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Recommended Citation

George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997)

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The Legal Construction of Race: Mexican-Americans and Whiteness

George A. Martinez*

I. INTRODUCTION

Critical Race theorists have sought to provide counter accounts of social reality.¹ In particular, they have sought to create new, oppositionist accounts of race.² In this regard, Critical Race Theory has evolved into several projects.

One project has sought to uncover how law is a constitutive

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1 See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberle Crenshaw et al. eds., 1995) [hereinafter, CRITICAL RACE THEORY]. See also John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing An Authentic Intellectual Life in A Multicultural World*, 65 S. CAL. L. REV. 2129 (1992). Calmore observes that critical race theorists are the "new interpreters" who contend that the large texts of law, society and culture must be subjected to fundamental criticism and reinterpretation. See *id.* at 2162-64.

2 See CRITICAL RACE THEORY, *supra* note 1, at xiii.

element of race itself.³ Put another way, this project has sought to identify how law constructed race.⁴ Another important project has focused on the way that whiteness functions as a social organizing principle.⁵ Thus, critical theorists have begun to examine how the privilege of being white works in our society.⁶

As to this second project, critical theorists have recognized that traditionally, white identity has been a source of privilege and protection.⁷ Indeed, during the time of slavery in this country, because whites could not be enslaved, the racial divide between black and white became a line of protection from the threat of commodification: whiteness protected one against being an object of property.⁸ The status of being white was therefore a valuable asset and carried with it a set of assumptions, privileges and benefits.⁹ Given this, it is hardly surprising that minorities have often sought to "pass" as white — i.e., present themselves as white

3 See *id.* at xxv.

4 See *id.* See also Martha Mahoney, *Segregation, Whiteness and Transformation*, 143 U. PA. L. REV. 1659, 1660 (1995). Critical scholarship has shown that race is a social construction. See *id.*

5 See CRITICAL RACE THEORY: THE CUTTING EDGE 541 (Richard Delgado ed., 1995).

6 See *id.* at 541. See also Mahoney, *supra* note 4, at 1663 ("Recently, social and legal theorists have begun to 'interrogate whiteness'"); BELL HOOKS, *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* 54 (1990) (discussing the need to "interrogate whiteness"); RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993) (examining the place of white women in the racial structure of the United States); Barbara J. Flagg, "Was Blind But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

7 See Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1721 (1993).

8 See *id.* at 1721.

9 See *id.* at 1713. See also Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 893-94 (1995) (defining white privilege as "an invisible package of unearned assets" which is "like an invisible weightless knapsack of special provisions, assurance, tools, maps, guides, code-books, passports, visas, clothes, compass, emergency gear, and blank checks").

persons.¹⁰ They did so because they thought that becoming white insured greater economic, political and social security.¹¹ Becoming white, they thought, meant gaining access to a whole set of public and private privileges, and was a way to avoid being the object of others' domination.¹² Whiteness, therefore, constituted a privileged identity.

In light of the privileged status of whiteness and these important critical race projects, this essay seeks to examine a number of issues concerning Mexican-Americans and whiteness. In particular, this essay seeks to examine how legal actors -- courts and others -- constructed the race of Mexican-Americans. In this regard, the essay seeks to examine whether the law constructed Mexican-Americans as white and whether they received the benefits traditionally associated with whiteness. The essay also explores the importance of group definition and argues that an examination of whiteness and Mexican-Americans has implications for the affirmative action debate. The article also explores how the legally defined race of Mexican-Americans contrasted with the colonial discourses that developed in the American southwest and which characterized Mexican-Americans as racial Others. In addition, the essay seeks to explain why Mexican-Americans were legally classified as white. The essay also seeks to link theory with practice. Toward that end, the essay briefly suggests how some of the insights of Critical Race Theory developed in this paper may be useful for litigators representing Mexican-Americans.

10 See Harris, *supra* note 7, at 1710, 1713. For other discussions of the phenomenon of "passing," see GUNNAR MYRDAL, 1 AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 683-86 (1996). Myrdal writes that "'Passing' means that a Negro becomes a white man, that is, moves from the lower to the higher caste. In the American caste order, this can be accomplished only by the deception of white people with whom the passer comes to associate and by a conspiracy of silence on the part of other Negroes who might know about it." *Id.* at 683. See also MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 39-40, 56-59 (1964).

11 See Harris, *supra* note 7, at 1713.

12 See *id.*

Beyond this, this essay seeks to help construct LatCrit Theory. Although a number of Latinos have been important practitioners of Critical Race Theory, few articles have applied critical theory to matters of particular concern to Latinos.¹³ This essay seeks to help fill this void in the literature.

Part II of this essay describes how the courts and other legal actors constructed the race of Mexican-Americans. It concludes that for the most part legal actors constructed the race of Mexican-Americans as "white." Part III discusses the importance of legal definition -- e.g., defining a group as white or in some other way -- for historically oppressed groups. It analyzes how dominant-group-controlled institutions may use power over minority group identity to reinforce group oppression. Part IV observes that although Mexican-Americans were legally defined as "white," they did not receive the benefits traditionally associated with whiteness. This section argues that this illustrates a principle developed by critical theorists -- the principle of marginality -- which holds that legal rules and doctrines often fail to impact on society. Part V argues that the fact that Mexican-Americans did not receive the benefits usually associated with whiteness has implications for the affirmative action debate. Part VI argues that the legal construction of Mexican-Americans as white is ironic. It is at odds with the

13 For examples of articles applying critical theory to issues of concern to Latinos, see Berta Esperanza Hernández-Truyol, *Building Bridges -- Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139 (1993); George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994); Margaret E. Montoya, *Mascaras, Trenzas y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L. J. 425 (1990); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995).

colonial discourses that developed in the American Southwest. Such discourses characterized Mexican-Americans as a racial Other. In light of their discursive production as racial Others, it is puzzling that Mexican-Americans were legally constructed as white. Part VII seeks to explain why Mexican-Americans were legally classified as "white."

II. THE SOCIAL CONSTRUCTION OF THE RACE OF MEXICAN-AMERICANS

Critical theory has recognized that race is a social or legal construction.¹⁴ Racial categories are constructed through the give-and-take of politics or social interaction.¹⁵ Thus, race is not a prelegal phenomenon or an independent given on which the law acts.¹⁶ Race is instead a social construction at least in part fashioned by law.¹⁷ How did the courts and other legal actors construct the race of Mexican-Americans?

A. *The Case Law*

A number of courts have construed the race of Mexican-Americans.¹⁸ A few examples will suffice to make the relevant

14 See IAN F. HANEY LÓPEZ, *WHITE BY LAW* 12 (1996); Mahoney, *supra* note 4, at 1661 ("Race is a social construction, not a 'a natural division of human-kind'"). See also Neil Gotanda, *A Critique of "Our Constitution Is Color Blind,"* 44 *STAN. L. REV.* 1 (1991); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice,* 29 *HARV. C.R. - C.L. L. REV.* 1 (1994).

15 See Luis Angel Toro, *"A People Distinct From Others:" Race and Identity In Federal Indian Law and the Hispanic Classification In OMB Directive No. 15,* 26 *TEX. TECH. L. REV.* 1219, 1244 (1995).

16 See HANEY LÓPEZ, *WHITE BY LAW,* *supra* note 14, at 13.

17 See *id.* at 13.

18 Cf. Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866,* 63 *CAL. L. REV.* 662 (1975). Greenfield and Kates analyze the race of Mexican-Americans for purposes of the

points. In *Inland Steel Co. v. Barcena*,¹⁹ an Indiana appellate court addressed the question of whether Mexicans were white. The court noted that the Encyclopedia Britannica stated that approximately one-fifth of the inhabitants of Mexico were whites, approximately two-fifths were Indians, and the balance was made up of mixed bloods, blacks, Japanese, and Chinese. Given this, the court held that a "Mexican" should not necessarily be construed to be a white person.²⁰

The Texas courts also considered the race of Mexican-Americans. In *In re Rodriguez*,²¹ a Texas federal court addressed in an immigration context the question of whether Mexicans were white. At that time, the federal naturalization laws required that an alien be white in order to become a citizen of the United States.²² There, the court stated that Mexicans would probably be considered non-white from an anthropological perspective.²³ The court noted, however, that the United States had entered into certain treaties with Mexico. Those treaties expressly allowed Mexicans to become citizens of the United States.²⁴ Under these circumstances, the court concluded that Congress intended that Mexicans were entitled to become citizens. Thus, the court held that Mexicans were white within the meaning of the naturalization laws.²⁵

In re Rodriguez is an important case. It clearly reveals how racial categories can be constructed through the political process.

Civil Rights Act of 1866 and discuss some of the legal materials mentioned in this section. They, however, do not analyze the race of Mexican-Americans through the lens of social construction or critical theory -- this essay seeks to do so.

19 39 N.E.2d 800 (Ind. 1942).

20 *Id.* at 801.

21 81 F. 337 (W.D. Tex. 1897).

22 See Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142, 143 (1996) (from 1790 to 1952 only white immigrants could naturalize as citizens).

23 See *In re Rodriguez*, 81 F. 337 at 349.

24 *Id.* at 350-52.

25 *Id.* at 354-55.

Through the give and take of treaty making, Mexicans became "white".

That politics operated to turn Mexicans into whites is revealed in analogous cases which considered whether mixed race persons were white under the immigration laws. In general, mixed race applicants failed to establish their whiteness.²⁶ For example, in *In re Camille*,²⁷ the court held that the son of a white Canadian father and an Indian mother was non-white, and therefore, was denied the right of naturalization. Similarly, in *In re Young*,²⁸ the son of a German father and a Japanese mother was not a white person within the meaning of the immigration laws.²⁹ It seems plausible to read these cases to stand for the proposition that mixed race persons are not considered white. Given this, it appears that Mexicans -- a mixture of Spanish and Indian -- should not have counted as white. The treaties nevertheless operated to turn them into whites.

The issue of the race of Mexican-Americans also arose in the context of school segregation. In *Independent School District v. Salvatierra*,³⁰ plaintiffs sought to enjoin segregation of Mexican-Americans in the City of Del Rio, Texas. There, the court treated Mexican-Americans as white, holding that Mexican-Americans could not be segregated from children of "other white races, merely

26 See HANEY LÓPEZ, *The Social Construction of Race*, *supra* note 14, at 2.

27 6 F. 256 (Or. Ct. App. 1880).

28 198 F. 715 (N.D. 1912).

29 See *id.* at 716-717. The court observed:

In the abstractions of higher mathematics, it may be plausibly said that the half of infinity is equal to the whole of infinity; but in the case of such a concrete thing as the person of a human being it cannot be said that one who is half white and half brown or yellow is a white person, as commonly understood.

Id. at 717.

30 33 S.W.2d 790 (Tex. Civ. App. 1930). *Salvatierra* was the first case to decide the issue of whether segregation of Mexican-Americans in public schools was permissible. See Martínez, *supra* note 13, at 574. For more discussion of the *Salvatierra* case, see GUADALUPE SAN MIGUEL, JR., "LET ALL OF THEM TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981, at 78-80 (1987).

or solely because they are Mexicans.³¹ Significantly, the court did permit segregation of Mexican-Americans on the basis of linguistic difficulties and migrant farming patterns.³²

Mexican-American participation on juries also involved the construction of the race of Mexican-Americans. For example, in *Hernandez v. State*,³³ a Mexican-American had been convicted of murder. He sought to reverse his conviction on the ground that Mexican-Americans had been excluded from the grand jury and the petit jury. He relied on cases holding that exclusion of blacks from jury service constituted a violation of due process and equal protection.³⁴ The court recognized only two classes as falling within the guarantee of the Fourteenth Amendment: the white race and the black race.³⁵ The court held that Mexican-Americans are white people, and therefore, fall within the classification of the white race for purposes of the Fourteenth Amendment.³⁶ The court reasoned that to say that the members of the various groups comprising the white race must be represented on grand and petit juries would destroy the jury system.³⁷ Since the juries that indicted and convicted the defendant were composed of members of his race -- white persons -- he had not been denied the equal protection of the laws.³⁸

31 33 S.W.2d at 795.

32 See *id.* at 795; Martinez, *supra* note 13, at 575-76.

33 251 S.W.2d 531 (Tex. 1952).

34 See *id.* at 532.

35 See *id.* at 535.

36 See *id.*

37 See *id.*

38 See *id.* at 536. In *Sanchez v. State*, 243 S.W.2d 700 (Tex. Crim. App. 1951) a Mexican-American had been convicted of murder. He sought to challenge his conviction on the ground that his due process rights had been violated because the county had discriminated against Mexican-Americans in the selection of grand jurors. The Texas court held that Mexican-Americans are not a separate race, but are white people of Spanish descent. *Id.* at 701. Thus, the defendants' rights were not violated because whites were not excluded from the grand juries.

B. The Census Bureau

Federal agencies also constructed the race of Mexican-Americans. The federal government compiled census data on persons of Mexican descent.³⁹ In 1930, the Census Bureau made the first effort to identify Mexican-Americans.⁴⁰ The Bureau used the term "Mexican" to classify Mexican-Americans and it was placed under the rubric of "other races" which also included Indians, Blacks and Asians.⁴¹ According to this definition, Mexican-Americans were not considered "whites".⁴² Interestingly, the Mexican government and the United States Department of State both objected to the 1930 census definition of Mexican.⁴³ Thus, in the 1950 census Mexican-Americans were classified as "whites".⁴⁴ The Census Bureau experience is significant in that it presents another example of how politics have influenced the construction of the race of Mexican-Americans.

C. The Office of Management and Budget

The Office of Management and Budget (OMB) has set forth the current federal law of racial classification.⁴⁵ In particular, Statistical Directive No. 15 deals with Mexican-Americans.⁴⁶ Directive No. 15 governs the collection of federal statistics regarding the implementation of a number of civil rights laws.⁴⁷ According to

39 See LEO GREBLER, ET AL., THE MEXICAN-AMERICAN PEOPLE 601 (1970).

40 See *id.*

41 See *id.*

42 See *id.*

43 See *id.*

44 See *id.* at 601-02.

45 See Toro, *supra* note 15, at 1221.

46 See Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,260, 19,269 (Off. Mgmt. & Budget 1978).

47 See Toro, *supra* note 15, at 1225.

Directive No. 15, Mexican-Americans are classified as white.⁴⁸

The record shows, then, that for the most part the courts and other legal actors constructed the race of Mexican-Americans as "white."⁴⁹ That conclusion is interesting in and of itself. But is there anything else that is significant about group definition? Why is legal definition of a group significant?

III. THE IMPORTANCE OF LEGAL SELF-DEFINITION FOR HISTORICALLY OPPRESSED GROUPS

Dominant-group-controlled institutions have determined the legal meaning of minority group identity.⁵⁰ The law has recognized racial group identity when such identity was a basis for exclusion and subordination.⁵¹ The law, however, often has refused to recognize group identity when asserted by racially oppressed groups as a basis for affirming rights and resisting subordination.⁵² Thus, dominant-group-controlled institutions often have defined racial groups and have imposed those definitions on those groups as a way to maintain the status quo -- i.e., racial subordination.

Mashpee Tribe v. Town of Mashpee,⁵³ is instructive on this point. There, the Indian community at Mashpee on Cape Cod sued to recover tribal lands alienated from them over the last two hundred years in violation of the Indian Non-Intercourse Act of 1790.⁵⁴ The Non-Intercourse Act prohibits the transfer of Indian tribal land to non-Indians without approval of the federal

48 *See id.* at 1227.

49 *Cf. Greenfield & Kates, supra* note 18, at 687 (observing that the case law gives "some indication that Mexican-Americans were not officially to be treated as a nonwhite group").

50 *See Harris, supra* note 7, at 1761.

51 *See id.*

52 *See id.*

53 447 F.Supp. 940 (D. Mass. 1978).

54 *See Gerald Torres & Kathryn Milun, Translating Yonnonidio By Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 633.

government.⁵⁵ The Tribe argued that its land had been taken from it without the required federal consent.⁵⁶ The defendant, Town of Mashpee, answered by denying that the plaintiffs Mashpee were a Tribe.⁵⁷ Therefore they fell outside the protection of the Non-Intercourse Act and had no standing to sue.⁵⁸

In order to recover the land, the Mashpee were required to prove that they were a Tribe at the time of conveyance.⁵⁹ Accepting the definition of "Tribe" as stated in earlier case law, the trial judge defined "Tribe" as a "body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."⁶⁰ The court held that the Mashpee were not a Tribe at the time the suit was filed. The court rejected their claim to land rights based on group identity.⁶¹

For the Mashpee, the court's standard was not the appropriate measure of group identity. Their identity as a group was demonstrated by their continued relationship to the land of the Mashpee and their awareness and preservation of cultural traditions.⁶² The Tribe, however, was incapable of legal self-definition.⁶³ Instead, the court imposed a definition or standard of group identity in order to maintain the status quo and resist their claim of right to be free from subordination.⁶⁴ The lesson of the *Mashpee* case seems clear: dominant-group-controlled institutions should not have exclusive power to define minority group identity. Historically dominated groups must struggle for the power of legal self-definition. Otherwise, dominant-group-controlled institutions

55 *See id.*

56 *See id.*

57 *See id.*

58 *See id.*

59 *See Harris, supra* note 7, at 1764.

60 *Montoya v. United States*, 180 U.S. 261, 266 (1901).

61 *See Mashpee*, 447 F.Supp. at 950.

62 *See Harris, supra* note 7, at 1765.

63 *See id.*

64 *See id.*

may use the power over meaning and group identity to reinforce group oppression.

We have seen this phenomenon in the cases dealing with Mexican-Americans. As discussed, in *Hernandez*, the Texas court controlled the legal meaning of the identity of Mexican-Americans. There, Mexican-Americans sought to assert a group identity -- the status of being a distinct group -- in an effort to resist oppression -- i.e., being excluded from grand and petit juries. The Texas court refused to recognize their group identity. Instead, the Texas court imposed a definition of "white" on Mexican-Americans so as to maintain the status quo -- i.e., exclusion from juries.

Subsequently, on review, the United States Supreme Court also imposed a group definition on Mexican-Americans. The Court held in *Hernandez v. Texas*⁶⁵ that "persons of Mexican descent" are a cognizable group for equal protection purposes in areas where they are subject to local discrimination.⁶⁶ Thus, in areas where Mexican-Americans are unable to prove the existence of discriminatory treatment, they lack sufficient definitional clarity as a class to warrant fourteenth amendment protection.⁶⁷ Defining Mexican-Americans in terms of the existence of local discrimination hinders Mexican-Americans in asserting their rights.⁶⁸ The *Hernandez* approach operates to impose artificially high standards on Mexican-American plaintiffs in that not every plaintiff can afford the expense of obtaining expert testimony to prove the required local prejudice.⁶⁹ Thus, the Supreme Court's definition of Mexican-Americans in terms of local prejudice is another example of imposing a group definition on Mexican-Americans which has the potential effect of subordinating Mexican-Americans.

65 347 U.S. 475 (1954).

66 *Id.* at 477-79.

67 See Richard Delgado & Vicky Palacios, *Mexican Americans As A Legally Cognizable Class Under Rule 23 and the Equal Protection Clause* 50 NOTRE DAME L. REV. 393, 395 (1975).

68 See *id.* at 401.

69 See *id.* at 400-01.

Similarly, in *Lopez Tijerina v. Henry*,⁷⁰ the court refused to allow Mexican-Americans to define themselves as a group. Plaintiffs sought to bring a class action on behalf of the class of "Mexican-Americans" in order to secure equal educational opportunity for Mexican-Americans. The court rejected the claim for class representation, holding that the term "Mexican-American" was too vague and failed to adequately define a class within the meaning of Rule 23 of the Federal Rules of Civil Procedure, governing class actions.⁷¹ Since the class was not adequately defined, the court dismissed the class action complaint.⁷²

Class actions permit a lawsuit to be brought by large numbers of persons whose interests are sufficiently related so that it is more efficient to adjudicate their rights in a single action.⁷³ Significantly, the class action device may represent the only viable procedure for people with small claims to vindicate their rights or for important social issues to be litigated.⁷⁴ Thus, the court's refusal to permit the class action may have meant that the Mexican-Americans would not have been able to pursue the important social issues raised by the complaint. Given this, the *Lopez Tijerina* case seems to be an example of a court refusing to allow Mexican-Americans to define themselves so as to resist oppression.

Subsequently, other courts permitted Mexican-Americans to sue as a class under Rule 23 by distinguishing *Tijerina* under the *Hernandez* rationale that local prejudice rendered the class sufficiently identifiable.⁷⁵ Thus, the courts defined Mexican-Americans in terms of local prejudice, a definition which, for the reasons discussed above, operated to the disadvantage of Mexican-

70 48 F.R.D. 274 (D.N.M. 1969).

71 See 48 F.R.D. at 276.

72 See *id.* at 277. For additional discussion of the *Lopez Tijerina* case, see generally Delgado & Palacios, *supra* note 67.

73 See JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE 721-22 (2d. ed. 1993).

74 See *id.* at 722.

75 See Delgado & Palacios, *supra* note 67, at 401.

Americans in their efforts to assert their rights under Rule 23.⁷⁶

A. Theory and Practice

Contemporary litigators representing Mexican-Americans need to be aware of the critical insight that legal self-definition is important. For example, they might use that insight to motivate a challenge to the current definition of "Hispanic" under the federal regulations. The current "Hispanic" classification operates to prevent Mexican-Americans from overcoming disadvantages imposed by racial subordination.⁷⁷ Hispanics are defined in Directive No. 15 as a white ethnic group.⁷⁸ This creates a serious problem: it allows white persons -- persons of European extraction -- to claim benefits meant to address the problems associated with racism.⁷⁹ This occurs when a person who is identified in the community as being a part of the Anglo majority claims to be a member of a racially subordinated minority group and uses that status to receive benefits meant to address the problems that group faces.⁸⁰ The net result is that the "Hispanic" classification is yet another legal definition imposed on Mexican-Americans which results in the subordination of Mexican-Americans.

IV. THE MARGINALITY OF LAW

Classical legal theory holds, among other things, that social action reflects norms generated by the legal system.⁸¹ That older

76 *See id.*

77 *See Toro, supra* note 15, at 1223.

78 *See id.* at 1227.

79 *See id.* at 1253.

80 *See id.*

81 *See, e.g.,* David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 577 (1984). Classical legal theory or the idea of legal order also holds that (1) the law is in some sense a system that provides an answer to all questions about social behavior; (2) a form of reasoning exists that can be employed by specialists to generate necessary answers from

tradition has been challenged in recent years.⁸² According to the critique of legal order,⁸³ even under those circumstances in which a consensus can be formed about the norms of the law, there is no reason to believe that law is a decisive factor in social behavior.⁸⁴ Legal rules often are only of marginal impact in daily life. This is called the principle of marginality.⁸⁵ The principle of marginality holds, then, that legal rules, doctrines and institutions often fail to impact on society.⁸⁶

For example, the critics of legal order have demonstrated the marginality of contract law in the realm of business.⁸⁷ Stewart Macauley has described the marginality of state enforced norms in the governance of contract relations.⁸⁸ He found that business persons did not rely on legal norms to define or sanctions to enforce their relations.⁸⁹ Thus, when "contracting" business persons did not consciously shape their conduct to conform to the requirements of law.⁹⁰

This essay began with the observation that white identity traditionally has been a source of privilege and protection. As discussed, for the most part, the courts and federal government constructed the race of Mexican-Americans as white. Since the law recognized Mexican-Americans as white, one might have expected,

doctrine; and (3) this doctrine reflects a coherent view about the basic relations between persons and about the nature of society. *See id.*

82 *See id.*

83 The critique of legal order challenges the idea that a legal order exists in any society. *See id.* The critique is based on four principles: indeterminacy, antiformalism, contradiction and marginality. *See id.* at 577-78.

84 *See id.* at 578.

85 *See id.*

86 *See id.* at 615.

87 *See, e.g.,* Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1305 (1990).

88 *See* Robert W. Gordon, *Macauley, Macneil and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 571.

89 *See id.*

90 *See* Feinman, *supra* note 87, at 1306.

if classical legal theory were correct, that social action would have reflected the Mexican-American's privileged legal status as white. That, however, was not the case. Consistent with the critique of legal order, legal recognition of the Mexican-American as white had only a marginal impact on conduct.

Far from having a privileged status, Mexican-Americans faced discrimination very similar to that experienced by African-Americans.⁹¹ Thus, Mexican-Americans were excluded from public facilities and neighborhoods, and were the targets of racial slurs.⁹² Mexican-Americans typically lived in one section of town because they were not permitted to rent or own property anywhere except in the "Mexican Colony," regardless of their social, educational or economic status.⁹³ Similarly, Mexican-Americans were segregated in public schools.⁹⁴ Mexican-Americans have also faced significant discrimination in the area of employment.⁹⁵ Mexican-Americans were earmarked for exclusive employment in the lowest brackets of employment.⁹⁶ They were paid less than Anglo-Americans for the same jobs.⁹⁷ Moreover, law enforcement officials have committed widespread discrimination against Mexican-Americans.⁹⁸ In this regard, Mexican-Americans have been subjected to unduly harsh

91 See generally Martinez, *supra* note 13. See also, Paul Brest & Miranda Oshige, *Affirmative Action For Whom?*, 47 STAN. L. REV. 855, 888 (1995) ("Latinos have encountered prejudice and systematic discrimination in virtually all realms, including housing, employment and education").

92 See Martinez, *supra* note 13, at 573.

93 See P. KIBBE, *LATIN AMERICANS IN TEXAS* 123-24 (1946).

94 See Martinez, *supra* note 13, at 584. See also SAN MIGUEL, *supra* note 30, at 54-55. ("School officials and board members, reflecting the specific desires of the general population, did not want Mexican students to attend school with Anglo children regardless of their social standing, economic status, language capability, or place of residence").

95 See, e.g., CAREY MCWILLIAMS, *NORTH FROM MEXICO* 195-97 (1948); KIBBE, *supra* note 93, at 157.

96 See MCWILLIAMS, *supra* note 95, at 196.

97 See *id.*

98 See U.S. Comm'n On Civil Rights, *Mexican Americans and the Administration of Justice in the Southwest* (SUMMARY) 2 (1970).

treatment by police, have been frequently arrested on insufficient grounds and have received harassment and penalties disproportionately severe compared to those imposed on Anglos for the same acts.⁹⁹ These facts seem to implicate the principle of marginality. Actual social behavior -- i.e., discrimination practiced against Mexican-Americans -- failed to reflect the legal norms that defined Mexican-Americans as white. Although Mexican-Americans were white as a matter of law, that law failed to provide them with a privileged status. Their legal status as white persons had only a marginal impact in daily life.

One of the most striking examples of the failure to provide the traditional benefits associated with whiteness occurred in Texas. Discrimination against Mexican-Americans in Texas had been particularly egregious.¹⁰⁰ As a result, the Mexican Ministry of Labor declared in 1943 that Mexican citizens would not be allowed to go to Texas.¹⁰¹ Mexican Foreign Minister Ezequiel Padilla informed Texas that Mexican citizens would be allowed to go to Texas only after the wave of racial prejudice had subsided.¹⁰² In response, the Texas legislature, on May 6, 1943, passed a resolution that established as a matter of Texas public policy that all Caucasians were entitled to equal accommodations.¹⁰³ Subsequently, Mexican-Americans attempted to rely on the resolution and sought to claim one of the traditional benefits of whiteness -- freedom from exclusion from public places. In *Terrell Wells Swimming Pool v. Rodriguez*,¹⁰⁴ Jacob Rodriguez sought an injunction requiring the defendant swimming pool operator to offer

99 *See id.*

100 *See* Martinez, *supra* note 13, at 564 n.38; SAN MIGUEL, *supra* note 30, at 92 ("the discrimination and mistreatment of Mexicans, both citizens and non-citizens, was most flagrant in Texas"). Michael Olivas has observed that for Mexican-Americans Texas is "our Mississippi". 2 MICHAEL OLIVAS, RECONSTRUCTION 50 (1993).

101 *See* Martinez, *supra* note 13, at 564 n.38; SAN MIGUEL, *supra* note 30, at 92.

102 *See id.* at 92-93.

103 *See* Martinez, *supra* note 13, at 564; SAN MIGUEL, *supra* note 30, at 93.

104 182 S.W.2d 824 (Tex. Civ. App. 1944).

equal accommodations to Mexican-Americans. Plaintiff argued that he could not be excluded from the pool on the basis of his Mexican ancestry because that would violate the public policy expressed in the resolution condemning discriminatory practices against all persons of the white race. The court refused to enforce the public policy on the ground that the resolution did not have the effect of a statute.¹⁰⁵ Thus, Mexican-Americans could not claim one of the most significant benefits of whiteness -- freedom from exclusion from public places.

A. Theory and Practice

Litigators representing Mexican-Americans can use the insight of the principle of marginality.¹⁰⁶ Historically, Mexican-Americans have fought a battle against being legally defined as non-white.¹⁰⁷ They have done so because they believed that if they were defined as "white" they would receive the rights and privileges traditionally associated with being "white."¹⁰⁸ That belief is mistaken. The

105 *Terrell Wells*, 112 S.W. 2d at 826.

106 In light of the principle of the marginality of law, it may seem incongruous to resort to litigation. To be sure, Latinos should be circumspect about the chances for litigation to improve the position of the Latino community. See Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 142 (1997); Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L. J. 42, 47 (1995) (discussing limited power of litigation alone to bring about change for Latinos) [hereinafter Johnson, *Challenges for the Latino Community*]; See generally Martinez, *supra* note 13 (reviewing litigation involving the interests of Mexican-Americans and concluding that courts often resolved legal indeterminacy against Mexican-Americans). Despite the limits of litigation, litigation is often necessary to bring about social change. See Johnson, *Challenges for the Latino Community*, *supra*, at 55 ("litigation obviously is a necessary weapon in any movement to facilitate social change"). To successfully bring about social change, however, litigation must be tied to a broader-based political and social movement. See *id.*

107 See Grebler, *supra* note 39, at 385.

108 See *id.*

Mexican-Americans' legal status of being white did not protect Mexican-Americans in the past. Therefore, it seems likely that it will not protect Mexican-Americans in the present or in the future. Thus, persons representing Mexican-Americans should not hesitate to challenge harmful legal definitions establishing Mexican-Americans as white -- e.g. OMB Directive No. 15.¹⁰⁹

V. MEXICAN-AMERICANS, WHITENESS AND AFFIRMATIVE ACTION

That Mexican-Americans have not benefited from their legal construction as white has implications for affirmative action. Although the meaning of "affirmative action" is somewhat unclear,¹¹⁰ it generally refers to attempts to bring members of underrepresented groups into a higher degree of participation in some beneficial program.¹¹¹ Affirmative action often includes some kind of preferential treatment.¹¹² In particular, affirmative action often refers to preferential hiring or admission of minorities and women.¹¹³ Mexican-Americans have benefited from affirmative-

109 In this connection, see Roger Sanjek, *Intermarriage and the Future of Races in the United States*, in RACE 120 (Steven Gregory and Roger Sanjek, eds. 1994). Sanjek observes that in recent decades an increasing number of Hispanics are answering "other" to the U.S. Census race question, rejecting white. *See id.* Interestingly, some Egyptians have objected to their classification as white by the United States government. *See* Soheir A. Morsy, *Beyond the Honorary "White" Classification of Egyptians: Societal Identity in Historical Context*, in RACE 175-198 (Steven Gregory & Roger Sanjek eds., 1994). They reject the "white" designation in favor of an African cultural identity. *See id.* at 175.

110 *See* MICHAEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE 42 (1991).

111 *See id.* For recent discussions of affirmative action, see generally Brest & Oshige, *supra* note 91; Richard Delgado, *Affirmative Action As A Majoritarian Device: Or, Do You Really Want to Be A Role Model*, 89 MICH. L. REV. 1222 (1991); Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893 (1994); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705.

112 *See* Rosenfeld, *supra* note 110, at 47.

113 *See id.*

action programs.¹¹⁴ Some scholars, however, recently have suggested that Mexican-Americans should not benefit from affirmative action programs because they are white.¹¹⁵

Critical theory reveals the flaw in this line of argument. Critical theorists have recognized that affirmative action is required to de-legitimize the property interest in whiteness.¹¹⁶ Affirmative action seeks to dismantle the actual and expected privileges traditionally associated with being white.¹¹⁷ Affirmative action, then, de-privileges whiteness and seeks to remove the legal protections of whiteness.¹¹⁸ Given this analysis of affirmative action, it is clear that Mexican-Americans should not be excluded from preferential treatment programs because they are white. As discussed above, Mexican-Americans have not significantly benefited from their legal construction as white. They have not received the benefits usually associated with whiteness. Thus, they should not be excluded from affirmative action programs on the ground that they are white. Since Mexican-Americans were never significantly privileged by whiteness, it makes no sense to de-privilege them by excluding them from preferential treatment programs.

VI. COLONIAL DISCOURSES AND THE CONSTRUCTION OF WHITENESS

The legal construction of Mexican-Americans as white is ironic. It is at odds with the colonial discourses — *i.e.*, the discursive repertoires associated with the process of colonial exploration and

114 See, e.g., Brest & Oshige, *supra* note 91, at 855.

115 See *id.* at 888-90. Brest and Oshige point out that the case for affirmative action for Latinos is weakened by, among other things, the fact that Latinos were traditionally classified as whites. See *id.* I am indebted to Rachel Moran for helpful discussion on this point. For further discussion of this issue, see Rachel Moran, *Unrepresented*, 55 REPRESENTATIONS 139 (1996).

116 See Harris, *supra* note 7, at 1779.

117 See *id.*

118 See *id.*

ruling¹¹⁹ — that developed in the American Southwest. There are close ties in the United States between racist and colonial discourses as well as between constructions of whiteness and Westernness.¹²⁰ Scholars of the era of West European colonial expansion have documented the centrality of the production of knowledge — i.e., the discourses on the colonized that the colonizer produced — to the success of colonial rule.¹²¹ The colonizers engaged in epistemic violence — i.e., produced modes of knowing that enabled and rationalized colonial domination from the standpoint of the West, and produced ways of viewing “Other” societies and cultures whose legacies endure into the present.¹²² Central to colonial discourses is the notion of the colonized subject irreducibly Other from the standpoint of a white self.¹²³

119 See FRANKENBERG, *supra* note 6, at 16.

120 See *id.* See also ROBERT YOUNG, *WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST* 173 (1990) (“the creation of an object of analysis called ‘colonial discourse’, has proved one of the most fruitful and significant areas of research...and the concept of colonial discourse...has been extended to other categories such as ‘minority discourse’, and is increasingly being used to describe certain power structures within the hierarchies of the West itself, particularly the relation of minorities to the dominant group”).

121 See FRANKENBERG, *supra* note 6, at 16. See also YOUNG, *supra* note 120, at 127 (analysts of the colonial era have demonstrated the “deep complicity of academic forms of knowledge with institutions of power”).

122 See FRANKENBERG, *supra* note 6, at 16. See also YOUNG *supra* note 120, at 158 (“analysis of colonial discourse . . . demonstrates that history is not simply the disinterested production of facts, but is rather a process of ‘epistemic violence’, an interested construction of a particular representation of an object, which may . . . be entirely constructed with no existence or reality outside its representation”).

123 See FRANKENBERG, *supra* note 6, at 16-17. See also EDWARD W. SAID, *ORIENTALISM* 228 (1978). Said writes:

Every statement made by Orientalists or White Men (who were usually interchangeable) conveyed a sense of the irreducible distance separating white from colored, or Occidental from Oriental; moreover, behind each statement there resonated the tradition of experience, learning and education that kept the Oriental-colored to his position of object studied by the Occidental-white, instead of vice versa.

One can view the history of Mexican-Americans in the United States as part of the larger history of western colonialism.¹²⁴ The Anglo colonizers in the American Southwest produced discourses regarding the Mexican-Americans. In sharp contrast to their legal construction as white, these discourses plainly construed Mexican-Americans as irreducibly Other from the standpoint of the white Anglo. A few examples will suffice. The historian David Weber writes:

Anglo Americans found an additional element to despise in Mexicans: racial mixture. American visitors to the Mexican frontier were nearly unanimous in commenting on the dark skin of Mexican mestizos, who, it was generally agreed had inherited the worst qualities of Spaniards and Indians to produce a 'race' still more despicable than that of either parent.¹²⁵

Similarly, another commentator described how Anglo Americans drew a racial distinction between themselves and Mexican-Americans:

Racial myths about Mexicans appeared as soon as Mexicans began to meet Anglo American settlers in the early nineteenth century. The differences in attitudes, temperament, and behavior were supposed to be genetic. It

Id. at 228.

124 See Angela Harris, *Forward: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 763 (1994) (citing BENJAMIN B. RINGER & ELINOR R. LAWLESS, RACE-ETHNICITY AND SOCIETY (1989) (the United States should be considered a colonial society with respect to its racial minorities); RODOLFO ACUNA, OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION iii (1972) (arguing that the experience of Mexican-Americans in the American Southwest parallels that of other Third World peoples who have suffered under the colonialism of technologically superior nations).

125 FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS 59-60 (David J. Weber ed., 1973).

is hard now to imagine the normal Mexican mixture of Spanish and Indian as constituting a distinct 'race,' but the Anglo Americans of the Southwest defined it as such.¹²⁶

Likewise, the dean of Texas historians, Walter Prescott Webb wrote:

Without disparagement it may be said that there is a cruel streak in the Mexican nature, or so the history of Texas would lead one to believe. This cruelty may be a heritage from the Spanish of the Inquisition; it may, and doubtless should, be attributed partly to the Indian blood.¹²⁷

One effect of this colonial discourse was to generate a racial Other -- the Mexican-American -- in contrast to an unmarked white/Anglo self.¹²⁸

Through this discourse on the Mexican-American, Anglo Americans also reformulated their white selves. Analysts of colonial expansion have recognized that while discursively

126 J. MOORE, *MEXICAN AMERICANS* 1 (1970). *See also* ACUNA, *supra* note 124, at 7 ("Anglo-Americans arriving in the Southwest believed that they were racially superior to the swarthy Mexicans, whom they considered a mongrel race of Indian halfbreeds.").

127 WALTER PRESCOTT WEBB, *THE TEXAS RANGERS: A CENTURY OF FRONTIER DEFENSE* 14 (1965).

128 In their discourse, then, the Anglo colonizers took a very negative view of the mixed-race Mexican-American. Interestingly, Mexican thinkers developed a much more positive view of racial mixture. For example, the Mexican philosopher, Jose Vasconcelos, predicted that a "raza cosmica" or "cosmic race" would emerge to fulfill the divine mission of America. *See* PATRICK ROMANELL, *THE MAKING OF THE MEXICAN MIND* 133 (1971). This *raza cosmica* would represent the synthesis of the various races. *See id.* Vasconcelos also argued that North Americans act on the anti-human and anti-Christian principle of racial segregation. *See id.* In contrast, Latin Americans act on the opposite principle of *mestizaje*. *See id.* As a result, Vasconcelos concluded that the germ of the *raza cosmica* of the future is to be found in the hybrid peoples of Latin America. *See id.*

generating and marking a range of racial Others as different from an apparently stable white self, the unmarked, apparently autonomous white self is itself produced as an effect of colonial discourse.¹²⁹ The white self and the racial Other are coconstructed as discursive products.¹³⁰ Thus, whiteness seems comprehensible to many only by reference to racial Others.¹³¹ Perhaps surprisingly, then, it is precisely by means of a construction of a range of racial Others that the white self constitutes itself.¹³² Thus, through colonial discourse regarding Mexican-Americans, Anglos were able to construct themselves.

In this regard, it is possible to identify the operation of a dualism -- Anglo versus Other -- in the colonial discourse regarding Mexican-Americans. Their descriptions of cultural difference were dualistic. Anglo whiteness was apparently comprehensible only by reference to the Mexican Other. For example, one commentator writes:

In the comparison Anglos made, the cultural structure of Mexicans was the antithesis of theirs. Where whites were energetic, Mexicans seemed backward; where whites were ambitious and aggressive, Mexicans seemed apathetic and complacent; where whites considered themselves inventive, Mexicans seemed anachronistic; and where whites knew their direction, Mexicans appeared to be going nowhere.¹³³

129 See FRANKENBERG, *supra* note 6, at 17.

130 See *id.*

131 See *id.*

132 See Ruth Frankenberg, *Whiteness and Americanness: Examining Constructions of Race, Culture and Nation in White Women's Life Narratives*, in RACE 63 (Steven Gregory & Roger Sanjek eds., 1994).

133 ARNOLDO DE LEON, THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821-1900 at 24 (1983). Cf. SAID, *supra* note 123. In describing the colonial discourse on the Orient, Said observed how such discourse showed the Oriental to be the opposite of the Westerner. For example, Said quotes England's representative in Egypt as follows:

As I am only a diplomatist and an administrator, whose proper study is

Marking the Mexican-American as a racial Other may also be viewed as inscribing the Mexican-American with a figurative border. Border theorists have discussed the significance of borders for different racial groups.¹³⁴ They have recognized that the literal border exists as an absolute police divide between two nations -- e.g., Mexico and the United States.¹³⁵ The border is defended through state violence.¹³⁶ The border also has a symbolic meaning: it stands for the harsh relations of dominance and subordination between Anglos and Mexicans.¹³⁷ Thus, the United States/Mexico border and the symbolic border defining the relationship between Anglos and Mexican-Americans constitute sites of violence and personal vulnerability.¹³⁸ Given this, marking the Mexican-American as a racial Other means that the Mexican-American is discursively produced as foreign.¹³⁹ Foreign-ness is inscribed on their bodies in such a way that Mexican-Americans carry a figurative border with them.¹⁴⁰ As a result, Mexican-Americans are always subject to the violence of heightened scrutiny that occurs at the border.¹⁴¹ This burden is of large significance. For border theorists, the border is everywhere.¹⁴²

also man, but from the point of view of governing him. . . I content myself with noting the fact that somehow or other the Oriental generally acts, speaks, and thinks in a manner exactly opposite to the European.

Id.

134 See, e.g., Robert S. Chang, *A Meditation on Borders*, in *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 244 (Juan F. Perea ed., 1996); Renato Rosaldo, *Race and Other Inequalities: The Borderlands in Arturo Islas Migrant Souls*, in *RACE* 213 (Steven Gregory & Roger Sanjek eds., 1994).

135 See *id.* at 217.

136 See *id.*

137 See *id.*

138 See *id.* at 219.

139 Cf. Chang, *supra* note 134, at 247 (Asian-Americans are discursively produced as foreign).

140 Cf. *id.* (Asian-Americans are marked by a figurative border).

141 Cf. *id.* (Asian-Americans are subject to greater scrutiny).

142 See *id.*

VII. THE MEXICAN-AMERICAN AS RACIAL OTHER AND LEGALLY WHITE

Given the discursive production of Mexican-Americans as racial Others, why were Mexican-Americans legally constructed as white? It seems that there were a number of reasons for this paradoxical result. First, politics operated to turn Mexican-Americans into whites. As discussed, in *In re Rodriguez*, Mexican-Americans became white as a result of certain treaties involving the United States and Mexico.¹⁴³ In addition, as noted above, the government of Mexico and the United States Department of State also pressured the United States Census Bureau to reclassify Mexican-Americans as white.¹⁴⁴ Thus, Mexico exerted political pressure to classify Mexican-Americans as white.

Other factors operating in the larger society may have contributed to the Mexican-American's legal classification as white. Social scientists have described the ways that European immigrants became whitened.¹⁴⁵ According to the social science account, by the 1920s, scientific racism promoted the idea that real Americans were white and real whites came from northwest Europe.¹⁴⁶ Accordingly, the 1930 census distinguished immigrants (southern and eastern Europeans) from "native" whites (northwestern Europeans).¹⁴⁷ Euroethnics became white in part because the war against facism led to a more inclusive version of whiteness.¹⁴⁸ Anti-European racism

143 See *supra* notes 21-27 and accompanying text.

144 See *supra* notes 41-42 and accompanying text.

145 See Karen Brodtkin Sacks, *How Did Jews Become White Folks?*, in RACE 78-102 (Steven Gregory & Roger Sanjek eds., 1994).

146 See *id.* at 81.

147 See *id.* at 82.

148 See *id.* at 87. See also ELAZAR BARKAN, THE RETREAT OF SCIENTIFIC RACISM: CHANGING CONCEPTS OF RACE IN BRITAIN AND THE UNITED STATES BETWEEN THE WORLD WARS 1 (1992) ("After World War II the painful recognition of what had been inflicted in the name of race led to the discrediting of racism in international politics and contributed to the decline and repudiation of scientific racism in intellectual discourse.").

lost respectability.¹⁴⁹ Thus, the 1940 census did not distinguish Euroethnics from native whites.¹⁵⁰ Euroethnics became white because of an expanded notion of whiteness.¹⁵¹ As noted above, during this time period, the Census Bureau also changed the race of Mexican-Americans to white.¹⁵² Thus, this post-war expanded notion of whiteness may have operated to reclassify Mexican-Americans as white.

VIII. CONCLUSION

This essay has sought to examine a number of issues concerning Mexican-Americans and whiteness. In particular it has sought to explore how legal actors constructed the race of Mexican-Americans. The record indicates that the law generally constructed Mexican-Americans as white. Drawing on critical theory, the essay explains why the legal definition of Mexican-Americans is important. It also demonstrates that legal recognition of Mexican-Americans as white failed to provide them with the benefits usually associated with whiteness. This failure to receive such benefits has implications for the affirmative action debate. The essay also has shown how the Mexican-American's legal construction as white contrasted with the colonial discourses of the American southwest which characterized Mexican-Americans as racial Others. Despite these colonial discourses establishing the Mexican-American as a racial Other, the essay has argued that politics and other social forces nevertheless operated to turn Mexican-Americans into "whites" as a matter of law. Finally, the essay also has sought to connect theory with practice. Toward that end, the essay has suggested how some of the insights of critical theory may be useful for litigators representing Mexican-Americans.

149 See Sacks, *supra* note 143, at 87.

150 See *id.*

151 See *id.*

152 See *supra* notes 37-42 and accompanying text.

