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Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education

Kevin R. Johnson* & George A. Martinez**

It's dump on Latino time again.¹

INTRODUCTION

In 1998, the California voters, by a sixty-one to thirty-nine percent margin, passed Proposition 227,² a ballot initiative innocuously known as “English for the Children.”³ This measure in effect prohibits bilingual education programs for non-English speakers in the state’s public school system. This Article contends that this pernicious initiative violates the Equal Protection Clause of the

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Fourteenth Amendment because, by employing language as a proxy for national origin, it discriminates against certain persons of Mexican and Latin American, as well as Asian, ancestry. By attacking non-English speakers, Proposition 227, in light of the historical context and modern circumstances, discriminates on the basis of race by focusing on an element central to the identity of many Latinas/os.

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

2 See Christopher Edley, Jr., Color at Century's End: Race in Law, Policy, and Politics, 67 FORDHAM L. REV. 939, 950, 951 (1998) ("[T]here is lurking just beneath the surface [of the bilingual education debate] a subtext about culture, color, and race."); see also infra text accompanying notes 129-217, 243-47 (analyzing this issue in context of Proposition 227). This Article focuses on how Proposition 227 discriminates against Latinas/os in California. Needless to say, other groups composed in part of non-English speakers, particularly Asian Americans, may be adversely impacted in ways similar to Latinas/os by the elimination of bilingual education. See Symposium, Rethinking Racial Divides — Panel on Affirmative Action, 4 MICH. J. RACE & L. 195, 210-11 (1998) (comments of Marina Hsieh) (noting negative impact that Proposition 227 will likely have on Asian Americans); see also Jim Chen, Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny, 59 OHIO ST. L.J. 811, 856-60 (1998) (collecting data showing great language diversity in United States). Indeed, Native Americans in California, often not thought of as linguistic minorities, may be adversely affected. See Scott Ellis Ferrin, Reasserting Language Rights of Native American Students in the Face of Proposition 227 and Other Language-Based Referenda, 28 J.L. & EDUC. 1 (1999). In our analysis, we recognize that the initiative "will not necessarily coincide with color lines" and will affect "white immigrants from Eastern Europe" as well as Latinas/os. Peter J. Spiro, Questioning Barriers to Naturalization, 13 GEO. IMMIGR. L.J. 479, 492 n.63 (1999) (discussing English language requirement for naturalization). However, language, under particular facts and circumstances, can serve as a proxy for race, which we establish in this Article.

3 We use the term "race" here interchangeably with national origin, based on the view that race, like national origin, is a social construction. See generally MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1994) (elaborating on theory of social construction of race).

4 In Hernandez v. New York, 500 U.S. 352, 371-72 (1991) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."); Berta Esperanza Hernández-Truyol, Las Olvidadas — Gendered Injustice/Gendered Injustice: Latinas,
In the face of constitutional and other challenges, the courts upheld the initiative but failed to sufficiently engage the core Equal Protection issue that the case raised. In *Washington v. Davis,* the Supreme Court held that, in order to establish an Equal Protection violation, the plaintiff must prove that the challenged state action was taken with a "discriminatory intent." The conventional wisdom considers this requirement to be unduly stringent because it fails to fully appreciate the nature of modern racial discrimination in the United States. Much can be said for this argument. However, in this instance, there is sufficient evidence to establish that Californians passed Proposition 227 with a discriminatory intent and that it therefore runs afoul of the Equal Protection Clause. This intent flies in the face of the debatable claim of

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


*In a similar vein,* Professor Girardeau Spann contends that voters passed California Proposition 209, which bars consideration of race and gender in state programs, with a discriminatory intent. *See* Girardeau A. Spann, *Proposition 209,* 47 DUKE L.J. 187, 300-14
some supporters that the law would improve educational opportunities for non-English speaking students, a contention that obscures the core racial motivation behind the law's enactment.12

This Article outlines the arguments supporting the Equal Protection challenge to Proposition 227. It is now an especially appropriate time to analyze the circumstances surrounding the initiative's passage because, as time passes, it becomes more difficult to marshal the evidence necessary to prove discriminatory intent.13 To place Proposition 227 into its larger historical context, Part I sketches the history of discrimination in education against persons of Mexican ancestry, citizens as well as immigrants, in California and the Southwest. Part II analyzes the racial edge to the initiative campaign, its provisions, and the disparate impact that the law will have on non-English speakers and, under current conditions in California, on racial minorities. It contends that Proposition 227 amounts to unlawful racial discrimination by proxy.14 Part III ana-


" See infra text accompanying notes 129-217. Proving a discriminatory intent is made all the more difficult by the fact that two Latina/o intellectuals popularized by the media have ardently advocated the elimination of bilingual education. See LINDA CHAVEZ, OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION (1991); RICHARD RODRIGUEZ, HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ (1981).

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

Discrimination by Proxy

alyzes the discrimination by proxy concept’s relevance to the understanding of discrimination against Mexican Americans and other minority groups in the United States and contends that the Supreme Court should incorporate the concept more fully into its Equal Protection jurisprudence.

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

I. THE HISTORY OF DISCRIMINATION AGAINST PERSONS OF MEXICAN ANCESTRY IN CALIFORNIA EDUCATION

A full understanding of Proposition 227 requires consideration of the long history of discrimination against persons of Mexican ancestry in California. Although most of the state was once part of Mexico, California has seen more than its share of racism directed at Mexican Americans and Mexican immigrants. Anti-Mexican sentiment also has pervaded other states in the Southwest, particu-


larly Texas and Arizona. This Section sketches the impact of anti-Mexican animus on educational opportunity in the twentieth century and the changes in the California educational system brought about because of the growing Latina/o population in the state.

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

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

1. School Desegregation Litigation

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

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

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18 See ACUNA, supra note 16, at 82-103.
19 See Brown v. Board of Educ., 347 U.S. 483, 494 (1954) ("[Separating children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.").
Despite the victory in Lemon Grove, by the 1940s the segregation of Mexican Americans was widespread throughout the West and Southwest. In *Westminster School District v. Mendez*, Mexican Americans in Orange County, California, filed an action against school district officials responsible for placing Mexican American children into segregated schools. The trial court found that the segregation violated plaintiffs' Fourteenth Amendment rights. The court of appeals affirmed, distinguishing cases, including *Plessy v. Ferguson*, that had upheld segregation. The court of appeals distinguished those cases because the California legislature in this instance had not authorized segregation.

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

Interestingly, the plaintiffs had urged the court to "strike out independently on the whole question of segregation" in light of the fact that the country had just fought and won World War II, in which many Mexican Americans had distinguished themselves on the battle field. Although acknowledging that judges "must keep

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12 161 F.2d 774 (9th Cir. 1947).
13 Id. at 776.
14 163 U.S. 537 (1896) (upholding segregation on passenger trains); see also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 452 (4th ed. 1991) (discussing cases upholding state laws authorizing segregation).
15 See Mendez, 161 F.2d at 779-81.
16 See id. at 780-81.
17 See id. at 781 (noting that California could legislatively authorize this type of segregation).
18 See id. at 784. The court stated that:

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

19 Id. at 780.
 abreast of the times,” the court declined to take an independent course, stating that “judges must ever be on their guard lest they rationalize outright legislation under the too free use of the power to interpret.” The court instead chose to simply distinguish the earlier segregation cases.

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

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

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51 *Mendez*, 161 F.2d at 780.
52 347 U.S. 483 (1954); see also DERRICK BELL, RACE, RACISM AND AMERICAN LAW 544 (3d ed. 1992) ("As with other landmark cases, the Supreme Court's 1954 decision in *Brown v. Board of Education* has taken on a life of its own, with meaning and significance beyond its facts and perhaps greater than its rationale"); Constance Baker Motley, *The Historical Setting of Brown and Its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 13 (1992) (stating that *Brown's* "new approach to attacking segregation, per se, in education had been inspired by *Mendez*").
53 *See Brown*, 347 U.S. at 495.
55 *See id.* at 580, 584.
56 *See id.* at 585.
cally decided whether de facto segregation violated the Constitution.  

The Soria case suggests that the ability to achieve social change through litigation may be limited.  

As Soria indicates, litigation led to judicial holdings that de jure segregation was unconstitutional. That litigation effort, however, found it difficult to remedy the de facto segregation that continued to exist in the California schools.

2. School Finance Litigation

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

In Serrano, Mexican Americans brought a class action alleging that the California public school financing scheme violated the Equal Protection Clause of the United States Constitution and the

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


33 5 Cal. 3d 584, 96 Cal. Rptr. 601 (1971).

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

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

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

44 See Serrano, 5 Cal. 3d at 589-90, 96 Cal. Rptr. at 604.
45 Id. at 604, 96 Cal. Rptr. at 615.
46 Id. at 608-09, 96 Cal. Rptr. at 618.
47 See id. at 609-15, 96 Cal. Rptr. at 619-23.
48 See id. at 614-15, 96 Cal. Rptr. at 623.
50 See id. at 28, 37.
51 See id. at 55. After Rodriguez, efforts shifted to state law to ensure educational opportunity through school finance litigation. See Enrich, supra note 41, at 128-93 (analyzing developments in school finance litigation under state law after Rodriguez).
53 See William A. Fischel, How Serrano Caused Proposition 13, 12 J.L. & Pol. 607, 611 (1997); see also Martha S. West, Equitable Funding of Public Schools Under State Law, 2 Iowa J.
The new law sought to reduce inequalities among school districts by transferring property taxes raised in affluent districts to poorer districts.  

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

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

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See Fischel, supra note 53, at 611.
See CAL. CONST. art. XIII A, §§ 1-6.
Fischel, supra note 53, at 613.
See RODOLFO F. ACUÑA, ANYTHING BUT MEXICAN: CHICANOS IN CONTEMPORARY LOS ANGELES 91-93 (1996).
See Fischel, supra note 53, at 613 ("Throughout the 1980s, California was last or near last in the country in terms of the percent of personal income spent on public education. What is not often noticed is that the decline began soon after Serrano.") (footnote omitted); see also infra notes 82-88 (providing statistics on rapid decline in California's spending per pupil in public schools as Latina/o percentage of student body increased).
See Hirji, supra note 59, at 596 (citing PAUL M. GOLDFINGER, REVENUES AND LIMITS: A GUIDE TO SCHOOL FINANCE IN CALIFORNIA 8 tbl.11 (1997)).
3. Bilingual Education

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

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

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

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64 *See Lau,* 414 U.S. at 568.


66 *See* CAL. EDUC. CODE § 52165 (Deering 1987).


68 *See id.* at 55.
B. The Latina/o Population Explosion and the Impact on California's Public School Enrollment

The legal developments in public education in California can only be fully understood by considering the changing demographics of the state. California's population is the country's most diverse and will continue to become more so for the foreseeable future. Although people of every race and national origin are contributing to this demographic shift, the growth of the Latina/o population has been nothing less than explosive. Alarming many Anglo Californians, it contributed to their unwillingness to support the state's public schools and to their embrace of Proposition 227.69

"If 'demography is destiny,' then California's destiny is becoming decidedly more Latino."70 Over seven million, or one-third, of the twenty-one millionLatinas/os living in the United States reside in the Golden State.71 Latinas/os jumped from 18% of the state's population in 1980 to 26% in 1990.72 Current projections have them comprising 25.8% of the state's population in 2000, 31.6% in 2010, and 36.3% in 2020,73 when they will be poised to become California's "majority minority."74 Most California Latinas/os are of Mexican origin. In 1990, 80% traced their roots to Mexico, followed by 11% from Central and South America.75

Nowhere has Latina/o population growth been more apparent than in Southern California. In Los Angeles County, Latinas/os already make up the majority of all residents, which represents a dramatic increase from 1990, when Latinas/os constituted about

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


71 See id.

72 See id. at 1, 7, tbl.1-1.


75 See GEY ET AL., supra note 70, at 9 tbls.1-3 & fig.1-3. Latinas/os, African Americans, and Asians together accounted for 32% of the state's population in 1980 (19% Latina/o, 8% African American, and 5% Asian) and 44% in 1990 (25% Latina/o, 7% African American, and 9% Asian). See id. at 8 fig.1-2.
38% of the county’s population, and 1980, when they amounted to over 27%. Indeed, “Los Angeles County alone contains 44% of California’s Latinos.” By 2010, Anglo majorities will have disappeared in at least sixteen local jurisdictions, including the high-growth counties of Fresno, Riverside, and San Bernardino.

A comparison of the surnames of new home buyers confirms the shift. Nationally, the top four buyers are named Smith, Johnson, Brown, and Jones. Garcia shows up at number seven. But in Los Angeles, the top four buyers are named Garcia, Hernandez, Martinez, and Gonzalez, all Spanish surnames. The grand “American” name Johnson drops to number seven.

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

Increased immigration, high birth rates, and “white flight” from urban areas and public schools to suburban areas and private schools, have resulted in Latina/o domination of California’s public schools. In 1997-98, of the state’s 5.7 million public school students, 2.3 million (40.5%) were Latina/o compared to 2.2 million white (38.8%). African Americans (8.8%) and Asians (8.1%) constituted another million students.

76 See id. at 21 tbl.2-5.
77 Jon Stiles et al., California Latino Demographic Databook 2-4 (California Policy Seminar publication 1998).
78 See RAND California, supra note 73.
79 See supra note 70, at 8 fig.1-2.
Similar changes have occurred in the enrollment of limited English proficient ("LEP") students, the vast majority of whom are recent immigrants. From 1982 to 1990, there was an increase of over 480,000 LEP students statewide to 1.4 million — an increase of 226%. LEP students accounted for nearly a quarter of all students enrolled in California public schools. For years, the lion’s share of LEP enrollment has been Spanish-speaking students of Latina/o origin. In 1993, 47.3% of Latina/o students were LEP; by 1998, this figure had risen to 49.2%. By contrast, in 1993, 44.1% of Asian students were LEP; by 1998, this figure had dropped to 40.1%.

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

Simultaneous with the Latinas/os increase as a percentage of California public school enrollment, California's spending per pu-
pil fell precipitously as a percentage of the national average. The trends are reflected graphically in Figures 1 and 2.
C. Responses to the Demographic Changes: Disadvantaging Latinas/os and Other Minorities Through Race Neutral Proxies

Many legal and political responses, in addition to decreased funding to the public schools, can be linked to the changing racial
demographics of the State of California.\textsuperscript{90} As the minority population increased as a proportion of the state's population in the post-World War II period, a variety of laws were passed in response. Consider the last decade.

Passed in 1994, Proposition 187, which if implemented would have barred undocumented immigrant children from the public schools and excluded undocumented immigrants from a variety of public benefits, would have disparately impacted the community of persons of Mexican ancestry in California.\textsuperscript{91} The initiative galvanized Latina/o voters in the state; they voted overwhelmingly against a law that Anglo voters decisively supported.\textsuperscript{92} Proposition 187 drew the attention of Congress, which in 1996, enacted welfare "reform" that eliminated eligibility of many legal, as well as undocumented, immigrants from various public benefits.\textsuperscript{93} Latina/o immigrants subsequently flocked to naturalize and become citizens in order to avoid the potential impacts of the new laws, as well as other onerous laws punishing noncitizens, and to participate in the political process to avoid such attacks in the future.\textsuperscript{94}

More generally, anti-immigrant sentiment contained a distinctly anti-Mexican tilt as the century came to a close.\textsuperscript{95} Drastic immigration reforms in 1996 eliminated judicial review of many immigration decisions of the immigration bureaucracy with devastating

\textsuperscript{90} See supra text accompanying notes 69-88.


\textsuperscript{92} See Johnson, \textit{Immigration Politics}, supra note 90, at 658-59 & n.143.


consequences for minority communities. Deportations of aliens, especially "criminal aliens," meant the removal of many Mexican and Central American immigrants. In fiscal year 1998, almost ninety percent of those removed from the United States were from Mexico and Central America. At the same historical moment, hate crimes, police harassment, and violence against Latina/o immigrants and citizens increased.

Other laws with similar racial bents often speak in facially neutral terms. The ever-popular "tough on crime" laws, such as the "three strikes" law, target minority criminals, as does the claim that certain politicians are "soft" on crime, as driven home by the famous Willie Horton advertisements in the 1988 Presidential election. Welfare "reform," often directed at women of color, long has been an issue polarizing minorities and whites, thereby forming a wedge between racial groups.
Moreover, the political retrenchment with respect to affirmative action directly challenged the status of racial minorities. Proposition 209, dubbed the “California Civil Rights Initiative,” in fact dismantled affirmative action programs designed to remedy discrimination against the state’s minority population and ensure diversity in employment and education. The electorate passed this law in the face of strong opposition from Latinas/os and African Americans. Coming on the heels of some high profile judicial decisions rolling back affirmative action, underrepresented minorities found it difficult to understand Proposition 209 as anything other than an attack directed at them.
D. Summary

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

III. PROPOSITION 227: DISCRIMINATION BY PROXY

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

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

The ability to speak Spanish has long been an issue in California. For much of the state's history, the public schools adhered to an English-only policy, with punishment meted out to children who braved speaking Spanish in the public schools. Sensibilities changed, however, and some school districts eventually began to offer bilingual education. Nonetheless, "[t]he debate over bilingual education has raged since the 1960s."

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107 See JULIAN SAMORA & PATRICIA VANDEL SIMON, A HISTORY OF THE MEXICAN AMERICAN PEOPLE 162 (rev. ed. 1993). As Professor Cruz Reynoso has described:

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


108 See supra text accompanying notes 63-68.

109 Rachel F. Moran, Bilingual Education as Status Conflict, 75 CAL. L. REV. 321, 326 (1987) (footnote omitted) [hereinafter Moran, Status Conflict]; see ACUÑA, supra note 58, at 293-94
In *Lau v. Nichols*, the Supreme Court held that a school district violated provisions of the Civil Rights Act of 1964 that barred discrimination on the basis of race, color, or national origin. The school district violated this act because it failed to establish a program for non-English speaking students. Critical to our analysis, the Court treated non-English speaking ability as a substitute for race, color, or national origin. Other cases also have treated language as a proxy for race in certain circumstances. This reasoning makes perfect sense. Consider the impact that English-only rules have on Spanish, Chinese, and other non-English speakers. It is clear at the outset that, under current conditions, such regulations will have racial impacts readily understood by proponents. "Given the huge numbers of immigrants who enter this country from Asian and Latin American countries whose citizens are not White and who in most cases do not speak English, criticism of the inability to speak English coincides neatly with race."
The sociological concept of status conflict also helps explain the intensity of the racial divisiveness generated by laws regulating language usage. Anglos and Latinas/os see language as a fight for status in U.S. society. Courts and commentators have analyzed extensively the Latina/o fight against English only laws and regulations. Some vocal critics claim that the alleged demise of the English language in the United States has "splintered" U.S. society. "Unfortunately, the English-only movement . . . hosts an undeniable component of nativism and anti-Latino feeling." Not coincidentally, English-only initiatives have tended to be in states with significant Latina/o, Asian, Native American, or foreign born populations.

With race at the core, the modern English-only and bilingual education controversies are closely related. Latinas/os resist

_Known as Race: The Road to Tamazunchale_, 30 RUTGERS L.J. 707, 709-10 (1999) (discussing connection between culture and race).

115 See Moran, Status Conflict, supra note 109, at 341-45.
116 See, e.g., Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994) (holding that employer’s English only rule did not violate Title VII); Gutierrez, 838 F.2d at 1031 (enjoining enforcement of English-only rule); Long v. Baeza, 894 F. Supp. 933 (E.D. Va. 1995) (finding that similar policy did not violate Title VII); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) (upholding employers English-only rule); EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 2d 911 (N.D. Ill. 1999) (holding that EEOC had stated valid claim based on employer’s English-only rule).
118 See Michael W. Valente, Comment, One Nation Divisible by Language: An Analysis of Official English Laws in the Wake of Yniguez v. Arizonans for Official English, 8 SETON HALL CONST. L.J. 205, 209-10 (1997) (compiling various English only laws proposed in Congress and those enacted by states). Discrimination on the basis of accent is a related concern. See Mari J. Matsuda, Voices of America: Accents, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 YALE L.J. 1325 (1991); see also Fragante v. City of Honolulu, 888 F.2d 591 (9th Cir. 1989) (addressing Title VII claim alleging accent discrimination); Carino v. University of Oklahoma, 750 F.2d 815, 819 (10th Cir. 1984) (“A foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions.”); Forsythe v. Board of Education, 956 F. Supp. 927 (D. Kan. 1997) (quoting Carino).
120 Lazos, Judicial Review, supra note 10, at 442.
121 See id. at 435-40.
language onslaught as an attack on their identity. "[L]anguage minorities understand English-only initiatives as targeted at them ... Spanish ... is related [to] affective attitudes of self-identity and self-worth. Thus, language symbolizes deeply held feelings about identity and is deeply embedded in how individuals place themselves within society."\footnote{22}

The intensity of the language debate at times is difficult to comprehend unless one views the laws as symbolic attacks under color of law against minority groups. For example, California voters in 1986 passed an advisory initiative that had no legal impact but to declare English the official language of the state of California.\footnote{23}

\[O\]pponents contended the measure conveyed a symbolic message that culturally and linguistically different groups were unwanted. They alleged that the campaign was a thinly veiled form of racism and derived from anti-immigrant sentiment. ... \[S\]upporters argued that it was a common sense way to ensure that California's population remained politically cohesive.\footnote{24}

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

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

B. The Case of Proposition 227

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

1. The Language of the Initiative

The people targeted by Proposition 227 are identified in the official title of the measure. This title, English Language Education for Immigrant Children, was shortened by advocates during the campaign to English for the Children. In the “Findings and Declarations,” Proposition 227 refers four times to immigrants or immigrant children. Mention is made of “[i]mmigrant parents,” who “are eager to have their children acquire a good knowledge of Eng-

127 Id.
128 See infra text accompanying notes 129-217.
129 See infra text accompanying notes 130-217.
131 “English for the Children” was also the name of the principal group advocating passage of Proposition 227. Its chairman was Ron Unz, who drafted the initiative. See, e.g., BALLOT PAMPHLET, supra note 2, at 34 (Argument in Favor of Proposition 227).
lish”;132 the state’s public school system, which has done “a poor job of educating immigrant children”,133 the “wast[e of] financial resources on costly experimental language programs whose failure . . . is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children”;134 and the resiliency of “[y]oung immigrant children,” who “can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language.”135

In a state where Latinas/os dominate the ranks of immigrants,136 public school children, and non-English speakers, references to immigrants necessarily refer primarily to Latinas/os. From 1992 to 1995, the largest group of legal immigrants to California — almost forty percent — came from Latin America,137 with more hailing from Mexico than any other country.138 In 1998, Latinas/os constituted over forty percent of California public school children enrolled in kindergarten through twelfth grade.139 According to the 1990 census, among the state’s school age children who lived in households where nobody over age fourteen spoke only English or spoke English well, over seventy percent lived in Spanish-speaking homes.140 In the California schools, students not fluent in English are classified as “limited English proficient” or “LEP.”141

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133 Id. § 300(d) (emphasis added).
134 Id. (emphasis added).
135 Id. § 300(e) (emphasis added).
136 See supra text accompanying notes 80-81.
137 See supra text accompanying notes 80-81. This does not include undocumented immigrants. In October 1996, the estimated undocumented population in California was about two million with immigrants from Mexico constituting roughly 54% of the total undocumented population. See U.S. DEP’T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 200 tbl.N (1999) [hereinafter INS STATISTICAL YEARBOOK].
138 See Hoang, supra note 81, at 1, 6 (reporting that, in 1995, 20% of all legal immigrants intending to settle in California were born in Mexico).
140 See Gey et al., supra note 70, at 34 tbls.3-5. Almost one-fourth lived in Asian-language-speaking homes and five percent in other-language-speaking homes. See id.
141 See, e.g., Valeria G. v. Wilson, 12 F. Supp. 1007, 1011 (N.D. Cal. 1998); see also supra text accompanying notes 84-86 (discussing increased numbers of Latina/o limited English proficient students in California schools).
over 1.3 million LEP students attended the state's public schools, with more than a million being Spanish-speakers.

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

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

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

This flies in the face of this nation's firm tradition of protecting fundamental family decisions, such as the type of education the children should receive, from governmental interference. Section 305 denies Latina/o parents the choice of having their children taught English through gradual exposure rather than through mandatory immersion. It also dismisses the views of bilingual education experts, many of whom believe that non-English-

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142 See Plaintiffs’ Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, at 51 n.86 (relying on Exhibit B to Declaration of Christopher Ho), Valeria G. v. Wilson, Case No. C 98-2252 CAL (N.D. Cal. 1998).
143 See id.
144 CAL. EDUC. CODE § 300(a) (West Supp. 1999).
145 See Aleinikoff & Rumbaut, supra note 123, at 11-14 (reviewing empirical data).
146 CAL. EDUC. CODE § 305 (West Supp. 1999).
147 See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating state law requiring all children to attend public school).
speaking children generally need years of study in a second language to become proficient enough to succeed in it academically."

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

2. Ballot Arguments

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

First, the Proposition 227 advocates proclaimed that "[f]or most of California's non-English speaking students, bilingual education actually means monolingual, SPANISH-ONLY education for the first 4 to 7 years of school." No mention is made of the type of education afforded any other group of students, whether African American, Asian, or white. Second, the argument identifies "La-

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


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


BALLOT PAMPHLET, supra note 2, at 34 (Argument in Favor of Proposition 227).

Id.
tino immigrant children" as "the principal victims of bilingual education," because they have the highest dropout rates and lowest test scores of any group.\textsuperscript{154}

Third, the proponents of the measure state that "[m]ost Latino parents [support the initiative], according to public polls. They know that Spanish-only bilingual education is preventing their children from learning English by segregating them into an educational dead-end."\textsuperscript{155} If Proposition 227 were truly race neutral, it would be unnecessary to invoke the alleged political opinions of Latina/o parents.\textsuperscript{156} Similarly, the rebuttal to the argument against Proposition 227 criticized the measure's opponents as the leaders of organizations whose members "receive HUNDREDS OF MILLIONS OF DOLLARS annually from our failed system of SPANISH-ONLY bilingual education."\textsuperscript{157}

3. Statements by Advocates

At first glance, the overt anti-Latina/o sentiments that surfaced during the racially-charged campaigns for Propositions 187 and 209\textsuperscript{158} seemed to be missing from the Proposition 227 campaign. California Governor Pete Wilson campaigned vigorously for passage of these racially-divisive immigration and affirmative action initiatives and gained the reputation as "the greatest bogeyman for Latinos."\textsuperscript{159} Quirky Silicon Valley millionaire Ron Unz, who wrote, financed, and directed the campaign for Proposition 227, and had once challenged Pete Wilson for the Republican gubernatorial

\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} As it turned out, the polling was inaccurate; Latinas/os voted against the initiative by a margin of nearly two to one. See infra text accompanying notes 199-217.
\textsuperscript{157} BALLOT PAMPHLET, supra note 2, at 35 (Rebuttal to Argument Against Proposition 227). Along similar lines, Proposition 227 proponents argued that California lacked the financial resources to effectively implement bilingual education, which long had been criticized from many fronts. See Amy S. Zabetakis, Note, Proposition 227: Death for Bilingual Education, 13 GEO. IMMIGR. L.J. 105, 120-22 (1998); see also supra text accompanying notes 41-62 (analyzing inequality in California public schools caused by school finance system).
\textsuperscript{158} See Johnson, Immigration Politics, supra note 90, at 654-58 (documenting disturbing anti-Latina/o statements made by drafters Ron Prince and Barbara Coe and by elected public officials).
\textsuperscript{159} See Benjamin A. Doherty, Comment, Creative Advocacy in Defense of Affirmative Action: A Comparative Institutional Analysis of Proposition 209, 1999 WIS. L. REV. 91, 103-07 (describing racial messages in Proposition 209 campaign, including David Duke's racist appeals in support of the initiative).
nomination, took a different tack. Having opposed Proposition 187, Unz distanced himself from Wilson and other kindred spirits.\textsuperscript{161} From the outset, the sponsors of Proposition 227 denied any racial animus. Unz claimed to support Latina/o parents who kept their children out of bilingual classes and insisted that they learn English.\textsuperscript{162} To unveil Proposition 227, he went to Jean Parker Elementary School in San Francisco,\textsuperscript{163} where nearly a quarter-century earlier the family of Kinney Lau, an immigrant Chinese student, had successfully sued the city’s school district to secure Lau’s right to receive a bilingual public education.\textsuperscript{164} In media appearances, Unz asserted that Proposition 227 was neither anti-immigrant nor anti-Latina/o\textsuperscript{165} and proclaimed that any victory would be morally hollow without Latina/o support.\textsuperscript{166} All of which prompted some Latinas/os, such as California Assembly Speaker Antonio Villaraigosa, to regard Unz as “a decent guy, although we have different views of the world.”\textsuperscript{167}

Three of the four principal spokespersons who joined Unz in sponsoring Proposition 227 were Latinas/os.\textsuperscript{168} Nevertheless, many

\begin{footnotes}
\item[161] See id.; see also Lou Cannon, Bilingual Education Under Attack, \textit{WASH. POST}, July 21, 1997, at A15 (quoting Unz as calling Governor Wilson’s campaign for Proposition 187 “despicable” and as saying no one associated with that campaign, or others with “anti-immigrant views,” would be permitted to join Proposition 227 campaign).
\item[162] See Zabetakis, supra note 157, at 111.
\item[165] See \textit{Morning Edition} (National Public Radio broadcast, Jan. 8, 1998) (transcript no. 98010806-210) (quoting Unz: “This is in no way an anti-Latino initiative or an anti-immigrant initiative or anything other than something that will benefit, most of all, California’s immigrant and Latino population.”); Cannon, supra note 161 (quoting Unz: “It would be a disaster if this initiative was perceived as anti-immigrant because it is not.”).
\item[166] See Rodriguez, \textit{English Lesson in California}, supra note 151, at 15 (quoting Unz to this effect).
\end{footnotes}
statements made by supporters demonstrated an intent to single out Spanish-speaking Latinas/os in a way that would not be tolerated if aimed at Anglos. Unz, for example, unfavorably compared today's Latina/o immigrants to the European immigrants of the 1920s and 1930s. He acknowledged that the only group of children given large quantities of "so-called bilingual instruction are Latino-Spanish speaking children" and emphasized that Proposition 227 was "something that will benefit, most of all, California's immigrant and Latino population." Responding to the argument that bilingual education helps immigrant pupils learn better by teaching them respect for their culture, he sharply responded that "[i]t isn't the duty of the public schools to help children maintain their native culture."

Emphasizing that she was a Latina supporter of Proposition 227, cosponsor Gloria Matta Tuchman played a similar role for Unz that Ward Connerly, an African American, did for Governor Wilson in the Proposition 209 campaign. She exuded the tough-love assimilationism of her father, who taught her that, "Anglos did us a favor by making us learn English. That's why we are so successful.

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


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

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

Although few would question the importance to immigrants of learning English, coerced assimilation, which too often calls upon immigrants to renounce their native language and other ties to their heritage, is another matter.

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

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

There is a strong public perception that many opponents of “bilingual education” are using the issue as a cover for anti-Latino and anti-immigrant views. Unfortunately, this is often true.

175 See supra text accompany note 145 (discussing English language acquisition by Latinas/os).
177 Nick Anderson, Latina Teacher Pushes Fight, supra note 173 (quoting Unz).
180 Minorities frequently find themselves employed as visible supporters for political ends considered by many to be antiminority. See Sumi Cho, Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption, 40 B.C. L. REV. 73, 121 (1998) (referring to “increasing use of people of color as spokespersons or ‘racial mascots’ for racially regressive policies”).
polling indicates that anger at "bilingual education" is a leading cause of anti-immigrant sentiment among California Anglos.\textsuperscript{181}

Similarly, Ron Unz "admit[ted] that some of the initiative's supporters are no doubt anti-immigrant."\textsuperscript{182}

Significant contributors to the pro-Proposition 227 campaign also had racial aims. For example, One Nation/One California, which gave over one million dollars to the campaign,\textsuperscript{183} expressed concern with "ethnic nationalism."\textsuperscript{184} The California English Campaign, which contributed almost twenty thousand dollars to the supporters of Proposition 227,\textsuperscript{185} expressed deep concerns with the emerging racial mix:

We are all American, but in recent years, our country has been losing its sense of cohesiveness, of unity and of an American identity. Among the reasons for these losses are a lack of an official language (which in our country must be English), bilingual education (meaning teaching immigrant children in native languages), foreign language ballots, drivers license tests (in scores of languages), rising ethnic nationalism, multilingualism, multiculturalism.\textsuperscript{186}

Race was near the surface of the campaign. Linda Chavez, the conservative Reagan Administration official turned syndicated columnist, attacked A. Jerrold Perenchio, the non-Latino television executive of Univision Communications, a Spanish language media outlet, who contributed $1.5 million to defeat Proposition 227.\textsuperscript{187} A school activist supporting the initiative accused Oakland school

officials of forcing bilingual education on English-speaking African American students.\textsuperscript{188}

To some extent, the harshest anti-Latina/o sentiments were expressed by Proposition 227's advocates \textit{after} the election.\textsuperscript{189} The head of the restrictionist Federation for American Immigration Reform, responded to a pro-immigration speech by President Clinton a few days after the measure passed, by stating that "[r]ather than revitalize the cities, immigrants have driven Americans out of the cities. Native-born Americans are fleeing cities like Los Angeles because of the impact of excessively high levels of immigration."\textsuperscript{190}

The president of the restrictionist Voice of Citizens Together, who had campaigned for Proposition 187, in effect predicted a race war and suggested that California’s demographic changes themselves were the problem: "[Proposition 227] passed overwhelmingly except for the Mexican and the black vote."\textsuperscript{191}

4. The Latina/o Reaction

Even if what the advocates of Proposition 227 said could be considered race neutral, what many Latinas/os actually heard was yet another direct attack on them. The initiative inevitably attracted support from Californians uncomfortable with the growing Latina/o population and lost support among Latinas/os who saw the measure as an extension of Propositions 187 and 209.\textsuperscript{192}

Among bilingual education teachers who worked directly with immigrant Latina/o children, feelings about Proposition 227 hit especially close to home. One first grade teacher said "It's a painful subject. I can't even begin to explain to somebody the pain and fright that children are going to feel if they are thrown into an all-English classroom."\textsuperscript{193}

Recalling the nasty Propositions 187 and 209 campaigns, one prominent attorney for the Mexican American Legal Defense and Education Fund called Proposition 227 "the third in a chain of

\textsuperscript{188} See Hansen, supra note 179.
\textsuperscript{189} See infra text accompanying notes 190-91, 199-217.
\textsuperscript{190} Doyle McManus, Clinton Hails Benefits of Legal Migration to America, L.A. TIMES, June 14, 1998, at A1 (quoting Dan Stein).
\textsuperscript{192} See Cannon, supra note 161.
\textsuperscript{193} Anderson, Debate Loud, supra note 172 (quoting Eliana Escobar).
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anti-immigrant, anti-Latino proposals. The vice president for the National Council of La Raza wondered: “Hasn’t the state had enough? Do we need another racially charged, sharp-edged debate about a hot-button, political wedge issue?” California Congressman Xavier Becerra characterized Proposition 227 as “immigrant-bashing.” Speaker of the California Assembly Antonio Villaraigosa called the measure “divisive and polarizing.” State Democratic Party Chair Art Torres called it “another attack” on the Latina/o community.

5. The Results

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

Streisand, supra note 148 (quoting Joseph Jaramillo); see also Anderson, Latina Teacher Pushes Fight, supra note 178 (quoting MALDEF attorney Theresa Fe Bustillos to same effect).

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


Marelius, supra note 160 (quoting Villaraigosa).

Unz, supra note 196 (quoting Torres).

See supra note 3 (citing authority). The official vote was 3.6 million (60.88%) for and slightly less than 2.3 million (39.12%) against. See BILLJONES, [CAL.] SECRETARY OF STATE, STATEMENT OF VOTE: PRIMARY ELECTION JUNE 2, 1998, at 86 (1998).

See Los Angeles Times Exit Poll, California Primary Election, June 2, 1998, at 1 (showing that whites supported the measure by 67-33% and Asian Americans supported it by 57-43% while Latinas/os opposed it by 63-37% and African Americans by 52-48%); see also Rodriguez, supra note 167 (analyzing why Latinas/os voted against Proposition 227). Interestingly, 6% of the supporters recognized that Proposition 227 “discriminates against non-English speaking students” compared to 32% of the opponents. See Los Angeles Times Exit Poll, supra, at 3.


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

It was only Latina/o media outlets that accurately documented the coming tide of resentment among Latina/o voters toward Proposition 227. In early 1998, La Opinion, Southern California's leading Spanish newspaper, and a Spanish television station com-

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203 See supra text accompanying notes 129-98.
204 See McLeod & Guara, supra note 201.
205 See, e.g., Streisand, supra note 148 (reporting results of L.A. Times poll).
206 Id.
208 See Unz, supra note 196 (reporting results of unidentified polls of Latinas/os and L.A. Times poll for all voters).
209 See, e.g., Gregory Rodriguez, The Bilingualism Debate Remakes California Politics, WASH. POST, Feb. 8, 1998, at C2 ("Surprisingly to some, early surveys by the Los Angeles Times and the Field Poll showed that Latino registered voters supported the initiative by a wide margin."). Rodriguez also reported that "early polls" showed registered Latina/o voters supporting Prop. 227 "by as big a margin as 66 percent to 30 percent." See id.
210 BALLOT PAMPHLET, supra note 2, at 334 (Argument in Favor of Proposition 227).
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missioned a poll showing that 43% of Latinas/os favored Proposition 227 but 49% opposed it.\textsuperscript{212}

Despite Latina/o voter rejection of Proposition 227, after the election the media continued to report that Latinas/os supported the measure. For at least two days after the vote, the Associated Press, Washington Post, Chicago Tribune, Christian Science Monitor, and Dallas Morning News, all erroneously reported that Latinas/os voted in favor of the measure by wide margins.\textsuperscript{213} These errors before and after the vote demonstrate that Proposition 227 was conceived, debated, and enacted in an atmosphere of obsession with Latinas/os and their views about the measure.

As the campaign and racially-polarized results demonstrate, Proposition 227 exacerbated already existing racial tensions.\textsuperscript{214} A horrible attack on a white principal of a predominantly Latina/o school in the Los Angeles area made this point clear.\textsuperscript{215} Latina/o students at a number of high schools walked out of class.\textsuperscript{216} Within weeks of Proposition 227's passage, a group of men attacked, kicked, and assaulted two Latinos at a convenience store in Lancaster, California, while yelling “What are you wetbacks doing in here?”\textsuperscript{217}

\section{C. The Discriminatory Intent Necessary for an Equal Protection Violation?}

In \textit{Valeria G. v. Wilson},\textsuperscript{218} the district court rejected all challenges to Proposition 227. The court specifically held against the plaintiffs on an Equal Protection claim based on the argument that the initiative created a political barrier that disadvantaged racial minorities.\textsuperscript{219} In so doing, the court emphasized that, even if the

\begin{itemize}
\item NATIONAL COUNCIL OF LA RAZA, \textit{supra} note 98, at 5. Analysis of this incident is complicated by that fact that the attackers were Asian American. \textit{See id.}
\item 12 F. Supp. 2d 1007 (N.D. Cal. 1998).
\item \textit{See id.} at 1023-24. The court of appeals rejected a similar challenge to Proposition 209. \textit{See supra} note 11 (discussing nature of unsuccessful challenge).
\end{itemize}
measure had a disproportionate impact on a minority group, the plaintiffs failed to establish the necessary discriminatory intent for an Equal Protection challenge. According to the court, the plaintiffs did not attempt to satisfy this “burden [but claimed] that they [were] not arguing a ‘conventional’ equal protection claim.”

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

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

1. Factors in Discerning a “Discriminatory Intent”

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

> [A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in

220 See Valeria G., 12 F. Supp. 2d at 1025.
221 Id.
223 Valeria G., 12 F. Supp. 2d at 1027.
224 See id. (“[A]s this court has already stated, the objective of both sides in this dispute is the same — to educate all [limited English proficient] children.”).
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various circumstances the discrimination is very difficult to explain on nonracial grounds.  

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

Subsequently, the Supreme Court held that an Equal Protection violation can be established with "proof that a discriminatory purpose has been a motivating factor in the decision."  

To make this determination requires:  

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

Among the factors that the Court has found appropriate to consider in evaluating whether state action was motivated by an invidious intent is the "historical background," "[t]he specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," and the "legislative or administrative history."  

Importantly, "[h]istorical evidence is relevant to a determination of discriminatory purpose."  

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

\[\text{Washington, 426 U.S. at 248.}\]  

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

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

\[\text{Arlington Heights, 429 U.S. at 267, 269; see United States v. Fordice, 505 U.S. 717, 747 (1992); see also Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 819 (4th Cir. 1995) (exploring such circumstances before finding that zoning decision was made without discriminatory}\]
The discriminatory intent standard has proven to be a formidable barrier to an Equal Protection claim, although it is not impossible to satisfy. It historically has proven particularly difficult to establish discriminatory motive when an institutional body made the challenged decision. Consequently, some critics claim that initiatives, often legally bullet-proof, are especially damaging to minority rights. History supports this contention. Not only...
racial minorities, but other minorities may be adversely affected. The initiative process effectively encourages voters to take out aggressions against an array of minority groups in a way that has become increasingly difficult to do in American political and community life. Indeed, one political scientist suggests that the increase in initiatives in California in the 1990s reflects the anxieties of middle class whites and is linked to increasing minority representation in government. Such fear about these sorts of passions swaying the political process help explain why the framers of the Constitution opted for a representative form of government.

Because of the rigor of the "discriminatory intent" requirement, some courts and advocates, as suggested by Valeria G., appear to have shied away from Equal Protection challenges to invalidate English-only laws passed by the voters in order to strike them down on less demanding grounds. For example, the Arizona Supreme Court invalidated an initiative that required government employees to speak only English on the job on First Amendment grounds. Previously, a federal court of appeals had invalidated the same law for similar reasons, only to have the case dismissed by the Supreme Court as moot. In so doing, the court of appeals expressly acknowledged the national origin impacts of the English-only law.

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240 See Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (en banc).


242 See Johnson, Immigration Politics, supra note 90, at 670-71 (reviewing language in panel opinion in Yniguez, which was never published after it was vacated, that "[s]ince language is a close and meaningful proxy for national origin, restrictions on the use of language may
2. Discriminatory Intent and Proposition 227

Because the evidence establishes that race was "a motivating factor"\(^2\) behind the passage of Proposition 227, the law violates the Equal Protection Clause of the Fourteenth Amendment.\(^3\) Language was employed as a proxy for race. Race, although not explicitly raised, can be seen by the near exclusive focus on the Spanish language, the history of discrimination against Mexican Americans in California, including the increase in anti-Latina/o and anti-immigrant animus in the 1990s, statements by the advocates of the initiative, and the racially-polarized vote. Race obviously was "a motivating factor" behind the passage of Proposition 227.

A judicial finding that Proposition 227 violates the Equal Protection Clause would be consistent with the landmark decision of *Brown v. Board of Education*.\(^4\) In *Brown*, Chief Justice Warren wrote that segregation "generates a feeling of inferiority as to [the] status [of African Americans] in the community that may affect their hearts and minds in a way unlikely ever to be undone." Proposition 227, by banning teaching in the native language of Spanish speakers, creates a similar stigma for Latinas/o. It suggests that Spanish and other languages are inferior to English and not fit for education.\(^5\)

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\(^3\) See supra text accompanying notes 106-217. Similar arguments have been made with respect to other state action that disparately affects racial minorities. See, e.g., Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIz. L. REV. 1219, 1277-87 (1998) (stating how intent is difficult to prove in environmental racism cases).


\(^5\) Id. at 494; see Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8-12 (1976) (discussing harmful effects of discrimination and segregation, including stigmatization of racial minorities).

III. MEXICAN AMERICANS AND THE FOURTEENTH AMENDMENT

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

The proxies for different minority groups may vary. For example, the “alien land” laws prevalent in many states early in the twentieth century discriminated against persons of Japanese ancestry in a facially neutral way by prohibiting real property ownership by persons “ineligible to citizenship,” at a time when Japanese were the largest nonwhite immigrant group ineligible for naturalization. Opposition to low income housing in certain circumstances may serve as cover for discrimination against African Americans.

In both instances, a proxy for race is employed to discriminate on the basis of race. To this point, the Supreme Court has not generally analyzed the issue by utilizing the proxy concept. In applying the antidiscrimination laws, courts have held that an employer cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination. An example is using gray hair as a proxy for age: there are young people with gray hair (a few), but the fit between age and gray hair is sufficiently close that they would form the basis for invidious classification.

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

See supra text accompanying notes 16-105.


See, e.g., Arlington Heights, 429 U.S. at 252.

McWright v. Alexander, 982 F.2d 222, 228 (7th Cir. 1992); see e.g., Slather v. Sather Trucking Corp., 78 F.3d 415, 418-19 (8th Cir. 1996) ("Age discrimination may exist when an
The Supreme Court has emphasized that an "employer cannot rely on age as a proxy for . . . characteristics such as productivity" and recognized that "[p]ension status may be a proxy for age." Indeed, in Hunter v. Underwood, the Court understood that Alabama's constitutional provision disenfranchising persons convicted of "any crime of moral turpitude" in effect served as a proxy for race and therefore was invalid under the Equal Protection Clause.

Immigration status is often used in today's public discourse as a proxy for race. For example, attacks on "illegal aliens" often may be used as a code, particularly in the Southwest, for Mexican immigrants and Mexican American citizens. This is because Mexican immigrants currently constitute about fifty percent of the undocumented population in the United States. Attacks on "illegal aliens" therefore tend to be directed at Mexican immigrants. Similarly, efforts to deport "criminal aliens" or others who have violated the criminal laws tend to adversely affect minority communities. This is because, in the post-1965 period, most of the lawful immi-

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


254 See infra text accompanying notes 257-59.


256 See INS STATISTICAL YEARBOOK, supra note 137, at 199 (estimating that Mexico is country of origin of 54% of undocumented immigrants in United States).
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grants have come from Asia and Latin America. Thus, an attack on the "criminal alien," and, similarly, the "alien" welfare abuser, may translate into attacks on immigrants of color.

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

Current Equal Protection doctrine and the discriminatory intent requirement, however, make it difficult for Latinas/os to establish constitutional violations. Mexican Americans historically have found it difficult to protect their rights under the Equal Protection Clause of the Fourteenth Amendment. For example, in Hernandez v. State, a Mexican American defendant challenged a murder conviction on the ground that Mexican Americans had been excluded from serving on the jury. Hernandez relied on case law holding that the government violated the Equal Protection Clause by excluding African Americans from serving on juries. The Texas Supreme Court, however, held that the Fourteenth Amendment exclusively protected African Americans. In this regard, the

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260 See supra text accompanying notes 84-86.

261 See United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

262 See supra text accompanying notes 63-88.

263 See supra text accompanying notes 106-217.

264 See supra text accompanying notes 199-217.


266 251 S.W. 2d 531 (Tex. 1952).

267 See id. at 535.
court held that Mexican Americans are "white." Because the juries that indicted and convicted Hernandez were composed of white persons and therefore members of his own race, the court refused to find an Equal Protection violation.\(^{269}\)

The Supreme Court reversed and held in *Hernandez v. Texas*\(^{270}\) that the Equal Protection Clause covered "persons of Mexican descent." The Court, however, only extended a weak form of protection to Mexican Americans. The Fourteenth Amendment covered Mexican Americans only in areas where they were the targets of local discrimination.\(^{271}\) Thus, in areas where Mexican Americans could not prove that they suffered from such discrimination, they were not entitled to invoke the Equal Protection Clause.\(^{272}\) Consequently, Mexican Americans found it difficult to assert rights under the Fourteenth Amendment, in part because they lacked funds to satisfy the evidentiary burden of establishing the existence of local prejudice.\(^{273}\)

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

> [N]o one can fail to be impressed with the one pervading purpose found in [all the Reconstruction Amendments]; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. . . . The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied . . . .\(^{274}\)

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\(^{258}\) Id.; *see* George A. Martínez, *Philosophical Considerations and the Use of Narrative in Law*, 30 Rutgers L.J. 683, 686 (1999) (stating that Texas Supreme Court in *Hernandez* failed to "recognize harm [Mexican Americans] suffered from having no Mexican Americans on juries.").

\(^{260}\) *See* *Hernandez*, 251 S.W. at 535.

\(^{270}\) 347 U.S. 475 (1954).

\(^{271}\) *See* id. at 477-79.


\(^{273}\) *See* id. at 400-01.

\(^{274}\) 83 U.S. (16 Wall.) 36, 71-80 (1872).
Indeed, the Court stated that the Fourteenth Amendment dealt exclusively with discrimination against African Americans: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." \(^275\)

The idea that the structure of civil rights law historically focused on African Americans and Whites has been termed the "Black-White binary." \(^276\) Although some argue that the Constitution must be interpreted in accordance with the intent of the Framers, \(^277\) a dualistic approach to antidiscrimination law is clearly outdated. As famous sociologist Nathan Glazer has proclaimed, "[w]e are all multiculturalists now." \(^278\) Justice Oliver Wendell Holmes explained in *Missouri v. Holland* that a constitutional issue "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what the country has become" in interpreting the Constitution. \(^279\) Thus, the

\(^{275}\) Id. at 81.

\(^{276}\) See, e.g., Delgado, * supra* note 265; see also Kevin R. Johnson & George A. Martínez, *Crossover Dreams: The Roots of LatCrit Theory in Chicano/o Studies Activism and Scholarship*, 53 U. MIAMI L. REV., 1143, 1157-59 (1999) (contending that studies of subordination of various racial minority groups has long been established in ethnic studies scholarship); Mary Romero, *Introduction*, in *CHALLENGING FRONTERAS: STRUCTURING LATINA AND LATINO LIVES IN THE U.S.* xiv (Mary Romero et al. eds., 1997) (criticizing "binary thinking of race relations in this country [that] is so ingrained in the dominant culture that it continues to shape what we see.").


\(^{279}\) 252 U.S. 416, 433-34 (1920). Holmes, viewed by many as "a legal icon in the history of American legal thought," Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell to Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 361 (1994), rejected formalistic approaches to law in favor of a jurisprudence that took account of human experience and social need. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) ("[T]he felt necessities . . . and the intuitions of public policy . . . have had a good deal more to do . . . in determining the rules by which men should be governed."). Professor Paul Brest wrote that:

According to the political theory most deeply rooted in the American tradition, the authority of the Constitution derives from the consent of its adopters. Even if the adopters freely consented to the Constitution, however, this is not an adequate basis for continuing fidelity to the founding document, for their consent alone cannot bind succeeding generations. We did not adopt the Constitution and those who did are dead and gone.
courts should interpret the Equal Protection Clause in a way to fully protect Mexican Americans and other minority groups as well as African Americans and whites.

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

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

Ultimately, interpreting the Constitution in a way that is sensitive to discrimination by proxy would benefit all minority groups. Various subordinated peoples — African Americans, Asian Americans, Native Americans, Latinas/os, women, lesbians, gay men, and others — are discriminated against through different proxies. As sociologists have recognized, appeals to "law and order" and for a


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

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

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return to "traditional" values can "effectively remarginalize minority cultures without ever expressly invoking issues of race."\(^{284}\)

Once this is considered, to demand that plaintiffs establish discriminatory intent — that is, some secret racist mental state — to establish unlawful race discrimination appears incoherent. Legal theorists who have investigated the "grammar" of the term "intent" have shown that when referring to intent, one does not seek to describe a mental event,\(^{285}\) but is simply asking for a justification for "fishy or untoward actions."\(^{286}\) The Supreme Court was mistaken to require plaintiffs to establish intent as a prerequisite for proving an Equal Protection violation. In so doing, the Court saddled racial minorities with an incoherent, often impossible task.

Moreover, it was unnecessary for the Supreme Court to establish the intent requirement. As the Court itself emphasized in *Brown v. Board of Education*, "[s]egregation is unconstitutional not because it is intended to hurt blacks but because, whatever its intent, it relegates them as a group to a permanently subservient position."\(^{287}\) As many have argued, this anticaste principle deserves greater valence in constitutional analysis.\(^{288}\)

**CONCLUSION**

This Article contends that Proposition 227, and possibly related measures, discriminates against persons of Mexican ancestry in violation of the Equal Protection Clause of the Fourteenth Amendment. California's history, together with the text of the initiative, the arguments of the proponents, the campaign, and the racially polarized election results, all demonstrate this to be true.\(^{289}\)

\(^{284}\) OMI & WINANT, *supra* note 6, at 123-128.


\(^{286}\) Yeager, *supra* note 285, at 15-16.


\(^{288}\) See Sunstein, *supra* note 287.

\(^{289}\) See *supra* text accompanying notes 16-228.
If the analysis is less than persuasive, then one must question the "discriminatory intent" requirement itself. Its coherence is far from clear when hundreds of thousands of voters cast ballots and discerning an "intent" is less real than imaginary. Like other discriminatory measures of the past, history books will record Proposition 227's discrimination by proxy as race-based. One worries when legal doctrine requires the difficult efforts at historical reconstruction of "intent" as seen in this Article. Legal doctrine that obscures social reality ultimately loses credibility. One almost feels like philosopher Ludwig Wittgenstein upon completion of his monumental tract:

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

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91 History already is recording the many initiatives passed by California voters as a response to the increased minority population in the state. See generally PETER SCHRAG, PARADISE LOST, CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE (1998) (making this argument).