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# WHO'S BLACK, WHO'S BROWN, AND WHO CARES?: A LEGAL DISCUSSION OF *HERNANDEZ V. TEXAS*[*]

## I. INTRODUCTION

The right to be tried by a jury of one's peers is considered fundamental in America. However, the classifications of individuals that compose a jury of one's peers, or even the pool from which such a jury is selected, have not always been as clearly defined. On June 18, 1952, the Texas Court of Criminal Appeals rejected the appeal of Pete Hernandez, a Mexican American[1] convicted by an all-Anglo jury panel in Jackson County.[2] This county, despite its high concentration of Mexican Americans, had not allowed Mexican Americans to serve on a jury panel in more than twenty-five years.[3] League of United Latin American Citizens ("LULAC") attorneys Gus Garcia[4] and John Herrera took Hernandez's case to the U.S. Supreme Court, using it to attack the systematic exclusion of Mexican Americans from jury service in Texas.[5] The case made

[*] This paper was prepared for the Latino/a Critical Legal Studies XI 2006 annual conference in Las Vegas, Nevada.

1. Although I use the term Mexican American predominantly throughout this paper, I also use the term Latino interchangeably.

2. Hernandez v. State (*Hernandez I*), 251 S.W.2d 531, 532 (Tex. Crim. App. 1952), *rev'd sub nom.* Hernandez v. Texas, 347 U.S. 475 (1954).

3. *Hernandez*, 347 U.S. at 480–81; *see also* Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1171 (1997) (stating that "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"). The point stipulated to in Hernandez was that many Mexican Americans qualified for jury service. *Id.*

4. *See generally* Lupe S. Salinas, *Gus Garcia and Thurgood Marshall: Two Legal Giants Fighting for Justice* 28 T. MARSHALL L. REV. 145 (2003) (overviewing LULAC's legal defense team); 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).

5. Haney Lopez, *supra* note 3, at 1144–45.

history when the Court ruled that systematic jury exclusion of a discriminated social class is unconstitutional.[6] In so ruling, the Court abandoned the notion that the Fourteenth Amendment only protected African Americans.[7] This result continues to have a significant impact in today's jurisprudence because it set precedent allowing for an expansive interpretation of Fourteenth Amendment protections beyond that of race.

This comment begins with an overview of the facts and issues in *Hernandez* at the appellate and Supreme Court level, and then analyzes the three ways in which *Hernandez* helped Mexican Americans and other minority groups. *Hernandez v. Texas* ("*Hernandez*") helped Mexican Americans and other minority groups[8] by (1) rejecting the established "two-class" social theory by extending Fourteenth Amendment privileges to other groups besides African Americans;[9,10] (2) establishing precedent to eliminate exclusion of social classes in jury venires; and (3) aiding in the desegregation of schools at a national level.[11] Although many scholars debate whether *Hernandez* went far enough in expanding the rights of Mexican Americans,

6. Neil Foley, Discourse at the University of Houston Law Center Conference on "*Hernandez v. Texas* at 50": Over The Rainbow: *Hernandez v. Texas*, *Brown v. Board of Education*, and Black v. Brown (November 19, 2004).

7. Haney Lopez, *supra* note 3, at 1145. 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).

8. This paper discusses the extension of Fourteenth Amendment protections to Mexican Americans and other minority groups, meaning, other non-Black minority groups. In addition, *Hernandez* helped all Latino races and not simply Mexican Americans. However, since *Hernandez* deals with Mexican Americans and not all Latino groups, in this paper I will simply refer to those protected as Mexican Americans.

9. I use the terms Black Americans, African Americans, and Blacks interchangeably. I know that many recent African immigrants resent the widespread use of the term African American. Conversely, many African Americans resent the terms black and Black American used to characterize them.

10. This "two classes" theory resulted from the treatment of the courts before *Hernandez*, which had recognized only white and black discrimination as an issue.

11. Although *Mendez v. Westminster*, 64 F.Supp. 544 (C.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947), famously desegregated schools in California, *Hernandez* influenced *Keyes v. School District No. 1*, 413 U.S. 189 (1973), which ultimately aided in integrating Anglo, African American, and Mexican American students.

this case was vital in helping Mexican Americans become included in Fourteenth Amendment discussions.

## II. *HERNANDEZ V. STATE*: THE STRUGGLE IN TEXAS STATE COURTS

Pete Hernandez was convicted of first-degree murder in the Texas trial court and sentenced to life imprisonment.[12] On appeal to the Texas Court of Criminal Appeals, Pete Hernandez claimed that in spite of the fact that Mexican Americans were legally considered white, he suffered race-based discrimination during his indictment. As the Supreme Court ultimately held, members of Mexican ethnicity were "deliberately, systematically, and wilfully [sic] excluded from the grand jury that found and returned the indictment in . . . [his] case . . . ."[13] In the trial court, a jury panel selected an all-Anglo jury to determine probable cause in his indictment.[14] Because Mexican Americans had been excluded from jury duty in Texas for at least twenty-five years, Pete Hernandez' legal team sought to reverse the indictment and petit jury panel, "claiming he had . . . been deprived of equal protection."[15] They argued that the state deprived him of his constitutional right to judgment by a jury of his peers.[16]

Hernandez had not been the only Mexican American in Jackson County to be denied the right to a jury of his peers. In fact, not only were there no Mexican Americans on the jury for Hernandez's indictment, but no Mexican Americans had been called for jury service in the entire county for twenty-five years.[17] This exclusion had existed even though

12. Hernandez v. State (*Hernandez I*), 251 S.W.2d 531, 532 (Tex. Crim. App. 1952), *rev'd sub nom.* Hernandez v. Texas, 347 U.S. 475 (1954); *Hernandez*, 347 U.S. at 476.

13. *Hernandez I*, 251 S.W.2d at 532.

14. *See id.* "All-Anglo" meaning Caucasians. Although Mexican Americans were considered white, they were excluded from the jury.

15. *Id.* at 532.

16. *See id.*

17. *Hernandez*, 347 U.S. at 480–81. The parties stipulated that no one with a Mexican-American surname had served on the jury for twenty-five years. While it is true that there may have been Mexican Americans with Anglo surnames invited to serve on a jury panel, there is no evidence to this effect.

there were Mexican Americans in Jackson County who "possessed the qualifications requisite to service as grand or petit jurors."[18] Even more, this system of discrimination was consistent in almost every county in the entire state of Texas. As Ian F. Haney Lopez explains, "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."[19]

Despite the obvious exclusion of eligible Mexican Americans from jury service, the Court of Criminal Appeals upheld the lower court's determination that Jackson County's jury selection process was constitutional.[20] Since the law considered Mexican Americans "white people of Spanish descent,"[21] there was no legally recognized racial difference between whites and Mexican Americans, and at that time, preference on the basis of national origin was not considered in juror selection. As Judge Davidson wrote in his opinion:

> In the absence of a holding by the Supreme Court of the United States that nationality and race bear the same relation, within the meaning of the constitutional provision (Fourteenth Amendment) mentioned, we shall continue to hold that the statute law of this State furnishes the guide for the selection of juries in the State, and that, in the absence of proof showing express discrimination by administrators of the law, a jury so selected in accordance therewith is valid.[22]

In other words, while discrimination based upon legally recognized races was prohibited, nationality-based discrimination within a legal classification during jury selection was permissible so far as the Court of Criminal Appeals was concerned until a statement from the U.S.

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18. *Hernandez I*, 251 S.W.2d at 533.

19. Haney Lopez, *supra* note 3.

20. *Hernandez I*, 251 S.W.2d at 533.

21. Sanchez v. State, 243 S.W.2d 700, 701 (Tex. Crim. App. 1951).

22. *Hernandez I*, 251 S.W.2d. at 533 (quoting Sanchez v. State, 181 S.W.2d 87, 90–91 (Tex. Crim. App. 1944)).

Supreme Court mandated otherwise.[23]

Pete Hernandez and his legal team appealed to higher courts. They first tried to file a motion to quash the indictment and petit jury panel.[24] The appellate court denied that appeal four months later on October 22, 1952.[25] The legal team then appealed to the U.S. Supreme Court, which granted a writ of certiorari on October 12, 1953.[26]

## III. *HERNANDEZ V. TEXAS*: THE U.S. SUPREME COURT'S BREAKTHROUGH HOLDING

Supreme Court Justice Earl Warren reversed Judge Davidson's decision from the Texas Appellate Court.[27] In doing so, the Warren Court noted, "The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro."[28] Thus, even though the law considered Mexican Americans white, they could still seek legal recourse under the Fourteenth Amendment for discrimination.[29] In order to find legal recourse, however, the petitioner had to prove that the individuals seeking protection were discriminated against as a group despite their legal uniformity with whites.[30] Once the petitioner established a prima facie case of discrimination against individuals within that group, the State of Texas had to rebut by showing that discrimination did not exist.[31]

As the petitioner, Pete Hernandez and the other members of his LULAC legal team were faced with the initial burden of showing group discrimination in selection of the jury panel in Jackson County. [32] This initial showing was accomplished in two steps. First, the LULAC attorneys

23. *See id.*
24. *Id.* at 531.
25. *Id.* at 531, 536.
26. Hernandez v. Texas, 74 S.Ct. 52 (1953).
27. Hernandez v. Texas (*Hernandez*), 347 U.S. 475 (1954).
28. *Id.* at 478.
29. *Id.* at 477–78.
30. *See id.* at 479–81.
31. *Id.* at 479, 481.
32. *Id.* at 480.

established that persons of Mexican descent constituted a separate class in Jackson County by showing the attitude of the community.[33] They provided testimony of "responsible officials and citizens" that residents distinguished between white and Mexican in many areas of life, including the exclusion of Mexicans from business and community groups, grade schools, local restaurants, and even washroom facilities.[34] Second, having established that Mexican Americans constituted a separate class, the LULAC attorneys showed discrimination against that class by supplying proof that the Jackson County jury commissioners had systematically excluded Mexican Americans from jury pools for twenty-five years.[35] The State of Texas failed to provide substantial rebuttal to Hernandez's asserted claims.[36] Because of this failure, the Court "concluded that [Hernandez had] succeeded in his proof"[37] and, therefore, had met his burden of establishing nationality-based discrimination that impermissibly influenced jury selection.[38]

While Jackson County's process of jury selection was not explicitly discriminatory, Warren concluded that the Texas system of juror selection was "susceptible to abuse."[39] The system the county employed consisted of the commissioners going through rosters of names to pick out available jurors.[40] This process allowed for discrimination based upon Spanish-sounding surnames. [41] Warren acknowledged that the selection process the commissioners used was "fair on its face[,]" but "[could] be employed in a discriminatory

33. *Id.* at 479–80.

34. I think it is worth noting that 1954 is the same year that a full-blown repatriation effort of the Braceros was taking place in the United States. It should be argued that this should evoke some kind of national test as opposed to a community-based test for prejudicial feelings towards the Mexican Americans. *See* JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980).

35. *Hernandez*, 347 U.S. at 479–80.

36. *Id.* at 481.

37. *Id.* at 480.

38. *Id.* at 480–81.

39. *Id.* at 479.

40. *Id.* at 476 n.1.

41. *Id.* at 480 n.12.

manner . . . [,] and discrimination [is] prohibited by the Fourteenth Amendment."[42] Warren concluded that Pete Hernandez was constitutionally entitled "to be indicted and tried by juries from which all members of his class [were] not systematically [excluded] . . . ."[43] Warren later noted that all qualified persons should be considered for jury panels regardless of race and that race-based discrimination for jury service violated the Constitution.[44]

The Warren Court's acknowledgement of race-based discrimination outside of the black-white context in the *Hernandez* decision is of particular significance today because its impact extended beyond that of jury selection and into the basic tenets of Fourteenth Amendment protections. Before the *Hernandez* ruling, many entities, including counsel for the State of Texas, had traditionally thought that the Fourteenth Amendment applied only to African Americans, and not to other minority groups.[45] The *Hernandez* opinion established that the Fourteenth Amendment should protect every social class created by a community attitude that subjects the class to unfair laws and discriminatory practices.[46] By recognizing that a community could create a social class—and that Mexican Americans, although traditionally classified as white, constituted such a class—the Court established a precedent that groups besides African Americans could receive Fourteenth Amendment protections.[47]

## IV. DIVERGENT VIEWS OF THE IMPLICATIONS OF *HERNANDEZ*

Legal and social scholars disagree over whether or not *Hernandez* helped or hurt Mexican Americans. The review and analysis of the divergent views will be broken up into two sections. Section A, discusses criticisms pointed out by commentators of *Hernandez* who feel that the opinion may

42. *Id.* at 479.

43. *Id.* at 482.

44. EARL WARREN, THE MEMOIRS OF EARL WARREN 299 (Doubleday 2001) (1977).

45. *See Hernandez*, 347 U.S. at 477.

46. *Id.*

47. *Id.*

prove to be a disadvantage for Mexican Americans in a legal context because the Court failed to recognize Mexican Americans as a protected class based upon national origin and only distinguished them from whites when local actions were discriminatory. Section B discusses the opinions and viewpoints of the proponents of *Hernandez*. The supporters of *Hernandez* argue that the *Hernandez* opinion set the stage for future decisions like *Cisneros v. Corpus Christi*[48] and other desegregation cases to establish rights for Mexican Americans.

### *A. Skeptical Viewpoints of* Hernandez

Skeptics of the *Hernandez* decision feel that by using a community-based standard rather than a race-based standard to extend Fourteenth Amendment protections, many classes that should find legal protection are left unrecognized by the courts. They decry *Hernandez*, citing that the decision only extended Fourteenth Amendment privileges to Mexican Americans if certain local community criteria were established. As Haney Lopez argues, this "implicitly [rejects] a conceptualization of Mexican Americans as a group defined in racial terms."[49] In terms that responded to the LULAC strategy of proving community-based discrimination, the Court failed to state outright in *Hernandez* that classification as Latino or Mexican American could be a distinct racial classification and subject to Fourteenth Amendment protections.

Instead, the Court found discrimination on the basis of Spanish surnames. The *Hernandez* opinion determined that "Spanish names provide ready identification"[50] of members of the Mexican American class in that county. This claim, notes one author, is misleading because of the many "[i]ndividuals who adopt a new last name upon marriage . . . [and] whose ethnicity may not be determined by surname."[51] In addition, many Spanish last names are

48. 467 F.2d 142 (5th Cir. 1972).

49. Haney Lopez, *supra* note 3, at 1151.

50. *Hernandez*, 347 U.S. at 481 n.12.

51. Lisette E. Simon, *Hispanics: Not a Cognizable Ethnic Group*, 63 U. CIN. L. REV. 497, 514 (Fall, 1994). The author notes, "Neither the legislatures nor the

indistinguishable from Italian last names, and "many natives of Central and South America do not have traditionally Spanish last names."[52] However, because the standard is a community-based discrimination standard, many of these individuals still suffer from the discrimination in their local communities because of their race, and yet do not receive Fourteenth Amendment protection because they are not legally distinguishable as a protected class.

One possible reason that the opinion failed to distinguish Mexican Americans as a separate and protected race is that the Supreme Court Justices, like many others in the period, may have been racially biased against Mexican Americans.[53] Legal historian Mark Tushnet argues that Justice Clark, one of the Justices present on the Court during *Hernandez*, was opposed to overturning *Plessy* and eliminating segregation in the South as late as 1952. Furthermore, Tushnet documents that Justice Clark spoke of Texas having "'the Mexican problem' which was 'more serious' because the Mexicans were 'more retarded' [than their peers], and mentioned the problem of a 'Mexican boy of 15 . . . in a class with a negro girl of 12.'"[54] Tushnet argues that Justice Clark's bias seems to be a factor that may have played a role in the outcome of the case.[55] However, inherent prejudice against Mexican Americans by

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courts, however, have been able to define consistently or accurately the term 'Hispanic.'" *Id.* at 506–07.

52. *Id.* at 514. Simon notes that since the 1930 census, Mexican Americans were known as a separate racial class. *Id.* at 507. This occurred until 1980 when the census bureau became aware of how inaccurate the surname classification really was. *Id.* at 513–14.

53. *See* IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 138–39 (1996). Haney Lopez argues that many times prosecutors and judges unconsciously let biases creep into sentencing and prosecuting.

54. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 194 (1993). In light of the evidence, it seems ironic that Thurgood Marshall was chosen to replace Clark on the bench in 1967. The use of "retarded" at the time referred to slower progress through the school system, not mental retardation. One who was held back was "retarded." *See* DAVID B. TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION 199 (1974). At the same time, there was use of IQ testing to place minority students into service-oriented tracks without respect to language or cultural barriers. *Id.* at 212.

55. *Id.*

the justices, which may have led to a community-based standard rather than a race-based standard, is not the only reason that the *Hernandez* decision receives criticism.

Another reason that the Supreme Court may not have classified Mexican Americans as a protected racial class is because the LULAC lawyers specifically avoided reclassifying Mexican Americans as "non-white." In essence, they told the Supreme Court they wanted protection without race reclassification. The Supreme Court gave them, more or less, what they requested.

Some civil rights organizations have argued that *Hernandez v. Texas* was debilitating to Mexican Americans because it did not go far enough. James A. Ferg Cadima, legislative staff attorney for the Mexican American Legal Defense and Education Fund (MALDEF), argues that *Hernandez* stood in the way of equal protection because it classified Mexican Americans as white and deprived them of the benefits that *Hernandez's* companion case, *Brown v. Board of Education*,[56] provided for blacks.[57] Thomas Saenz, a MALDEF litigator, argues that "[i]n *Hernandez*, the Court squarely faced an argument that discrimination based on ethnicity is legally distinct from race discrimination."[58] Saenz argues that the outcome of *Hernandez* failed to establish anti-Mexican discrimination as proscribed racial discrimination. Thus, as the precedent-setting Mexican American civil rights case, many skeptics are frustrated that *Hernandez* did not do more.

Finally, Richard Delgado argues that the *Hernandez* opinion came about solely because Anglo-Americans desire to give Mexican Americans a sense of false empowerment.[59] Delgado argues, much like Mary Dudziak and Derrick Bell, that Mexican American Civil Rights had less to do with

56. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

57. JAMES A. FERG-CADIMA, MEXICAN AM. LEGAL DEF. & EDUC. FUND, BLACK, WHITE AND BROWN: LATINO SCHOOL DESEGREGATION EFFORTS IN THE PRE- AND POST- BROWN V. BOARD OF EDUCATION ERA 23–24 (2004), *available at* http://www.maldef.org/publications/pdf/LatinoDesegragationPaper2004.pdf.

58. Thomas A. Saenz, *Mendez and the Legacy of* Brown: *A Latino Civil Rights Lawyer's Assessment*, 11 ASIAN L.J. 276, 280 (2004).

59. Richard Delgado, *Rodrigo's Roundelay:* Hernandez v. Texas *and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L.L. REV. 23 (2006).

Mexican American actions and more to do with the actions of Anglo-Americans who gave groups civil rights simply to fulfill their own selfish interests.[60] Delgado may, however, go too far as his argument develops from the fact that the self-interest merely influences the decision to a near dictation of how civil rights issues are resolved. While this viewpoint should be considered carefully, it is difficult to accept the core of Delgado's argument—that civil rights activists had no impact on the granting of civil rights in America and any gains made were merely a product of the majority interests converging with minority rights.

### *B. Optimistic Viewpoints of* Hernandez

Despite the frustration of many Mexican American advocates, not all observers of the *Hernandez* decision feel that the protections afforded by the decision are inadequate. Justice Earl Warren argued that the protections of *Hernandez* were consistent with the *Brown* decision.[61] Warren explained that the "segregation case decisions went hand-in-hand with the principle of *Brown v. Board of Education*. Those decisions related not only to blacks but equally to all racial groups that were discriminated against."[62] Regarding *Hernandez*, a case argued two weeks before *Brown*, Warren explained:

> The state contended that . . . discrimination did not violate the Constitution because the Fourteenth Amendment bore only on the relationship between blacks and whites. We hold that it applied to "any delineated class" and reversed the conviction. And so it must go with any such cases. They apply to any class that is singled out for discrimination. Most of our cases have involved blacks, but that is because . . . [they] have been the most discriminated against.[63]

Thus, according to Warren, the Court tried to extend application of the Equal Protection Clause of the Fourteenth Amendment to all minority groups.[64]

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60. *Id.* at 30-31.
61. WARREN, *supra* note 44, at 299.
62. *Id.*
63. *Id.*
64. Warren wrote such favorable words in his memoirs because he may have

Legal scholars who agree with Warren share the belief that *Hernandez* extended Fourteenth Amendment rights beyond African Americans. One such scholar, Kevin Johnson, argues that "*Brown*, when read in combination with *Yick Wo*,[65] *Carolene Products*,[66] and *Korematsu*,"[67] clearly extend the protections of the Fourteenth Amendment beyond African Americans.[68] He continues, "It was not much of a leap to hold that Mexican Americans deserved the same constitutional protections as other racial minorities, which was the precise question posed by *Hernandez v. Texas*."[69] However, while there is disagreement amongst legal scholars as to how far the racial protections of the *Hernandez* decision extend, some feel that the decision is based upon entirely different principles.

## V. THE *HERNANDEZ* COURT AND COLORBLINDNESS

Perhaps the Court's reasoning in *Hernandez* is colorblind as it does not even address the issue of Mexican American's racial classification.[70] While *Hernandez* challenged a discriminatory process of jury selection eerily similar to the Jim Crow laws of the South, the Court

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understood that *Brown* would become a very high profile case with far-reaching ramifications. The media glorified and deified Earl Warren and his court—in spite of Warren's less-than-stellar civil rights record as Governor of California. Warren may have altered his memoirs according to how he would have liked to perceive the truth, which may have been that since African Americans had been the most discriminated against, the *Brown* opinion truly did only protect them and no other minority group.

65. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that the discriminatory enforcement of a local ordinance against persons of Chinese ancestry violated the Equal Protection Clause of the Fourteenth Amendment).

66. United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (using general language to describe groups protected by the Equal Protection Clause).

67. Korematsu v. United States, 323 U.S. 214 (1944) (declaring that while the Fourteenth Amendment protects persons of a single racial group, military necessity justified the Japanese internment camps).

68. Kevin Johnson, Hernandez v. Texas*: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 171 (2005).

69. *Id.*

70. For a further discussion of this idea see Ian F. Haney Lopez, *Race and Colorblindness After* Hernandez *and* Brown, 25 CHICANO-LATINO L. REV. 61 (2005).

recognized that traditionally Fourteenth Amendment protections had been only extended to those of color.[71] The Court further noted that the *Hernandez* case stemmed from jury exclusion of a class based on "grounds other than race or color."[72] Significantly, the Court recognized that because Mexican Americans were legally classified as white, the Fourteenth Amendment protections should be extended to people whose class is distinguished by other means.[73]

Indeed, the Hernandez decision arguably bases Fourteenth Amendment protection on a standard disconnected from race altogether. Notably, the LULAC team emphasized this when they propounded the notion that their experience was similar to that of other white groups who had been historically discriminated against.[74] Gus Garcia, the LULAC attorney representing Pete Hernandez, wrote:

> We are not passing through anything different from that endured at one time or another by other unassimilated population 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 (call dumb square-heads and krauts); and our much maligned friends of the Jewish faith, who have been persecuted even here, in the

71. *See* Hernandez v. Texas (*Hernandez*), 347 U.S. 475, 478 (1954).

72. *See id.* at 477.

73. *Id.* at 479–80.

74. Evidences of this notion stem from the fact that the preferred title was "person of Latin descent," "Hispanic (meaning of Spanish origin)," and other names for Latinos besides "Mexican," or "Mexican American." It can be argued that even their advocacy groups (The American GI Forum, League of United Latin American Citizens) never used the word "Mexican," "Brown," "colored," or any other non-white language. Currently, names for Latinos consist of Mexican Americans, Mex-Americans, Chicanos, La Raza, Mexicanos, and Xicanos. The main advocacy groups have names like the Mexican American Legal Defense and Education Fund, La Raza Unida, and other such names. *See* IGNACIO GARCIA, CHICANISMO: THE FORGING OF A MILITANT ETHOS AMONG MEXICAN AMERICANS (1997); *see also* HENRY A.J. RAMOS, THE AMERICAN GI FORUM: IN PURSUIT OF THE DREAM, 1948–1983 (1998); ARMANDO NAVARRO, THE CRISTAL EXPERIMENT: A CHICANO STRUGGLE FOR COMMUNITY CONTROL (1998); IGNACIO GARCIA, VIVA KENNEDY: MEXICAN AMERICANS IN SEARCH OF CAMELOT (2000); ARMANDO NAVARRO, MEXICAN AMERICAN YOUTH ORGANIZATION: AVANT-GARDE OF THE CHICANO MOVEMENT IN TEXAS (1995).

land of the free, because to the bigoted they were just 'lousy kikes.'[75]

Garcia never drew a parallel to the Chinese, Middle Easterners, or any other group that has been considered racially distinct; rather, he drew parallels to Italians, Jews, Poles, and the Irish, groups who were considered to be white Americans. This exclusive use of other groups legally classified as white provides support for the assertion that the *Hernandez* decision was not founded in racial differences.

Despite the possibility that *Hernandez* was based upon principles outside of the racial context, and although both the LULAC attorneys and the Court insisted that Mexican Americans were white, *Hernandez* ironically became the first of many cases that eventually dismantled the southern Jim Crow laws.[76] The decision was able to do this because it provided a legal foundation that recognized that discrimination ultimately boils down to the local practices within the community and not to legally recognized classifications.[77] The Warren Court struck down the notion that there are only two racial classes.[78] Notably, when considering Fourteenth Amendment protections, the Court cited social norms that existed in Jackson County, Texas, at the time of the *Hernandez* sentencing instead of using skin color as an example.[79] It was this language that leads Haney Lopez to feel that the Hernandez decision is actually colorblind.

This colorblind principle for the decision is supported by closer examination of the LULAC lawyer's strategy. LULAC lawyers provided the Court with evidence that documented the social phenomena that existed within Jackson County to demonstrate that an inferior sub-classification existed within the broader white classification of Anglos and

75. 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).

76. Haney Lopez, *supra* note 70, at 63.

77. *Id.* at 67.

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

79. *Id.* at 479–80.

Mexican Americans.[80] The Court found that "testimony of responsible officials and citizens contained the admission that residents of the community distinguished between 'white' and 'Mexican.'"[81] The Court noted that the county required Mexican children to attend a segregated school for the first four grades in classrooms filled to twice the capacity of the Anglo schools.[82] Many local restaurants refused service to Mexican Americans.[83] The courthouse where the Hernandez case was tried even had segregated bathrooms for Mexican Americans and Anglos.[84] Furthermore, the Court found that "[n]o substantial evidence was offered to rebut the logical inference [of discrimination] to be drawn from these facts . . . ."[85] The Court determined that, in light of the evidence of inferior treatment towards Mexican Americans, a social class had developed.[86] Thus, despite the historical legal distinction based upon color, the Court determined that a social class was distinct for purposes of protection against discrimination. This colorblind approach helped extend Fourteenth Amendment Equal Protection to people of all social classes—especially in the context of jury selection.

## VI. GETTING PAST BLACK AND WHITE: THE ROLE OF *HERNANDEZ* IN REDEFINING THE FOURTEENTH AMENDMENT

The legal precedent before *Hernandez* supported the "two-class" social theory of race, which recognized African Americans as the only group protected by the Fourteenth Amendment.[87] This constitutional history of *Hernandez* has

80. *Id.* at 479.

81. *Id.*

82. *Id.* The Court also noted that most of the children of Mexican descent left school by the fifth or sixth grades. *Id.* at 480 n.10. *See generally* GUADALUPE SAN MIGUEL, "LET ALL OF THEM TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981 (1988).

83. *Hernandez*, 347 U.S. at 479–80.

84. *Id.*

85. *See id.*

86. *Id.* at 480.

87. For an excellent discussion of contemporary legal scholars perpetuating this idea, see Juan F. Perea, *The Black/White Binary Paradigm of Race, in*

its roots in the events that led up to the Civil War. Before the Fourteenth Amendment was adopted, the U.S. Supreme Court held in *Dred Scott v. Sanford* that African Americans were property, and therefore not citizens of the United States.[88] At the conclusion of the Civil War, the Fourteenth Amendment was adopted and explicitly overruled the *Dred Scott* decision, giving African Americans state and federal citizenship.[89] Furthermore, the Equal Protection Clause of the Fourteenth Amendment protected the civil equality of newly freed slaves from hostile state action.[90] However, these Fourteenth Amendment protections were later eroded when *Plessy v. Ferguson* (overruled by *Brown v. Board of Education,* 347 U.S. 483) sanctioned the "separate but equal" regime established by Jim Crow laws throughout the South.[91] All of this legal action specifically focused on the black-white divide.

This established black-white mindset posed special challenges for LULAC lawyers. At the time of *Hernandez*, Mexican American activists struggled with desegregation on the basis that the law classified Mexican Americans as white. This classification was problematic not only because there was no legal precedent that recognized discrimination outside of the black-white context but also because it presented challenges to Mexican Americans in distinguishing themselves without being reclassified by race. Notably, LULAC activists did not advance the argument that Fourteenth Amendment protections should be given to Mexican Americans by reclassifying Mexican Americans as non-white. Instead, LULAC activists sought to have Mexican Americans recognized as a segment of the white population that suffered from discrimination.[92] Historian Mario T. Garcia notes that "LULAC rejected any

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CRITICAL RACE THEORY: THE CUTTING EDGE, *passim* (Richard Delgado & Jean Stefancic eds., 2000).

88. Dred Scott v. Sanford, 60 U.S. 393, 395 (1856).

89. U.S. CONST. amend. XIV § 1.

90. *See* The Slaughterhouse Cases, 83 U.S. 36, 81 (1873); Strauder v. West Virginia, 100 U.S. 303, 306 (1879).

91. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

92. MARIO T. GARCIA, MEXICAN AMERICANS 48 (1989).

attempt to segregate Mexican Americans as a nonwhite population."[93] Garcia further clarifies that LULAC attorneys consistently argued that Mexicans should legally be recognized as members of the white race who deserved special protections because of the historical discrimination they suffered in their communities.[94]

In contrast to this historical system of basing Fourteenth Amendment protections on legally based distinctions of race alone, the *Hernandez* decision implemented a community-based standard in distinguishing a social class. Rather than relying upon differences of skin color, the court considered discriminatory treatment within the community that was directed toward the group in question. Ian F. Haney Lopez argues that *Hernandez* was a milestone for Latinos in particular.[95] According to Haney Lopez, "No Supreme Court case has dealt so squarely with this question [of Latino racial identity], before or since."[96] He argues that the *Hernandez* opinion requires that the identification of whether or not a racial group exists is a local question that can "be answered only in terms of community attitudes."[97] "To translate this insight into [a] broader language, race is social, not biological."[98] He further argues, "Races exist only as local facts measured in terms of community attitudes and the material inequalities such attitudes have built up."[99] Whether or not Mexican Americans constituted a targeted minority group depended not solely on their ancestry or the pigmentation in their skin, but on local

93. *Id.*

94. *Id. See also* RODOLFO F. ACUNA, ANYTHING BUT MEXICAN: CHICANOS IN CONTEMPORARY LOS ANGELES (1996) (documenting the efforts by Mexican Americans to embrace Spanish as opposed to Mexican identity in greater Los Angeles during parts of the twentieth century to avoid discrimination).

95. Haney Lopez, *supra* note 3, at 1146.

96. *Id.* (arguing that *Hernandez* is a crucial case that helped to form the newly established LatCrit movement, which is a movement that is dedicated to exploring Latino/a issues and the law).

97. *Id.* at 1163.

98. Ian F. Haney Lopez, *Retaining Race: LatCrit Theory and Mexican American Identity in* Hernandez v. Texas, 2 HARV. LATINO L. REV. 279, 288 (1997).

99. *Id.* at 289.

community attitudes. However, while shifting the focus of Fourteenth Amendment class protection from the previous black-white standard to a community-based standard allowed the *Hernandez* legal team to establish discrimination for a previously unprotected class, there were some potentially negative consequences for Mexican Americans.[100]

## VII. *HERNANDEZ:* PROVIDING PRECEDENT TO END JURY DISCRIMINATION

*Hernandez v. Texas* established precedent that extended Fourteenth Amendment protections to all identifiable minority groups against the exclusion from jury venires. Specifically, the *Hernandez* ruling helped integrate minorities into juries by setting a legal precedent that an "identifiable group" created by societal norms and not solely by race-based classifications should be protected by the Fourteenth Amendment.[101] In carving out this precedent,

100. Today, the two groups that historically defined race relations in the United States, whites and blacks, no longer account for the overwhelming majority of Americans. *See* Rachel F. Moran, *Neither Black Nor White*, 2 HARV. LATINO L. REV. 61, 61–62 (Fall 1997); *see also* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995). In the 1950s and 1960s, when the modern civil rights movement was in its ascendancy, Whites accounted for almost 90% of the population, and Blacks represented nearly 10%. Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 958 (1995). Latinos and Asian Americans combined amounted to only about 5% of the total population. *Id.* at 958–59. While one should hesitate when reading such statistics because Mexican Americans were considered white and it could be that many Mexican Americans counted themselves as white rather than Mexican on the census registries and other data sheets. Not surprisingly, race relations were largely defined in Black-White terms. By 1990, dramatic changes had taken place. Due to the rapid growth in Latino and Asian American populations, about 25% of Americans identified themselves as people of color, and only half of these identified themselves as black. ABRAHAM HOFFMAN, UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION: REPATRIATION PRESSURES 1929–1939, at 13–14 (1974); *Hispanics Now Largest U.S. Minority*, CBS NEWS, Jan. 21, 2003, *available at* http://www.cbsnews.com/stories/2003/01/21/national/main537369.shtml.

101. *Hernandez* may have also helped integrate women into jury venires. For example, in *Barber v. Ponte*, 772 F.2d 982, 1002 (1985), the court recognized that *Hernandez* integrated "women and blacks" and "Mexican Americans" into jury service. This makes sense in that, under the *Hernandez* analysis, if societal norms prove to show discrimination to females then it is probable that females can also constitute a

the Court in *Hernandez* established a test that would later be influential in determining whether jury selection processes discriminated against Mexican Americans as a social class and other groups that could now receive protection under the Fourteenth Amendment.

The Court recognized in *Hernandez* that Jackson County failed to offer any evidence that contradicted the assertion that Mexican Americans were discriminated against—helping to establish the existence of a social class in Texas.[102] This recognition of discrimination led the

protected class for Fourteenth Amendment purposes. *See also* Donald H. Zeigler, *Young Adults as a Cognizable Group in Jury Selection*, 76 MICH. L. Rev. 1045 (1978).

102. *See generally* Hernandez v. Texas (*Hernandez*), 347 U.S. 475 (1954). Kevin R. Johnson argues that several factors leading up the *Hernandez* decision combined to classify Mexican Americans as second-class citizens. Johnson, *supra* note 68, at 154–55. Johnson mentions two important factors. *Id.* First, the United States undertook mass deportation efforts in the 1930s. *Id.* (citing FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930'S (1995) (The process of repatriation was a conniving scheme that worked. The government decided to give each Mexican American family $100 to return to Mexico. They also enticed them with free or half-priced train rides to the border or beyond. Once the Mexicans were repatriated to Mexico, the book then documents the plight of starting again in Mexico with nothing, many times being sick or out of money when they arrived.)). Second, Johnson discusses "Operation Wetback." *Id.* In spite of the recently resolved Mexican Revolution, Mexico sent 250,000 troops to Europe as they fought under the United States in WWII. *Id.* Many Mexican workers worked in the southwestern United States during the war under a contract labor arrangement known as the Bracero Program. *Id.* The Bracero Program was one of the many ways that Mexico joined the Allies during World War II. Mexico, riddled with economic hardship throughout the early twentieth century, was anxious to maintain friendly relations with the United States because they saw the United States as a potential source of income for even the most unskilled Mexican laborers. *Id.* The United States was anxious to take advantage of the economic opportunity that importing unskilled laborers presented. *Id.* In order to legally import these workers, the U.S. established a program to lure Mexican "Braceros," or workers designated to help them produce supplies for the war effort; when the soldiers returned and wanted their jobs back, the government established a militant program to repatriate the Mexican Nationalists called "Operation Wetback." *Id.*; *see generally* NELSON GAGE COPP, WETBACKS AND BRACEROS: MEXICAN MIGRANT LABORERS AND AMERICAN POLICY, 1930–1960 (1963); CARROL NORQUEST, RIO GRANDE WETBACKS: MEXICAN MIGRANT WORKERS (1972); MARK REISLER, BY THE SWEAT OF THEIR BROW: MEXICAN IMMIGRANT LABOR IN THE UNITED STATES, 1900–1940 (1976); HENRY P. ANDERSON, THE BRACERO PROGRAM IN CALIFORNIA (1976); JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980); ERASMO GAMBOA, MEXICAN LABOR AND WORLD WAR II: BRACEROS IN THE PACIFIC NORTHWEST, 1942–1947 (1990).

Supreme Court to decide to extend Fourteenth Amendment protections to persons of any distinct social class. The Court held that "[t]he Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro."[103] As the petitioner, Hernandez had "substantiat[ed] his charge of group discrimination . . . [by] prov[ing] that persons of Mexican descent constitute a separate class in Jackson County, distinct from 'whites.'"[104] The Court decided that despite the lack of a legally recognized racial distinction between the groups, the action of jury exclusion violated Fourteenth Amendment protections.[105] By recognizing Mexican Americans as a separate class, the Court substantiated Hernandez's claim that he had suffered discrimination. Specifically, the Court noted that "it taxes our credulity to say that mere chance resulted in their [sic] being no member of this class among the over six thousand jurors called in the past 25 years."[106] In short, *Hernandez* opened the door for Fourteenth Amendment protection into jury selection; a legal protection that had previously been recognized only for African Americans.

After the reconstruction era, the Supreme Court recognized the right of African Americans to participate in jury service.[107] In *Strauder v. West Virginia*, the Court

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

104. *Id.* at 479. The Court further concluded that "it must be concluded that petitioner succeeded in his proof." *Id.* at 480.

105. *Id.* at 482.

106. *Id.*

107. Strauder v. West Virginia, 100 U.S. 303, 307–08 (1879) (striking down a state statute limiting jury service to white males because it violates equal protection rights of African Americans). *Strauder* began a long string of other jury discrimination cases decided by the United States Supreme Court that would pave the way for *Hernandez v. Texas*. *See* Neal v. Delaware, 103 U.S. 370 (1880); Carter v. Texas, 177 U.S. 442, 447 (1900); Norris v. Alabama, 294 U.S. 587 (1935); Hale v. Kentucky, 303 U.S. 613 (1938); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Akins v. Texas, 325 U.S. 398 (1945); Patton v. Mississippi, 332 U.S. 463 (1947); Cassell v. Texas, 339 U.S. 282 (1950); and Avery v. Georgia, 345 U.S. 559 (1953). It is interesting to note how many of the United States Supreme Court cases that come from the state of Texas. *Carter*, *Smith*, *Hill*, *Akins*, *Cassell*, and *Hernandez* each found the state of Texas to be discriminating in the jury selection process because of race or color.

struck down a state statute qualifying only white people for jury duty because it determined that legislation exempting African Americans from jury duty implied inferiority in civil society.[108] In *Carter v. Texas*, the Court expanded its reasoning used in *Strauder* to hold that "[w]henever by any action of a state . . . all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied . . . ."[109] This same effort to eliminate discrimination in jury selection continued, and in 1935, in *Norris v. Alabama*, the Court rejected the testimony that a community simply gathered those that were the best qualified for jury selection resulting in the complete exclusion of African Americans.[110] The reasoning in *Norris* proved significant for the Court in its future efforts at eliminating discrimination in jury selection in *Hernandez*.

The *Hernandez* decision used *Norris* to reject the testimony of the Jackson County jury commissioners.[111] These commissioners stated that their reason for eliminating Mexican Americans from jury rolls was simply a result of selecting citizens who were the most qualified for jury service.[112] Chief Justice Warren wrote in his opinion that mere testimony of an alternative basis of selection is insufficient and cited the following language from *Norris*:

That showing as to the long-continued exclusion of [N]egroes from jury service, and as to the many [N]egroes qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of [N]egroes from jury service, the constitutional provision . . . would be but a vain and illusory requirement.[113]

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108. *Strauder*, 100 U.S. at 307–08.
109. *Carter*, 177 U.S. at 447.
110. *Norris*, 294 U.S. at 598.
111. *Hernandez*, 347 U.S. at 481.
112. *Id.*
113. *Id.* at 481–82 (citing *Norris*, 294 U.S. at 598).

Thus, *Norris* provided an important precedent in rejecting the biases of community members about the fitness of a particular group as valid criteria for withholding constitutional rights such as jury selection.

The *Hernandez* ruling built on the *Norris* precedent and extended equal protection to jury venire exclusion from African Americans to other "identifiable groups."[114] After the Court accepted the proof that Mexican Americans were treated disparately and as inferiors, it determined that, if the "attitude of the community" is such that it creates a hostile environment to an "identifiable group" within the community, such groups should receive Fourteenth Amendment protections.[115]

In order to extend this protection to Hernandez, the LULAC team had to prove to the Warren Court that the method used by jury commissioners excluded Mexican Americans from jury venire selections. To do this, the county's method of using surname data collected by those who sat for juries[116] was scrutinized. The Court noted that because jury commissioners work from a list of names, that "just as persons of a different race are distinguished by color, these Spanish surnames provide ready identification of the members of this class."[117] The exclusion of all individuals having Spanish-sounding surnames provided ready evidence for the Court that the method of jury selection as used by the county was discriminatory.

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114. This argument is elaborated in much more detail in Sandra Guerra Thompson, *The Non-Discrimination Ideal of* Hernandez v. Texas *Confronts a "Culture" of Discrimination: The Amazing Story of* Miller-El v. Texas, 25 CHICANO-LATINO L. REV. 97, 101 (2005).

115. *Hernandez*, 347 U.S. at 478–79.

116. *Id.* at 480–81. While surname tables proved effective, it is likely that many Latinos had changed their surname in Texas for assimilation purposes. It is also likely that intermarriage, adoption, and other circumstances made this practice slightly problematic. It proved, however, to be a good indicator. Sandra Guerra Thompson notes that "[b]y relying on 'Latin American surnames' the Court was presumably willing to include persons who lineage might be traceable to other Latin American countries such as Peru or Guatemala, although the defendant's claim was that persons of Mexican descent were the 'distinct' class. Given the testimony provided at the hearing, it is likely that the community would have treated all persons of Latin American descent as 'Mexican.'" Thompson, *supra* note 114, at 106 n.47.

117. *Hernandez*, 347 U.S. at 481 n.12.

If there was any ambiguity as to whether or not the Court intended the *Hernandez* decision to expand the Fourteenth Amendment to other social groups subject to discrimination, it did not last long. The Court further clarified its intention to recognize discrimination in jury selection one year later in *Swain v. Alabama.*[118] In *Swain*, although the particular method for jury selection was not discriminatory, the Court specifically recognized that not only is the exclusion of African Americans unconstitutional, but the Court interpreted the *Hernandez* decision to apply to "any identifiable group in the community which may be the subject of prejudice."[119] This standard of jurisprudence that eliminated jury discrimination based upon the *Hernandez* decision did not end with *Swain*.

*Castaneda v. Partida*[120] expanded the *Hernandez* ruling by using it as a jury discrimination test. Unlike *Hernandez*, in *Castaneda* there was not complete exclusion, but simply disproportionate representation on the grand jury.[121] In *Castaneda*, although 79.1% of the broader population was comprised of Mexican Americans, only 39% of persons summoned for grand jury service over an eleven-year period were Mexican American.[122] The Court found this staggering disparity sufficient to establish a prima facie case of purposeful discrimination against Mexican Americans.[123] The Court further reasoned that because the state could not provide evidence to rebut the accusations, it became "impossible to draw any inference" about how many Mexican Americans qualified for jury service.[124] The Court rejected the possibility that because Mexican Americans held more elected offices in the area they were actually the governing majority who simply excluded themselves from jury venires.[125] Therefore, even without the complete exclusion of Mexican Americans from juries, Castaneda had

118. Swain v. Alabama, 380 U.S. 202 (1965).
119. *Id.* at 205 (citing *Hernandez*, 347 U.S. at 475).
120. Castaneda v. Partida, 430 U.S. 482 (1977).
121. Thompson, *supra* note 114, at 108.
122. *Castenada*, 430 U.S. at 495.
123. *Id.* at 496.
124. *Id.* at 498–99.
125. *Id.* at 500.

proven his claim of unconstitutional discrimination in jury venire selection.[126]

The *Castaneda* decision used the *Hernandez* precedent to reinforce and expand several points. Justice Blackmun used *Hernandez* to reinforce the argument that the Court had "long recognized that 'it is a denial of the equal protection of the laws' to try a defendant of a particular race or color" in front of a jury "'from which all persons of his race or color have . . . been excluded by the State . . . .'"[127] In *Castaneda*, the Court used the test established in *Hernandez* to show a violation of equal protection.[128] It first looked at whether the group was "a recognizable, distinct class, singled out for different treatment under the laws."[129] Then the Court continued the *Hernandez* test and considered whether the selection of jurors was proportional over a significant period of years and whether the selection procedure was susceptible to being abused.[130] Finally, the Court noted that, consistent with the *Hernandez* ruling, Mexican Americans constituted an identifiable class, and the exclusion of such a class constituted a prima facie case of discrimination.[131] This

126. *Id.* at 499; Thompson, *supra* note 114. Thompson notes that the Supreme Court further reasoned "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Id.* at 110 (citing *Castenada*, 430 U.S. at 499).

127. *Castenada*, 430 U.S. at 492 (quoting Hernandez v. Texas (*Hernandez*), 347 U.S. 475, 477 (1954)).

128. *Id.* at 494.

129. *Id.*

130. *Id.*

131. *Id.* at 495. Justice Thurgood Marshall used *Hernandez* when he noted in his concurrence that since the jurors were selected on a discretionary basis and Spanish-surnamed people are easily identified the "commissioners who constructed the grand jury panels had ample opportunity to discriminate against Mexican-Americans." *Id.* at 501–02. It is also interesting to note that Justice Stewart, in a lone dissent, argued that in *Hernandez*, since the Texas jury selection is "'capable of being utilized without discrimination'[,]" the Court should not interfere with the Texas jury selection system. *Id.* at 513 n.4. While *Hernandez* only started anti-discriminatory practices with respect to jury venires, there are still many obstacles to be overcome before Mexican Americans will truly have full protections. Many jury systems employ various legal tools that effectively limit Mexican American jurors from serving: citizenship, English language requirements, peremptory challenges barring bilingual jurors, disqualification of felons, and so on. *See* Johnson, *supra* note 68, at 186–96.

recognition as a class, as established in *Hernandez*, has proven significant in areas outside of jury selection for many Mexican Americans.

## VIII. *HERNANDEZ*: SHAPING SCHOOL DESEGREGATION

Because of the *Hernandez* ruling, the law classified Mexican Americans as a protected class and eligible to receive Fourteenth Amendment protections. When the Supreme Court issued its decision in *Brown v. Board of Education* later in the same month, this not only meant that Mexican Americans received protections from unfair jury discrimination, but also from other major forms of discrimination, such as segregation in schools.[132] School segregation was a widespread practice in communities with Mexican American populations.[133] Before *Hernandez* and its companion case *Brown v. Board of Education*, there was limited legal recourse for Mexican American students who suffered from school segregation. The courts were able to use *Hernandez'* reasoning to establish that Mexican American students, while legally classified as white, were experiencing discrimination and then were able to integrate *Hernandez'* reasoning with the reasoning in *Brown v. Board of Education* to eliminate historical practices of segregation.[134]

School districts throughout the Southwest had segregated Mexican Americans from Anglos for decades.[135]

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132. *See* BROWN AT 50: THE UNFINISHED LEGACY (Deborah L. Rhode & Charles Ogletree eds., 2004).

*133. See* COLORED MEN AND HOMBRES AQUÍ: *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN AMERICAN LAWYERING (Michael Olivas ed., Arte Público Press, 2006).

134. Mark Tushnet, *Implementing ,Transforming, and Abandoning* Brown, in BROWN AT 50: THE UNFINISHED LEGACY (Deborah L. Rhode & Charles Ogletree eds., 2004).

135. *See* GUADALUPE SAN MIGUEL, CONTESTED POLICY (2004); GUADALUPE SAN MIGUEL, BROWN, NOT WHITE (2001); GUADALUPE SAN MIGUEL, LET ALL OF THEM TAKE HEED: MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS (1987). Guadalupe San Miguel is one of the most widely cited authors with respect to Mexican American desegregation in Texas, the bilingual education debate in Texas, and other issues facing Mexican American public education. Guadalupe San Miguel argues that *Hernandez* did not identify Mexican Americans as a cognizable ethnic group and that Mexican Americans

Legal justification for segregation had developed in many states prior to 1954, when the Court ruled segregation was unconstitutional. For example, in 1918, one school board in Santa Ana, California, decided to segregate Mexican Americans and Anglos at the urging of its all-Anglo PTA Board because "'it would be a rank injustice to our school, our teachers, and our children' if Mexican American children continued to attend" school with white children.[136] The city attorney provided the legal foundation for that decision. He informed the Board that while it was legal to segregate "'Indians, Chinese, and people of Mongolian descent,'" the law provided "no provision to maintain separate schools for" Mexican Americans.[137] However, since it was legal to segregate Mexican Americans on the grounds of language, age, and regularity of attendance, segregation was "'fully supported by the law.'"[138] Segregation practices against Mexican Americans were perhaps so widespread not only because they sometimes found legal justifications, but also because court decisions ending segregation were met with opposition.

Even before *Hernandez,* there were lawsuits filed throughout the Southwest to end segregation of Mexican American and Anglo students.[139] In 1947, in *Westminster School District of Orange County v. Mendez,*[140] Gonzalo Mendez and many other plaintiffs challenged Santa Ana's legal basis for segregating Mexican Americans. They argued that segregation of Mexican American children violated the

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were not classified as a cognizable ethnic group until *Cisneros*. He also argues that the *Hernandez* ruling only applied to Jackson County, Texas. By contrast, this paper argues that *Hernandez* classified Mexican Americans as an identifiable, "discreet and insular" minority group wherever social norms show that they are a distinct group.

136. GILBERT GONZALEZ, CHICANO EDUCATION IN THE ERA OF SEGREGATION 141 (1990) (quoting Santa Ana School District Board of Education, minutes, 19 August 1918).

137. *Id.*

138. *Id.*

139. SAN MIGUEL, BROWN, NOT WHITE, *supra* note 135, at 47. LULAC activists were also able to successfully end the segregation of Mexican Americans and whites in swimming pools, restaurants, hospitals, and other forms of public accommodations. *See* MARIO T. GARCIA, MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY & IDENTITY: 1930–1960, at 48 (1989).

140. Westminster Sch. Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1947).

Fourteenth Amendment because no California State law existed to give them authority to segregate nonwhite races.[141] While segregated, Mexican Americans complained that "'they and all others of Mexican and Latin descent were being barred [from] . . . receiving the benefits and education furnished to other children.'"[142] California State Education codes allowed segregation of nonwhite races only, and because the law considered Mexicans white, the segregation of Mexican American children denied and deprived them of equal protection of the laws.[143] In *Mendez*, Stephens, the presiding judge, wrote for the majority and issued an injunction prohibiting segregation of Mexican American children. The court held that the school district could not segregate white students from other white students—and since the law considered Mexican Americans white, the district had illegally segregated the two groups.[144]

*Mendez*, a case decided pre-*Brown v. Board of Education*, quickly generated a lot of controversy among those legal scholars who considered Mexican Americans as racially distinct from whites because it seemed to be inconsistent with the *Plessy v. Ferguson* Supreme Court ruling. *Columbia Law Review* published an article arguing that the court in *Mendez* was inconsistent with *Plessy* because no constitutional issue existed regarding segregation "so long as equal facilities were made available to both groups."[145] The *Yale Law Journal* also asserted the decision was inconsistent with *Plessy*; however, it argued that "modern sociological and psychological studies lend much support to the District court's views."[146] *Mendez* set a

141. GILBERT GONZALES, CHICANO EDUCATION IN THE ERA OF SEGREGATION 153 (1990).

142. Marco Portales, "*A History of Latino Segregation Lawsuits*," *in* BLACK ISSUES IN HIGHER EDUCATION: THE UNFINISHED AGENDA OF BROWN V. BOARD OF EDUCATION 126 (James Anderson & Dary N. Byrne eds., 2004) (quoting *Mendez*, 161 F.2d at 776 (1947)).

143. *Id.* at 128.

144. *Mendez*, 161 F.2d at 780.

145. Case Note, *Segregation in Schools as a Violation of the XIVth Amendment*, 47 COLUM. L. REV. 325 (1947).

146. Note, *Segregation in Public Schools—A Violation of "Equal Protection of the Laws,"* 56 YALE L.J. 1059 (1947).

legal precedent for ending segregation of Mexican Americans in schools. However, efforts at desegregation were rendered impotent when, rather than integrating Mexican Americans into white schools, many communities integrated Mexican Americans into schools that were predominately black. Despite these obstacles posed to desegregation efforts, the legal precedent established in *Mendez* still proved significant.

The *Mendez* decision inspired anti-segregation lawsuits resulting in the *Delgado v. Bastrop* decision, a landmark case for Mexican American desegregation efforts.[147] In *Delgado*, the court affirmed the controversial *Mendez* decision and "undermined the rigid segregation of the pre-1948 Texas school system."[148] The plaintiff's attorneys demonstrated that because of the segregated school system, "the median educational attainment for persons over twenty-five was 3.5 years for those with Spanish surnames . . . [compared to] 10.3 years for Anglo-Americans."[149] Marco Portales argues in an article that the *Delgado* decision "served as a precursor to how the Supreme Court would rule in *Brown*."[150] However, while both *Delgado* and *Mendez* helped to provide legal precedent for ending segregation of Mexican Americans at the state level, no case had yet risen to the level of the Supreme Court and established national precedent.

*Hernandez* was the first case to take the issue of racial bias against Mexican Americans to the national level. Mexican Americans were able to use the precedent set in *Hernandez* to implement the Fourteenth Amendment

147. Delgado v. Bastrop Indep. Sch. Dist., Civil Action No. 388 (W.D. Tex. 1948). It is discussed in GUADALUPE SAN MIGUEL, JR., "LET ALL OF THEM TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910–1981, at 123–26, 178 (1987). *See also* SAN MIGUEL, BROWN, NOT WHITE, *supra* note 135; GONZALEZ, *supra* note 141. This case was a landmark case because at this time, legal remedies were virtually nonexistent for Mexican Americans—not because it was a case that set nationally binding precedent.

148. SAN MIGUEL, BROWN, NOT WHITE, *supra* note 135.

149. V. Carl Allsup, *Delgado v. Bastrup ISD*, HANDBOOK OF TEXAS ONLINE, http://www.tsha.utexas.edu/handbook/online/articles/DD/jrd1.html (last visited March 26, 2006); *see also* MARIO T. GARCIA, DESERT IMMIGRANTS: THE MEXICANS OF EL PASO, 1880–1920 (1981).

150. PORTALES, *supra* note 142, at 128.

protections afforded to minority groups other than blacks in order to desegregate using the principles established by *Brown v. Board of Education*. In *Cisneros v. Corpus Christi Independent School District*,[151] parents brought a class action against the Corpus Christi Independent School District and its Board of Trustees alleging that the schools were segregated in Corpus Christi.[152] The plaintiffs could show evidence of segregation in Corpus Christi as early as 1896.[153] The court established that Mexican Americans were an identifiable ethnic group in Corpus Christi by using the reasoning in *Hernandez*.[154] The court extended the *Brown* ruling in *Cisneros* because, prior to *Cisneros*, *Brown* only protected minorities from state-mandated segregation.[155] In Corpus Christi, there were no statutes that mandated segregation by the state, however, the court held in *Cisneros* that it makes no difference whether it is by statute or social norms—segregation is illegal in public schools.[156] This same recognition of social norms was significant in *Hernandez* in establishing discrimination. However, because it rose to the level of the Supreme Court, the *Hernandez* decision not only expanded Fourteenth Amendment protections to Mexican Americans as a class that had been discriminated against, but also expanded these protections to them as a class previously considered white, opening the door for desegregation efforts when other attempts had failed.

In the controversial case of *Keyes v. School District No.1, Denver, Colorado,* the Supreme Court used *Hernandez* to reason, "Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment." [157] Relying upon

151. Cisneros v. Corpus Christi Independent Sch. Dist., 467 F.2d 142 (5th Cir. 1972).

152. *Id.* at 144.

153. SAN MIGUEL, BROWN, NOT WHITE, *supra* note 135, at 22.

154. *Cisneros*, 467 F.2d at 147, 152.

155. *Id.* at 148.

156. *Id.* at 149.

157. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 197 (1973) (citing Hernandez v. Texas (*Hernandez*), 347 U.S. 475 (1954)). The plaintiffs asked the court to rule on the following questions: (1) Can *Brown* apply to Mexican Americans? (2) If it can, does it apply to the particular case in Corpus Christi? (3) Is there a dual or unitary school system for blacks and whites? (4) If there is segregation, is it de

this reasoning, the Court concluded that the district court erred when it failed to place "Negroes" and "Hispanos" in the same category as a protected class.[158] The Court held that in Denver, Mexican Americans constitute a protected class and should be integrated with the Anglo students so that they can be afforded the same opportunities.[159]

In addition to the Supreme Court holding in *Keyes*, the Court also found in *Regents of the University of California v. Bakke*[160] that *Strauder*, *Yick Wo*, *Korematsu*, and *Hernandez* combined guaranteed equal protection to all persons regardless of any differences of race, of color, or of nationality. In *Bakke*, the Court reaffirmed the abolishment, as articulated in *Hernandez*, of the "two-class" theory of race and declared that racial minorities are entitled to a special "degree of protection greater than that accorded others."[161] The Court's use of *Hernandez* in these landmark cases regarding race illustrates the importance of the *Hernandez* decision in U.S. legal history.[162]

## IX. CONCLUSION

*Hernandez* became a landmark civil rights case because it established Mexican Americans and other minority groups previously unrecognized by the law as a class eligible for Fourteenth Amendment protections, which had previously been held as an African American dominated arena. The significance of the precedent established in *Hernandez* continues to increase today as the two groups that historically defined race relations in the United States,

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jure or de facto? (5) If there is segregation, how can the court disestablish the dual system and maintain a unitary one? SAN MIGUEL, BROWN, NOT WHITE, *supra* note 135, at 77.

158. *Keyes*, 413 U.S. at 196–97.

159. *Id.* at 198.

160. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292–93 (1978).

161. *Id.* at 295.

162. *See* RUBEN DONATO, THE OTHER STRUGGLE FOR EQUAL SCHOOLS: MEXICAN AMERICANS DURING THE CIVIL RIGHTS ERA (1997); WILLIS HAWLEY, EFFECTIVE SCHOOL DESEGREGATION: EQUITY, QUALITY, AND FEASIBILITY 123 (1981); CHICANO FAILURE AND SUCCESS: PAST, PRESENT, AND FUTURE (Richard R. Valencia ed., 2002); CARLOS KEVIN BLANTON, THE STRANGE CAREER OF BILINGUAL EDUCATION IN TEXAS 1836–1981, at 115–16 (2004).

whites and blacks, no longer account for the overwhelming majority of Americans.[163] In the 1950s and 1960s, when the modern civil rights movement was in its ascendancy and *Hernandez* was decided, whites accounted for almost ninety percent of the population,[164] and blacks represented nearly ten percent.[165] Scholars estimated that Latinos and Asian Americans amounted to only about five percent of the total population when combined.[166] Not surprisingly, scholars and courts largely defined race relations in black-white terms. *Hernandez* redefined these terms in a way that continues to become of greater significance as definitions of race continue to evolve and the boundaries of a protected class under the Fourteenth Amendment continue to call for re-evaluation. However, while the full impact of *Hernandez* is still undetermined, its impact today cannot be disputed.

The opinion of *Hernandez* has evoked a multitude of responses from scholars who disagree as to whether this actually hurt or helped Mexican Americans. This comment has shown that *Hernandez* (1) rejected the established "two-class" social theory by extending Fourteenth Amendment privileges to other groups besides African Americans; (2) established a precedent to eliminate exclusion of social classes from jury venires; and (3) aided in the desegregation of schools.

*Hernandez* also established the foundation for *Cisneros v. Corpus Christi* to extend the *Brown v. Board of Education* protections to Mexican Americans. Thus, *Hernandez* gave Mexican Americans, who the law classified as white, a protection that had previously been extended

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163. Moran, *supra* note 100; *see also* KUHN, *supra* note 100; Perea, *supra* note 100.

164. One should hesitate when reading such statistics because Mexican Americans were considered white and it could be that many Mexican Americans counted themselves as white rather than Mexican on the census registries and other data sheets. However, Francisco Balderrama and Raymond Rodriguez document that in the early twentieth century only a few hundred thousand Mexican Americans lived in the United States. BALDERRAMA & RODRIGUEZ, *supra* note 102.

165. Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 958–59 (1995).

166. For a discussion of Mexican American growth in the United States, see generally HOFFMAN, *supra* note 100, and *Hispanics Now Largest U.S. Minority*, *supra* note 100.

only to African Americans —integrated schools. Another benefit of *Hernandez* was to provide impetus in integrating Mexican Americans into jury venires—a right that African Americans had had since the 1880 *Strauder* decision.

Using *Hernandez,* the Supreme Court sent a message to the public that Mexican Americans and other minority groups should receive Fourteenth Amendment protections. The opinion thrust Mexican Americans into the civil rights arena when the modern concept of civil rights was still in its infancy. Although some skeptics say that *Hernandez* hurt Mexican Americans by not going far enough, *Hernandez* should be viewed as a landmark case that allowed Mexican Americans to establish themselves as a legitimate and unified social class eligible for the necessary legal recognition extended to all, the protections available to them under the Fourteenth Amendment.

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