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PANEL: RACES, NATIONALITIES, ETHNICITIES: MAPPING LATCRIT (DIS)CONTINUITIES:  
Retaining Race: LatCrit Theory and Mexican American Identity in *Hernandez v. Texas* \*

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**BIO:**

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An expanded version of this article is forthcoming as Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. (forthcoming 1997).

**SUMMARY:** ... This essay addresses the legal construction of Mexican American racial identity by examining a 1954 Supreme Court case, *Hernandez v. Texas*. It does so as a means of accepting the invitation issued by Professor Juan Perea to consider some fundamental axioms regarding Latinos/as and race. ... Professor Perea offers this definition of ethnicity: "Ethnicity consists of a set of traits that may include, but are not limited to: race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness among members of the group. ... Race is social, in the sense that the groups commonly recognized as racially distinct have their genesis in cultural practices of differentiation rather than in genetics, which plays no role in racial fabrication other than contributing the morphological differences onto which the myths of racial identity are inscribed. ... Nevertheless, Professor Perea contends that in grappling with these constituent characteristics of Latino/a identity, "race is not a helpful concept" and instead, "the concepts of ethnicity and ethnic identity may be the most appropriate vehicle." ... The distinct historical deployment of race and ethnicity requires that both be used in theorizing Latino/a identity. ... *Hernandez* provides a graphic example of how White ethnic status is on occasion strategically imputed to Latinos/as as a means of opposing Latino/a access to remedies for race-based discrimination. ...

**[\*279] INTRODUCTION: ETHNICITY OR RACE?**

This essay addresses the legal construction of Mexican American racial identity n1 by examining a 1954 Supreme Court case, [\*280] *Hernandez v. Texas*. n2 It does so as a means of accepting the invitation issued by Professor Juan Perea to consider some fundamental axioms regarding Latinos/as and race. n3 Professor Perea issued this invitation in the context of a conference intended to inaugurate a new legal genre, LatCrit theory, dedicated to exploring the relationship between Latinos/as and law. This essay considers in particular Professor Perea's suggestion that race may not be a helpful concept in understanding the experiences of Latinos/as or in promoting equality for Latino/a communities, and that instead, ethnicity may be more helpful. While ethnicity offers a powerful paradigm for conceptualizing Latino/a identity, one that has been extensively and fruitfully used, n4 this essay argues that race remains indispensable to understanding Latino/a experiences and to improving the welfare of Latino/a communities.

In one sense the disagreement with Professor Perea is a semantic one. Professor Perea offers this definition of ethnicity: "Ethnicity consists of a set of traits that may include, but are not limited to: race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness among members of the group. These traits also may engender a perception of group distinctiveness in persons who [\*281] are not members of that group." n5 The differences may be semantic because this definition of ethnicity also serves well as a definition of race. If the two are substituted, the following results: race consists of a set of traits not limited to national origin, ancestry, language, religion, shared history, traditions, values, and symbols that contribute to a sense of distinctiveness among members of the group, and that also engender a perception of group distinctiveness in persons not members of the group. This serves well as a fairly broad and flexible definition of race. Race operates along each of the axes Professor Perea identifies to bind people together as a matter of external perception and internal self-conception into groups supposedly distinct as a function of biology and ancestry. Race is social, in the sense that the groups commonly recognized as racially distinct have their genesis in cultural practices of differentiation rather than in genetics, which plays no role in racial fabrication other than contributing the morphological differences onto which the myths of racial identity are inscribed. n6 The first section of this essay uses *Hernandez* to illustrate the contention that race is social.

Despite the success of Professor Perea's definition of ethnicity as a definition of race, however, the differences presented here are more than semantic. To a certain extent, of course, we are both [\*282] saying the same thing: LatCrit theorists must look to a broad array of factors including language, religion, shared history, traditions, values, external perceptions of group identity, and so on, to understand and advocate on behalf of Latinos/as. On this much -- and it is quite a lot -- we completely agree. Nevertheless, Professor Perea contends that in grappling with these constituent characteristics of Latino/a identity, "race is not a helpful concept" n7 and instead, "the concepts of ethnicity and ethnic identity may be the most appropriate vehicle." n8 Professor Perea seems to be arguing that LatCrit theory should prefer ethnicity over race; it is possible to hear in his remarks echoes of the more stringent position taken by others that, in favor of ethnicity, we eschew race altogether. n9 However, both race and ethnicity are helpful and productive, with each possessing strengths and weaknesses. This essay suggests that neither should be abandoned as a lense through which to view Latino/a communities. More directly in response to Professor Perea's contentions, this essay argues that race should be retained.

Although race and ethnicity are equally the products of social invention, the processes of racial fabrication in the United States have and continue to impose distinct burdens on racialized peoples. Under the differing social constructions of ethnicity and race [\*283] prevalent in the United States over the last century, ethnicity has been equated with culture, and race with biology. Of course, the decision to use biology as a basis for group differentiation is itself an ethnocentric one, and increasingly, race is now constructed in terms of culture. n10 Nevertheless, race and ethnicity should not be equated. This is so not because they are essentially different; on the contrary, as this essay's usurpation of Professor Perea's definition suggests, race and ethnicity are largely the same. Rather, race and ethnicity should not be conflated because these two forms of identity have been *deployed* in fundamentally different ways. The attribution of a distinct ethnic identity has often served to indicate cultural distance from Anglo-Saxon norms. n11 Left unstated but implicit, however, is a claim of transcendental, biological similarity: ethnics and Anglo-Saxons are both White. The attribution of a distinct racial identity, on the other hand, has served to indicate distance not only from Anglo-Saxon norms, but also from Whiteness. n12 Racial minorities are thus twice removed from normalcy, across a gap that is not only cultural, but supposedly innate.

The distinct historical deployment of race and ethnicity requires that both be used in theorizing Latino/a identity. Utilizing ethnicity focuses our attention on the experience of being constructed as culturally removed from the norm; using race forces us to assess the imposition of an inferior identity constructed in immutable terms. Race is thus indispensable to understanding the lived experiences of Latinos/as in this

country. The second section of this essay employs *Hernandez* to support the contention that race provides a necessary tool for LatCrit theory. The essay then changes tack, considering in conclusion the role LatCrit theory might play in remaking [\*284] understandings of race.

### I. *HERNANDEZ V. TEXAS* AND MEXICAN AMERICAN RACIAL IDENTITY

On September 20, 1951, the Grand Jury of Jackson County, Texas indicted Pete Hernandez for the murder of Joe Espinosa. Gus Garcia, a lawyer 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. n13 Garcia moved to quash Hernandez's indictment under the Fourteenth Amendment, arguing that people of Mexican descent were purposefully excluded from the grand jury which indicted Hernandez in violation of the guarantee of equal protection of the laws. The State of Texas conceded that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County." n14 Texas also conceded that Mexican and Latin Americans comprised roughly fifteen percent of the county's population, and that over the previous quarter century Jackson County had called more than six thousand jurors. n15 Nevertheless, the District Court denied the motion to quash. Hernandez was tried, convicted, and sentenced to life in prison. On appeal, the Texas Court of Criminal Appeals denied Hernandez relief on the ground that the equal protection [\*285] clause did not extend to Mexican Americans as a group. The appellate court wrote 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." n16 *Hernandez* thus presented the Supreme Court with the issue of whether Mexican Americans constituted a protected class within the meaning of the Fourteenth Amendment; in effect, *Hernandez* required the Court to negotiate the terms of Mexican American existence.

The Court's struggle to conceptualize Mexican American identity merits close study. To begin with, the Court refused to hold that Mexican Americans constitute a racial group. The Court could have ruled in response to the Texas court's restrictive reading of the equal protection clause that the Fourteenth Amendment protected not only the Black and White races but other races as well. Instead, the Court announced that the equal protection clause reached beyond not just White and Black, but also beyond "race and color." "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static," the Court wrote, "and from time to time *other differences* from the community norm may define other groups which need the same protection." n17 According to the Court, Hernandez had to show not that he was discriminated against as a member of a disfavored race, but as a member of a group marked by "other differences." In perhaps the most significant sentence of the opinion, Chief Justice Warren then added that "whether such a group exists within a community is a question of fact." n18

[\*286] This terse sentence invites extended comment. However, it may be worthwhile first to examine the effect given this sentence in the opinion. The Court noted that Hernandez's "initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County," and that this might be demonstrated "by showing the attitude of the community." n19 In considering the community attitudes extant in Jackson County towards Mexican Americans, the Court reviewed the evidence Hernandez had introduced before the Jackson County District Court in his original motion to quash the indictment. As summarized by the Court, that evidence revealed the following: First, "residents of the community distinguished between 'white' and 'Mexican.'" n20 Second, "the participation of persons of Mexican descent in business and community groups was shown to be slight." n21 Third, "until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades." n22 The Court also observed in a footnote that "most of the children of Mexican descent

left school by the fifth or sixth grade." n23 Fourth, "at least one restaurant in town prominently displayed a sign announcing 'No Mexicans Served.'" n24 And finally, the Court noted that on the Jackson County courthouse grounds at the time of the hearing, "there were two men's toilets, one unmarked, and the other marked 'Colored Men' and 'Hombres [\*287] Aqui' ('Men Here')." n25 On the basis of this evidence, the Court held that persons of Mexican descent were a distinct class within Jackson County, Texas, and that the exclusion of Mexican Americans from jury service violated the Fourteenth Amendment. n26

In *Hernandez*, the Court took a contradictory approach to the question of Mexican American racial identity: on the one hand, the Court announced at the outset that if Mexican Americans deserve constitutional protection, they merit this protection on some ground other than race or color. On the other hand, the Court recited what can only be viewed as a long history of racial discrimination in order to establish that Mexican Americans existed as a group deserving protection. This contradictory approach follows from and highlights the Court's conception of race as something biological and immutable. Proceeding from this understanding of race, the Court could not help but be perplexed by Mexican American identity. Though subject to violent and extensive discrimination in some parts of the country, Mexican Americans were virtually unknown, and unracialized, in other parts of the nation; n27 though the objects of extreme social prejudice, Mexican Americans were relatively rarely the objects of de jure legal discrimination; n28 though often darker in skin color than most Whites, Mexican Americans often insisted, as did the lawyers for Hernandez in their argument before the Supreme Court, that Mexican Americans were members of the White race. n29 A biological view of race positing that each [\*288] person possesses an obvious, immutable, and exclusive racial identity cannot account for, or accept, these contradictions. Operating under such a Manichean racial view, the Court insisted in the face of viscerally moving evidence to the contrary that the exclusion of Mexican Americans from juries in Jackson County, Texas, involved neither race nor color. Nevertheless, *Hernandez* is all about race.

Albeit unwittingly, the *Hernandez* opinion offers a sophisticated insight into racial formation: whether a racial group exists, the opinion correctly tells us, is a local question that can be answered only in terms of community attitudes. To translate this insight into broader language, race is social, not biological; it is a matter of what people believe, rather than of natural decree. Thus, it is possible for Mexican Americans to exist as a race in Jackson County, Texas, but simultaneously not to constitute a race in Washington, DC. It is possible for Mexican Americans to suffer under the lash of severe racial prejudice, but at the very same moment to be legally categorized as White. It is possible for many to perceive and discriminate against Mexican Americans as a non-White race, but at the same time for Mexican Americans to insist that they are White. All of this is possible because race is not a question of biology, but rather a question of community opinion. The Court erred in concluding that Mexican Americans did not constitute a racial group in Jackson County, Texas. It was more correct than it knew, however, when it wrote that the existence of [\*289] Mexican Americans as a group suffering discrimination was a local question of fact. Races exist only as local facts measured in terms of community attitudes and the material inequalities such attitudes have built up. Professor Perea suggests that virtually all Latinos/as are *mestizo* (multiracial). n30 I submit everyone is *mestizo*: there are no pure biological races, only invented, complex, hybrid, social, local ones. All races are equally social constructions, though the force and thrust of that construction clearly differs between groups and across history and geography. Revisiting the definition borrowed from Professor Perea, race consists of a set of traits including national origin, ancestry, language, religion, shared history, traditions, values, and symbols that contribute to a sense of distinctiveness among members of the group, and that also engender a perception of group distinctiveness in persons not members of the group.

## II. RACE AND LATCRIT THEORY

As social constructions, race and ethnicity substantially overlap. Nevertheless, as discussed above, these identities have been deployed in the United States in remarkably different ways. n31 While ethnicity tends to be socially defined on the basis of cultural criteria, race has been defined on the basis of physical factors.

n32 This section uses *Hernandez* to develop the argument that race provides a necessary tool for LatCrit theory, one that cannot be neatly supplanted by ethnicity.

To begin with, relying solely on ethnicity to the exclusion of race as a basis for conceptualizing Latino/a lives risks obscuring central facets of Latino/a experiences. To understand what is lost [\*290] from view, consider the evidence of discriminatory treatment at the root of *Hernandez*. In Jackson County, Mexican Americans were barred from local restaurants, excluded from social and business circles, relegated to inferior and segregated schooling, and subject to the humiliation of Jim Crow facilities, including separate bathrooms in the halls of justice. To grasp the experience of just this last, imagine being present at the moment that Garcia called co-counsel John Herrera to testify about those courthouse bathrooms. As excerpted from the trial court transcript, that moment progressed like this:

Q. During the noon recess I will ask you if you had occasion to go back there 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. 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. n33

[\*291] 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. But perhaps we can imagine the wrenching pain we would feel, in our guts and in 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.

Do not suppose that imagining such a moment gives us insight into the very worst damage done by racism in this country. It does not. Or that those discriminated against because of differences conceptualized in ethnic or other non-racial terms do not also suffer significant, sometimes far greater harms. They often

have. But placing oneself in that moment does afford insight into the qualitative difference that race frequently makes. The sort of group oppression documented in *Hernandez* -- the sort manifest on the bathroom doors of the Jackson County courthouse -- has in this country traditionally been meted out to those characterized as racially different, not simply different in ethnic terms. The treatment accorded those constructed as *innately* inferior has often been far more damaging, in kind and degree, than that accorded those understood as culturally inferior, if innately similar.

A rigorously ethnic conception of Latino/a identity risks more than simply losing sight of significant facets of Latino/a experiences, however. It jeopardizes as well the ability to address and remedy the social burdens imposed through race-based discrimination. Because the language of ethnicity hides from view the vastly disparate social conditions confronting differently racialized groups in this country, this language allows the politically dangerous assertion that every group in the United States has found [\*292] the same opportunities, and encountered the same hurdles. n34 Under this conflation, which I have elsewhere termed the "immigrant analogy," group differences in social standing and economic success are explained as a function of group attributes or failings, not social prejudices or structural advantages and disadvantages. n35 With systemic manifestations of racial prejudice removed as an explanation for social inequality at the level of assumptions, those subscribing to the immigrant analogy construe requests for protection against unfair discrimination as pleadings for special favors. Such "favors," for example the inclusion of a group within the ambit of antidiscrimination laws, cannot be countenanced, the immigrant analogy suggests, because of the unfairness to other similarly situated ethnics who receive no such protection. Paradoxically, however, under the analogy these "special pleadings" become evidence of the inferiority of the pleaders. Denying that systemic racial discrimination poses a significant hurdle to advancement for some communities, the immigrant analogy interprets requests for protection against entrenched disadvantage as indicia of an unwillingness or inability to compete on even terms, and as an admission of the need for extraordinary government assistance to escape the poverty and low social status every other group has purportedly successfully transcended on their own strength. Petitioning for or receiving antidiscrimination protection emerges under the analogy as unfair advantage over, and as evidence of inability relative to, those not protected. The immigrant analogy asserts a fundamental sameness ("we are all ethnics") at the same time that it reifies the essential racial differences it purports to deny ("but you people can't compete and are always asking for handouts."). n36 Unfortunately, the immigrant analogy has long been applied to Latinos/as.

*Hernandez* provides a graphic example of how White ethnic [\*293] status is on occasion strategically imputed to Latinos/as as a means of opposing Latino/a access to remedies for race-based discrimination. The Texas Court of Criminal Appeals denied Hernandez's claim in part on the ground that "Mexicans are white people." n37 In the face of the State's concession that no person of Mexican descent had served on any jury in Jackson County over at least the previous quarter-century, the court used this asserted Whiteness to hold 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." n38 The court in effect asserted that because Hernandez was White, the shared identity and essential similarity between Hernandez and members of the juries nullified his claim of discrimination. Yet, the court also seemed to suggest that this essential similarity did not exist, and more, that it did not exist because of the actions of Hernandez. "It is apparent," the court wrote, "that 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." n39 The court here presents itself as the defender of equality, and Hernandez as the transgressor. It is Hernandez, in his claim for protection under the Fourteenth Amendment, who threatens to disrupt the basic equality between all persons in this society, a threat the court must guard against. At the same instant, it is also Hernandez, in his need as much as in his request for

legal protection from discrimination, who demonstrates his own inferiority. After all, according to the court's implied [\*294] narrative, no other Whites make such requests, or need such protections. In what must be viewed as a considerable irony, the ethnic-immigrant analogy denies the need for and access to antidiscrimination remedies in the very instant that it confirms the supposed inferiority of those who ask for and to whom protection is denied.

Depicting Latinos/as solely in ethnic terms obscures from view central elements of Latino/a experiences in this country. It also facilitates a denial to Latinos/as of access to remedies for racial discrimination. n40 *Hernandez* compels the conclusion that race should be retained in understanding and working on behalf of Latino/a communities.

#### CONCLUSION: RECONSIDERING RACE

Race provides an important vantage point from which to assess Mexican American and Latino/a identity, one which LatCrit theorists should fully utilize. In doing so, however, it is likely LatCrit theory's reliance on race will rework the very meaning of that term. Using race to understand the experiences of Latino/a communities in the United States should lead to an increased sophistication in our understanding of race itself, particularly as that [\*295] concept has been deployed and constructed by law.

*Hernandez* illustrates this last point, as well. In the U.S. Reports, *Hernandez* immediately precedes another leading Fourteenth Amendment case, *Brown v. Board of Education*, n41 having been decided just two weeks before that watershed case. Despite the fact that both cases extend the reach of the Fourteenth Amendment, the cases differ dramatically. In *Brown*, the Court grappled with the harm done through segregation, but considered the applicability of the equal protection clause to African Americans a foregone conclusion. In *Hernandez*, the reverse was true. The Court wrestled with whether the Fourteenth Amendment protected Mexican Americans, but took for granted that the equal protection clause, if it applied, would prohibit the state conduct in question. In large part, this difference is historical -- that is, it is a function of the historical processes of racial fabrication in the United States. African Americans have been constructed relentlessly as the archetypal racial inferiors, both socially and at law. By contrast, the racialization of Mexican Americans has occurred unevenly in the limited geographic context of the Southwest, dating back not much further than the beginning of the last century, and largely without taking de jure legal form. n42 These differing histories make the study of the racial identity of Mexican Americans helpful to the study of race in general. The partial, incomplete, inconsistent racialization of Mexican Americans brings to the fore aspects of the process of racial formation difficult to perceive but nonetheless present in the relentless racialization of African Americans. Reading *Brown* against *Hernandez* directs our attention to rarely explored facets of the former, such as the genesis of the Court's assumption that African Americans constitute a biologically distinct race, the social and legal consequences of that belief, and that decision's role in [\*296] legitimating racialized understandings of African American identity. Studying the racialization of Latinos/as can offer important insights into the processes of racial fabrication in law and in general, because of rather than despite our incomplete and shifting racial identity.

#### FOOTNOTE-1:

n1 Regarding nomenclature, I treat all racial designations as proper nouns. I employ "Mexican American" to refer 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 this community. See RODOLFO ACUNA, OCCUPIED AMERICA: A HISTORY OF CHICANOS ix-x (3rd ed. 1988). I use "Latino/a" to refer 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 rather than the singular. Also, I have adopted the convention of using a virgule at the end of "Latino," rendering it "Latino/a," rather than relying on the gendered grammar of Spanish whereby reference to both males and females is indicated through the use of the masculine form. For an extended discussion of similar matters, see Angel R. Oquendo, *Re-imagining the Latino/a Race*, [12 HARV. BLACKLETTER J. 93, 94-99 \(1995\)](#). See also Alex M. Saragoza et al., *History and Public Policy: Title VII and the Use of the Hispanic Classification*, 5 LA RAZA L. J. 1 (1992).

n2 [347 U.S. 475 \(1954\)](#). I have previously set out some general theories regarding the legal construction of race. IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

n3 This essay responds to the talk given by Professor Perea at the First Annual LatCrit Conference, published in revised form herein as Juan Perea, *Five Axioms in Search of Equality*, [2 HARV. LATINO L. REV. 231 \(1997\)](#). Professor Perea's position has since changed in some key respects with regard to the utility of race as an analytic concept. See Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 Cal. L. Rev. (forthcoming 1997).

n4 Myriad studies of Latinos/as draw upon an ethnicity paradigm. See e.g., FRANK D. BEAN & MARTA TIENDA, *THE HISPANIC POPULATION OF THE UNITED STATES* (1987); SUSAN E. KEEFE & AMADO M. PADILLA, *CHICANO ETHNICITY* (1987).

n5 This approximates the definition Professor Perea offered at the conference; it is quoted from a recent article. Juan Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, [35 WM. & MARY L. REV. 805, 833-34 \(1994\)](#), quoting from HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS VI (Stephen Thernstrom ed., 1980). See also Juan Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, [36 WM. & MARY L. REV. 571, 575 \(1995\)](#).

n6 On the lack of any biological basis to race, see generally L. LUCA CAVALLI-SFORZA ET AL., *THE HISTORY AND GEOGRAPHY OF HUMAN GENES* (1994). On the social construction of race, see generally 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 \(1994\)](#); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* (1986).

n7 See *supra* note 3.

n8 *Id.*

n9 Several legal scholars have recently abandoned or advocated abandoning race as a concept irrelevant to Latinos/as. See, e.g., Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, [47 STAN. L. REV. 855, 883-890 \(1995\)](#) (answering the question "Who are the Latinos?" almost exclusively in terms of ethnicity, national origin, and immigrant status, with scant reference to race); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, [47 STAN. L. REV. 957, 958 n.5 \(1995\)](#) (suggesting that "Hispanics [are] an ethnic group with multiracial origins"); and Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States' Definition of Race and Racial Classifications*, [48 VAND. L. REV. 513, 563-566 \(1995\)](#) (calling for a new racial classification system in which "the Hispanic classification is eliminated and the other racial classifications are restructured so that they are parallel.").

n10 For an insightful discussion of the conflation of race and ethnicity, see DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* 70-78 (1993).

n11 *See generally* RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* (1989).

n12 *See generally* HANEY LOPEZ, *supra* note 2.

n13 *See* MARIO T. GARCIA, *MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY, & IDENTITY, 1930-1960*, at 49 (1989). Gus Garcia was assisted by John Herrera, a Houston attorney who served as first national vice president at LULAC, and by Carlos Cadena, a law professor at St. Mary's University in San Antonio. *Id.*

n14 [Hernandez, 347 U.S. at 481](#) (quoting Record at 34).

n15 *See id.* at 480, 482. Garcia adduced the following population figures: "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 \(on file with author\), Hernandez v. Texas, 347 U.S. 475](#) (No. 406).

n16 [Hernandez v. State, 251 S.W.2d 531, 535 \(Tex. Crim. App. 1952\)](#).

n17 [347 U.S. at 478](#) (emphasis added).

n18 *Id.*

n19 [Id. at 479](#).

n20 *Id.* 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* 208-248 (1981).

n21 [347 U.S. at 479](#).

n22 *Id.*

n23 [Id. at 480 n.10](#). The history of segregated schools for Mexican Americans in Texas is examined in Jorge C. Rangel and Carlos M. Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307 (1972). *See also* GUADALUPE SAN MIGUEL, JR., "LET THEM ALL TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981 (1987).

n24 [347 U.S. at 479](#).

n25 [Id. at 479-480](#). Racial discrimination against Mexican Americans in the administration of justice is discussed in ALFREDO MIRANDE, *GRINGO JUSTICE* (1987), as well as in U.S. COMMISSION ON CIVIL RIGHTS, *MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST* (1970).

n26 Having prevailed before the Supreme Court, Hernandez's case was remanded for a second trial. He was again convicted. *See* GARCIA, *supra* note 13, at 51.

n27 *See generally* HORSMAN, *supra* note 20.

n28 For an overview of recent 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 \(1994\)](#).

n29 See GARCIA, *supra* note 13, at 50. Many Mexican Americans during this period subscribed to the notion that they were White, in part because of the widespread belief that everyone was of one race or another, where the principal choices were White and Black; partially as a result of the stigma attached to being non-White; and also partially through prejudice against Blacks. Such beliefs animated the litigation strategy of LULAC. As Mario Garcia writes, "In [its] antisegregation efforts, LULAC rejected any attempt to segregate Mexican Americans as a nonwhite population. Mexican Americans expressed ambivalences about race identity and possessed their own prejudices against blacks. However, they also recognized that irrespective of how they saw themselves, reclassification as colored, especially in Texas, would subject Mexicans not only to de facto segregation but to de jure as well." *Id.* at 48.

n30 See Perea, *supra* note 3, at 235-236.

n31 See *supra* notes 3, 7, and 30 and accompanying text.

n32 Werner Sollors provides a highly useful discussion of the origins of the notion of ethnicity, considering in that context the relation between ethnicity and race. Werner Sollors, *Foreword: Theories of American Ethnicity*, in THEORIES OF ETHNICITY: A CLASSICAL READER (Werner Sollors ed., 1996).

n33 Transcript of Hearing on Motion to Quash Jury Panel and Motion to Quash the Indictment, State v. Hernandez (Dist. Ct. Jackson Co., Oct. 4, 1951) (No. 2091), reprinted in [Transcript of Record at 74-75 \(on file with author\)](#), [Hernandez v. Texas](#), 347 U.S. 475 (No. 406).

n34 See OMI & WINANT, *supra* note 6, at 14-24.

n35 See Haney Lopez, *supra* note 6, at 20-24.

n36 See GOLDBERG, *supra* note 10, at 78.

n37 [Hernandez v. State](#), 251 S.W.2d at 536.

n38 *Id.*

n39 *Id.* at 535.

n40 I do not mean to suggest that access to antidiscrimination law currently depends on whether one alleges discrimination on the basis of race as opposed to ethnicity. Rather, I contend that the construction of Latino/a identity in ethnic rather than racial terms continues as a basis for arguing that the remedies fashioned to redress racial discrimination should not be available to our communities. This is the central theme elaborated in PETER SKERRY, MEXICAN AMERICANS: THE AMBIVALENT MINORITY (1993). Skerry laments that "one means Mexican Americans now have of advancing themselves -- of pursuing the American dream -- is to take advantage of the racially designated benefits afforded them . . . . Indeed, we must recognize that defining themselves as a [racial] minority group may be the way this new wave of immigrants assimilates into the new American political system." *Id.* at 29. According to Skerry, the threat to Mexican American assimilation comes not from racial prejudice or hostility, but from access to the legal remedies designed to combat racism.

n41 [347 U.S. 483 \(1954\)](#).

n42 See generally HORSMAN, *supra* note 20; and TOMAS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994).