable claim, turning not only on a tricky balancing but more fundamentally on the calibration of the scale. For instance, assume for simplifying purposes a single yardstick, ending racial discrimination. On this level, did the Court do more good than harm in not referring to race in its decision in *Hernandez*? On one cut, was basing the decision on community opinion rather than race more helpful than not for efforts to achieve equality for all Mexican Americans? n134 On another, did the Court in fact avoid contributing to the racialization of Mexican Americans? n135 Such questions must be assessed in

weighing whether eschewing the language of race is warranted. It is not enough to note that using racial language has the potential to do harm; at issue is whether on balance such language is more harmful than not.

In the context of legal scholarship, the balance seemingly falls toward using racial language. Considering the harm warned of by Patterson, Appiah, and others, the racializing effects of race-conscious scholarship contribute only on the margin to the everyday legitimization and extension of racial identities that occurs throughout society. Efforts to fathom and redress racism through the language of race are not the principle loci of racial fabrication; if they were, we would be much further along in the pursuit of equality. The use of race in antiracist scholarship in the end is likely to be harmful only marginally. In contrast, the language of race may well constitute the single most indispensable tool for combating and ameliorating the deleterious effects of racism. Because race is so deeply embedded in this society, its reach [\*1188] and effects must be addressed in terms of race itself - there is no better, indeed, no other language available to us. n136

Arguably, the language of race is indispensable to remaking the powerful essentialisms that race has inscribed on our bodies and imposed on our identities. n137 Be that as it may, however, the more general point remains: the constructionist critique of racial language cannot be maintained absent a debate about not only the harms but also the benefits of its use. It is simply not enough to call for the rejection of racial terminology on the strength of the observation that it may facilitate racism. Of course it may; but might it not simultaneously serve on other levels to disestablish and combat racism sufficiently to outweigh any harm done? Constructionist calls to reject racial language must rest not on the claim that such language may serve ill, but on the argument that it does so on balance.

#### B. Race or Ethnicity?

General arguments against the use of a racial idiom aside, Latinos/as are often urged to supplant race with ethnicity as a means of constructing and understanding their identity. Consider, for example, Deborah Ramirez's argument that Hispanics should be thought of as an ethnic group with multiracial origins. n138 Understanding race and ethnicity as social constructs blurs the distinctions between the two - both emerge as concerning the construction of identity along the lines of ancestry, culture, language, national origin, and so on. n139 For however [\*1189] closely related these forms of social differentiation may seem when compared in terms that highlight their culturally constructed nature, however, they remain quite distinct in the manner in which they have been and continue to be deployed. In effect, race has been used as a marker of differences believed to be physical and innate, whereas ethnicity has been applied in ways suggesting cultural distance. Their divergent historical and contemporary deployment precludes the possibility that the rhetoric of ethnicity can fairly and fully replace the terminology of race as a means of conceptualizing racialized groups in the United States. As preface to an elaboration of this argument, it is worthwhile here to briefly historicize the uses of race and ethnicity in this country.

Race as a concept entered the English language in the sixteenth century, originally signifying primarily group similarities shared through common lines of descent, but eventually taking on rigorously biological meanings as a result of the rise of natural sciences in the nineteenth century. n140 Numerous scholars have documented the evolution of this concept in the United States, stressing the manner in which the idea of race tied moral, political, and intellectual attributes to group identities ostensibly demarcated by physiological differences. n141 In [\*1190] contrast, however, ethnicity in the United States is a very modern invention indeed, dating back only sixty or so years and owing its existence to Nazi racial extremism. According to Werner Sollors, "The term...was intended to substitute for 'race' at a time that the older word had become deeply compromised by 'racism.'" n142 "'Race,'" Sollors writes, "was discredited by the emergence of fascism." n143 From its inception, the use of ethnicity was intended to avoid the biologism of race, drawing instead on the cultural descent models advocated by liberal intellectuals such as

Horace Kallen and Robert Park. n144 This distinction between race-as-biology versus ethnicity-as-culture persists in the way these terms are widely understood, as well as in the ways these terms are commonly deployed. Though race and ethnicity may represent subsets of what Floya Anthias terms "ethnos," their development and history in the United States have been quite distinct. n145

Under the differing social constructions of ethnicity and race prevalent in the United States in this century, in David Goldberg's formulation, "ethnicity...tends to emphasize a rhetoric of cultural content, whereas race tends to resort to a rhetoric of descent." n146 Within this context, the attribution of a distinct ethnic identity has often served to indicate cultural distance from Anglo-Saxon norms, which have been [\*1191] established as the effective meter. Left unstated but implicit, however, is an assumption of transcendental, biological similarity: ethnics and Anglo-Saxons are both White. In contrast, the attribution of a distinct racial identity has served to indicate distance not only from Anglo-Saxon norms, but also from Whiteness. In this way, "racial" minorities have been constructed as twice removed from normalcy, across a gap that is not only cultural, but supposedly innate. This distinction has been of fundamental importance in the United States. Whereas, in other regions of the world, ethnicity as a combination of culture and descent has proved more than adequate to the task of social oppression, and even extirpation, in the United States, the most extreme sorts of social stratification have been imposed along putatively biological lines. n147 This is not to argue that some groups in the United States now considered "ethnic," for example the Irish, did not also suffer extensive discrimination. That some did, however, confirms rather than detracts from the point. As the history of Irish assimilation shows, their degradation was initially "racial" in character, and their move to "White ethnic" status marked their triumph over such discrimination, albeit at the price of transforming themselves into members of the dominant race. n148 It is supposedly biological and not merely cultural difference, race and not ethnicity, that has provided the sharpest line of group division and oppression in the United States. [\*1192]

As a function of the basic fact that it is "racial" more than "ethnic" minorities that have been subject to especially severe degradation in the United States, the substitution of ethnic rhetoric for the language of race entails two sorts of risks. The first risk is the tendency of ethnic nomenclature to obscure the sorts of experiences and conditions that are particular to racialized communities. Drawing on a model of cultural differentiation, the rhetoric of ethnicity tends to focus attention on the construction of groups in cultural relation to the norm but fails to direct attention to the different sorts of social experiences engendered particularly by the construction of identities in immutable terms. As analysts, LatCrit theorists must take care against losing sight of such aspects of social reality. The second risk involves not omission but commission. Among those who employ "ethnicity" - and other concepts such as "nationality," "immigrant," "non-citizen," and "illegal alien" - some do so not solely in order to highlight certain salient aspects of identity implicated in such terms, for example cultural differences or political status, but in order to hide or deny the extent to which the groups referred to have often been racialized as non-White. Because the language of ethnicity may be harnessed to the political project of rewriting the social history of some Latino/a groups, LatCrit scholars must be doubly careful in using such language themselves.

### 1. The Experience of Race

In the United States, the elaboration of non-White racial identities has historically been accomplished through practices of extreme social segregation. Hernandez exemplifies some of the most typical of such practices. In Jackson County, Mexican Americans were denied the right to participate on juries, barred from local restaurants, excluded from social and business circles, relegated to inferior and segregated schooling, and subjected to the humiliation of Jim Crow facilities, including separate bathrooms in the halls of justice. Each of these aspects of social oppression substantially affected, although of course even in their totality they did not completely define, the experience of being Mexican American in Jackson County at mid-century. LatCrit Theory must concern itself directly with such practices and experiences. To the extent that an ethnic idiom does not focus significant attention on racialized experiences, however, analysts using such

language to discuss racialized groups risk misunderstanding the experiences that may be most fundamental to individual and group identity. [\*1193]

To fathom the potential centrality of such experiences for an individual, imagine being present at the moment that Gus Garcia sought to introduce evidence before the trial court regarding the segregated courthouse bathrooms. He did so by calling to the stand co-counsel John Herrera. In picturing this episode, keep in mind that both Garcia and Herrera had family ties to that area stretching back before Texan independence (indeed, Herrera's great-great-grandfather, Col. Francisco Ruiz, was one of two Mexican signatories to the 1836 Texas Declaration of Independence). n149 As excerpted from the trial court transcript, the exchange between Garcia and Herrera progressed like this:

Q. During the noon recess I will ask you if you had occasion to go back here to a public privy, right in back of the courthouse square?

A. Yes, sir.

Q. The one designated for men?

A. Yes, sir.

Q. Now did you find one toilet there or more?

A. I found two.

Q. Did the one on the right have any lettering on it?

A. No, Sir.

Q. Did the one on the left have any lettering on it?

A. Yes, it did.

Q. What did it have?

A. It had the lettering "Colored Men" and right under "Colored Men" it had two Spanish words.

Q. What were those words?

A. The first word was "Hombres".

Q. What does that mean?

A. That means "Men".

Q. And the second one?

A. "Aqui", meaning "Here".

Q. Right under the words "Colored Men" was "Hombres Aqui" in Spanish, which means "Men Here"?

A. Yes, sir. n150

Under cross-examination by the district attorney, Herrera continued:

Q. There was not a lock on this unmarked door to the privy? [\*1194]

A. No, sir.

Q. It was open to the public?

A. They were both open to the public, yes, sir.

Q. And didn't have on it "For Americans Only", or "For English Only", or "For Whites Only"?

A. No, sir.

Q. Did you undertake to use either one of these toilets while you were down there?

A. I did feel like it, but the feeling went away when I saw the sign.

Q. So you did not?

A. No, sir, I did not. n151

By themselves, on paper, the words are dry, disembodied, untethered. It is hard to envision the Jackson County courtroom, difficult to sense its feel and smell; we cannot hear Garcia pose his questions; we do not register the emotion perhaps betrayed in Herrera's voice as he testified to his own exclusion; we cannot know if the courtroom was silent, solemn and attentive, or murmurous and indifferent. But perhaps we can imagine the deep mixture of anger, frustration, and sorrow that would fill our guts and our hearts if it were us - if it were us confronted by that accusatory bathroom lettering, us called to the stand to testify about the signs of our supposed inferiority, us serving as witnesses to our undesirability in order to prove we exist.

Imagining such a moment should not be understood as giving insight into the very worst damage done by racism in this country. Nor should it be taken to suggest that everyone constructed as non-White has come up against such abuse, or has experienced it the same way. Finally, it should not be taken to imply that those denigrated in non-racial terms do not also suffer significant, sometimes far greater harms. Imagining the moment described above cannot and does not pretend to afford insight into the full dynamics of racial oppression, or to provide a solid base from which to compare other forms of disadvantage. What it does afford, however, is a sense of the experience of racial discrimination in the United States. In this country, the sort of group oppression documented in Hernandez, the sort manifest on the bathroom doors of the Jackson County courthouse, has traditionally been meted out to those characterized as racially different, not to those simply different in ethnic terms. It is on the basis of race that groups in the United States have been subject to the deepest prejudices, to exclusion and [\*1195] denigration across the range of social interactions, to state-sanctioned segregation and humiliation. In comparison to ethnic antagonisms, the flames of racial hatred in the United States have been stoked higher and have seared deeper. They have been fueled to such levels by beliefs stressing the innateness, not simply the cultural significance, of superior and inferior identities. n152

It is important to imagine enduring John Herrera's testimony in order to understand how racial experience may be a fundamental component of personal identity, a component one potentially overlooks if relying on exclusively ethnic language to conceptualize racialized groups. It is perhaps more important, however, to recognize the role such experiences play not simply in the lives of individuals, but in group formation. The experience of racial mistreatment often constitutes a widely shared facet of identity within non-White communities, one integral to conceptualizations of group solidarity. In this context, experience should be understood broadly. Experience does not simply involve direct, unmediated interaction with a prediscursive reality. Nor is it something peculiar to individuals qua individuals, something unique as to each person. Rather, experience should be understood as partially a function of our identity, and also as a factor contributing to that identity. As expressed by Joan Scott, "It is not individuals who have experience, but subjects who are constituted through experience....To think about experience in this way is to historicize it as well as to historicize the identities it produces." n153 What we feel, see, and know is intimately bound up with our understandings of ourselves and the world around us, even as it causes us to reevaluate those understandings. In this way, racial experience would involve not just the lash of racial segregation, but for example such daily cultural practices as the inculcation by families of lessons regarding "racial" identity, or

the representation of racial ideologies in the various media of popular culture. It means those interactions with the world that serve to locate one or one's community within a socially constituted domain wherein racial identities play a [\*1196] considerable role. n154 In this broad sense, experiencing racial discrimination may be understood as the means by which people come to understand themselves as constituting a racial community. n155

Highlighting the experience of racial discrimination should not be taken to imply a wholly negative or reactionary view of racial group formation. Although racial victimization has been instrumental in the cultural formation of group identity (this is, to be sure, one of the central themes to emerge in recent studies of Mexican-American group formation n156), this is not the same thing as suggesting that racial group identities are solely determined by the negative forces of invidious racial discrimination. Or, put another way, this is not to say, as some have, that racial categories such as Black, Brown, White, Red, and Yellow are empty of culture and only denote groups accorded privilege or subject to discrimination on the basis of physical markers. n157 Rather, communities in [\*1197] this country have often elaborated cultural practices and philosophies within boundaries loosely traced by race. Communities demarcated along racial lines possess distinct cultures, even though cultural practices overflow and as often undercut as reinforce racial boundaries. Nevertheless, it remains true that the experience of racial discrimination, understood broadly, constitutes a primary means of (racial) community formation and individual identification. In this way, to risk losing sight of the experience of race is to risk losing sight not only of fundamental components of individual and group identity, but of racial fabrication itself.

## 2. Racial Conditions n158

The language of race, more than that of ethnicity, calls attention to the experience of racial oppression. In addition, it also directs attention to racial oppression's long-term effects on the day-to-day conditions encountered and endured by racialized communities. To understand the importance of such attention, consider the segregated school system noted in Hernandez. Jackson County's scholastic segregation of Whites and Mexican Americans typified the practices of Texas school districts: although not mandated by state law, from the turn of the century, school boards in Texas customarily separated Mexican-American and White students. In his study of the Mexican-American struggle for educational equality in Texas, Guadalupe San Miguel writes,

School officials and board members, reflecting the specific desires of the general population, did not want Mexican students to attend school with Anglo children regardless of their social standing, economic status, language capabilities, or place of residence...

...

Wherever there were significant numbers of Mexican children in school, local officials tried to place them in facilities separate from the other white children. n159

Though it should be obvious, it bears making explicit that racism drove this practice. For example, a school superintendent explained the need for segregation this way: "Some Mexicans are very bright, but you can't compare their brightest with the average white children. They [\*1198] are an inferior race." n160

According to San Miguel, many whites "simply felt that public education would not benefit [Mexican Americans] since they were intellectually inferior to Anglos." n161 To be sure, as in Jackson County, school segregation in Texas was most pronounced in the lower grades. n162 However, also as in that county, this fact reflected not a lack of concern with segregation at the higher grades, but rather the practice of forcing Mexican-American children out of the educational system after only a few years of school. n163 The segregated schooling noted in Hernandez constitutes but one instance in a rampant practice of educational discrimination against Mexican Americans in Texas and across the Southwest. n164 [\*1199]

Using the language of race pushes us to look to the pronounced effects on minority communities of long-standing practices of racial discrimination. These effects can be devastating in their physical concreteness, as evidenced by the dilapidated edifice that served as the schoolhouse for the Mexican-American children in Jackson County's Edna Independent School District. According to the testimony of one frustrated mother, the "Latin American school" consisted of a decaying one-room wooden building that flooded repeatedly during rains, with only a wood stove for heat and outside bathroom facilities, and with but one teacher for the four grades taught there. n165 Such effects may also be personal and intangible, though not for those reasons any less real, dire, or permanent. In Jackson County, as in the rest of Texas, the Mexican-American children subject to state-sanctioned segregation no doubt suffered grave harm to their sense of self-worth and belonging - feelings of inferiority embossed on their hearts and minds in ways unlikely ever to be undone, in the language of Chief Justice Warren. n166

Irrespective of their form, material or spiritual, the conditions produced by racism profoundly degrade the quality of life of non-White community members while also delimiting their life chances. Consider in this regard the net educational impact of school segregation on Jackson County's Mexican-American community. In their brief to the Court, the LULAC attorneys sought to establish that there were at least some Mexican Americans residing in Jackson County with sufficient [\*1200] education to serve as jurors. They cited statistics from the 1950 census to prove this. Of the 645 persons of Spanish surname in that county over the age of 25, the lawyers informed the Court,

245 have completed from 1 to 4 years of elementary schooling; 85 have completed the fifth and sixth years; 35 have completed 7 years of elementary schooling; 15 have completed 8 years; 60 have completed from one to three years of high school; 5 have completed 4 years of high school; and five are college graduates. n167

While these figures prove that some Mexican Americans were educationally qualified to serve as jurors, they also demonstrate the impact of that county's systematic educational discrimination against Mexican Americans. The figures tell us, for example, that out of 645 Mexican-American adults in Jackson County, only five had completed college, while 245 had no better than a fourth grade education. Consider also two additional census numbers not cited by the lawyers: First, out of that population of 645, fully 175 had received no formal education whatsoever; and second, the median number of school years completed was a dismal 3.2 years. n168 Reflecting on these numbers, it is difficult to conclude other than that the net educational impact of segregation on Mexican Americans in Jackson County was nothing short of disastrous.

In Jackson County, segregated schools were just one manifestation of racial discrimination. As the evidence from that county demonstrates, the effects of long-term racism on the conditions of minority communities are profound. Those effects warrant close attention if we hope to understand the lives of persons oppressed because of supposed racial differences - people systematically relegated to society's bottom, not just through the operation of individual prejudices but by institutionalized cultural, political, and juridical practices. The impact on community members, such as widespread alienation and low levels of education, largely set the parameters of the lives of those within the community. None but the fewest and

most fortunate Mexican Americans raised in the 1950s in Jackson County, Texas, could escape the grinding poverty dictated for them by the racial prejudices of Whites there. Because these conditions circumscribe the lives people can reasonably expect to live in this society, racial language remains a salient [\*1201] vocabulary for discussing socially constituted communities severely subordinated in racial terms.

It is also important that racial language draw close attention to the effects of racial discrimination because such effects do more than delimit life chances; they also contribute to the persistence of racial ideas. Race does not persist simply because it is a widely held belief; it continues because the conditions in which different communities live in our society - conditions themselves often the result of racism - constantly reconfirm racial ideas. n169 Recall that many Whites in Texas justified the segregation of Mexican-American school children on the ground that they were intellectually inferior to Whites. n170 School segregation became, in terms of its rationale, self-confirming: racist thinking held that Mexican-American children should be taught in separate schools because of their intellectual inferiority, the evidence of which lay manifest in the widespread maleducation of the Mexican-American adult community, which itself stemmed largely from discrimination in the provision of schooling. In contrast, Whites were considered intelligent and educable, and hence, were educated, in turn confirming their intelligence. Racial discrimination against Mexican-American children produced a largely illiterate adult population, especially in comparison to the White community. The relative "ignorance" of Mexican Americans and "intelligence" of Whites, then, became the principal confirmation of the belief that Mexican Americans were indeed intellectual inferiors to Whites, by virtue of race. The material conditions of our society, produced in part by the institutionalization of racial prejudices, seem constantly to confirm in people's minds not the dangers of stereotypes so much as the basic validity of racial beliefs regarding the innate superiority and inferiority of different groups. This tendency is evident in many of the contemporary negative beliefs regarding Latinos/as offered to explain relatively low socioeconomic status. n171 [\*1202]

Notice that the basic point regarding the manner in which conditions confirm racial myths is not dependent on racism serving as the principal cause of those conditions. This is significant for Latinos/as, as the conditions in Latino/a communities reflect not just racism but continuing immigration. Although not a function of racism directly, n172 such immigration may contribute to the persistence of racial beliefs concerning Latinos/as. As Rachel Moran points out, "The recent influx of immigrants increases, rather than diminishes, the likelihood of discriminatory treatment. The growing visibility of Latino/a immigrant populations may reinforce stereotypical beliefs that Latinos/as are foreign and unwilling to assimilate." n173 The conditions confronting communities constructed in racial terms deserve careful attention. This is so in part in order to understand the inequitable long-term effects of racism. It is also important, however, in order to grasp how it is that racial beliefs remain so deeply naturalized in the U.S. public's imagination. Race seems natural because so much in this country, from the alienation or education of certain populations to the buildings in particular neighborhoods, correspond to and corroborate racial myths. These conditions need not be themselves the products of racism, though they often are. To the extent they are, immanent myths regarding racial difference are transformed into tangible confirmations of the difference that race [\*1203] makes. Again, to risk losing sight of racial experiences and conditions is to risk losing sight of racial formation, of the way in which race is daily reconstituted and revitalized.

### 3. Racial Denial and Social Justice

For LatCrit theorists, to adopt the exclusive use of ethnic language to describe and understand Latinos/as is to run the risk of focusing on "cultural" aspects of differentiation to the omission of "racial" ones. More than this, however, it is also to chance contributing to efforts to deny that some Latino/a groups have been racialized. The opinion of the Texas Court of Criminal Appeals in *Hernandez* exemplifies the revisionist efforts this section warns against. It also anticipates the claims that Latinos/as have not experienced the nether world of racial discrimination elaborated in the pseudo-policy scholarship of contemporaries such as Peter Skerry and Peter Brimelow. n174 Responding to such claims requires that LatCrit theorists retain in

some fashion the language of race. In this way, racial rhetoric emerges as not just analytically necessary to the LatCrit project, but also as essential to the normative aspirations of LatCrit Theory. For LatCrit theorists, racial terminology may be fundamental to the pursuit of social justice.

By focusing attention on the conditions confronting racialized groups, racial understandings of Latino/a identities help establish the basis from which to demand committed responses to the deleterious effects of race. In contrast, a non-racial understanding of Latino/a identities all too easily facilitates opposition to racial remediation. This is one of the lessons of Hernandez, taught in particular in the Texas appellate decision. Recall that the Court of Criminal Appeals denied Hernandez's claim in part on the ground that "Mexicans are white people," one among the "various nationalities and groups composing the white race." n175 The court asserted that "the grand jury that indicted the appellant and the petit jury that tried him being composed of members of his race, it cannot be said...that appellant has been discriminated against in the organization of such juries and thereby denied equal protection of the laws." n176 The court in effect claimed that although Hernandez was a member of the "Mexican nationality," he was also White, and that the shared identity and essential similarity between [\*1204] Hernandez and the members of the grand and petit juries nullified his claim of discrimination.

The appellate decision in Hernandez exemplifies the attraction for some of a singular reliance on ethnicity as a basis for conceptualizing social relations. Utilizing ethnicity as the sole lens through which to view socially constituted groups can be used to hide the extent to which harms and benefits have been conferred on the basis of presumed racial differences. Embracing an exclusively ethnic focus allows one to effectively abjure at the level of vocabulary the role of race in structuring opportunities in the United States. "Ethnicity" under this approach becomes a way to focus attention on the surface, on the word, and to forestall attention to the underlying social relations of domination and subordination that do not observe such neat word-boundaries. In this way, it facilitates the politically charged belief that every ethnic group that has come to the United States has found the same possibilities, and encountered the same hurdles. n177 Under such an approach, group differences in social standing and economic success must be explained as a function of group attributes or failings, not as a result of social prejudices or structural advantages and disadvantages.

It is not simply, however, that an exclusive focus on ethnicity seems sometimes to be pursued as a conscious strategy for denying the significance of past or on-going racialization. In addition, the language of ethnicity is occasionally used to actively oppose judicial or legislative remedies for racism. Recall again the appellate decision in Hernandez. Immediately upon insisting that Hernandez was a member of a White nationality, the court wrote as follows:

Appellant seeks to have this court recognize and classify Mexicans as a special class within the white race and to recognize that special class as entitled to special privileges in the organization of grand and petit juries in this state.

To so hold would constitute a violation of equal protection, because it would be extending to members of a class special privileges not accorded to all others of that class similarly situated. n178

It is worthwhile to disaggregate the court's complex rhetorical moves. First, strictly ethnic conceptions of identity are employed in order to deny systemic racial discrimination: as a White nationality, it is impossible for Mexican Americans to have suffered discrimination in Texas; everyone is the same. By implication, however, if everyone is the same, [\*1205] then requests for protection against structural disadvantage constitute indicia of an unwillingness or an inability to compete on even terms. Thus, in the

second move, petitioning for antidiscrimination protection emerges as an effort to secure special treatment as well as a tacit admission of inability: not having suffered discrimination but also not having achieved social equality, the request for protection constitutes special pleadings by those interested in securing for themselves unfair and unearned advantages. It follows, according to the court, that the true defense of equality lies in opposing the special pleadings of those who call for racial remediation. In the final move, then, the court contends that equality is defended by rejecting unsupported claims of difference; true fidelity to equal protection requires protecting the Fourteenth Amendment against those who would violate it in the name of remedying alleged racism.

Putting the moves of the appellate decision back together, a strictly ethnic approach to group identity can be used to justify assertions of a fundamental sameness ("we are all ethnics"); to reify the essential racial differences ethnic language purports to deny ("but you people just can't compete"); and finally to declare committed efforts to achieve racial equality both immoral and illegitimate ("so stop asking for handouts").<sup>179</sup> As this decision demonstrates, completely substituting ethnicity for race as a basis for discussing racialized Latino/a groups can do more than simply hide their racialization. It can also easily be harnessed to the project of denying the need for as well as access to antidiscrimination remedies, in the very same moment that it implicitly confirms Latino/a inferiority.

Unfortunately, the construction of Latino/a identity in non-racial terms continues as a basis for arguing that the remedies fashioned to redress racial discrimination should not be available to Latino/a communities. For example, this is the central theme Peter Skerry elaborates in his 1993 book, *Mexican Americans: The Ambivalent Minority*,<sup>180</sup> a theme amplified and applied to Latinos/as as a whole in Peter Brimelow's 1995 best seller, *Alien Nation*.<sup>181</sup> Skerry suggests that **[\*1206]** Mexican Americans inappropriately seek to take advantage of race-based remedies for discrimination. Characterizing Mexican Americans as immigrants, Skerry writes: "If their experience is in many respects similar to that of typical immigrant groups, then what entitles them to the same protections that the nation has, with considerable reluctance and controversy, given to blacks in recognition of the debilitating effects of slavery and Jim Crow?"<sup>182</sup> For Skerry, the answer is nothing, or at most, not much.<sup>183</sup> Skerry's lament is that "Mexican Americans are being seduced ... into adopting the not entirely appropriate, divisive, and counterproductive stance of a racial minority group."<sup>184</sup> According to Skerry, the threat to Mexican-American assimilation comes not from racial prejudice or hostility, but from access to the legal and institutional remedies designed to combat racism.

Skerry contrasts immigrant and non-White identity, suggesting that these exist in exclusive opposition. This false dichotomy may reflect the classic understanding of the differences between ethnicity as culture (immigrants) and race as biology (minorities). Nevertheless, this dichotomy is false: no reason exists why a group might not constitute both ethnic immigrants in the cultural sense and racial minorities in the sense of being denigrated because of putative biological differences.<sup>185</sup> **[\*1207]** Indeed, this is the common fate for non-European immigrant groups to the United States.<sup>186</sup> Thus, in order to adequately conceptualize Latino/a identities, LatCrit theorists should reject calls to completely substitute the language of ethnicity for that of race. Rigorously ethnic conceptions of Latino/a group identity have been and will continue to be advanced in order to deny both the racialization of some Latino/a groups and the legitimacy of their calls for redress. In contrast, the language of race can serve as a basis for contesting the falsification of group histories as well as a means to affirm both the need for and legitimacy of committed social responses to racial harms. Eric Yamamoto argues that to be relevant to minority communities, the concept of justice must be racialized, pragmatically grounded "in concrete racial realities" by taking account of the experiences of racial communities as well as their struggles.<sup>187</sup> In this sense, a racial assessment of Latino/a identities may be an important prerequisite to achieving social justice and equality. For those Latinos/as racialized as non-White, "race" serves as "the moral marker of wrongs that have been and continue to be done."<sup>188</sup> LatCrit theorists should not hide that marker, or allow it to be hidden, under the exclusive rhetoric of ethnicity.

To recapitulate the arguments just advanced, while ethnicity and race are closely related, they are not fungible. To the extent that Latino/a communities have been racialized, we should reject efforts to [\*1208] replace wholly the language of race with other, ostensibly less problematic concepts such as ethnicity, nationality, and so on. n189 Using non-racial language to assess Latino/a racial identities risks obscuring important aspects of experience and threatens to hide from view racially determined conditions. It also facilitates a dangerous denial of the legitimate need for as well as access to antidiscrimination institutions and practices. Of course, insofar as the non-racial language one adopts more closely tracks that of race, it more directly draws attention to racial experiences and conditions, thereby diminishing the dangers posed by such substitution. Thus, among the various terms suggested, Patterson's preference for "ethnicity" seems less problematic than Appiah's proposed turn to "culture," while Hollinger's proffer of "ethno-racial blocs" may pose the least dangers of the three. n190 That said, it remains the case that LatCrit theorists must carefully evaluate the risks associated with rejecting racial terminology for use in analysis and advocacy on behalf of racialized Latino/a communities. In the end, at stake is not just an adequate understanding of Latino/a lives, but the persistence of, and the necessity of committed responses to, race and racism. Latino/a identity need not be, and should not be, constructed or construed solely in racial terms. But neither should Latino/a racial identity be erased.

Conclusion:

Post-Anglo America n191

The racial demography of the United States is changing, and changing quickly. In 1960, the census counted nearly ninety percent of the population as White and the remainder as Black. Latinos/as, who comprised less than four percent of the population, found themselves counted with the former. Other groups, including Native Americans, Pacific Islanders, and Asian Americans, constituted no more than one percent of the United States' people. n192 On the advent of the new [\*1209] millennium, however, those numbers are radically different - and nowhere are those changes more evident than in California. Sometime between 1998 and 2000, Whites will officially fall to less than half the total population of that state, which currently stands at 31.6 million. n193 According to census projections, two decades after that, Whites will constitute only 34 percent of California's population, while Latinos/as will surpass them with 36 percent, Asian Americans will constitute a further 20 percent, and African Americans and Native Americans will make up 8 and 1 percent, respectively. n194 These changes, which reflect declines in the White population, stability among African Americans, and rapid growth in the Latino/a and Asian American groups, n195 herald in California and with some delay across the country the emergence of a post-Anglo society. What this means, at least in demographic terms, is easy to explain. Soon after California joins Hawaii and New Mexico as a polyracial state, other states will follow: Texas probably will lose its White majority in 2015, then in quick succession Arizona, New York, Nevada, New Jersey, and Maryland. If current trends continue, by 2050 the United States will be just a bit more than half White. n196

What this will mean in social and political terms, however, is much harder to say. No one can be sure what the next fifty years or so will work on US society, not least in terms of race relations or race relations law. After all, it was only a hundred years ago that the Supreme Court in *Plessy v. Ferguson* n197 empowered state and local governments to mandate racial segregation, and it has been less than fifty years since the Court began to dismantle such practices in cases like *Brown* and *Hernandez*. There is great reason, however, to view the impending change as truly millennial: As Dale Maharidge warns in *The Coming White Minority*, never before has a society almost entirely White come to have a majority non-White population. n198 What will happen when this society, founded and built not only on the ideals of individual equality and inalienable rights but also on the basis of White supremacy, comes to have a majority non-White population? Which of those traditions, the [\*1210] proud or the ignoble, will predominate? n199 Will California set the trend for the country here too, as in so many other, less momentous ways?

I believe race relations - the relations between peoples constructed in racial terms, if you prefer - will worsen over the next decades. I say this writing self-consciously from California, and with California as my evidence. As California becomes non-White, much of its recent history points to increasing fractures along racial lines. One could cite the actions of the electorate - a group that in California is four-fifths White, with a median age of fifty, and among whom two-thirds earn more than \$ 40,000. n200 Last fall, under title of the California Civil Rights Initiative, the voters of this state became the first to repudiate affirmative action at all levels of government. n201 In 1994, these voters also approved Proposition 187, the Save Our State initiative that seeks to deny undocumented immigrants and their children access to public services such as education and healthcare. n202 Alternately, as evidence of increasing racial tension one could note the deep and bitter frustration on the part of non-White communities. Here, for example, one might point to the 1992 Los Angeles riots, which provide 58 deaths, 16,000 arrests, [\*1211] and one billion dollars in damage worth of testimony to worsening race relations. n203

Of course, the picture in California, as across the rest of the nation, is not uniform; one could also identify many instances of cooperation and solidarity across racial lines in California and elsewhere. So perhaps I am mistaken, and our society will establish a trajectory of improving relations between persons ostensibly different in racial terms. But if not, then it is all the more important for us to understand the salience of race to Latino/a identity - an understanding, as Hernandez demonstrates, that depends on taking seriously the unique ways in which race has influenced Latino/a lives and communities, even as it also depends on carefully historicizing both race and Latino/a identity in order to guard against reifying either. By 2005, Latinos/as will be the largest minority group in the United States. n204 Put differently, it is very likely that within eight years or so Latinos/as will be this nation's most numerous racial minority. As we move rapidly toward that point, the language of race will be indispensable to LatCrit Theory, affording not only a manner for focusing on the experiences and conditions of our communities but a basis for responding to the inequities of racialization.

#### FOOTNOTE-1:

n1. See [Transcript of Record at 1, Hernandez v. Texas, 347 U.S. 475 \(1954\)](#) (No. 406). Regarding nomenclature, I treat all racial designations, including White, as proper nouns. On occasion, I use the term "Anglo" as a synonym for White. (This term is common throughout the Southwest.) I employ "Mexican American" to refer generally to all permanent immigrants to the United States from Mexico and their descendants, as well as to persons descended from Mexican inhabitants of the region acquired by the United States under the Treaty of Guadalupe Hidalgo. A long-standing debate surrounds this term as well as others intended to refer to Mexican Americans. See Rodolfo Acuña, *Occupied America: A History of Chicanos* ix-x (3d ed. 1988); Carlos Muñoz, Jr., *Youth, Identity, Power: The Chicano Movement* 7-12 (1989). "Latino/a" refers to those in the United States who immigrated from or who are descendants of persons from one of the Spanish speaking countries of the Western Hemisphere. Many different communities come under the Latino/a label. To highlight this multiplicity, I refer to Latino/a communities in the plural. In addition, I have adopted the convention of using a virgule at the end of "Latino," rendering it "Latino/a." This convention responds to the gendered grammar of Spanish, whereby reference to both males and females is indicated through the use of the masculine form. For an informative discussion of similar matters, see Angel R. Oquendo, *Re-imagining the Latino/a Race*, [12 Harv. BlackLetter J. 93, 94-99 \(1995\)](#); see also Fernando M. Treviño, *Standardized Terminology for Hispanic Populations*, 77 *Am. J. Pub. Health* 69 (1987). Finally, the categories used here (principally White, Anglo, Mexican American, and Latino/a) are not rigid or mutually exclusive; as this Essay itself

demonstrates, they are instead more or less flexible and overlapping socially mediated groupings.

n2. See Gustavo C. Garcia, An Informal Report to the People, in *A Cotton Picker Finds Justice! The Saga of the Hernandez Case* (Ruben Munguia ed., 1954) (no page numbers in original) [hereinafter Garcia, Informal Report] (noting LULAC accepted Hernandez because "we had an excellent opportunity to make a test case on the issue of the systematic exclusion of persons of Mexican and other Latin American descent from service as jury commissioners, grand jurors and petit jurors"); see also Mario T. Garcia, *Mexican Americans: Leadership, Ideology, & Identity, 1930-1960*, at 49 (1989) [hereinafter, Garcia, Mexican Americans].

n3. See [Hernandez v. Texas, 251 S.W.2d 531, 533 \(Tex. Crim. App. 1952\)](#), rev'd, [347 U.S. 475 \(1954\)](#).

n4. See [id. at 532](#). Hernandez's lawyers cited the following population figures from the 1950 census: "The total population of Jackson County is 12,916. Persons of Spanish surname total 1,865, of whom 1,738 are native-born citizens, and 65 are naturalized citizens." [Brief for Petitioner at 18, Hernandez v. Texas, 347 U.S. 475 \(1954\)](#) (No. 406).

n5. See [Transcript of Record at 16, 18, Hernandez v. Texas, 347 U.S. 475 \(1954\)](#) (No. 406).

n6. [Hernandez, 251 S.W.2d at 535](#).

n7. In an apparent contradiction, which the Court of Criminal Appeals did not address, the Texas Court of Civil Appeals had held in 1948 that the Fourteenth Amendment protected Mexican Americans in the context of restrictive covenants, relying on the reasoning of [Shelley v. Kraemer, 334 U.S. 1 \(1948\)](#). See [Clifton v. Puente, 218 S.W.2d 272, 273-74 \(Tex. Civ. App. 1948\)](#); accord [Matthews v. Andrade, 198 P.2d 66, 66 \(Cal. Dist. Ct. App. 1948\)](#).

n8. See Garcia, Informal Report, *supra* note 2. Garcia noted with some glee that the petition for certiorari was granted "on Oct. 12, 1954, Columbus Day, or better known throughout Latin America and Spain as "El Dia de la Raza" - the Day of the Race. *Id.* La raza is a common term by which Mexican Americans express their sense of peoplehood and community. See Lawrence H. Fuchs, *The American Kaleidoscope: Race, Ethnicity, and the Civic Culture* 240-41 (1990).

n9. [Hernandez v. Texas, 347 U.S. 475 \(1954\)](#). Although he prevailed before the Supreme Court, Hernandez was reindicted and again convicted. See Garcia, Mexican Americans, *supra* note 2, at 51.

n10. [Hernandez, 347 U.S. at 478](#).

n11. [Id. at 477, 479-80](#). The Court suggested, but did not explicitly rule, that this "other" basis corresponded to ancestry or national origin. See [id. at 479](#).

n12. See generally Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 1 Harv. Latino L. Rev. (forthcoming 1997).

n13. For an overview of Mexican-American civil rights litigation, see George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, [27 U.C. Davis L. Rev. 555 \(1994\)](#).

n14. In one of its earliest references to Mexican Americans, the Supreme Court in the Slaughter-House Cases opined that the Thirteenth Amendment barred not only the enslavement of Africans, but also of "the Mexican and Chinese races." [Slaughter-House Cases, 83 U.S. 36, 72 \(1872\)](#). The Court noted further:

Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.

Id. However, in two earlier cases dealing with land disputes arising in California, the Court described the Mexican-American inhabitants of that state as members of the Spanish race. See [Luco v. United States, 64 U.S. 515, 527 \(1859\)](#) ("The striking characteristic of the Spanish race, in its adherence to form and profusion of records, was retained by them in California, and pervades their public registries."); [White v. United States, 68 U.S. 660, 680-81 \(1863\)](#) ("The Mexicans of the Spanish race, like their progenitors, were a formal people, and their officials were usually formal and careful in the administration of their public affairs.").

n15. In cases subsequent to Hernandez raising questions about the racial identity of Mexican Americans, the Court has largely accepted the analysis presented there, or has otherwise treated Mexican-American identity as unproblematic. As an example of the former tendency, in 1970 the Supreme Court denied certiorari in a case involving the dismissal of a suit filed in New Mexico on behalf of a class "designated as Indo-Hispano, also called Mexican, Mexican-American and Spanish American, [which is] generally characterized by Spanish surnames, mixed Indian and Spanish ancestry and...Spanish as a primary or maternal language." [Tijerina v. Henry, 398 U.S. 922, 922 \(1970\)](#) (Douglas, J., dissenting from denial of certiorari) (emendations and ellipses in original) (quoting Appellants). In denying certiorari, the majority of the Court declined to consider whether Mexican Americans constituted a class. Justice Douglas, dissenting from the denial, relied without additional discussion on the language of Hernandez that "'persons of Mexican descent' constituted a distinct class." [Id. at 924](#). Indicative of the tendency to treat Mexican-American identity as unproblematic, the Court in 1975 concluded that the Fourth Amendment prohibited the border patrol's practice of employing roving patrols to stop vehicles near the Mexican border solely on the basis of the vehicle occupants' apparent Mexican ancestry, but did so without significantly addressing underlying conceptions of Mexican-American identity. See [United States v. Brignoni-Ponce, 422 U.S. 873 \(1975\)](#). On the other hand, on occasion the Court has employed yet other approaches to Mexican-American identity, as it did for instance in [Castaneda v. Partida, 430 U.S. 482 \(1977\)](#). In that case, the Court relied on the category used in the 1970 census, which referred to "Persons of Spanish Language or Spanish Surname." [Id. at 486 n.5](#).

n16. Johnson's principal publications include the following: 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]; Fear of an "Alien Nation": Race, Immigration, and Immigrants, [7 Stan. L. & Pol'y Rev. 111 \(1996\)](#) [hereinafter Johnson, Fear of an "Alien Nation"]; A "Hard Look" at the Executive Branch's Asylum Decisions, 1991 Utah L. Rev. 279; Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century, 8 La Raza L.J. 42 (1995) [hereinafter Civil Rights and Immigration]; Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class, [42 UCLA L. Rev. 1509 \(1995\)](#).

n17. Kevin Johnson, The Ring of Fire: Assimilation and the Mexican-American Experience, [85 Calif. L. Rev. 1259 \(1997\)](#), [10 La Raza L.J. 173 \(1997\)](#).

n18. Perea's publications include: Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in America (Juan F. Perea ed., 1997); Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English, [77 Minn. L. Rev. 269 \(1992\)](#);

English-Only Rules and the Right to Speak One's Primary Language in the Workplace, 23 U. Mich. J.L. Reform 265 (1990); Ethnicity and the Constitution: Beyond the Black and White Binary Constitution, [36 Wm. & Mary L. Rev. 571 \(1995\)](#) [hereinafter Perea, Ethnicity and the Constitution]; Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII, [35 Wm. & Mary L. Rev. 805 \(1994\)](#); Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish, [21 Hofstra L. Rev. 1 \(1992\)](#); Los Olvidados: On the Making of Invisible People, [70 N.Y.U. L. Rev. 965 \(1995\)](#).

n19. Juan Perea, The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought, [85 Calif. L. Rev. 1213 \(1997\)](#), [10 La Raza L.J. 127 \(1997\)](#).

n20. See Sharon M. Lee, Racial Classifications in the US Census: 1890-1990, 16 Ethnic & Racial Stud. 75, 81-82 (1993). In the 1930 census, the Bureau counted Mexican Americans as a separate racial group, distinct from the following "races": White, Negro, Indian, Chinese, Japanese, Filipino, Hindu, Korean, and Other. See *id.* at 78. In the censuses taken between 1940 and 1970, the Bureau's racial taxonomy included Latinos/as as White, unless the census takers found the respondents to be "definitely...Negro, Indian, or some other race." See *id.* The 1980 census provided fifteen options for self-identification, including White, Negro or Black, Japanese, Chinese, Filipino, Korean, Vietnamese, Indian (Amer.), Asian Indian, Hawaiian, Guamanian, Samoan, Eskimo, Aleut, and Other. See *id.* Unlike in the 1970 census and earlier, however, "persons who did not classify themselves in one of the specific race categories but reported entries such as Cuban, Puerto Rican, Mexican, or Dominican were included in the 'other' races category." Bureau of the Census, U.S. Dep't of Commerce, 1980 Census of Population, Supplementary Reports, Age, Sex, Race, and Spanish Origin of the Population by Regions, Divisions, and States: 1980, at 2 (1981).

n21. Symposium, Race and Remedy in a Multicultural Society, [47 Stan. L. Rev. 819 \(1995\)](#).

n22. See Paul Brest & Miranda Oshige, Affirmative Action for Whom? [47 Stan. L. Rev. 855, 856, 883-90 \(1995\)](#); see also Miranda Oshige, Diversity of What? 55 Representations 129 (1996). Brest and Oshige take an agnostic stance regarding whether affirmative action programs should benefit Latinos/as. They suggest that

whatever uncertainties there may be about the causes and long-term intractability of the disadvantaged status of Latinos, the social salience of some groups - for example, Puerto Ricans in the East and Mexican Americans in the West - speaks to the importance of their presence to the educational mission of many law schools.

Brest & Oshige, *supra* at 890. By way of contrast, in his exploration of the relevance of racialized identities to participation in affirmative action programs, Stanford Lyman advocates the inclusion of Latinos/as, stressing the racism to which Mexican Americans and Puerto Ricans have been and continue to be subject. See Stanford M. Lyman, Color, Culture, Civilization: Race and Minority Issues in American Society 339-41 (1994). See also *infra* note 183.

n23. Deborah Ramirez, Multicultural Empowerment: It's Not Just Black and White Anymore, [47 Stan. L. Rev. 957, 974-75 \(1995\)](#).

n24. [Id. at 958 n.5](#); see also Deborah Ramirez, Forging a Latino Identity, 9 La Raza L.J. 61 (1996).

n25. Luther Wright, Jr., Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications, [48 Vand. L. Rev. 513, 563, 564](#)

(1995). In a footnote, Wright further explains that "a Hispanic racial classification ignores the sociopolitical aspects of race by paying no attention to color and historical realities." [Id. at 549 n.241](#). He adds, "This proposal merely suggests changes in how Hispanics should be racially classified, but does not seek to change or invalidate the unique Hispanic culture." *Id.*

n26. Lisette E. Simon, Hispanics: Not a Cognizable Ethnic Group, [63 U. Cin. L. Rev. 497, 516, 518 \(1994\)](#).

n27. A range of legal scholars, myself included, have forayed into this area. See, e.g., Ian F. Haney Lopez, *White by Law: The Legal Construction of Race* (1996); Jayne Chong-Soon Lee, Navigating the Topology of Race, [46 Stan. L. Rev. 747 \(1994\)](#); Christopher A. Ford, Administering Identity: The Determination of "Race" in Race-Conscious Law, [82 Calif. L. Rev. 1231 \(1994\)](#); Neil Gotanda, A Critique of "Our Constitution is Color-Blind," [44 Stan. L. Rev. 1 \(1991\)](#); D. Marvin Jones, Darkness Made Visible: Law, Metaphor, and the Racial Self, [82 Geo. L.J. 437 \(1993\)](#); and Paul Finkelman, The Color of Law, [87 Nw. U. L. Rev. 937 \(1993\)](#).

n28. In contrast, other legal scholars argue for or treat Latinos/as as a racial group. For an insightful discussion that builds upon a critique of "material" notions of race in favor of "spiritual" ones, see Oquendo, *supra* note 1; see also Ruben J. Garcia, Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law, [17 Chicano-Latino L. Rev. 118 \(1995\)](#); Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 *Inter-Am. L. Rev.* 263 (1996-97); Johnson, Immigration Politics, *supra* note 16; Michael A. Olivas, The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicles as Racial History, 34 *St. Louis U. L.J.* 425 (1990); Luis Angel Toro, "A People Distinct From Others": Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15, [26 Tex. Tech. L. Rev. 1219, 1245-51 \(1995\)](#).

n29. See Kwame Anthony Appiah, *In My Fathers House: Africa in the Philosophy of Culture* 45 (1992) (suggesting that "culture" be used instead of "race"); David A. Hollinger, *Postethnic America: Beyond Multiculturalism* 39 (1995) (urging the use of the term "ethno-racial blocs"); Orlando Patterson, *The Race Trap*, *N.Y. Times*, July 11, 1997, at A27 (arguing for references only to "ethnicity"); see also *infra* notes 116-120 and accompanying text.

n30. See Patterson, *supra* note 29.

n31. This call is at first-blush quite curious coming from Patterson, who has been an aggressive critic of ethnicity. See Orlando Patterson, *Ethnic Chauvinism: The Reactionary Impulse* (1977). There, Patterson took to task "the present legion of lesser minds who would have us run like frightened chickens from the complex, changing, and fascinating demands of our urban industrial culture back to the pristine fold of the tribe, the ethnic group, the traditional community, or whatever else they choose to call it." *Id.* at 14. *Race Trap*, *supra* note 29, accords with Patterson's earlier position if one assumes that Patterson finds notions of race more objectionable than notions of ethnicity because they are further from his ideal of a social world comprised of cosmopolitan individuals.

n32. Patterson, *supra* note 29.

n33. Orlando Patterson, *Erase Race: End our misguided obsession with racial categories*, *Hous. Chron.*, July 20, 1997, at 1C. To be fair, Patterson urges the use of ethnicity rather than race in the particular context of the census. However, he does not seem to intend to limit his arguments to that context, nor do any of his points seem narrowly tailored to it. On the contrary,

Patterson's editorial comes across as a broad call for the elimination of racial language, and this Essay so understands it.

n34. I survey some of the burgeoning literature advancing this understanding of race in Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, [29 Harv. C.R.-C.L. L. Rev. 1 \(1994\)](#); see also Michael Omi & Howard Winant, *Racial Formation in the United States: From the 1960s to the 1980s* (1986).

n35. See *infra* notes 139-148 and accompanying text. To the extent it emphasizes elements of culture such as language, religion, and custom, ethnicity provides a powerful means of understanding and explaining Latino/a communities. Indeed, ethnicity provides perhaps the most common framework for studies of Latino/a identity. See, e.g., Frank D. Bean & Marta Tienda, *The Hispanic Population of the United States* 7-35 (1987) (exploring theoretical and historical considerations regarding "Hispanic ethnicity"). In this way, it is no surprise and indeed quite appropriate that some LatCrit writers have called for a scholarly emphasis on Latino/a ethnicity. For example, Frank Valdes has suggested that LatCrit theory "can endeavor to elevate ethnicity within Critical Race theorizing," and that "LatCrit theory faces a specific project: the exploration of Latina/o pan-ethnicity." Francisco Valdes, *Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 *La Raza L.J.* 1, 25, 26 (1996). Valdes describes pan-ethnicity as a "threshold query" for LatCrit theory, formulating it in the following terms: "Do the varied Latina/o groups of this country, including Mexican American, Puerto Rican and Cuban American ones, perceive sufficient similarities in language, culture, history or circumstance to generate a sense of pan-group affinity? If so, to what extent - where are the limits of pan-ethnic groupness?" *Id.* at 26. Juan Perea has also suggested viewing Latinos/as in ethnic terms, though in doing so he has utilized a broad definition of ethnicity that incorporates notions of racial difference. See [Perea, \*Ethnicity and the Constitution\*, \*supra\* note 18, at 575](#).

For the above reasons, this Essay does not object to the use of ethnicity on the ground that it is an inherently poor way of conceptualizing Latinos/as. On the contrary, this Essay objects only to the use of ethnicity to the exclusion of race, as a complete rhetorical substitute for race.

n36. Angel Oquendo argues that

though different, the historical experience of other Latino(a)s parallels that of Mexicans and Puerto Ricans in relevant ways....The concept of a Latino(a) race, which is originally founded in the Mexican and the Puerto Rican experience, becomes more complex, but does not change in essence as it expands to incorporate Cubans, Dominicans, Guatemalans, Salvadorans, and other Latino(a)s.

Angel Oquendo, *Comments by Angel Oquendo*, 9 *La Raza L.J.* 43-44 (1996). Oquendo suggests locating the racialization of Latinos/as in the experiences of Mexican Americans and Puerto Ricans, arguing that a racial conception of Latino/a identity must be rooted in the specific historical practices of United States colonial expansion in the Southwest as well as the Caribbean. See *id.* at 43.

n37. For a short but helpful discussion of the different communities that are commonly linked under the "Hispanic" label see Jorge Klor de Alva, *Telling Hispanics Apart: Latino Sociocultural Diversity*, in *The Hispanic Experience in the United States: Contemporary Issues and Perspectives* 107 (Edna Acosta-Belen & Barbara R. Sjoström eds., 1988).

n38. Cf. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, [46 Stan. L. Rev. 503, 566 \(1994\)](#) (suggesting a similar approach in considering the legal construction of gay identity).

n39. See *infra* note 171.

n40. See *infra* notes 70-95 and accompanying text.

n41. Martha Minow, *Not Only for Myself: Identity, Politics & the Law* 63 (1997).

n42. *Id.*

n43. See, e.g., [Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240-41 \(1995\)](#) (J. Thomas, concurring) ("I believe that there is a 'moral [and] constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality....In my mind, government-sponsored racial discrimination...is just as noxious as discrimination inspired by malicious prejudice.") (internal citations and notes omitted); [City of Richmond v. J.A. Croson Co., 488 U.S. 469 \(1989\)](#).

n44. Neil Gotanda has convincingly demonstrated that ideologies of race now constitute the primary field on which battles regarding the extent of equal protection are covertly fought. See Gotanda, *supra* note 27.

n45. [347 U.S. 483 \(1954\)](#).

n46. [Hernandez v. Texas, 347 U.S. 475, 478 \(1954\)](#).

n47. *Id.* (emphasis added).

n48. *Id.*

n49. [Id. at 479](#). The Court declined to reach the question "whether or not the Court might take judicial notice that persons of Mexican descent are there considered as a separate class." [Id. at 479 n.9](#). Instead, Hernandez provided that the question of distinct class status would have to be answered on a case-by-case basis. This result has been roundly criticized. See, e.g., Richard Delgado & Vicky Palacios, *Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 *Notre Dame Law.* 393, 395 (1975) ("This approach is unsatisfactory on its face."); Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 *Calif. L. Rev.* 662, 692-93 n.149 (1975) ("The conclusion we have reached is that courts should take judicial notice of the fact that Mexican Americans have been generally perceived as nonwhite throughout the Southwest.").

n50. See [Hernandez, 347 U.S. at 479](#). The rise of racial distinctions between "whites" and "Mexicans" is traced in Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* 208-48 (1981). See *infra* notes 61-62.

n51. See [Hernandez, 347 U.S. at 479](#).

n52. See [id. at 479 n.10](#). The history of segregated schools for Mexican Americans in Texas is examined in 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). See *infra* notes 159-168 and accompanying text.

n53. [Hernandez, 347 U.S. at 479](#).

n54. [Id. at 480](#).

n55. [Id. at 481.](#)

n56. In their brief to the Court, Hernandez's lawyers provided their own summary regarding the treatment accorded Mexican Americans in Jackson County:

While the Texas court elaborates its "two classes" theory, in Jackson County, and in other areas in Texas, persons of Mexican descent are treated as a third class - a notch above the Negroes, perhaps, but several notches below the rest of the population. They are segregated in schools, they are denied service in public places, they are discouraged from using non-Negro rest rooms....They are told that they are assured of a fair trial at the hands of persons who do not want to go to school with them, who do not want to give them service in public places, who do not want to sit on juries with them, and who would prefer not to share rest room facilities with them, not even at the Jackson County court house.

[Brief for Petitioner at 28-29, Hernandez v. Texas, 347 U.S. 475 \(1954\)](#) (No. 406). "The blunt truth," Hernandez's lawyers insisted, "is that in Texas, persons of Mexican descent occupy a definite minority status." *Id.* at 13.

n57. In examining the origins of the Court's unanimous opinion in *Brown*, Mark Tushnet brings to light revealing comments regarding Mexican Americans made by Justice Tom Clark during a 1952 conference discussion of the anti-segregation decisions. Tushnet reports the following:

Clark, in a statement which, apart from its racism, is quite difficult to figure out, said that Texas "also has the Mexican problem" which was "more serious" because the Mexicans were "more retarded," and mentioned the problem of a "Mexican boy of 15...in a class with a negro girl of 12," when "some negro girls [would] get in trouble."

Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961*, at 194 (1994). Tushnet adds, "These references capture the personal way the justices understood the problem they were confronting, and the unfocused quality suggests that they were attempting to reconcile themselves to the result they were about to reach." *Id.* Clark, formerly the Civil District Attorney for Texas and a Truman appointee to the Court in 1949, was replaced on the bench by Thurgood Marshall in 1967. See William B. Lockhart et al., *Constitutional Rights and Liberties 1433-35* (8th ed., 1996).

n58. In the wake of a sharp economic recession in 1953, national attention focused on the supposed dangers posed by the porous border with Mexico. See Juan Ramon Garcia, *Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954*, at 143-44 (1980). On June 9, 1954, a little over a month after the Court decided *Hernandez*, Attorney General Herbert Brownell launched "Operation Wetback," a detention and repatriation campaign orchestrated by the Border Patrol that expelled from this country in the course of several months over one million persons of Mexican descent. See Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the I.N.S.* 54-55 (1992). "To ensure the effectiveness of the expulsion process, many of those apprehended were denied a hearing to assert their constitutional rights and to present evidence that would have prevented their deportation." Moreover, "among those caught up in the expulsion campaign were American citizens of Mexican descent who were forced to leave the country of their birth." U.S. Comm'n on Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration* 11 (1980). The Supreme Court thus heard and decided *Hernandez* in the context of widespread anxiety about the invasion of the United States by Mexican nationals.

n59. This view can be traced back to Carolus Linnaeus and the advent of biological racism in the early eighteenth century. See Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro* 218-21 (1968). For a brief but informative discussion of the development of the earliest of American race laws, the laws of slavery, situating in that context the role of scientific racism, see William M. Wiecek, *The Origins of Slavery in British North America*, [17 \*Cardozo L. Rev.\* 1711, 1733-35 \(1996\)](#).

n60. See *supra* note 20 and accompanying text.

n61. Horsman, *supra* note 50, at 210.

n62. Arnaldo de Leon, *They Called Them Greasers: Anglo Attitudes Toward Mexicans in Texas, 1821-1900*, at 104 (1983).

n63. [Hernandez v. Texas](#), 251 S.W.2d 531, 535 (Tex. Crim. App. 1952) (citing [Sanchez v. Texas](#), 243 S.W.2d 700, 701 (1951)), rev'd, [347 U.S. 475 \(1954\)](#).

n64. [Brief for Petitioner at 38, Hernandez v. Texas](#), 347 U.S. 475 (1954) (No. 406). The Attorney General of Texas was also party to this consensus, stating emphatically in his brief to the Court, "The defendant in this case is a white man. The jury was composed of white men. No actual exclusion of the white race or any other race therefrom is shown." [Brief in Opposition at 4, Hernandez v. Texas](#), 347 U.S. 475 (1954) (No. 406).

n65. See Garcia, *Mexican Americans*, *supra* note 2, at 25-29.

n66. *Id.* at 30-31.

n67. *Id.* at 43.

n68. *Id.* at 48. The insistence by many in the Mexican-American community that they be considered White was also fueled by prejudice harbored against Blacks. See *id.*

n69. LULAC's approach to race has been labeled the "other white" legal strategy. According to Guadalupe San Miguel,

The "other white" legal strategy sought to have Mexican Americans declared part of the white race. Most federal and state documents before 1954 mandated or sanctioned the separation of blacks and whites, but they did not stipulate that members of the same race could or should be segregated. Mexican Americans thus sought acceptance of their own group as Caucasian or "other white" in order to prove that in the absence of a statute allowing segregation of Mexican Americans any attempt...to separate them would be a violation of law.

Guadalupe San Miguel, Jr., "Let All of Them Take Heed": Mexican Americans and the Campaign for Educational Equality in Texas, 1910-1981, at 178 (1987) (footnotes omitted).

n70. See [Sanchez v. Texas](#), 243 S.W.2d 700 (Tex. Crim. App. 1951); [Rogers v. Texas](#), 236 S.W.2d 141 (Tex. Crim. App. 1951); [Bustillos v. Texas](#), 213 S.W.2d 837 (Tex. Crim. App. 1948); [Salazar v. Texas](#), 193 S.W.2d 211 (Tex. Crim. App. 1946); [Sanchez v. Texas](#), 181 S.W.2d 87 (Tex. Crim. App. 1944); [Carrasco v. Texas](#), 95 S.W.2d 433 (Tex. Crim. App. 1936); [Ramirez v. Texas](#), 40 S.W.2d 138 (Tex. Crim. App. 1931).

n71. [Ramirez](#), 40 S.W.2d at 139.

n72. [Carrasco](#), 95 S.W.2d at 434; see also [Sanchez](#), 181 S.W.2d at 88 ("alleged race discrimination in the selection of the grand jury"); [Bustillos](#), 213 S.W.2d at 841 ("alleged discrimination against the Mexican race").

n73. Eligibility for service on Texas grand juries at the time Hernandez was decided required being a male citizen qualified to vote, a freeholder in the state or a householder in the county, of sound mind and good moral character, able to read and write, without a felony conviction, and not under indictment for theft or felony. See [Brief for Petitioner at 32, app. a, Hernandez v. Texas, 347 U.S. 475 \(1954\)](#) (No. 406) (appending [Tex. Crim. P. Code 339](#)). In order to qualify as a petit juror, a person must have been a male citizen over 21 years of age qualified to vote, of sound mind, able to read and write, and a freeholder in the state or a householder in the county. See [Brief for Petitioner at 32, app. a, Hernandez v. Texas, 347 U.S. 475 \(1954\)](#) (No. 406) (appending [Tex. Crim. P. Code 579](#)).

n74. [Ramirez, 40 S.W.2d at 139.](#)

n75. Id.

n76. Id.

n77. [Id. at 140.](#)

n78. [Ramirez v. Texas, 284 U.S. 659 \(1931\).](#)

n79. See [Bustillos v. Texas, 213 S.W.2d 837, 841 \(Tex. Crim. App. 1948\)](#); [Sanchez v. Texas, 181 S.W.2d 87, 88 \(Tex. Crim. App. 1944\)](#); [Carrasco v. Texas, 95 S.W.2d 433, 434 \(Tex. Crim. App. 1936\).](#)

n80. For example, consider the court's discussion regarding jury discrimination in Sanchez:

The testimony relative to the action of the jury commissioners in selecting the grand jury which returned the indictment against him shows that they did not intentionally or designedly fail or refuse to select any member of Mexican or Spanish descent; that they selected men whom they considered best qualified for grand jury service; that there were a great number of persons of Mexican or Spanish descent in Hudspeth County who were not citizens, quite a number who could not read, write or speak English, and only a few had paid a poll tax; that approximately forty or fifty per cent of the population of Hudspeth County were of Mexican or Spanish descent. There were a few who could read, write and speak English, who had paid a poll tax but some of them were in the Army...

...

In filing his motion to quash the indictment, appellant assumed the burden of sustaining his allegations therein by proof. The trial court patiently heard all the testimony relative to the question presented and decided it adversely to the appellant's contention. We do not feel that under the evidence adduced upon the hearing thereof that we would be authorized or justified in setting aside the conclusion reached by the court on the facts as presented by the record.

[181 S.W.2d at 88-89.](#) Here, the court distinguishes between racial discrimination against Mexican Americans and the selection of those "best qualified for grand jury service," a class that in a county approximately half Mexican American never included a member of that group.

The Texas Law Review criticized the holding in Sanchez, arguing that because "it seems clear that most Mexican nationals would be classified by ethnologists as belonging to a distinct racial stock, the 'red' race...justice would seem to require that a person of Mexican extraction should be entitled to the same protection from discrimination in the selection of the jury as that afforded to a member of the negro race." Recent Cases, 23 Tex. L. Rev. 78 (1945).

n81. See [Rogers v. Texas, 236 S.W.2d 141, 143 \(Tex. Crim. App. 1951\)](#); [Sanchez v. Texas, 243 S.W.2d 700, 701 \(Tex. Crim. App. 1951\)](#); [Salazar v. Texas, 193 S.W.2d 211, 212 \(Tex. Crim. App. 1946\)](#).

n82. [Salazar, 193 S.W.2d at 212](#).

n83. [Sanchez, 243 S.W.2d at 701](#). Aniceto Sanchez was represented by John Herrera and James De Anda, see [Sanchez, 243 S.W.2d at 701](#), both of whom were active in LULAC and would assist Gus Garcia in his representation of Hernandez. See Garcia, Mexican Americans, supra note 2, at 50, 58. Victoriano Salazar had been represented by M.C. Gonzales, a lawyer prominent in the founding of LULAC. See id. at 27.

n84. See also [Rogers, 236 S.W.2d at 143](#) ("Mexicans or Latin Americans are not of a race different to that of the white. Until the Supreme Court of the United States extends the rule of discrimination [regarding jury selection]...to include members of different nationalities, we shall continue to hold as we have always held.").

n85. The Hernandez court cited Sanchez with approval:

We said in Sanchez v. Texas that "Mexican people...are not a separate race but are white people of Spanish descent'. [sic] In contemplation of the Fourteenth Amendment, Mexicans are therefore members of and within the classification of the white race, as distinguished from members of the Negro race. In so far as we are advised, no member of the Mexican nationality challenges that statement. Appellant does not here do so.

[Hernandez v. Texas, 251 S.W.2d 531, 535 \(Tex. Crim. App. 1952\)](#) (citation omitted), rev'd, [347 U.S. 475 \(1954\)](#).

n86. See [In re Rodriguez, 81 F. 337 \(W.D. Tex. 1897\)](#).

n87. See [Lueras v. Lafayette, 65 P.2d 1431 \(Colo. 1937\)](#). In Lueras, Mexican-American plaintiffs relied on the Fourteenth Amendment to challenge their exclusion from a public pool. The court noted that the pool was posted with a sign reading "Firemen's Pool. We reserve the right to reject any or all persons without cause. White trade only. Lafayette Fire Department." [Id. at 1432](#). However, the court held that this sign did not constitute proof of racial discrimination against Mexican Americans, concluding that "the sign herein quoted...seemingly, in its offensive sense, was without application to petitioners." Id. Cases concerning the exclusion of Mexican Americans from swimming pools also arose in Texas and California. See [Terrell Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824 \(Tex. Civ. App. 1944\)](#) (upholding exclusion of Mexican Americans); [Lopez v. Seccombe, 71 F. Supp. 769 \(S.D. Cal. 1944\)](#) (Fourteenth Amendment prohibits exclusion of Mexican Americans from the San Bernardino municipal pool).

n88. Bureau of the Census, U.S. Dep't of Commerce, Sixteenth Census of the United States: 1940, at 3 (1943).

n89. Carey McWilliams, North from Mexico: The Spanish-Speaking People of the United States 270 (1949, Greenwood 1968).

n90. *Id.* at 270-71. At least one Texas court concluded that such public pronouncements aside, discrimination against Mexican Americans continued to be a lawful practice. See [Rodriguez, 182 S.W.2d at 826-27.](#)

n91. See [Brief for Petitioner at 14, Hernandez v. Texas, 347 U.S. 475 \(1954\)](#) (No. 406) (quoting Pauline R. Kibbe, *Latin Americans in Texas* 229 (1946)).

n92. See [Hernandez, 347 U.S. at 481.](#)

n93. [Brief for Petitioner at 29, Hernandez v. Texas, 347 U.S. 475 \(1954\)](#) (No. 406); see [Cassell v. Texas, 339 U.S. 282 \(1950\)](#); [Akins v. Texas, 325 U.S. 398 \(1945\)](#); [Hill v. Texas, 316 U.S. 400 \(1942\)](#); [Smith v. Texas, 311 U.S. 128 \(1940\).](#)

n94. Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, [105 Yale L.J. 2117 \(1996\)](#). As Siegel notes,

Efforts to reform a status regime do bring about change - but not always the kind of change advocates seek. When the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges - gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend. Thus, civil rights reform can breathe new life into a body of status law, by pressuring legal elites to translate it into a more contemporary, and less controversial, social idiom. I call this kind of change in the rules and rhetoric of a status regime "preservation through transformation."

[Id. at 2119.](#)

n95. The Court of Criminal Appeals' refusal to address the Court of Civil Appeals decision that extended equal protection analysis to Mexican Americans in the context of housing discrimination is noteworthy here. See *supra* note 7. Hernandez's lawyers hammered at this contradiction. See [Brief for Petitioner at 9-11, Hernandez v. Texas, 347 U.S. 475 \(1954\)](#) (No. 406).

n96. See Omi & Winant, *supra* note 34.

n97. *Id.* at 61 (emphasis on "racial formation" in original omitted; emphasis on "process" supplied).

n98. Renato Rosaldo offers the sort of conception of culture intended here:

Culture...refers broadly to the forms through which people make sense of their lives, rather than more narrowly to the opera or art museums. It does not inhabit a set-aside domain, as does, for example, that of politics or economics. From the pirouettes of classical ballet to the most brute of brute facts, all human conduct is culturally mediated. Culture encompasses the everyday and the esoteric, the mundane and the elevated, the ridiculous and the sublime. Neither high nor low, culture is all pervasive.

Renato Rosaldo, *Culture and Truth: The Remaking of Social Analysis* 26 (1989).

n99. See Carlos C. Cadena, *Legal Ramifications of the Hernandez Case: A Thumbnail Sketch, in A Cotton Picker Finds Justice!*, *supra* note 2.

n100. See Garcia, *Informal Report*, *supra* note 2. Garcia made his point about Mexican Americans as White ethnics in the following language:

We are not passing through anything different from that endured at one time or another by other unassimilated populations groups: the Irish in Boston (damned micks, they were derisively called); the Polish in the Detroit area (their designation was bohunks and polackers); the Italians in New York (referred to as stinking little wops, dagoes and guineas); the Germans in many sections of the country (called dumb square-heads and krauts); and our much maligned friends of the Jewish faith, who have been persecuted even here, in the land of the free, because to the bigoted they were just "lousy kikes."

Id.

n101. Cadena, *supra* note 99.

n102. Howard Winant, *Racial Conditions: Politics, Theory, and Comparisons* 116 (1994). As Winant observed, "We can speak of racial formation as a process precisely because the inherently capricious and erratic nature of racial categories forces their constant rearticulation and reformulation - their social construction - in respect to the changing historical contexts in which they are invoked." *Id.* at 115 (emphasis in original).

n103. See, e.g., Horsman, *supra* note 50; Tomas Almaguer, *Racial Fault Lines: The Historical Origins of White Supremacy in California* (1994).

n104. See Hollinger, *supra* note 29, at 51-58.

n105. See *id.* at 60.

n106. Several legal scholars have argued this point forcefully. See, e.g., Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, [20 Fordham Urb. L.J. 699 \(1993\)](#); John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* [143 U. Pa. L. Rev. 1233 \(1995\)](#); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, [107 Harv. L. Rev. 1841 \(1994\)](#); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, [143 U. Pa. L. Rev. 1659 \(1995\)](#); Symposium, *Surveying Law and Borders*, [48 Stan. L. Rev. 1037 \(1996\)](#).

n107. See Michael Pina, *The Archaic, Historical and Mythicized Dimensions of Aztlan*, in *Aztlan: Essays on the Chicano Homeland* 14 (Rodolfo A. Anaya & Francisco A. Lomeli eds., 1989).

n108. Carey McWilliams, one of California's most insightful chroniclers, fifty years ago criticized the incongruities of that state's celebration of its Spanish past. Writing in 1946, McWilliams attested that "there is scarcely a community in Southern California...that does not have its annual "Spanish Fiesta'... Once the fiesta is over, however, the Mexicans retreat to their barrios, the costumes are carefully put away for the balance of the year, and the grotesque Spanish spoken in the streets during the fiesta is heard no more." Carey McWilliams, *Southern California: An Island on the Land* 81 (1946, Peregrine 1988). McWilliams adds that "with the rediscovery of the Catholic-Mission past, the same split occurred in the Spanish tradition of the region that had occurred in relation to its Indian background....The Spanish Dons, rather than the Mexicano paisanos, became the sacred symbols of the Spanish past." *Id.* at 80. For contemporary reflections along similar lines, see Richard Rodriguez, *Days of Obligation: An Argument with my Mexican Father* 107-32 (1992).

n109. David Montejano, in an excellent history of Anglo-Mexican relations in Texas, argues that these relations did not develop uniformly, but within "a patchwork or mosaic of distinct

local societies." David Montejano, *Anglos and Mexicans in the Making of Texas, 1836-1986*, at 7 (1987). Thus, the racial identity of Mexican Americans was not uniform even across Texas. Montejano argues:

These local societies were not vague entities but were bounded by administrative and political agencies with the authority to organize and regulate social life - in the case of Texas, by county and city governments. Thus, whether or not Mexicans were "treated white" reflected the distinct class structure of Texas ranch and farm counties. The sociological patterns became more complex when the urban setting was considered; here the presence of Anglo merchants and an independent Mexican American middle class moderated the segregationist tenor evident in farm areas. In view of these variations, it makes sense to say that Mexicans were more of a race in one place and less of a race in another.<sup>Id.</sup>

n110. One measure of this metaphor's prominence is the extent to which it figures in the titles of contemporary works concerning Mexican Americans. See, e.g., Carl Gutierrez-Jones, *Rethinking the Borderlands* (1995); *Criticism in the Borderlands* (Hector Calderon and Jose David Saldivar eds., 1991); and Gloria Anzaldua, *Borderlands/La Frontera* (1987).

n111. This point is now widely understood with respect to gender, so much so that the tendency to talk of gender without reflecting on the significance of race has earned the well recognized sobriquet of gender essentialism. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, [42 \*Stan. L. Rev.\* 581 \(1990\)](#). Yet, as Harris insists in the same breadth in which she warns of gender essentialism, we must also be concerned with racial essentialism, the corollary tendency to discuss racial identities as if such identities are independent of gender, sexuality, class, and so on. See [id. at 588](#) ("The notion that there is a monolithic 'women's experience' that can be described independent of other facets of experience like race, class, and sexual orientation is one I refer to in this essay as 'gender essentialism.' A corollary to gender essentialism is 'racial essentialism' - the belief that there is a monolithic 'Black Experience,' or 'Chicano Experience.'"). On racial essentialism, see Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, [32 \*Harv. C.R.-C.L. L. Rev.\* 49 \(1997\)](#).

n112. See, e.g., Anzaldua, *supra* note 110; Sarah Deutsch, *No Separate Refuge: Culture, Class, and Gender on an Anglo-Hispanic Frontier in the American Southwest, 1880-1940* (1987); *Between Borders: Essays on Mexicana/Chicana History* (Adelaida R. Del Castillo ed., 1990). The concern with exploring the relations between race and gender has also found compelling expression in Latina legal scholarship. See, e.g., Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 *Va. J. Soc. Pol'y & L.* 23 (1994); Berta Esperanza Hernandez Truyol, *Building Bridges - Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 *Colum. Hum. Rts. L. Rev.* 369 (1994); Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, [17 \*Harv. Women's L.J.\* 185 \(1994\)](#); Maria L. Ontiveros, Rosa Lopez, David Letterman, Christopher Darden, and Me: Issues of Gender, Ethnicity, and Class in Evaluating Witness Credibility, 6 *Hastings Women's L.J.* 135 (1995); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 *B.C. Third World L.J.* 231 (1994); Celina Romany, *Ain't I A Feminist?*, 4 *Yale J.L. & Feminism.* 23 (1991).

n113. As Kevin Johnson notes, "Experiences with discrimination on the basis of phenotype vary dramatically in the Latino community. While a relatively minor problem for some portions of the community, it looms much larger in the lives of others." Johnson, *Civil Rights and Immigration*, *supra* note 16, at 68 (citing Edward E. Telles & Edward Murguia, *Phenotypic*

Discrimination and Income Differences Among Mexican Americans, 71 Soc. Sci. Q. 682 (1990) (stating that the earnings of Mexican-American males with dark and Native American phenotype are significantly lower than those of Mexican-American males with more European features); Carlos H. Arce et al., Phenotype and Life Chances Among Chicanos, 9 Hispanic J. Behav. Sci. 19 (1987) (concluding that Mexican Americans with European physical appearance have enhanced "life chances" compared with Mexican Americans possessing indigenous features)).

n114. Klor de Alva, *supra* note 37, at 114. Klor de Alva adds:

For those Mexicans who migrated as children or are in the second generation, problems of self-identity are focused on competing ethnic and cultural demands generated by their ambiguity concerning the degree to which they see themselves and are seen as Mexican, American, or "Chicano" (self-consciously Mexican-American)...

The question "Who am I?" takes on a different meaning when the choices are not just culturally delimiting (What ethnic group do I belong to?) but also socioracially constricting (What race must I belong to, and is that more important than my ethnicity, and what ethnicity is that?).

*Id.* (emphasis in original).

n115. On the question of class, Mario Garcia notes that "Lulacers indeed possessed a class bias in their desegregation efforts. They sought to eradicate discrimination that particularly affected their hopes for greater mobility as more middle-class-oriented Mexican Americans." Garcia, Mexican Americans, *supra* note 2, at 47. Nevertheless, Garcia insists that "if we concede a class bias for Lulacers, the fact remains that their desegregation efforts did affect to one degree or another the mostly working-class Mexicans." *Id.*

n116. Patterson, *supra* note 29.

n117. *Id.*

n118. *Id.*

n119. *Id.*

n120. Critiquing biological notions of race, Appiah has argued that we should abandon the concept altogether. "The truth is that there are no races," Appiah writes. "There is nothing in the world that can do all we ask race to do for us." Appiah, *supra* note 29, at 45. In his most recent version of this call, Appiah backs off his argument that races do not exist as sociohistorical constructions. See K. Anthony Appiah, Race, Culture, Identity: Misunderstood Connections, in K. Anthony Appiah & Amy Gutmann, *Color Conscious: The Political Morality of Race* 81 (1996) [hereinafter Appiah, Race, Culture, Identity]. Insisting that biological races do not exist, Appiah presents himself as willing to acknowledge the existence of "racial identities." "But if," he writes, "you understand the sociohistorical process of construction of the race, you'll see that the label works despite the absence of an essence." *Id.* Nevertheless, he continues to warn against such identities, suggesting that these may come at the cost of a tyranny of identity. "Racial identity can be the basis of resistance to racism; but even as we struggle against racism - and though we have made great progress, we have further still to go - let us not let our racial identities subject us to new tyrannies." *Id.* at 104. Appiah also earlier

warned against racial language on the ground that "to maintain the terminology of difference is to make possible the continuance of...racism, which has usually been the basis for treating people worse than we otherwise might, for giving them less than their humanity entitles them to." Kwame Anthony Appiah, *The Conservation of "Race,"* 23 *Black Am. Lit. F.* 37, 48 (1989); see also Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race,* in "Race," *Writing, and Difference* 21 (Henry Louis Gates, Jr. ed., 1986).

Prompted by similar concerns, David Hollinger has advanced an intermediate position, suggesting that we talk not of races but of "ethno-racial blocs." Hollinger, *supra* note 29, at 39. According to Hollinger, such phraseological conflation

better reflects our understanding of the contingent and instrumental character of the categories, acknowledges that the groups traditionally called racial exist on a blurred continuum with those traditionally called ethnic, and more easily admits the renunciation, once and for all, of the unequal treatment in America of human beings on the basis of the marks of descent once called racial.

Id.

n121. As an approach to equal protection, colorblindness in effect condemns explicit reliance on racial categories in the absence of a strong remedial rationale, on the ground that such categories have been used in the past in harmful ways. Note, however, that colorblindness is often tied not to a constructionist understanding of race, but instead to a conception described by Neil Gotanda as "formal-race." Under this conception, racial designations are understood as "neutral, apolitical descriptions, reflecting merely 'skin color' or country of ancestral origin." Gotanda, *supra* note 27, at 4. Gotanda further explains: "Formal-race is unrelated to ability, disadvantage, or moral culpability. Moreover, formal-race categories are unconnected to social attributes such as culture, education, wealth, or language. This 'unconnectedness' is the defining characteristic of formal-race." Id.

Formal-race strips racial categories of their social meaning, asserting that race refers to and serves as a proxy for nothing more than "arbitrary" aspects of identity such as integument. Trading on this view of race, those who advocate colorblindness typically argue that racism can be understood as unjustified reliance on an irrelevant characteristic - unjustified exactly because race is seen as arbitrary, as skin-color and nothing more. By implication, antiracism requires only the explicit nonrecognition of race. Peggy Pascoe terms this "powerfully persuasive belief that the eradication of racism depends on the deliberate nonrecognition of race" the "modernist racial ideology." Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America,* 83 *J. Am. Hist.* 44, 48 (1996) (emphasis omitted). According to Pascoe,

Modernist racial ideology has been widely accepted; indeed, it compels nearly as much adherence in the late-twentieth-century United States as racialism did in the late nineteenth century. It is therefore important to see it not as what it claims to be - the nonideological end of racism - but as a racial ideology of its own, whose history shapes many of today's arguments about the meaning of race in American society.

Id. Pascoe and Gotanda provide compelling critiques of the formal-race, modernist racial ideology version of colorblindness, one distinct from but substantially overlapping the constructionist version discussed in the text of this Essay.

n122. See Ramirez, *supra* note 23.

n123. Christopher A. Ford, Administering Identity: The Determination of "Race" in Race-Conscious Law, [82 Calif. L. Rev. 1231, 1285 \(1994\)](#).

n124. Christopher A. Ford, Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action, [43 UCLA L. Rev. 1953, 2029 \(1996\)](#).

n125. The notion of an overarching Latino/a or Hispanic identity is a contemporary invention that can be traced back to the 1970s. See Laura E. Gomez, The Birth of the "Hispanic" Generation: Attitudes of Mexican-American Political Elites Toward the Hispanic Label, 75 *Latin Am. Persp.* 45 (1992). Partially because of its recent provenance, doubts persist regarding the extent to which a pan-Latino/a identity is accepted by those so categorized. Brest and Oshige contend, for instance, that "few Latinos have much contact with members of other Latino national origin groups,...[resulting in] little pan-Latino identity." Brest & Oshige, *supra* note 22, at 888 (footnote omitted). However, evidence suggests that this generalized identity may be increasingly accepted among group members as an authentic means of self-identification. According to Latino/a studies scholar Suzanne Oboler,

The fact that with the gradual dissemination of the term Hispanic since the 1970s a significant number of second-and later-generation Latinos have grown up identified and self-identifying as Latinos or Hispanics raises the question whether Latinismo can be viewed, in certain regions around the country, solely as a "situational" identity, particularly in urban areas like New York City. Preliminary observations among second and later generations of Chicanos, Puerto Ricans, Cubans, Dominicans, and Central and South Americans raised in the United States appear to suggest that for some, Latinismo is not only or necessarily "situational." Latino-Americans are growing up in the borderlands of at least two cultures and are affected by and aware of the discrimination and prejudice against them as Latinos. It is therefore not surprising that some might want to take the term farther by constructing their identities as a group in this country.

Suzanne Oboler, The Politics of Labeling: Latino/a Cultural Identities of Self and Others, 75 *Latin Am. Persp.* 18, 19-20 (1992) (footnotes omitted); see also Suzanne Oboler, *Ethnic Labels, Latino Lives: Identity and the Politics of (Re)Presentation in the United States* (1995). Numerous cases concern discrimination against Latinos/as or Hispanics as a class, rather than as members of specific national origin groups. See, e.g., [Hernandez v. New York, 500 U.S. 352 \(1991\)](#); [Perez v. FBI, 707 F. Supp. 891 \(W.D. Tex. 1988\)](#), *aff'd*, [956 F.2d 265 \(5th Cir. 1992\)](#).

n126. See Jorge Klor de Alva et. al., Colloquy, Our Next Race Question: The Uneasiness Between Blacks and Latinos, *Harper's Mag.* 55 (Apr. 1996).

n127. *Id.* at 59. Of course, we should maintain a certain skepticism toward the claim that Latinos/as are "racially diverse" in ways that other "racial" groups are not. In fact, the *mestisaje* or mixing of peoples that is often singularly associated with Latinos/as is a quintessential American tale for all groups. For an entertaining argument to this end, see Gary B. Nash, The Hidden History of Mestizo America, 82 *J. Am. Hist.* 941 (1995).

n128. Klor de Alva et. al., *supra* note 126, at 59.

n129. This is true even when, as seems apparent, some of the calls for a non-racial Latino identity are animated by biological understandings of race. For example, Lisette Simon seemingly adopts a biological view of race when she insists that "race is not an option when determining what identifiers to use in characterizing Hispanics....Because the term Hispanic

encompasses all races, Hispanics are not readily identifiable by race, and that is why courts must use other indicators like name and language. Hispanics can be of any race." Simon, *supra* note 26, at 515-16. Brest, Oshige, and Ramirez, on the other hand, seemingly subscribe to a constructionist understanding of race. Brest and Oshige begin their analysis with the recognition that race is a social construction. See Brest & Oshige, *supra* note 22, at 860 ("Racial and ethnic groups...are socially constructed."). Ramirez's understanding of race seems less clear, though she too apparently accedes to a social conception. See Ramirez, *supra* note 23, at 964 n.33.

n130. Henry Louis Gates, Jr., *Loose Canons: Notes on the Culture Wars* 37 (1992).

n131. Kimberle Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in *Critical Race Theory: The Key Writings that Formed the Movement* 357, 375 (Kimberle Crenshaw et al. eds., 1995). Crenshaw responds to this thesis as follows:

To say that a category such as race or gender is socially constructed is not to say that that category has no significance in our world. On the contrary, a large and continuing project for subordinated people - and indeed, one of the projects for which postmodern theories have been very helpful - is thinking about the way power has clustered around certain categories and is exercised against others. This project attempts to unveil the processes of subordination and the various ways those processes are experienced by people who are subordinated and people who are privileged by them. It is, then, a project that presumes that categories have meaning and consequences. This project's most pressing problem, in many if not most cases, is not the existence of the categories but, rather, the particular values attached to them and the way those values foster and create social hierarchies.

Id.

n132. See Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993); Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (1992).

n133. As Toni Morrison suggests, speaking of the 1990s:

Race has become metaphorical - a way of referring to and disguising forces, events, classes, and expressions of social decay and economic division far more threatening to the body politic than biological "race" ever was. Expensively kept, economically unsound, a spurious and useless political asset in election campaigns, racism is as healthy today as it was during the Enlightenment. It seems that it has a utility far beyond economy, beyond the sequestering of classes from one another, and has assumed a metaphorical life so completely embedded in daily discourse that it is perhaps more necessary and more on display than ever before.

Toni Morrison, *Playing in the Dark: Whiteness and the Literary Imagination* 63 (1992).

n134. Some scholars have noted that by constructing its opinion in terms of local attitudes while refusing to recognize the existence of Mexican Americans generally as a class eligible for equal protection, Hernandez imposed substantial evidentiary burdens on Mexican Americans seeking judicial redress. See Greenfield & Kates, *supra* note 49, at 692 n.149.

n135. Despite refusing the language of race, Hernandez had its own racializing effect. Recall that racial discrimination led LULAC in the 1940s and 50s to an "other white" legal strategy,

evident in [Hernandez](#). See [supra](#) notes 65-69 and accompanying text. By not talking in terms of race, Hernandez did more than reflect this strategy; it contributed to its persistence. As Richard Delgado and Vicky Palacios point out, "The Court's failure to take judicial notice in the Hernandez case of the existence of Chicanos as a national class and its reliance instead on a limited factual finding resulted in a solidification of the 'other white' strategy." Delgado & Palacios, *supra* note 49, at 395.

n136. See Angela F. Harris, Foreword: The Jurisprudence of Reconstruction, [82 Calif. L. Rev. 741, 774 \(1994\)](#). Charles Lawrence makes a similar point:

Critical race theorists offer an alternative to the colorblind "just-don't-talk-about-it" approach to race and racism. We name it and talk about it; the more conversation the better. Rather than attempt to avoid demeaning constructions of race by acting as if they don't exist, we call for direct engagement with white supremacy in the battle over meanings that define us and our place in the world. We choose to be active combatants in the struggle over how to name and understand our lived experience.

Charles R. Lawrence, Race, Multiculturalism, and the Jurisprudence of Transformation, [47 Stan. L. Rev. 819, 838-39 \(1995\)](#).

n137. In this way, to continue to think and act in racial terms as part of an antiracist praxis would not be to engage generally in antiracist (or "strategic") essentialism, as Gayatri Spivak has suggested we sometimes should. See Gayatri Chakravorty Spivak, *In Other Worlds: Essays in Cultural Politics* 205-206 (1988). Rather, it would be to engage in race-conscious anti-essentialism, an on-going effort to rely on, grapple with, and remake race without succumbing to the attraction of racial essences.

n138. See Ramirez, *supra* note 23, at 958 n.5; see also Peter Skerry, *Mexican Americans: The Ambivalent Minority* (1993). Skerry's particular version of this suggestion is discussed in greater detail *infra* notes 180, 182-184.

n139. While acknowledging and exploring competing understandings of ethnicity, Werner Sollors seems to adopt the following inclusive definition:

An ethnic group is...a collectivity within a larger society having real or putative common ancestry, memories of a shared historical past, and a cultural focus on one or more symbolic elements defined as the epitome of their peoplehood. Examples of such symbolic elements are: kinship patterns, physical contiguity (as in localism or sectionalism), religious affiliation, language or dialect forms, tribal affiliation, nationality, phenotypal features, or any combination of these. A necessary accompaniment is some consciousness of kind among members of the group.

Werner Sollors, Foreword: Theories of American Ethnicity, in *Theories of Ethnicity: A Classical Reader* xii (Werner Sollors ed., 1996) (quoting R. A. Schermerhorn, *Comparative Ethnic Relations* 12 (1970, 1978)). While instructive in showing the range of axes across which ethnicity is constructed, Sollors' broad definition by implication encompasses race as a subphenomenon of ethnic identity. My point is not that one is subordinate to or a species of the other, but that race and ethnicity are built along similar lines.

n140. Michael Banton, Race - As Classification, in *Dictionary of Race and Ethnic Relations* 294 (Ellis Cashmore ed., 4th ed. 1996).

n141. See, e.g., George Fredrickson, *The Black Image in the White Mind: Origin and Evolution of a Worldview* (1971); Horsman, *supra* note 50; Jordan, *supra* note 59; Audrey Smedley, *Race in North America: The Debate on Afro-American Character and Destiny, 1817-1914* (1993); and William Stanton, *The Leopard's Spots: Scientific Attitudes Toward Race in America, 1815-59* (1960). To a greater or lesser extent, these works focus on the elaboration of race relations through the subordination of groups characterized as non-White. Other works trace the same history through a focus on the rise of White group identity. See, e.g., Theodore W. Allen, *The Invention of the White Race Volume One: Racial Oppression and Social Control* (1994); Alexander Saxton, *The Rise and Fall of the White Republic: Class Politics and Mass Culture in Nineteenth Century America* (1990).

n142. Sollors, *supra* note 139, at xxix.

n143. *Id.* at x (citation omitted).

n144. See Horace M. Kallen, *Democracy Versus the Melting-Pot: A Study of American Nationality*, in [Theories of Ethnicity](#), *supra* note 139, at 67; Robert E. Park, *Human Migration and the Marginal Man*, in [Theories of Ethnicity](#), *supra* note 139, at 156. See also Omi & Winant, *supra* note 34, at 15.

n145. Floya Anthias suggests understanding race, ethnicity, and nationalism as related but not identical phenomena that can be considered distinct aspects of a more general construction of identity in terms of "ethnos":

What is common to them, in all their diversity, is that they involve the social construction of an origin as a basis for community or collectivity. This origin, mythical or 'real,' can be historically, territorially, culturally, or physiognomically based...

Despite the great heterogeneity of the phenomena of ethnos therefore, a commonality exists in two ways: by the construction or representation of a group 'origin', [sic] as providing claims to common identity, and by an 'imaginary' or imagery of common culture, language, territory and so on, that belong as an inalienable right to the group. In this sense, ethnos involves the construction of an origin as a significant arena for collective identity and action. This identity may be constructed from outside as well as inside the group. Ethnicity, nationalism and 'race' can be located as belonging to this group of phenomena.

Floya Anthias, [Connecting "Race' and Ethnic Phenomena](#), 26 *Soc.* 421, 422-23 (1992).

n146. David Theo Goldberg, *Racist Culture: Philosophy and the Politics of Meaning* 76 (1993). Of course, as Goldberg explains, the decision to use biology as a basis for group differentiation is itself a cultural one. Thus, as he remarks, "The influential distinction drawn by Pierre van den Berghe between an ethnic group as 'socially defined on the basis of cultural criteria' and a race as 'socially defined but on the basis of physical criteria' collapses in favor of the former." *Id.* at 75 (citation omitted).

n147. Benjamin Ringer and Elinor Lawless focus on exactly this difference as the basis for maintaining a conceptual distinction between race and ethnicity:

The they-ness imputed to racial minorities by the dominant American society has been qualitatively different from the they-ness imputed to white ethnic minorities. True, the latter have experienced historically considerable deprivation and discrimination in America but not the kind of exclusionary and dehumanizing treatment that deprived racial minorities of even the most basic rights and amenities for much of U.S. history. So imprinted has this differential treatment been onto the very foundations of American society from the colonial period onward that we have constructed a theory of duality to account for this differential treatment.

Benjamin B. Ringer & Elinor R. Lawless, *Race-Ethnicity and Society* 27 (1989).

n148. See Noel Ignatiev, *How the Irish Became White* 2-3 (1995). Orlando Patterson uses the example of the Irish in his editorial to argue that race is a fiction. "Americans need not go beyond their borders to see the meaninglessness of the 'race' category," he writes.

Until the early decades of this century, the Irish Catholic "race" was stereotyped in Britain and the United States as subhuman, lazy and violent in both scientific and popular writings. The Irish, like the Italians - another group previously considered "nonwhite" - had to struggle hard for their reclassification into the white "race."

Patterson, *supra* note 29. This point seems to establish not that race is a fiction, but that it is very real. For those racialized as non-White, its reality lies in being the target of severe oppression, and for those racialized as White, it lies in wielding privilege and managing oppression. It is perhaps in this sense that Ignatiev describes the aim of his book as the examination of "how one group of people became white....how the Catholic Irish, an oppressed race in Ireland, became part of an oppressing race in America." Ignatiev, *supra* at 1.

n149. See Garcia, *Informal Report*, *supra* note 2; Maury Maverick, *Foreword*, in *A Cotton Picker Finds Justice!*, *supra* note 2.

n150. [Transcript of Record at 74-75, Hernandez v. Texas, 347 U.S. 475 \(1954\)](#) (No. 406) (hearing in the trial court on Motion to Quash Jury Panel and Motion to Quash the Indictment).

n151. *Id.* at 76.

n152. The level of extreme physical violence imposed on persons understood as innately different, evident in the practice of lynching, offers one measure of the severity of social oppression meted out on putatively racial grounds. Hernandez's lawyers took this practice into account, reporting that "it was necessary...to travel a hundred miles to and from Houston each morning and evening to attend Court [in Jackson County] because, for obvious reasons, it would have been ill advised to stay overnight in Edna." Garcia, *Informal Report*, *supra* note 2.

n153. Joan W. Scott, *The Evidence of Experience*, 17 *Critical Inquiry* 773, 779-80 (1991).

n154. This broad definition plays to the cultural component of experience. However, I in no way intend a moral equation between this definition of racial discrimination and the more common understanding of that term, for example as it would be applied to the practices underlying Hernandez.

n155. It should be clear that the experience of racial discrimination involves not only the oppressed but the oppressor. Thus, such experience acts also to constitute membership in racially dominant groups. Scott offers the following quote to explain the broadly constitutive powers of "experience":

[Experience is the] process by which, for all social beings, subjectivity is constructed. Through that process one places oneself or is placed in social reality, and so perceives and comprehends as subjective (referring to, originating in, oneself) those relations - material, economic, and interpersonal - which are in fact social and, in a larger perspective, historical.

Id. at 782 (quoting Teresa de Lauretis, *Alice Doesn't* 159 (1984)).

n156. See, e.g., Richard Griswold del Castillo, *The Los Angeles Barrio, 1850-1890: A Social History* (1979); George J. Sanchez, *Becoming Mexican American: Ethnicity, Culture and Identity in Chicano Los Angeles, 1900-1945* (1993).

n157. Anthony Appiah seems to take the position rejected here. He writes, "What seems clear enough is that being an African-American or an Asian-American or white is an important social identity in the United States. Whether these are important social identities because these groups have shared common cultures is, on the other hand, quite doubtful, not least because it is doubtful whether they have common cultures at all." Appiah, *Race, Culture, Identity*, supra note 120, at 88. Appiah's point may turn on his definition of a "common culture," which seems surprisingly restrictive, drawing as it does on a model of a small-scale, face-to-face society. See id. at 85-86. It may be more generous to understand him as arguing for the less controversial proposition that the social significance of racial categories stems relatively more from their role as markers of discrimination than as cultural boundaries. This position accords with that taken by David Hollinger. See Hollinger, supra note 29, at 128-29; David A. Hollinger, *Group Preferences, Cultural Diversity, and Social Democracy: Notes Toward a Theory of Affirmative Action*, 55 *Representations* 31, 33 (1996) [hereinafter *Hollinger, Group Preferences*]. According to Hollinger, "To be sure, there is plenty of culture in all five blocs of the [racial] pentagon. And much of it was created under racist conditions....But culture also transcends these barriers... What the ethno-racial pentagon is really good for is identifying people according to the physical characteristics that render them most vulnerable to mistreatment." Id.

n158. This phrase is borrowed from Howard Winant's book of the same title. See Winant, supra note 102.

n159. San Miguel, supra note 69, at 54-55 (1987) (citation omitted); see also Guadalupe Salinas, *Mexican-Americans and the Desegregation of Schools in the Southwest*, 8 *Hous. L. Rev.* 929 (1971).

n160. San Miguel, supra note 69, at 32 (emphasis omitted) (quoting Paul Schuster Taylor, *An American-Mexican Frontier* (1934) (specific page attribution not given)). At least one Texas court accepted such rationales in upholding the segregation of Mexican-American school children. [Independent Sch. Dist. v. Salvatierra, 33 S.W.2d 790 \(Tex. Civ. App. 1930\)](#). In reaching its decision, the court relied on the testimony of the school district superintendent regarding the innate differences that characterized children of Mexican descent, citing for example the "fact" that "a Mexican child will reach the puberty stage sooner than an American child, and that people originating in torrid climates will mature earlier; its owing to the climatic conditions." [Id. at 793](#).

n161. San Miguel, supra note 69, at 51. Other rationalizations for segregating Mexican-American children were also offered. One concerned the potential harm to White children posed by association with Mexican-American children, either because of their hygiene or because of their retarded learning pace; a second cited the benefit to Mexican-American children of attending classes with other Spanish speakers and of not having to compete with White children. See id. at 55. Ranchers and farmers had their own reasons for opposing the

education of Mexican-American children. As one ranch foreman pithily explained, "The illiterates make the best farm labor." *Id.* at 51 (quoted without specific attribution).

n162. A study conducted in 1944 found that out of 122 widely dispersed school districts in Texas, ninety percent segregated students through the first two grades or above, fifty percent separated these students through the sixth grade or above, and seventeen percent continued segregation through the eighth grade or higher. U.S. Comm'n on Civil Rights, Mexican American Education Study, Report 1: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest 13 (1971) (citing Wilson Little, *Spanish-Speaking Children in Texas* 60 (1944)).

n163. See Rangel & Alcala, *supra* note 52, at 314-15 ("Explicit segregation of Chicano students by local authorities during this initial period [1920-1940] was limited to the elementary grades. This was not due to laudable or benign motives. Local policy often limited Chicano children to elementary education. Pressures were put on Mexican-American students not to go beyond the elementary level.") (citations omitted).

n164. Jackson County's segregation of Mexican-American school children came to an official end only in 1948, after a federal court ruled that similar segregation in four central Texas counties violated the Fourteenth Amendment. See *Delgado v. Bastrop Indep. Sch. Dist.*, Civ. Case No. 338 (W.D. Tex., June 15, 1948). This case is discussed in San Miguel, *supra* note 69, at 123-26. Delgado was brought with the assistance of LULAC as part of its larger struggle for Mexican-American civil rights; Gus Garcia was the attorney. See *id.* at 123.

Separate schools for Mexican Americans were widespread throughout the Southwest, although nowhere more so than in Texas. See U.S. Comm'n on Civil Rights, *supra* note 162, at 11. Cases involving the segregation of Mexican-American school children also arose in Arizona and California. See [Westminster Sch. Dist. v. Mendez](#), 161 F.2d 774 (9th Cir. 1947) (in the absence of state legislation authorizing segregation, segregation of Mexican-American school children violates the Fourteenth Amendment); [Gonzales v. Sheely](#), 96 F. Supp. 1004 (D. Ariz. 1951) (segregation of Mexican-American school children violates Fourteenth Amendment). Like Hernandez, Mendez is one of the key early Mexican-American civil rights cases. Thurgood Marshall and the NAACP assisted in the Mendez case. See Ricardo Romo, *Southern California and the Origins of Latino Civil-Rights Activism*, 3 W. Legal Hist. 379, 401 (1990).

n165. See [Transcript of Record at 84-87, Hernandez v. Texas](#), 347 U.S. 475 (1954) (No. 406) (hearing in trial court on Motion to Quash the Indictment, Motion to Quash Jury Panel, and Motion to Quash the Talesmen After Special Venire was Exhausted). This testimony relates to experiences with the school in the early nineteen-forties. By 1948, there were apparently two teachers and two rooms in the Edna District Latin American school. See *id.* at 51 (testimony of Oscar Bounds, Superintendent of the Edna Independent School District). The Court relies on these latter figures. See [Hernandez](#), 347 U.S. 425, 479 n.10 (1954). Whether one room or two, one teacher or two, it remains the case that typically the physical facilities of the schools made available to Mexican-American children were substantially inferior to those afforded White students. "In a 1947 survey of ten [Texas] school systems, it was found that "the physical facilities, equipment, and instructional materials in the schools for Spanish-name children were found to be generally inferior and inadequate as compared with those existing in the Anglo schools." Rangel & Alcala, *supra* note 52, at 321 n.83 (second alteration in original) (quoting Strickland & Sanchez, *Spanish Name Spells Discrimination*, in *The Nation's Schools* 22-24 (1948)).

n166. See [Brown v. Board of Educ.](#), 347 U.S. 483, 494 (1954).

n167. [Brief for Petitioner at 19, Hernandez v. Texas, 347 U.S. 475 \(1954\)](#) (No. 406) (citation omitted).

n168. See Bureau of the Census, U.S. Dep't of Commerce, U.S. Census of Population: 1950: Special Reports: Persons of Spanish Surnames 3C-67 (1953).

n169. See Haney Lopez, *supra* note 27, at 130-33.

n170. See *supra* notes 160-161 and accompanying text.

n171. Among the various stereotypes advanced, Jorge Klor de Alva identifies and criticizes the following: anti-intellectualism; an absence of future orientation and an inability to delay gratification; a noncompetitive, nonprogressive, easily satisfied psychological makeup that caters to a family-oriented, fatalistic world view; tendencies toward violence and dishonesty, necessitating punitive or restraining law enforcement procedures; dependent personalities, frequently inducing disproportionate welfare use as well as chemical abuse; an irresponsible and irrational mindset, leading to and perhaps the product of extensive familial abuse, abandonment, and neglect; and immaturity and improvidence, impeding persistence in employment or the adequate provision for oneself or one's family. See Klor de Alva, *supra* note 37, at 115-16.

As Klor de Alva notes, on one level these stereotypes amount to little more than racial prejudice. On another level, however, to the extent such beliefs in fact trace and respond to existing patterns in Latino/a communities, those patterns reflect not a widely shared, pre-established culture peculiar to all Latinos/as, but the daily practices engendered by the socioeconomic conditions in which many Latinos/as find themselves.

It is evident to any serious student of modern American racial minorities that class is indeed culture....The study of the Hispanic subcultures in the United States cannot be blind to the fact that they are composed primarily of people with limited access to resources who therefore must create cultural mechanisms different from those of their wealthier counterparts if they are to survive.

*Id.* at 116. These different mechanisms should not be taken, as they often are, to indicate the cultural - and more, the racial - character of Latinos/as.

n172. Though not perhaps primarily shaped by racism, U.S. immigration policies and laws as well as relations between the United States and developing countries more generally often implicate questions of race. See, e.g., Oquendo, *supra* note 36, at 43 ("Mexicans and Puerto Ricans...are part of the United States territorial system due to the colonial expansion that took place last century....In both cases, the imperialistic onslaught immediately made a group of Latinos(as) part of the United States reality and created the necessary historical conditions for the subsequent massive Latino(a) migrations to the United States mainland."). Kimberle Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas argue that Critical Race theorists should turn their attention to generating "an adequate account of the connections between racial power and political economy in the New World Order." Introduction, *Critical Race Theory*, *supra* note 131, at xxx.

n173. Rachel F. Moran, *Unrepresented, 55 Representations* 139, 149 (1996). The point is not that Latino/a immigrants cause or are to blame for stereotypes of Latino/a inassimilability, but that in a context in which Latinos/as are racialized as an undifferentiated, homogenous group, the presence of recent immigrants lends credence to particular negative stereotypes.

n174. See *infra* notes 180-184.

n175. [Hernandez v. Texas, 251 S.W.2d 531, 535, 536 \(Tex. Crim. App. 1952\)](#), *rev'd*, [347 U.S. 475 \(1954\)](#).

n176. [Id. at 536](#).

n177. See Omi & Winant, *supra* note 34, at 14-24.

n178. [Hernandez, 251 S.W.2d at 535](#).

n179. See Goldberg, *supra* note 146, at 78. For a thoughtful discussion of the application of ethnicity theory to African Americans, see Ringer & Lawless, *supra* note 147, at 201-23.

n180. Skerry, *supra* note 138.

n181. Peter Brimelow, *Alien Nation* (1995). Legal scholars have widely criticized Brimelow's book. See, e.g., Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, [7 Stan. L. & Pol'y Rev. 35 \(1996\)](#); Hiroshi Motomura, *Whose Alien Nation? Two Models of Constitutional Immigration Law*, [94 Mich. L. Rev. 1927 \(1996\)](#) (book review); Peter Schuck, *Alien Ruminations*, [105 Yale L.J. 1963 \(1996\)](#) (book review). Brimelow's arguments as they apply to Latinos/as are powerfully critiqued in Johnson, *Fear of an "Alien Nation," supra* note 16; Moran, *supra* note 173, at 148-49.

n182. Skerry, *supra* note 138, at 8-9.

n183. Paul Brest and Miranda Oshige's question regarding Latinos/as and affirmative action is, in effect, the same one posed by Skerry. See *supra* note 22 and accompanying text. Moreover, they seem to offer the same answer. Rachel Moran provides a compelling critique of Brest and Oshige:

Because Brest and Oshige only perfunctorily acknowledge that Latinos have encountered systematic discrimination, the authors dismiss its impact by linking differences in socioeconomic status between Latinos and whites to the former's lack of English proficiency and inadequate job skills, characteristics that should change as immigrants and their progeny assimilate. In reaching this conclusion, the authors fail to address the ways in which pervasive prejudice blocks assimilation and forces newcomers to adapt themselves to existing structures of racial and ethnic inequality.

Moran, *supra* note 173, at 146 (citation omitted).

n184. Skerry, *supra* note 138, at 367.

n185. Focusing on Latinos/as, Rachel Moran has insightfully explored the contradictions that arise when these dual aspects of identity are divorced. Decrying the efforts to force Latinos/as to neatly fit themselves within a civil rights model that looks to the experiences of non-White racial minorities or an immigration model that analogizes to the White ethnic experience, Moran suggests that it is imperative "to establish the ways in which each paradigm accentuates the need for a heightened commitment to fairness and equity under the other." Moran, *supra* note 173, at 149. Ultimately, she argues, "the greatest contribution that Latinos may make is to alert Americans to the way in which each paradigm has become obsolete. Latinos may not fit the models because the models just don't fit the complications of a multiracial, multiethnic, multicultural, multilingual America." *Id.* at 151; see also Rachel F. Moran, *Foreword - Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 *La Raza L.J.* 1 (1995).

n186. This fate is shared not only by many Latinos/as, but by Asian Americans. See Robert Chang & Keith Aoki, Centering the Immigrant in the Inter/National Imagination, [85 Calif. L. Rev. 1395 \(1997\)](#), [10 La Raza L.J. 309 \(1997\)](#).

n187. Eric K. Yamamoto, Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America, [95 Mich. L. Rev. 821, 830, 881 \(1997\)](#). Cf. Robert L. Hayman, Jr., The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism, [30 Harv. C.R.-C.L. L. Rev. 57, 70 \(1995\)](#) (arguing that a central tenet of Critical Race Theory may be that "justice cannot be merely theoretical, but must be informed by and realized in lived experiences").

n188. Angela P. Harris, Foreword: The Unbearable Lightness of Identity, 11 Berkeley Women's L.J. 207, 212 (1996) (citations omitted). Harris writes:

In the unique circumstances of the United States, "ethnicity" will not do as a substitute for "race," precisely because its history has been different than that of "race." To claim a nonwhite racial identity in the United States in an anti-racist context is to claim that history matters in a very specific way: that white supremacy, with its obsessions, exploitations, and cruelty over the past two and a half centuries, has made us into a people really divided by those imaginary lines. Claiming a nonwhite racial identity in this anti-racist context is to make a moral demand on whites to recognize and redress the injuries caused by white supremacy....The substitution of "ethnicity" for "race" on anti-essentialist grounds thus misses the point...

"Race" when used in this anti-racist context is neither a fixed, mysterious essence that determines personality, nor a meaningless fact about one's skin or hair; it is the moral marker of wrongs that have been and continue to be done.

Id. (citations omitted).

n189. Howard Winant argues that

the main task facing racial theory today...is to focus attention on the continuing significance and changing meaning of race. It is to argue against the recent discovery of the illusory nature of race...against the widely reported death of the concept of race; and against the replacement of the category of race by other, supposedly objective, categories like ethnicity, nationality, or class.

Winant, *supra* note 102, at 14 (emphasis in original).

n190. See Appiah, *supra* note 29, at 45; Hollinger, *supra* note 29, at 39; Patterson, *supra* note 29.

n191. This phrase is adopted, in slightly altered form, from Richard Walker, California's Collision of Race and Class, 55 Representations 163, 178 (1996).

n192. See Ramirez, *supra* note 23, at 958-59.

n193. See Dale Maharidge, The Coming White Minority: California's Eruptions and America's Future 1 (1996).

n194. See Moran, *supra* note 185, at 2.

n195. See *id.* at 1.

n196. See Maharidge, *supra* note 193, at 1.

n197. [163 U.S. 537 \(1896\)](#).

n198. See Maharidge, *supra* note 193, at 1.

n199. This question assumes these traditions are not, as some scholars have compellingly argued they may be, inseparable and symbiotic. See, e.g., Derrick Bell, *Race, Racism, and American Law* 60-64 (3rd ed. 1992). If they are mutually dependent traditions, then the question becomes whether in a post-Anglo society we can break out of the tragic symbiosis between democracy and racial oppression, with the likelihood of an encouraging answer still further diminished.

n200. See Walker, *supra* note 191, at 169. In Walker's opinion,

The [California] electorate is an aging white elite disinclined to tax itself to pay for government spending on the needs of workers, people of color, and young people. The interests of the mass of these working people for jobs, public education, or health care are not expressed by elected officials, who are overwhelmingly white and well-to-do.

*Id.*

n201. See The California Civil Rights Initiative, Proposition 209, Cal. Const. art. 1, 31. On April 8, 1997, a three-judge panel of the Ninth Circuit Court of Appeals vacated a district court preliminary injunction enjoining California from enforcing the Proposition. See [Coalition for Economic Equality v. Wilson, 110 F.3d 1431 \(9th Cir. 1997\)](#). The petition for rehearing and the suggestion for rehearing en banc were denied. See *Coalition for Economic Equality v. Wilson*, Nos. 97-15030, 97-15031, 1997 WL 160667 (9th Cir. Aug. 21, 1997). The United States Supreme Court denied certiorari. See [Coalition for Economic Equality v. Wilson, 118 S. Ct. 397](#) (Mem.) (November 3, 1997). Troy Duster offers an insightful critique of the California electorate's response to affirmative action, arguing among other things that "White bloc voting for white candidates and 'white group interests' has become one of the untold stories of American (and particularly Californian) politics." Troy Duster, *Individual Fairness, Group Preferences, and the California Strategy*, 55 *Representations* 41, 54 (1996).

n202. See Proposition 187: Text of Proposed Law, in California Ballot Pamphlet, General Election, November 8, 1994, at 91 (1994). One could also add to the list of ballot initiatives indicating a backlash against those perceived as non-White Proposition 184, the three-strikes sentencing law, passed in 1994 and Proposition 63, establishing English as California's official language, passed in 1986.

n203. See Maharidge, *supra* note 193, at 5.

n204. See Katherine Seelye, *Future U.S.: Grayer and More Hispanic*, N.Y. Times, Mar. 27, 1997, at B16, c.1. Seelye relies on a recent Census Bureau report, noting also that by approximately 2050, Latinos/as will outnumber the nation's total of African Americans, Asian Americans, and American Indians, and will constitute one fourth of the country's population, up from 10.7 percent in 1995.