

# Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866

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*The authors examine the legislative history of section one of the Civil Rights Act of 1866, scientific concepts of race and racial classifications, state racial statutes and litigation, the early federal naturalization law, the perception of Mexican Americans in the Southwest, and the discrimination which the Mexican American has encountered. They conclude that Mexican Americans generally have been perceived as a nonwhite racial group and that the discrimination they have encountered has been based upon that perception. They further conclude that Mexican Americans are entitled to the protections of section one of the Civil Rights Act of 1866.*

Since the Civil War, Congress has enacted a number of statutes designed to eradicate various forms of discrimination. The earliest of these statutes was the Civil Rights Act of 1866.<sup>1</sup> The first section of that Act read:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.<sup>2</sup>

That section is now codified as sections 1981 and 1982 of title 42 of the United States Code.<sup>3</sup>

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1. Act of April 9, 1866, ch. 31, 14 Stat. 27.

2. *Id.* § 1.

3. Section 1981 reads:

All person within the jurisdiction of the United States shall have the same

In early cases dealing with the post-Civil War amendments and civil rights statutes, the Supreme Court gave restrictive interpretations to both section one of the 1866 Act and the thirteenth amendment,<sup>4</sup> upon which the Act was initially based. In the *Civil Rights Cases*,<sup>5</sup> for example, the Court "conceded" that the thirteenth amendment empowered Congress to eliminate all the "badges and incidents of slavery,"<sup>6</sup> but declared that: "Mere discriminations on account of race and color were not regarded as badges of slavery."<sup>7</sup> As for the Civil Rights Act of 1866, the Court stated in dictum<sup>8</sup> that section one, which had been reenacted after passage of the fourteenth amendment,<sup>9</sup> was

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right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1970).

Section 1982 reads: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *Id.* § 1982.

The Civil Rights Act of 1866 was reenacted by the Enforcement Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144, codified as sections 1977 and 1978 of the Revised Statutes of 1874, and appears now as 42 U.S.C. §§ 1981-82 (1970).

4. The text of the thirteenth amendment reads:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONSR. amend. XIII.

5. 109 U.S. 3 (1883).

6. *Id.* at 20-21.

7. *Id.* at 25.

8. The question presented in the *Civil Rights Cases* was the constitutionality of the first two sections of the Civil Rights Act of 1875, Act of March 1, 1875, ch. 114, §§ 1-2, 18 Stat. 336, banning private racial discrimination in public accommodations. 109 U.S. at 8-9.

9. The fourteenth amendment was certified as having been adopted by the requisite number of states on July 28, 1868. See 15 Stat. 708-11 (appendix to Statutes at Large for the 40th Congress). The Civil Rights Act of 1866 was reenacted in 1870. See note 3 *supra*.

The interrelationship of the 1866 Act, its reenactment, the fourteenth amendment, and the *Civil Rights Cases* is protean and complex. A minority of congressmen had, in opposition to the original enactment of the 1866 Act, urged the view later adopted by the Supreme Court in the *Civil Rights Cases*, *i.e.*, that the thirteenth amendment did not authorize congressional enactments beyond a direct prohibition of slavery itself. See, *e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1290 (1866) (remarks of Rep. Bingham). The majority disagreed, feeling that the thirteenth amendment allowed congressional eradication of the "incidents" of slavery, by which they meant the legal theory of slavery. That theory had provided that a slave, being simply a species of property, could not own, devise, inherit, or convey realty or personalty, nor make contracts, testify, sue or be sued. See, *e.g.*, Kates, *Abolition, Deportation, Integration: Attitudes Toward Slavery in the Early Republic*, 53 J. NEGRO HIST. 33, 37-38 n.25 (1968).

Representative Bingham, who believed that the thirteenth amendment did not au-

"intended to counteract and furnish redress against state laws and proceedings,"<sup>10</sup> rather than against private activities. These statements by the Court were typical of those made in both earlier<sup>11</sup> and later<sup>12</sup> cases, with the result that section one of the 1866 Act was thought to ban only government denials of the rights accorded therein.

In *Jones v. Alfred H. Mayer Company*,<sup>13</sup> however, the Court concluded that the thirteenth amendment, in outlawing the institution of slavery, also empowered Congress to ban both public and private racial or color discrimination as vestiges of slavery not immediately eradicated by the prohibition of the institution itself.<sup>14</sup> Moreover, the Court held that Congress, in enacting section 1982, had intended to make both public and private housing discrimination illegal.<sup>15</sup> As a result of the Court's reassessment of the thirteenth amendment and the Civil Rights Act, sections 1981 and 1982 have become important vehicles for combatting private discrimination, particularly in the areas of employment and housing.<sup>16</sup> While Title VII of the Civil Rights Act of

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thorize the Civil Rights Act, was the author of the fourteenth amendment. In it he intended to incorporate the principles enunciated by the 1866 Civil Rights Act and thereby put them beyond constitutional challenge. The vast majority of other supporters of the fourteenth amendment, though reading it as unnecessary for this purpose, advocated it as a method of placing the principles of the 1866 Act in the Constitution and beyond repeal by Southerners and their allies should they ever regain control of Congress. See CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1868) (remarks of Rep. Stevens); *id.* at 2462 (remarks of Rep. Garfield); *id.* at 2502 (remarks of Rep. Raymond); *id.* at 2511 (remarks of Rep. Elliot).

Thus, after the fourteenth amendment became effective, the 1866 Act was reenacted as an addendum to the Enforcement Act of 1870 in order to dispel any possible doubt as to its constitutionality. Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144.

10. 109 U.S. at 16.

11. *Virginia v. Rives*, 100 U.S. 313, 317-18 (1879) (dictum).

12. *E.g.*, *Hurd v. Hodge*, 334 U.S. 24, 31 (1948) (dictum); *Hodges v. United States*, 203 U.S. 1 (1906), *overruled*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 n.78 (1968).

13. 392 U.S. 409 (1968).

14. *Id.* at 437-44.

15. *Id.* at 420-37. Following the Supreme Court's lead, a number of lower federal courts have interpreted section 1981's guarantee of the right to "make and enforce contracts" as creating a cause of action for racial discrimination in private employment. *E.g.*, *Brady v. Bristol Myers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971). See also cases cited in note 16 *infra*.

16. Section 1981's declaration of equal rights to contract has made it a very versatile weapon. Besides banning private employment discrimination, *e.g.*, *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Sanders v. Dobbs House, Inc.*, 431 F.2d 1097 (5th Cir. 1970); *Waters v. Wisconsin Steel Works of Int'l Harv. Co.*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970); see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 n.78 (1968), it has also been held to prohibit discriminatory labor union policies. *E.g.*, *Waters v. Wisconsin Steel Works of Int'l Harv. Co.*, *supra*; *Sabala v. Western Gillette, Inc.*, 362 F. Supp. 1142 (S.D. Tex.

1964 prohibits private discrimination in employment,<sup>17</sup> as does Title VIII of the Civil Rights Act of 1968 in housing,<sup>18</sup> major benefits ensue both to plaintiffs and the public interest in the eradication of discrimination when parties are able to utilize the Civil Rights Act of 1866. These benefits include broader coverage, less onerous requirements for the exhaustion of administrative remedies, longer statutes of limitations, and greater potential remedies.<sup>19</sup>

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1973). It has also been employed to challenge discriminatory admission policies by a private school. *Gonzalez v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va. 1973).

Besides banning discrimination in real estate transactions, *Jones v. Alfred H. Mayer Co.*, *supra*, section 1982 has been interpreted as prohibiting discriminatory membership policies in organizations in which membership is an incident to a lease. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). The Seventh Circuit has recently held that section 1982 created a cause of action for plaintiffs seeking to show that they were charged excessive prices for homes due to the exploitation by builders and land companies of a preexisting segregated housing market. The segregation was the product of past racial discrimination by persons other than the defendants, resulting in a greater demand for housing in black areas than could be met, and consequently higher prices. *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), *cert. denied*, 95 S. Ct. 657 (1974).

17. 42 U.S.C. §§ 2000e *et seq.* (1970), *as amended*, (Supp. II, 1970).

18. 42 U.S.C. §§ 3601 *et seq.* (1970).

19. The coverage of sections 1981 and 1982 is different from that of the 1964 and 1968 provisions. While the former apply to any person who discriminates on the basis of race or color, the latter contain numerous exceptions exempting the discriminatory conduct of various individuals and organizations. For example, as originally enacted, the 1964 Act exempted employers of 25 or fewer employees. 42 U.S.C. § 2000e(b) (1970), *as amended*, (Supp. II, 1970). Members of Congress estimated that this would exclude from coverage 92 percent of all employers and 60 percent of all employees in the United States. *See* 110 CONG. REC. 13090 (1964). The 1972 amendments extended the act to reach employers of 15 or more employees, 42 U.S.C. § 2000e(b), *as amended*, (Supp. II, 1970), but the coverage is obviously still not as extensive as that under section 1981. Similarly, the Fair Housing provisions of the 1968 Act exempt persons selling or renting single-family dwellings who have no more than three such dwellings under certain circumstances. *See* 42 U.S.C. § 3603(b) (1970). Section 1982 contains no such exemption.

Perhaps the most significant differences relate to the statutes of limitations and procedural requirements of the various acts. The statute of limitations under the housing provisions of the 1968 Act is 180 days, 42 U.S.C. §§ 3610(b), 3612(a) (1970), as is that under the employment provisions of the 1964 Act, 42 U.S.C. § 2000e-5(e) (1970), *as amended*, (Supp. II, 1970). (In the case of the 1964 employment provisions, if the person aggrieved has filed a grievance with a state agency which can remedy the discriminatory employment practice, the complaint must be filed with the federal Equal Employment Opportunity Commission (EEOC) within 300 days after the discriminatory act occurred, or within 30 days after notification that the state agency has terminated its proceedings, *whichever is earlier*. *Id.*)

Because sections 1981 and 1982 contain no express statute of limitations, courts have generally looked to an analogous state statute of limitations. The results have varied. Some courts have applied the statute of limitations applicable to civil actions not otherwise provided for by state law. *E.g.*, *Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970). Others have applied the time limitation appropriate for contract actions, analogizing a section 1981 claim to a normal contract claim.

*E.g.*, *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n.16 (5th Cir. 1971). Still other courts have applied the common law personal injury statute of limitations. *E.g.*, *Allen v. Gifford*, 462 F.2d 615 (4th Cir. 1972). See *Larson, The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 56, 76-83 (1972) [hereinafter cited as *Larson*]. But no matter which state statute of limitations is applied, the time during which a suit may be brought is greater than the 180 days provided for in the original 1964 and 1968 Acts or even the 300 days in the amended 1964 Act.

The longer statute of limitations has obvious advantages for plaintiffs, but also serves the public interest in eradicating discrimination. Unlike many breaches of contract or torts, the fact of remediable injury may not be immediately apparent, as where discrimination is not intentional, or where it is intentional but not express. A person denied a job or promotion because of inability to pass a test found to be racially discriminatory because unrelated to job qualifications, should not be barred from relief by failure to discover the discriminatory effect of the test within six months. *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1970).

An additional drawback to the employment provisions of the 1964 Act is the requirement of exhaustion of both state and federal administrative remedies. 42 U.S.C. §§ 2000e-5(c)-(f) (1970), *as amended*, (Supp. II, 1970). See *Love v. Pullman Co.*, 404 U.S. 522, 523 (1972). A plaintiff must file a complaint with the state fair employment practices commission, if any, and then with the EEOC. These agencies have 60 days and 180 days respectively to take action (with extensions in certain limited situations). 42 U.S.C. §§ 2000e-5(c), (f)(1) (1970), *as amended*, (Supp. II, 1970). If the EEOC does not file a civil action within that initial period of 240 days, or if it notifies the complainant of its intention not to bring suit, the complainant may then file a civil action within 90 days. *Id.* § 2000e-5(f)(1) (1970), *as amended*, (Supp. II, 1970). For the indigent plaintiff, this 240 day hiatus precludes seeking an immediate temporary injunction commanding his or her employment (or rehiring if the employee was discharged.) It may operate as a permanent discouragement from bringing any action at all. If the plaintiff is a migrant farm worker, failure to get or keep a job will often necessitate his or her departure from an area long before the 240 days is up.

Requiring resort to administrative conciliation procedures evidences a congressional desire to eradicate discrimination in employment through mediation rather than litigation when possible, but the EEOC procedures have been very ineffective. The EEOC processes its workload very slowly. In 1971, a delay of 18 to 24 months ensued between the filing of a charge with the EEOC and the completion of EEOC action. H.R. REP. NO. 92-238, 92d Cong., 1st Sess. 61 (1971). There were over 25,000 cases in the EEOC's backlog in early 1971. *Larson, supra*, at 72 n.97. In addition, the EEOC has not been very successful in reaching conciliation agreements. In fiscal year 1971-72, agreements were obtained in only three percent of the complaints in the current and carryover workload of the Commission. See *id.* at 72 and source cited therein. In practice, the EEOC seems to sit on the complaint for the requisite time period and then send the complainant a form letter explaining its inability to process the complaint and allowing him or her to initiate judicial proceedings without further ado. In most cases the 240 day conciliation period has no practical effect except to delay effectuation of the declared national policy against discrimination in employment. Thus the EEOC's procedures may simply constitute a meaningless delay of 240 days before suit can be filed, discouraging resort to the protections of the 1964 Act and even providing a period of time during which employers and unions can seek to put the best possible evidentiary face on their policies.

In view of these problems attendant to fair employment practices commissions, it is not surprising that a 1964 survey among unemployed Mexican-Americans in Los Angeles revealed that 90 percent of those interviewed felt that the civil rights and fair employment practices legislation that had been enacted up until that time had produced no results whatsoever. See H. Rowan, *The Mexican American* 3 (1968) (Staff paper prepared for the U.S. Comm'n on Civil Rights) [hereinafter cited as *Rowan*]. The unavailability of adequate remedies for discriminatory employment practices is especially significant for Mexican Americans in light of the view expressed by several commenta-

While repudiating the "state action" limitation on section 1982, the Court recognized a different limit on the coverage of the statute. It stated that section 1982 reached only racial discrimination, as distinguished from religious or national origin discrimination.<sup>20</sup> Exactly

tors that employment discrimination has been the central problem facing people of Mexican descent in the United States. See text accompanying notes 325 & 331 *infra*.

Courts faced with the effect of the exhaustion requirement of Title VII of the 1964 Act on section 1981 actions have reached varying conclusions. In *Waters v. Wiseonsin Steel Works of International Harvester Co.*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970), the court concluded that failure to exhaust Title VII procedures would not bar a section 1981 action if the plaintiff pleads a "reasonable excuse" for having failed to do so. 427 F.2d at 487. The Third and Fifth Circuits have rejected this approach, concluding that there is no exhaustion prerequisite, but suggesting that district courts might, in their discretion, encourage resort to EEOC procedures during the pendency of section 1981 actions. *Young v. International Tel. & Tel. Co.*, 438 F.2d 757, 764 (3d Cir. 1971); *Caldwell v. National Brewing Co.*, 443 F.2d 1044, 1046 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972). Earlier Fifth Circuit cases had concluded that there was no exhaustion requirement at all. *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971); *Sanders v. Dobbs House, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). *But see Penn v. Schlesinger*, 497 F.2d 970 (5th Cir. 1974) (en banc) (per curiam) (individual plaintiffs in class action against 17 federal agencies dismissed for failure to exhaust administrative remedies before Civil Service Commission). Thus plaintiffs who can sue under section 1981 are faced with less onerous exhaustion requirements than plaintiffs who must resort to Title VII.

The remedies available also differ. Because of the exhaustion requirement, only the EEOC can seek an immediate preliminary injunction commanding employment or reinstatement. See 42 U.S.C. § 2000e-5(f)(2) (1970), *as amended*, (Supp. II, 1970). No such limitation exists with respect to section 1981 actions. Also Title VII makes no explicit provision for the award of punitive damages, no matter how outrageous the discriminatory actions are, or for compensatory damages except for back pay. See 42 U.S.C. § 2000(e)-5(g), *as amended*, (Supp. II, 1970). Courts have found no such limitation on actions brought under the post-Civil War civil rights statutes. See, e.g., *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970) (damages for mental suffering available under 42 U.S.C. § 1983 (1970) for job termination in violation of first amendment); *Solomon v. Pennsylvania R.R.*, 96 F. Supp. 709 (S.D.N.Y. 1951) (punitive damages awarded to black plaintiff unconstitutionally forced to surrender seat in accordance with railroad segregation policies).

For more detailed analyses of the relationship between the 1964 and 1968 Acts and sections 1981 and 1982, see *Larson, supra*; Comment, *Racial Discrimination in Employment under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615 (1969).

20. 392 U.S. at 413. The Court's comment is technically dictum since it did not bear directly on the issue presented by the case—whether section 1982 barred private discrimination. It appears to have been primarily a response to the dissent's contention that the majority was creating a civil remedy for discrimination in housing which was wholly unnecessary since the recently enacted Fair Housing provisions of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (1970), created just such a remedy. 392 U.S. at 450, 477-80 (Harlan, J., dissenting). The majority opinion noted this objection in passing and replied that there were many differences between the 1866 and 1968 Acts, *inter alia*, the fact that the 1866 Act applied only to racial discrimination, while the 1968 Act reached racial, religious, and national origin discrimination. 392 U.S. at 413; see 42 U.S.C. §§ 3604-06 (1970). Nevertheless, the limitation of the 1866 Act to racial discrimination was consistent with prior interpretations of the Act. See, e.g., *Georgia v. Rachel*, 384 U.S. 780, 791 (1966); *Agnew v. City of Compton*, 239 F.2d 226, 230 (9th Cir. 1956).

what the Court meant by racial discrimination has not been decided or even much discussed.<sup>21</sup> Sections 1981 and 1982 speak in terms of equality with "white citizens;"<sup>22</sup> the Court in *Jones* spoke of "race or color" discrimination,<sup>23</sup> as did the original Act.<sup>24</sup> Under either of these definitions, persons subject to discrimination because they are of non-white skin color come within the purview of the Act.<sup>25</sup>

The purpose of this Article is to explore whether Mexican Americans,<sup>26</sup> who are already recognized as an identifiable class and national origin group for purposes of the equal protection clause<sup>27</sup> and Civil Rights Acts of 1964 and 1968,<sup>28</sup> are a group entitled to the protections

21. Several law review articles appearing soon after the *Jones* decision briefly examined the question. Compare Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1021, 1034-35 (1969) with Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1315-18 (1969). Most courts which have been faced with the contention that section 1981 bars sex discrimination have rejected the argument. *E.g.*, *Braden v. University of Pittsburgh*, 343 F. Supp. 836 (W.D. Pa. 1972); *League of Academic Women v. Regents of the Univ. of Cal.*, 343 F. Supp. 636 (N.D. Cal. 1972). But see *Johnson v. City of Cincinnati*, 450 F.2d 796 (6th Cir. 1971); *Parmer v. National Cash Register Co.*, 346 F. Supp. 1043 (S.D. Ohio 1972). One court has held that section 1981 reached discrimination against Jews. *Marlowe v. General Motors Corp.*, 4 F.E.P. Cas. 1160 (E.D. Mich. 1972), *complaint dismissed on other grounds*, 5 F.E.P. Cas. 786 (E.D. Mich.), *vacated and remanded sub nom. Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973). Another concluded that East Indian aliens could sue under the statute. *Sud v. Import Motors Limited, Inc.*, 379 F. Supp. 1064 (W.D. Mich. 1974). Two courts have concluded that Mexican Americans can sue under sections 1981 and 1982. See text accompanying notes 30-35 *infra*. Cf. *Godbolt v. Hughes Tool Co.*, 63 F.R.D. 370, 373-74 (S.D. Tex. 1972) (Spanish-surnamed individuals may tentatively join black plaintiffs in class action under Title VII, discrimination based upon national origin being little different than that based upon race).

22. See note 3 *supra*.

23. 392 U.S. at 420.

24. See text accompanying note 2 *supra*.

25. It is now clear that blacks are not the only people to come within the general province of the post-Civil War enactments. See, *e.g.*, *Hernandez v. Texas*, 347 U.S. 475, 477-78 (1954) (fourteenth amendment precludes exclusion of Mexican Americans from grand jury service); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948) (fourteenth amendment and Civil Rights Act of 1866 ban discrimination against Japanese aliens); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (fourteenth amendment and Civil Rights Act of 1866 outlaw discrimination against Chinese aliens); *Hodges v. United States*, 203 U.S. 1, 16-17 (1906) (thirteenth amendment bans slavery and involuntary servitude, irrespective of race or color), *rev'd on other grounds*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43, n.78 (1968); *accord*, *Slaughter-House Cases*, 83 U.S. 36, 72 (1872) (dictum). For a further discussion of the thirteenth amendment see note 29 *infra*.

26. We will generally refer to persons of Mexican descent as Mexican Americans, Mexicans, or persons of Mexican descent. We will use the term Anglo or Anglo-American to refer to others, generally to the exclusion of Indians, Orientals, and blacks.

27. *Hernandez v. Texas*, 347 U.S. 475 (1954); see *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

28. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1970), as amended, (Supp. II, 1970), prohibits private and public employment discrimination

of section one of the Civil Rights Act of 1866.<sup>29</sup> Two federal district courts have passed directly on the question. In *Sabala v. Western Gil-*

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against individuals because of their national origin. *Id.* §§ 2000e-2(a)-(e) (1970), as amended, (Supp. II, 1970). Similarly, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (1970), prohibits public and private housing discrimination against individuals because of their national origin. *Id.* §§ 3604-06 (1970).

29. Although the Supreme Court in *Jones* found the constitutional basis for Congress' power to ban private discrimination in the thirteenth amendment, abolishing slavery, that power is not limited to prohibiting private discrimination against black people. The Supreme Court has stated on a number of occasions that the thirteenth amendment does not just apply to blacks. *E.g.*, *Bailey v. Alabama*, 219 U.S. 219, 240-41 (1911); *Hodges v. United States*, 203 U.S. 1, 16-18 (1905), *overruled on other grounds*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 n.78 (1968); *Clyatt v. United States*, 197 U.S. 207, 218 (1905); *Slaughter House Cases*, 83 U.S. 36, 72 (1872).

Some have argued that the expanded interpretation given the thirteenth amendment and sections 1981 and 1982 following the *Jones* decision, see text accompanying notes 15-16 *supra*, should not be available to all nonwhite minorities because their ancestors were not subjected to the institution of slavery and that the necessary relationship with the thirteenth amendment is, therefore, lacking. *See, e.g.*, Note, *The New Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1315-18 (1969). *But see* Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1021, 1025-26, 1034-35 (1969).

Even accepting the thesis that persons should be covered today by sections 1981 and 1982 only if their ancestors encountered institutionalized slavery or involuntary servitude would not foreclose the question analyzed in this Article—whether Mexican Americans can utilize sections 1981 and 1982. "Involuntary servitude" within the meaning of the thirteenth amendment was practiced in the southwestern territories in the form of peonage—the Mexican equivalent to slavery—under which a debtor could be legally compelled to work for his creditor until the debt was paid. In 1867 Congress acted to specifically outlaw peonage pursuant to its authority under the thirteenth amendment. Act of March 2, 1867, ch. 187, § 1, 14 Stat. 546 (codified at 42 U.S.C. § 1994 (1970)). *See Bailey v. Alabama*, 219 U.S. 219 (1911). Even after its illegalization, however, peonage continued to exist in Arizona and other parts of the United States. R. ACUÑA, *OCCUPIED AMERICA* 86 (1972) [hereinafter cited as ACUÑA], and it was practiced by Anglo as well as Mexican creditors.

But limiting the scope of the thirteenth amendment and sections 1981 and 1982 to groups of persons who could establish that their ancestors had been subjected to institutionalized slavery would be inappropriate. For example, this limitation would mean that not all blacks would be within the purview of the amendment and statutes since not all blacks trace their ancestry to slaves. Approximately 500,000 black people were already free when the thirteenth amendment was adopted. CONG. GLOBE, 39th Cong., 1st Sess. app. 184 (remarks of Sen. Davis). Others immigrated to this country after the amendment passed. Yet the racial discrimination which their descendants encounter is not of a different sort than that encountered by those blacks whose ancestors *were* emancipated by the thirteenth amendment. The import of the *Jones* decision is that the thirteenth amendment banned not only an institution, but action by individuals founded on a particular attitude—racism. While racism and its concomitant ideology of the biological inferiority of nonwhites to whites, see text accompanying notes 79-80, 145-49 *infra*, developed in America initially to justify slavery and the caste system primarily as it affected blacks, *see* G. MYRDAL, *AN AMERICAN DILEMMA* 87-90 (2d ed. 1962) [hereinafter cited as MYRDAL], it also served to justify the treatment of other groups perceived as nonwhite, *e.g.*, Orientals, and as we explore in this Article, Mexican Americans. That is not to say that Mexican Americans were perceived as being identical to blacks or that the discrimination which they have encountered has been of equal breadth or virulence in all cases. Sometimes it has been less substantial; sometimes, worse.



*lette, Inc.*,<sup>30</sup> the court rejected a challenge to the use of section 1981 by Mexican Americans, relying upon a prior holding that Mexican *aliens* could utilize section 1981.<sup>31</sup> But section 1981, because of its foundation in the fourteenth amendment, has long been interpreted as banning state action which discriminates on the basis of alienage.<sup>32</sup> It does not necessarily follow that section 1981's ban on discrimination against Mexican aliens applies with equal force to discrimination against citizens of Mexican descent.<sup>33</sup>

In *Ranjel v. City of Lansing*,<sup>34</sup> the court held that Mexican Americans are covered by section 1982. The court stated:

The Black members of the Lansing ghetto are not the only victims of racial discrimination. At present, because of the economic, social and cultural disadvantages of Mexican-Americans in the Lansing area, as well as their darker complexion, they *also* are the victims of racial discrimination within the meaning of the thirteenth amendment.<sup>35</sup>

While the conclusion we reach in this Article is similar to that reached by the court in *Ranjel*, the statement quoted above represents the total of the court's analysis. And despite the conclusions reached in *Sabala* and *Ranjel*, there are some factors which indicate that Mexican Americans might be considered "white" for purposes of section 1981 and 1982.<sup>36</sup>

We will attempt to answer this question<sup>37</sup> by looking at the

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Rather, to the extent that Mexican Americans or any group of people are subject to discrimination because they are perceived as racially different from "white" Americans, that discrimination is an outgrowth of the attitude that was originally developed to justify slavery. Indeed discriminatory treatment against Mexican Americans was often justified on the grounds that they were similar to blacks and should be treated accordingly. See, e.g., text accompanying notes 235, 276, 288-89 *infra*. American slavery opened the door not only to racism against blacks, but to racism against all groups perceived as nonwhite. The racism a person of Mexican descent encounters is a "badge and incident of slavery."

30. 362 F. Supp. 1142 (S.D. Tex. 1973).

31. *Guerra v. Manchester Terminal Corp.*, 350 F. Supp. 529 (S.D. Tex. 1972), *aff'd*, 498 F.2d 641 (5th Cir. 1974).

32. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948).

33. The defendants in *Sabala* had also stipulated in the pretrial order that the plaintiffs could sue under section 1981 so the defendants' challenge apparently came too late. 362 F. Supp. at 1147.

34. 293 F. Supp. 301 (W.D. Mich.), *rev'd on other grounds*, 417 F.2d 321 (6th Cir., 1969), *cert. denied*, 397 U.S. 980 (1970).

35. 293 F. Supp. at 308 (emphasis in original).

36. Statutes listing races to be segregated from Anglos never mentioned Mexican Americans, see text accompanying notes 81-101 *infra*; a few court decisions referred to Mexican Americans as white, see text accompanying notes 108-26 *infra*; they have been classified as white in the United States census since 1930, see note 197 *infra*; many persons of Mexican descent have rejected any classification which would imply that they were not white, see text accompanying notes 251-58 *infra*.

37. It is important to note that the issue is not whether "Mexican" is a racial,

legislative background of the Act, scientific notions of race, state racial statutes and court decisions, the definition of "white" persons developed by the federal courts in the context of naturalization, the perception of Mexican Americans in the Southwest,<sup>38</sup> and the nature and effects of the discrimination Mexican Americans have encountered.

## I

### THE SETTING

#### A. *Legislative History*

The Civil Rights Act of 1866 was obviously passed primarily to grant citizenship to black people and to guarantee their civil rights. There is not a great deal of material in the debates surrounding the passage of the Act which indicates who else was considered nonwhite, or otherwise within the purview of the Act; and there is almost nothing about persons of Mexican descent. What discussion there is indicates that both proponents and opponents of the bill interpreted the language of section one as applicable to more than just black people. They were well aware that the grant of citizenship and equal rights with white citizens was to "*all persons born in the United States.*"<sup>39</sup>

Opponents argued that this breadth of coverage made the bill both unwise<sup>40</sup> and unconstitutional.<sup>41</sup> Senator Cowan, who argued that the

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as opposed to a national origin category, or whether Mexicans constitute a separate race from all others. Obviously Mexican is a national origin category, just as "Chinese" is a national origin category. But the Chinese are also generally considered to be members of the Oriental race, a category which would also include the Japanese, Mongolians, Manchurians, Vietnamese, Taiwanese, etc. A people defined in terms of nationality may also be nonwhite racially and discrimination they encounter may thus in fact be based upon their perceived race rather than their national origin.

38. Our analysis will deal primarily with conditions as they have existed and still exist in the five southwestern states where the vast majority of Mexican Americans have traditionally resided. The 1970 census indicated that there were a total of 4,532,435 persons of Mexican descent living in the United States. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION: PERSONS OF SPANISH ORIGIN 8 (1973) (Subject Report PC(2)-1C) [hereinafter cited as SPAN. ORIG. POP.]. Of these 3,938,775 or 86.9 percent live in the five southwestern states of Arizona, California, Colorado, New Mexico, and Texas. *Id.* at 9, 11, 13, 23, 29. While representing less than five percent of the total population of the United States, Mexican Americans comprise 12 percent of the population of these five states and are the largest significant minority group in the region. J. MOORE, MEXICAN AMERICANS 52-53 (1970) [hereinafter cited as MOORE]. In addition, our discussion will place particular emphasis on conditions as they exist and have existed in California and Texas, where 3,476,331 persons of Mexican descent, 88.3 percent of the Mexican-American population of the Southwest, reside. SPAN. ORIG. POP., *supra*, at 11, 29.

39. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (emphasis added). See text accompanying note 2 *supra*.

40. Senator Cowan, for example, argued that the Act would grant citizenship to the Chinese in California, perhaps allowing them to take political control there. CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866). See text accompanying notes 51-55 *infra*.

thirteenth amendment did nothing more than abolish the master-slave relationship between whites and blacks<sup>42</sup> and that the Civil Rights Act was, therefore, beyond the scope of the thirteenth amendment,<sup>43</sup> made one of the few examinations of the words "race" and "color." He noted the imprecision of the language, asking:

[W]hat is meant by the word "race," and where [is it] settled that that there are two races of men, and if it is settled that there are two or more, how many[?] Where is the line to be drawn? What constitute the distinctive characteristics and marks which limit and bound these races? . . .

Then "color" is another word upon which nobody is very well advised just at present. Men are of all shades of color, and the races of men differ from the deepest jet up to the fairest of lily white all over the world. But I am not disposed to quarrel with that part of the bill, and I only notice it as an indication of the loose manner in which we legislate about these subjects.<sup>44</sup>

Later in the debates, another opponent, Senator Davis, also noted that the scope of the bill extended beyond blacks:

What does it do?

. . . Here the honorable Senator [Trumbull] in one short bill breaks down all the domestic systems of law that prevail in all the states, so far not only as the negro, but as any man without regard to color is concerned . . .<sup>45</sup>

While opponents of the bill might have been expected to overstate its ramifications in hope of securing its defeat, they were not the only ones attributing a broad scope to the measure—the bill's supporters did so as well. In response to the argument that the bill would give more favorable treatment to blacks than whites, Senator Trumbull, the bill's floor manager, reaffirmed that the bill applied not just to blacks, but to "all persons" in the United States: "Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights . . ."<sup>46</sup> Senator

41. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1784 (1866) (remarks of Sen. Cowan).

42. *Id.* at 499, 1784. See also *id.* at app. 184 (remarks of Sen. Davis).

43. *Id.* at 499.

44. *Id.*

45. *Id.* at 598.

46. *Id.* at 599. Although Trumbull stated in his argument that "the very object of the bill is to break down all discrimination between black men and white men," *id.*, he was not interpreting the Act as applying *only* to blacks. He was simply arguing that the major purpose of the bill, conceded by all, was to guarantee equality between blacks and whites and that the bill did not discriminate in favor of blacks. See *id.* In fact, sponsors of the thirteenth amendment and Civil Rights Act perceived one of the major purposes of the enactments to be protecting the civil rights of whites who had been harassed because of their antislavery beliefs. See J. TENBROEK, *EQUAL UNDER LAW* 168-69, 179 (2d ed. 1965) [hereinafter cited as TENBROEK].

Trumbull reiterated the universal coverage of his bill in various contexts. In response to the argument that the bill would confer suffrage and other political rights on blacks, he stated: "The bill is applicable exclusively to civil rights. . . . [It] is simply intended to carry out a constitutional provision, and guaranty to *every person of every color* the same civil rights."<sup>47</sup> When President Johnson vetoed the initial passage of the bill and argued that the provisions favored blacks over others,<sup>48</sup> Senator Trumbull retorted:

"The details of the bill," says the President, "establish for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race."

With what truth this can be said of a bill which declares that the civil rights and the punishment of all races, including, of course, the colored, shall be the same as those "of white persons," let an intelligent public judge.<sup>49</sup>

Since Senator Trumbull described "all races" as including black people, he obviously did not believe the bill applied *only* to them.<sup>50</sup>

The intended breadth of coverage becomes clearer when one considers the remarks made in Congress concerning the grant of citizenship. Section one declared all persons born in the United States to be citizens.<sup>51</sup> In this regard both opponents and proponents recognized that "all persons" encompassed more than just blacks, even though the primary purpose of the clause was to grant black people born in this country citizenship.<sup>52</sup>

Senator Trumbull was asked on several occasions whether the Act would make citizens of the Chinese and Indians. As to Indians, he he replied: "[I]t would be desirable that it should apply to the Indians so far as those who are domesticated and pay taxes and live in civilized society are concerned."<sup>53</sup> Senator Cowan asked: "[W]hether it will

47. CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866) (emphasis added).

48. *Id.* at 1679.

49. *Id.* at 1760.

50. President Johnson had also charged that the bill favored blacks and discriminated against foreigners. To this Senator Trumbull responded:

But the President tells us that "the bill, in effect, proposes a discrimination against large numbers of . . . foreigners, and in favor of the negro." Is that true? What is the bill? *It declares that there shall be no distinction in civil rights between any other race or color and the white race.* It declares that there shall be no different punishment inflicted on a colored man in consequence of his color than that which is inflicted on a white man for the same offense. Is that a discrimination in favor of the negro and against the foreigner—a bill the only effect of which is to preserve equality of rights?

*Id.* at 1756-57 (emphasis added).

51. See text accompanying note 2 *supra*.

52. See note 61 *infra*.

53. CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866). One of the clearest indications that the Act was not intended to apply to blacks alone was the exclusion from

not have the effect of naturalizing the children of Chinese and Gypsies born in this country?<sup>54</sup> Senator Trumbull simply replied: "Undoubtedly."<sup>55</sup>

Senator Williams discussed what he saw to be the ramifications of making all Indians in Oregon citizens:

The Indians are put under certain disabilities . . . to protect the peace and safety of the community. . . . Suppose these Indians have equal rights with white men. . . . Then if a man is indicted for selling arms and ammunition to an Indian, may he not defend that prosecution successfully upon the ground that Congress has declared that an Indian is a citizen, and has the same right to buy and hold any kind of property that a white man of that State has?<sup>56</sup>

One of the few references to persons of Mexican descent occurred in Trumbull's response to President Johnson's veto message. Presi-

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citizenship of "Indians not taxed." See text accompanying note 2 *supra*. This qualification was the means Congress settled upon to describe those Indians who had not severed their tribal relationship, were not enumerated in the census, and were considered akin to foreigners. See CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866) (remarks of Sen. Trumbull). Indians who were not excluded by this qualification came within the purview of the Act.

54. *Id.*

55. *Id.* The contemporary concern in Congress about citizenship for *foreign-born* Chinese also provides strong evidence that members of Congress knew that granting citizenship and equal rights with whites to "all persons born in the United States" did not just mean blacks. Naturalization was limited to "white" persons, Act of March 26, 1790, ch. 3, 1 Stat. 103; see text accompanying note 128 *infra*, and a number of attempts were made to eliminate that restriction so that the laws would not be racially discriminatory. Representative Raymond introduced one such bill during the debates concerning the Civil Rights Act of 1866. CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866). In 1870, the same year in which the Civil Rights Act of 1866 was reenacted, see note 3 *supra*, Congress amended the naturalization laws, and again there were attempts to eliminate the "white" person limitation. The opposition to these attempts came, to a great extent, from those who were against granting citizenship to the foreign-born Chinese who were immigrating to the Pacific states. See *id.*, 41st Cong., 2d Sess. 5121-25, 5150-67, 5168-76 (1870). For example, Senator Stewart of Nevada explicitly noted that Congress had recently reenacted the Civil Rights Act of 1866, quoted section one of the Act, *id.* at 5150-51, and then stated: "We have given the Chinese a standing in the courts. We have given them all the civil rights that white citizens have . . . ." *Id.* at 5151. Nevertheless he was against granting citizenship to those who were not native-born. *Id.* at 5150-52.

56. CONG. GLOBE, 39th Cong., 1st Sess. 573 (1866). Senator Henderson, who favored citizenship for those Indians who were not connected with any tribe, see *id.* at 571, was concerned that the "not taxed" language, see note 53 *supra*, would be literally construed to exclude Indians who had not paid taxes. He favored instead excluding Indians "subject to tribal authority." CONG. GLOBE, 39th Cong., 1st Sess. 574 (1866). Trumbull finally argued that the "not taxed" qualification would be most easily understood because of its use in the Constitution, U.S. CONST. art. I, § 2[3]. CONG. GLOBE, 39th Cong., 1st Sess. 574 (1866). Henderson then stated: "we are deciding today that [this government] was made for the white man and the black man, but that the red man shall have no interest in it." *Id.* Trumbull responded, "We are not deciding any such thing." *Id.*

dent Johnson had denounced the Act as an unprecedented bestowal of citizenship.<sup>57</sup> Trumbull answered by pointing to the Louisiana and Florida purchases, the treaty which ended the Mexican War, and various other treaties under which: "Frenchmen and Spaniards, Mexicans and Indians, have at different times been made citizens of the United States; and among them some of the very classes of persons mentioned in this bill."<sup>58</sup> Since the French and Spanish were perceived as white at that time,<sup>59</sup> the "very classes of persons mentioned in this bill" must have been a reference to Indians<sup>60</sup> and Mexicans.<sup>61</sup>

These few references to statements contained in the legislative history of the Civil Rights Act indicate that the Act was not conceived of as limited in application to black people.<sup>62</sup> But they obviously do not definitively answer the question whether persons of Mexican descent were considered nonwhite for purposes of the Act's protections. We will therefore examine the concept of race and racial classifications in other contexts. We will look first to the scientific definitions of race and we conclude that they are only helpful to the extent that they shaped popular understanding. We will then examine state racial statutes and adjudication. Neither of these sources leads to an answer to our inquiry either. Next we will look at early federal naturalization legislation as an area containing many of the same concerns as those

57. CONG. GLOBE, 39th Cong., 1st Sess. 1679-81 (1866).

58. *Id.* at 1756.

59. The Spanish and French, being European, were considered white. *See, e.g., id.* at 575 (remarks of Sen. Davis). *See also* the text accompanying notes 137-39 *infra*.

60. *See* text accompanying notes 53-56 *supra*.

61. It is not surprising that Trumbull links Indians and Mexicans. Members of Congress had long been informed of the primarily Indian ancestry of Mexicans. *See* text accompanying notes 86-91, 163-69 *infra*.

Indeed, since a major purpose of the 1866 Act was to combat the decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), which had held that blacks could not be United States citizens, *see* Civil Rights Cases, 109 U.S. 3, 30-36 (1883) (Harlan, J., dissenting), Senator Trumbull was probably familiar with Mr. Justice McLean's dissenting opinion therein, which contains the following language:

On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico [The Treaty of Guadalupe-Hidalgo, which ended the Mexican-American war], we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held, that the people of these Territories did not become citizens under the treaty. They have exercised all the rights of citizens, without being naturalized under the acts of Congress.

60 U.S. (19 How.) at 533.

62. Professor tenBroek stated: "Neither [the Freedmen's Bureau bill nor the Civil Rights Act] was confined to the Negro. . . . The civil rights bill covered the inhabitants of any state or territory of the United States. It was intended to be permanent, truly countrywide, and inclusive of persons of all races." TENBROEK, *supra* note 46, at 179.

surrounding the Civil Rights Act. Finally we will apply a test similar to that developed in the naturalization context for determining whether Mexican Americans have been perceived as nonwhite and whether the discrimination they have encountered has been based upon that perception.

### B. *Scientific Racial Classifications*

Sections 1981 and 1982 were designed to deal with the problem of racial discrimination. In order to determine whether discrimination directed at an individual is "racial," one might first attempt to delineate the various races; and since race is, to some extent, a scientific concept, one might look first to science.

Unfortunately, there has been no generally accepted scientific definition of race or of the major racial classifications which could lead to a definitive interpretation of section one of the 1866 Act. One nineteenth century scientific system contained 29 races; another listed four.<sup>63</sup> The most familiar system had five categories with which it associated five skin colors: Mongolian (yellow), Negro (black), Caucasian (white), Indians of North and South America (red), and Malay (brown).<sup>64</sup> Since there was no scientific consensus, it is unlikely that Congress had scientific classifications in mind when it drafted the statute in terms of equality with "white citizens." At least there is nothing in the debates concerning the 1866 Act which indicates that Congress was using the terminology in a scientific sense. Congress was concerned with those groups whom most Americans, rather than nineteenth-century scientists, considered nonwhite. It would thus be inappropriate to interpret section one of the 1866 Act solely with regard to scientific definitions of race prevailing at that time.<sup>65</sup>

Modern anthropology likewise provides little assistance. It considers skin color to be an inappropriate and inconclusive means of identifying racial groups.<sup>66</sup> Montagu, for example, defines race as follows:

[T]he term "race" designates a group or population characterized by some concentrations, relative as to frequency and distribution,

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63. DICTIONARY OF RACES OR PEOPLES, S. DOC. NO. 662, 61st Cong., 3d Sess. 3 (1911).

64. *Id.*

65. Even though the "white citizens" language ought not to be interpreted in a strictly scientific sense, scientific definitions of race in the early nineteenth century may be relevant to the extent they were popularly known and thus may have informed the opinion of members of Congress. See text accompanying notes 163-69 *infra*.

66. See G. LASKER, PHYSICAL ANTHROPOLOGY 358 (1973). Skin color may be relevant to the extent that skin pigmentation is genetic among large bodies of people. R. BENEDICT, RACE: SCIENCE AND POLITICS 25-26 (rev. ed. 1959) [hereinafter cited as BENEDICT].

of hereditary particles (genes) or physical characters, which appear, fluctuate, and often disappear in the course of time by reason of geographic and/or cultural isolation.<sup>67</sup>

Similarly, another anthropologist defines race as "an interbreeding population whose gene pool is different from all other populations."<sup>68</sup> Utilizing these definitions based on genetic traits common to large and somewhat distinct bodies of peoples, modern anthropologists generally agree upon three major races—Negroid, Mongoloid, and Caucasoid,<sup>69</sup> with American Indians generally classified as a subcategory of the Mongoloid.<sup>70</sup>

Modern racial classifications would seem even more inappropriate for interpreting an act passed in 1866 than the use of scientific notions then prevailing. While they might give some indication of groups which are today subjected to discrimination because of perceived racial characteristics, as Montagu has pointed out:

[W]hen most people use the term "race" they do not do so in the [scientifically accurate] sense above defined. To most people, a race is any group of people whom they choose to describe as a race. Thus, many national, religious, geographic, linguistic or cultural groups have, in such loose usage, been called "race" . . . .<sup>71</sup>

Modern science may thus give an inaccurate picture of who is subject to racial discrimination today because individuals belonging to a group which is accurately defined only in terms of a common religion, country of origin, or other characteristic not passed on through heredity may nonetheless be subjected to discrimination because the discriminator perceives them as having distinct "racial" characteristics.

For example, the Jewish people are a religious rather than a racial group in a strictly scientific sense. But the Nazi attitude and discrimination against the Jews was not founded upon their religious practices; it did not cease upon religious conversion. Indeed it even manifested itself in hunting down and "re-judaizing" assimilated Christians of Jew-

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67. A. MONTAGU, *STATEMENT ON RACE* 8 (3d ed. 1972) [hereinafter cited as MONTAGU]. Obviously, then a persons' nationality, religion, language or culture would be irrelevant to a scientific definition of race based on heredity. *Id.* See also BENEDICT, *supra* note 66, at 9-18. Yet these latter categories have often been used in speaking of various groups of peoples as races. See MONTAGU, *supra*, at 8. In reality, race has been an arbitrary term applied to a group of people to distinguish them from other groups based on whatever characteristics the selector of the characteristics wishes to use. *Id.* See text accompanying note 71 *infra*.

68. J. BIRDELL, *HUMAN EVOLUTION* 487 (1972) (emphasis omitted).

69. MONTAGU, *supra* note 67, at 9. BENEDICT, *supra* note 66, at 31-36.

70. BENEDICT, *supra* note 66, at 177; C. MARDEN & G. MEYER, *MINORITIES IN AMERICAN SOCIETY* 55-56 (2d ed. 1962) [hereinafter cited as MARDEN & MEYER].

71. MONTAGU, *supra* note 67, at 8.



ish extraction.<sup>72</sup> Nor was this discrimination based upon national origin, since Jews of impeccable German ancestry were equally subject to the atrocities visited upon French, Polish, Danish, and Russian Jews. The Nazi discrimination against the Jews was racial in that the Nazis defined the Jews as separate from their "Aryan" race and maintained that Jews were a physically distinct people.<sup>73</sup>

Sections 1981 and 1982 represent attempts to deal with a social phenomenon. Since the evil at which the statutes are aimed is discrimination, the scientific validity of the discriminator's racial definition is irrelevant.<sup>74</sup> The standard of equality with "white citizens" employed

72. This is reflected by the following passage from a novel describing the experiences of a nonreligious Jewish woman raised by intellectual, nonconforming parents, while she was living in Germany during her husband's active military duty there:

I read about the Einsatzgruppen and imagined digging my own grave and standing on the brink of a great pit clutching my baby while the Nazi officers readied their machine guns. I imagined the shrieks of terror and the sounds of bodies falling. I imagined being wounded and rolling into the pit with the twitching bodies and having dirt shoveled over me. How could I protest that I wasn't a Jew but a pantheist? How could I plead worship of the Winter Solstice and the Rites of Spring? For the purposes of the Nazis, I was as Jewish as anyone.

E. JONG, *FEAR OF FLYING* 67 (1973).

73. The following exchange between the anti-semitic pornographer Julius Streicher and the Nuremberg prison psychologist exemplifies the perception of the Jews as a physically, and thus racially, distinct group:

"They are crucifying me now," [Streicher] said confidentially. "I can tell. Three of the judges are Jews."

"How can you tell that?"

"I can recognize blood. Three of them get uncomfortable when I look at them. I can tell. I've been studying race for 20 years. The body structure shows the character. I'm an authority on that subject. Himmler thought he was, but he didn't know anything about it. He had Negro blood himself."

"Really?"

"Oh, yes," he grinned triumphantly, "I could tell it by his head shape and hair. I can recognize blood."

G. GILBERT, *NUREMBERG DIARY* 43 (1947). The Nuremberg judges (none of whom were Jewish so far as can be determined) decisively rejected Streicher's claims to expertise by convicting him of crimes against humanity and sentencing him to death. It is noteworthy that the Nazi regime, presumably considering most of its agents less expert than Streicher, resolved the identification problem by requiring Jews to wear yellow Stars of David, the letter "J," or some other distinctive mark.

74. Gunnar Myrdal wrote:

The definition of the "Negro race" is thus a social and conventional, not a biological concept. The social definition and not the biological facts actually determines the status of an individual and his place in interracial relations.

...

Thus the scientific concept of race is *totally inapplicable at the very spots where we recognize "race problems."*

MYRDAL, *supra* note 29, at 115 (emphasis in original). See also notes 77, 80 *infra*.

This is not to say that science has played no role in racism in this country. The nativist movement, which proclaimed the superiority of the "Anglo-Saxon race," received important support from the "scientific" racial theories of eugenics, which contended that heredity was absolute and favored breeding from the best "racial stocks." J. HIGHAM, *STRANGERS IN THE LAND* 149-57 (2d ed. 1963) [hereinafter cited as HIGHAM].

in the statutes is consistent with *popular* rather than scientific usage and equates skin color with race. While many groups have encountered discrimination (and this discrimination may even be temporarily racial in nature<sup>75</sup>), groups which are more readily distinguishable through their visible, physical characteristics seem to encounter discrimination in the United States which is stronger, more long-term, and less susceptible to social and economic change than that encountered by others. In part, this results from the fact that such groups are more readily *distinguishable* by virtue of their visible physical traits. But the exterior, visible differences become symbolic of invisible differences. It is this whole set of perceived physical differences—of which skin color is the prime example<sup>76</sup>—and the group characteristics they are believed to signify that inform popular racial classifications.<sup>77</sup> It is what

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The nativists were a powerful force behind the drive to curtail immigration from outside northwestern Europe and Britain which culminated in the passage of the first permanent quota law in 1924. Act of May 26, 1924, ch. 190, § 11, 43 Stat. 159-60. After the passage of the 1924 Act, those favoring restricted immigration turned their attention to the problem of immigration from the Western Hemisphere—*i.e.*, from Mexico. The same eugenicists who had testified in Congress as to the racial inferiority of the peoples from eastern and southern Europe returned in order to “scientifically” establish the inherent inferiority of the Mexican immigrant and the consequent threat to the American people that continued immigration from Mexico entailed. See text accompanying notes 176-84 *infra*. Scientific definitions of race and scientific racial classifications may therefore be relevant to the extent that they contribute to popular notions of race.

75. The successful drive to limit immigration from areas outside northwestern Europe and Britain was premised to a major extent on the argument that the immigrants were physically (*i.e.*, racially) inferior to the “Anglo-Saxons.” See note 74 *supra*. See generally HIGHAM, *supra* note 74. Today, however, persons from southern and eastern Europe, while still encountering some stereotyping, are generally not conceived of as separate racially from most Anglo-Americans.

76. Color is the most important determinant of permeability. White skin color explains why the “Okies” of the 1930s have been upwardly mobile and why European immigrant groups have been more successful than those from Asia, Africa, and South America. Among nonwhite groups, degree of pigmentation has had a direct bearing on success. White supremacists usually have a well-developed sense of which races are superior and which are inferior: the rank order precisely corresponds to pigmentation. For example, one common ranking of racial superiority is the following: 1. Caucasian, 2. Mongolian, 3. Malaysian, 4. American Indian, 5. Negro. The lighter the skin pigmentation the higher the status, and even within the Caucasian group the blonde Nordic types are supposedly superior to darker Southern Europeans. Lighter-skinned Orientals have generally been more mobile than the darker Africans.

R. DANIELS & H. KITANO, *AMERICAN RACISM: EXPLORATION OF THE NATURE OF PREJUDICE* 89-90 (1970) (footnote omitted) [hereinafter cited as DANIELS & KITANO]. See also notes 77, 80 *infra*.

77. Even though “race” and “color” refer to two different kinds of human characteristics, in America it is the visibility of skin color—and of other physical traits associated with particular color or groups—that marks individuals as “targets” for subordination by members of the white majority. This is true of Negroes, Puerto Ricans, Mexican Americans, Japanese Americans, Chinese Americans, and American Indians. Specifically, white racism subordinates members of all these other groups primarily because they are not white in color, even though some are technically considered to be members of the “white race” and even view themselves as “whites.”

some have called "social race."<sup>78</sup> It is also the source of the racial stereotype, and while the set of stereotypical characteristics may vary, Anglos appear to consider all groups perceived as nonwhite inherently inferior to white.<sup>79</sup> These kinds of social judgments and the discriminatory deprivations they foster constitute the ground on which the statutes were built and lend meaning to the language employed.<sup>80</sup>

### C. State Racial Statutes

Statutes setting forth racial classifications were pervasive in earlier years. They included immigration,<sup>81</sup> miscegenation, and segregation laws,<sup>82</sup> antebellum legislation for the governance of both free and enslaved black people, provisions excluding Orientals from landholding, liquor and gun laws relating to Indians,<sup>83</sup> as well as civil rights acts. Unfortunately this source of historical perspective does not serve to clarify whether Mexican Americans are nonwhite for purposes of the 1866 Civil Rights Act because, once again, they were rarely mentioned.

In keeping with the social definition of white,<sup>84</sup> state statutory and decisional law generally defined a person as nonwhite unless the per-

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D. BELL, *RACE, RACISM, AND AMERICAN LAW* 88 (1973 ed.) [hereinafter cited as BELL], quoting DOWNS, *Racism in America and How to Combat It* 5-6 (1970) (Report of the U.S. Comm'n on Civil Rights).

78. See MARDEN & MEYER, *supra* note 70, at 60.

79. See DANIELS & KITANO, *supra* note 76, at 2-3. See also notes 76-77 *supra*.

80. Thus Downs states:

Perhaps the best definition of *racism* is an operational one. This means that it must be based upon the way people actually behave, rather than upon logical consistency or purely scientific ideas. Therefore, racism may be viewed as *any attitude, action, or institutional structure which subordinates a person or group because of his or their color.*

Quoted in BELL, *supra* note 77, at 87-88 (emphasis in original).

81. The initial federal naturalization statute limited citizenship to "white" persons. Act of March 26, 1790, ch. 3, 1 Stat. 103. See text accompanying note 128 *infra*.

82. Examples of these statutes are set out in note 92 *infra*.

83. See *Legal Definitions of Race*, 3 RACE REL. L. REP. 571 (1958) [hereinafter cited as *Legal Definitions of Race*]; P. MURRAY, *STATES' LAWS ON RACE AND COLOR* (1952) [hereinafter cited as MURRAY]; G. STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* (1910) [hereinafter cited as STEPHENSON].

84. The social definition of race as it relates to black Americans is described by Myrdal in the following terms:

The "Negro race" is defined in America by the white people. It is defined in terms of parentage. Everybody having a *known* trace of Negro blood in his veins—no matter how far back it was acquired—is classified as a Negro. No amount of white ancestry, except one hundred per cent, will permit entrance to the white race. . . .

Legislation in this respect tends to conform to social usage although often it is not so exclusive. . . . These legal definitions and their changes and differences . . . should not be taken too seriously, however. The more absolutistic "social" definition is, in most life situations, the decisive one.

MYRDAL, *supra* note 29, at 113 (emphasis in original; footnotes omitted).

son's ancestry was at least three-quarters white (one nonwhite grandparent), and very often the necessary component went to seven-eighths white or even more.<sup>85</sup>

Applying this test, it would appear that Mexican Americans, in general, would not fit the definition of white.<sup>86</sup> Historically the Mexican people are descendants of the *Conquistadores* and Spanish immigrants to this hemisphere who freely intermarried with the indigenous Indian population.<sup>87</sup> Because total Spanish immigration in the period since 1500 has numbered no more than a few hundred thousand, compared with an Indian population of millions,<sup>88</sup> most persons of Mexican extraction are probably primarily Indian.<sup>89</sup> The population of Mexico has been estimated as being 10 percent pure Caucasian, 30 percent pure Indian, and 60 percent *mestizo* (mixed).<sup>90</sup> Furthermore, it is generally thought that the great bulk of Mexicans who immigrated to the United States during the early twentieth century were from the lower economic classes of Mexico which were even more Indian in heritage.<sup>91</sup>

However, none of these racial statutes specifically named persons of Mexican descent as a group separate from whites or Caucasians.<sup>92</sup>

85. See STEPHENSON, *supra* note 83, at 14-20; *Legal Definitions of Race*, *supra* note 83. The federal courts often used this principle that a person with a small amount of nonwhite blood was deemed nonwhite in adjudicating under the initial naturalization statute which limited naturalization to "white" persons. Act of March 26, 1790, ch. 3, 1 Stat. 103. See, e.g., *In re Young*, 198 F. 715 (W.D. Wash. 1912). In *Morrison v. California*, 291 U.S. 82 (1934), the Supreme Court summarized the decisional law:

"White persons" within the meaning of the statute are members of the Caucasian race, as Caucasian is defined in the understanding of the mass of men. The term excludes . . . the American Indians . . . Nor is the range of the exclusion limited to persons of the full blood. . . . [M]en are not white if the strain of colored blood in them is a half or a quarter, or, not improbably, even less, the governing test always being that of common understanding.

*Id.* at 85-86 (dictum) (citations omitted).

86. See *Morrison v. California*, 291 U.S. 82, 95-96 n.5 (1934) (dictum), discussed in the text accompanying notes 155-59 *infra*.

87. Borah, *Race and Class in Mexico*, 23 PACIFIC HIST. REV. 331 (1954) [hereinafter cited as Borah].

88. *Id.* at 337-38.

89. *Id.*

90. MARDEN & MEYER, *supra* note 70, at 122. Woodrow Borah has noted that use of Mexican census figures for determining the racial composition of the population of Mexico is somewhat questionable because "Indian" was defined in linguistic, cultural, and economic, rather than racial terms. Borah, *supra* note 87, at 332. Nevertheless he too concludes that almost three-fourths of the Mexican population is thought to be of Indian, rather than European, descent. *Id.* at 337-38.

91. T. WOOFER, RACES AND ETHNIC GROUPS IN AMERICAN LIFE 56-57 (1933). See also MARDEN & MEYER, *supra* note 70, at 122-23.

92. See sources cited in note 83 *supra*. The following statutes are from the five southwestern states with which we are primarily concerned.

Arizona initially required segregation of "pupils of the African race from pupils of the white races," Act of May 20, 1912, ch. 77, § 41, [1912] Laws of Ariz. 364, 382,

Indeed they often defined nonwhite or specifically listed the races in question in a manner that would have expressly excluded the consideration of Mexican Americans as nonwhite. For example, Texas defined "colored children" as all persons of mixed blood descended from "negro ancestry" for purposes of its school segregation laws,<sup>93</sup> and defined all persons besides those of African descent as white for purposes

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and then made segregation of "pupils of the African race from pupils of the Caucasian race" mandatory in the lower grades of public schools, but dependent in the high schools on a majority vote of the electorate. Act of March 19, 1921, ch. 137, [1921] Sess. Laws of Ariz. 304. Arizona banned marriages between "persons of Caucasian blood . . . with negroes, Mongolians or Indians . . . ." Rev. Stat. of Ariz. Territory § 3092 (1901). In 1942, "Indians" were deleted from the statute and Malays and Hindus added to the groups who could not marry Caucasians. Act of April 28, 1942, ch. 12, [1942] Sess. Laws of Ariz., 1st Spec. Sess. 465.

In 1947 California repealed its school segregation laws, Act of June 14, 1947, ch. 737, § 1 [1947] Cal. Stat. 1792, which had, since 1921, provided authorization for local school districts to establish segregated schools for Indian, Chinese, Japanese, or Mongolian children. See Act of June 3, 1921, ch. 685, § 1, [1921] Cal. Stat. 1161. Noticeably absent was authorization for segregation of black children. In 1880, California repealed its early school segregation statute, applicable to blacks and Indians, see Act of March 28, 1874, ch. 543, § 26, [1874] Amendments to the Codes of Cal. 86, 97, repealed, Act of April 7, 1880, ch. 44, § 62, [1880] Amendments to the Codes of Cal. 47, and declared all schools open to all children residing in each school district. Act of April 7, 1880, ch. 44, § 26, [1880] Amendments to the Codes of Cal. 38. In 1885, however, California authorized separate schools for Mongolian or Chinese children, Act of March 12, 1885, ch. 117, [1885] Cal. Stat. 99-100. In 1893 Indians were added to the list, Act of March 23, 1893, ch. 193, § 1662, [1893] Cal. Stat. 253-54; and in 1921, Japanese children were included. Act of June 3, 1921, ch. 685, § 1, [1921] Cal. Stat. 1161.

California banned marriages between white persons and negroes, Mongolians, or mulattoes. Act of March 21, 1905, ch. 414, § 2, [1905] Cal. Stat. 554. In 1933, "members of the Malay race" were added to the list. Act of April 20, 1933, ch. 104, § 1, [1933] Cal. Stat. 561.

Colorado banned marriages between negroes or mulattoes and whites. See Act of February 13, 1883, § 1, [1883] Sess. Laws of Colo. 243.

New Mexico authorized school districts to establish schools for "pupils of African descent" separate from those for "pupils of Caucasian or other descent." Act of March 17, 1925, ch. 73, § 21, [1925] Laws of N.M. 109-10.

Texas provided for separate schools for "white and colored children," see Act of April 1905, ch. 124, §§ 93-96, [1905] Gen. Laws of Tex. 263, 288-89, and defined "colored children" as "all persons of mixed blood descended from Negro ancestry." *Id.* § 96, [1905] Gen. Laws of Tex. 289.

Texas banned marriages between persons of "Caucasian blood" and "Africans." Act of June 5, 1837, [1838] Laws of the Republic of Tex. 239. This law was maintained in effect with slight changes of wording, from 1837 to 1969, when it was repealed. Act of May 14, 1969, ch. 888, § 6, [1969] Gen. & Spec. Laws of Tex. 2707, 2733.

The above list is not exhaustive as to the racial statutes enacted in the Southwest; but it serves to make our point: Mexican Americans were never expressly mentioned in any of these statutes or others of their type. Even those statutes which included Indians as a "covered group," and which could conceivably have been applied to Mexican Americans, were not, as far as our research has been able to discover, ever applied to persons of Mexican descent. Cf. *Westminster School Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (en banc).

93. See note 92 *supra*.

of its anti-miscegenation and Jim Crow laws.<sup>94</sup> Even statutes which included Indians as a separate racial group do not appear to have been made applicable to Mexicans even though they would technically have encompassed most Mexicans because of their predominantly Indian parentage.<sup>95</sup>

The failure of these statutes to speak of persons of Mexican descent could have resulted from a perception that Mexican Americans were white. There would then be no need to have children of Mexican descent in segregated schools or to prevent intermarriage between persons of Mexican descent and Anglos. But in view of the overwhelming documentation, discussed below, indicating that persons of Mexican descent were commonly perceived as nonwhite in the Southwest,<sup>96</sup> it is likely that other factors explain the failure of these statutes to classify Mexican Americans as nonwhite. For example, such a classification would have presented diplomatic problems with Mexico, as illustrated by the protests from the Mexican government over the classification of Mexicans as a separate race from whites in the 1930 census.<sup>97</sup> In fact, an attempt to limit suffrage in California to white males was defeated because of apprehension that this would be construed to exclude Mexican Americans and would be contrary to treaty provisions with Mexico designed to protect the rights of Mexicans in areas ceded to the United States.<sup>98</sup> This same fear may have carried over to other types of racial statutes. In addition, although these statutes enumerated races to be separated from whites for various purposes, the races named did not comprise either fixed or exhaustive lists of those people

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94. The penal provision for the anti-miscegenation law stated that:

The term "negro" includes also a person of mixed blood descended from negro ancestry from the third generation inclusive, though one ancestor of each generation may have been a white person. *Any person not included in the foregoing definition is deemed a white person within the meaning of this law.*

TEX. PENAL CODE art. 493 (1952), *repealed*, Act of May 14, 1969, ch. 888, § 6, [1969] Gen. & Spec. Laws of Tex. 2707 (emphasis added). The similar provision in the statute requiring segregation on motor buses provided: "The term 'Negro' as used herein includes every person of African descent as defined by the Statutes of the State of Texas, and all persons not included in the definition 'Negro' shall be termed 'White persons' within the meaning of this Act." Act of May 22, 1943, ch. 370, § 2, [1943] Tex. Laws 652.

95. See text accompanying notes 86-91.

96. See text accompanying notes 213-269 *infra*.

97. See note 197 *infra*. As a result of these protests, persons of Mexican descent have been listed under various subheadings of "white" since the census of 1930. *Id.* The possibility of diplomatic problems resulting from imposition of a quota on Mexican (or Latin American) immigration was discussed during the immigration debates of the 1920's and early 1930's. Several members of Congress were of the view that Mexico and the other countries of Latin America would interpret such a policy as a racial insult. See text accompanying notes 208-10 *infra*.

98. See L. PITT, *THE DECLINE OF THE CALIFORNIOS* 45 (1966) [hereinafter cited as PITT]. See also Hargis, *Native Californians in the Constitutional Convention of 1849*, 36 HIST. SOC'Y S. CAL. Q. 3 (1954) [hereinafter cited as Hargis].

commonly perceived by Anglos to be nonwhite. This is well illustrated by California's school segregation statute which, after 1880, did not list black children among those to be segregated,<sup>99</sup> yet black people have been invariably perceived as nonwhite.<sup>100</sup> In any event, a statutory classification of persons of Mexican descent as nonwhite was actually unnecessary because of the strong tradition of de facto segregation and discrimination which accomplished much the same effect as statutory classifications.<sup>101</sup> Thus the racial statutes themselves do not present a conclusive answer to the question of how Mexican Americans were legally defined or commonly perceived in the Southwest.

#### D. Early Litigation

There was almost no nineteenth century litigation involving Mexican Americans which could clarify the legal racial definition of persons of Mexican descent during that period. Litigation during the twentieth century can be divided into two categories: that involving the racial statutes, and that dealing with practices alleged to discriminate against Mexican Americans.

The only case involving the applicability of an anti-miscegenation statute to a person of Mexican descent did not arise in the Southwest, but rather in Indiana. In *Inland Steel Company v. Barcena*,<sup>102</sup> the court concluded that a person of Mexican descent was not necessarily white for purposes of its miscegenation statute which banned marriages between whites and blacks.

The court stated:

It is no more logical or consistent to say that all Mexicans are white persons than to say that all inhabitants and residents within the United States are white persons. We cannot adopt the contention . . .

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99. See note 92 *supra*.

100. A related problem with using the racial statutes is that the groups named in the statutes varied over time. For example, Arizona banned marriages between Caucasians and blacks, Mongolians, or Indians, but in 1942, struck the word "Indians" from the statute and added Malays and Hindus. See note 92 *supra*. Similarly, California initially provided for segregated schools for blacks and Indians, repealed all authority for any segregated schools in 1880, then provided for separate schools for Mongolian or Chinese children in 1885, Indians in 1893, and Japanese in 1921. See *id.* These alterations indicate not that a change occurred in how the particular groups omitted, added, or deleted were perceived racially, but rather that other factors besides racial perceptions dictated the coverage of the statutes in many cases. Thus California's provision for segregated schools for Oriental children came about as the result of a growing concern over the influx of Oriental immigrants. STEPHENSON, *supra* note 83, at 159-63. Yet there is little question that Orientals were perceived as non-white long prior to 1885. See text accompanying notes 51-54 *supra*.

101. See text accompanying notes 270-385 *infra*.

102. 110 Ind. App. 551, 39 N.E.2d 800 (1942).

that the word "Mexican" should necessarily be construed to be a white person from that country.<sup>103</sup>

Several southwestern courts were faced with challenges to school segregation involving Mexican Americans prior to *Brown v. Board of Education*.<sup>104</sup> In each case, the court held the segregation illegal to the extent that it was justified on purely ethnic grounds.<sup>105</sup> In *Independent School District v. Salvatierra*,<sup>106</sup> the Texas Court of Civil Appeals held omnibus segregation of children of Mexican descent illegal when carried out "merely or solely because they are Mexicans."<sup>107</sup> Texas required segregation of "white" and "colored" children and defined "colored" children as those of African descent.<sup>108</sup> The court agreed with the plaintiffs that children of Mexican descent could not be segregated from "other white races,"<sup>109</sup> apparently because Mexican Americans were not included in the school segregation statute.<sup>110</sup> Indeed the failure of California's school segregation statute to authorize segregation of Mexican children<sup>111</sup> was the express ground of decision

103. *Id.* at 555, 39 N.E.2d at 801.

104. 347 U.S. 483 (1954).

105. *Westminster School Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (en banc), *aff'g* 64 F. Supp. 544 (S.D. Cal. 1946); *Gonzales v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951); *Independent School Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930), *cert. denied*, 284 U.S. 580 (1931).

106. 33 S.W.2d 790 (Tex. Civ. App. 1930), *cert. denied*, 284 U.S. 580 (1931).

107. 33 S.W.2d at 795. Because the plaintiffs had not shown that any of them were seeking and being denied entrance to the Anglo schools, the court dissolved the injunction entered by the trial court against the district's segregatory practices, *id.* at 795-96, effectively nullifying the victory the plaintiffs had won in principle.

108. See note 92 *supra*.

109. 33 S.W.2d at 794. Because of the court's acceptance of the characterization of the plaintiffs as among "other white races," attorneys representing Mexican Americans adopted the strategy of attempting to show that discriminatory policies were illegal on the grounds that Mexican Americans were white and that segregation was therefore without statutory authority. This strategy is extensively analyzed in Comment, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 307, 333-48 (1972) [hereinafter cited as *Project Report*]. The use of the "other white" strategy may partially account for the dearth of reported opinions dealing with the question of whether Mexican Americans are legally white. It should also be noted that while the court in *Salvatierra* characterized the plaintiffs as "white," it also characterized them as members of the "Mexican race," 33 S.W.2d at 794, which is illustrative of the loose manner in which the term "race" is used.

110. The court in *Salvatierra* did not mention the fact that persons of Mexican descent were not included in the state statute as a ground for the decision, but since school segregation was legal at that time, it would seem to follow that the only bar to segregation would have been the absence of statutory authority expressly calling for segregation of children of Mexican descent and the recurrent tendency of the Texas statutes to define whites as all but persons of African descent. See notes 92, 94 *supra*; *Project Report*, *supra* note 109, at 333-34. See also *Westminster School Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (en banc) (failure of California statute to provide for segregation of children of Mexican descent precludes that segregation).

111. See note 92 *supra*.



in *Westminster School District v. Mendez*.<sup>112</sup> In fact, the California legislature had enacted a statute providing that children of Mexican descent were to be admitted to schools even though their parents were noncitizens and even if the child's legal residence was in Mexico.<sup>113</sup> The district court concluded that the segregation of Mexican children was contrary to the "principle" embodied in that statute,<sup>114</sup> and even the defendant school officials in *Mendez* conceded that segregation of the children of Mexican descent was contrary to the public policy of California.<sup>115</sup> Thus in the few decisions touching on the southwestern racial statutes, the courts treated persons of Mexican descent as white or as not to be separated from whites, at least absent more express statutory authority.<sup>116</sup>

Similar results were reached in a series of Texas cases dealing not with racial statutes, but rather with charges of discrimination in jury selection procedures claimed to violate the equal protection clause. In each case, the courts held that Mexican Americans were white and thus not entitled to the same evidentiary advantages as blacks in challenging the selection procedures.<sup>117</sup> When the United States Supreme Court finally reversed these decisions in *Hernandez v. Texas*,<sup>118</sup> it did so not on the ground that persons of Mexican descent were a separate racial group, but rather because groups defined by ancestry or national origin are entitled to the same protections under the equal protection clause as racial groups.<sup>119</sup>

112. 161 F.2d 774 (9th Cir. 1947) (en banc), *aff'd* 64 F. Supp. 544 (S.D. Cal. 1946).

113. Act of April 7, 1943, ch. 71, § 16004, [1943] Cal. Stat. 630.

114. 64 F. Supp. at 548.

115. They stated in their brief:

"The situation in California as conclusively shown by the record is:

"1. The legislative department of the State has clearly and expressly prohibited the establishment of separate schools for Mexican pupils.

"2. The Judicial Department of the state has emphatically declared it to be unlawful to establish separate schools for Mexican pupils (*Wysinger v. Crookshank*, 82 Cal. 588, 23 P. 54 [segregation of any type illegal absent statutory authority])."

*Quoted in Westminster School Dist. v. Mendez*, 161 F.2d 774, 783 (9th Cir. 1947) (en banc) (Denman, J., concurring).

116. In 1951, a federal court in Arizona found school district policies perpetuating school segregation of Mexican American children (again with no statutory authority, see note 92 *supra*) illegal on the basis of *Mendez*. *Gonzales v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951). The court characterized the plaintiffs as of "Mexican or Latin descent or extraction" as distinct from those "purportedly known as white or Anglo-Saxon." *Id.* at 1006.

117. *E.g.*, *Hernandez v. State*, 160 Tex. Crim. 72, 251 S.W.2d 531 (1952), *rev'd*, 347 U.S. 475 (1954); *Sanchez v. State*, 156 Tex. Crim. 468, 243 S.W.2d 700 (1951); *Rogers v. State*, 155 Tex. Crim. 423, 236 S.W.2d 141 (1951).

118. 347 U.S. 475 (1954).

119. *Id.* at 477-79. At the same time, however, the Court did not hold that persons of Mexican descent were white. It simply rejected the argument that the

Both categories of early litigation, like the racial statutes, are inconclusive on the issue with which we are concerned—whether Mexican Americans are nonwhite for purposes of sections 1981 and 1982. First, the scarcity of the litigation prevents a coherent picture.<sup>120</sup> The cases give some indication that Mexican Americans were not officially to be treated as a nonwhite group, but this judicial treatment belies the actual experience of Mexican Americans in the Southwest.<sup>121</sup> Indeed viewed against the background of this experience, the litigation can be seen to suggest discrimination similar to that encountered by blacks, Indians, and Orientals. In *Mendez*,<sup>122</sup> for example, the presence of an acknowledged and express state policy against segregation of Mexican Americans did not prevent that segregation from occurring.<sup>123</sup> Similarly, the Texas decisions and the Supreme Court decision in *Hernandez* indicate that discrimination in grand jury selection procedures was common in Texas.<sup>124</sup> Other early litigation presents essentially the same picture: Mexican Americans encountered discrimination in the same areas and with the same virulence as that typically reserved for groups traditionally perceived as nonwhite—restrictive covenants in housing,<sup>125</sup> denials of access to public accommodations,<sup>126</sup> and segregation in the schools.<sup>127</sup>

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fourteenth amendment was directed solely at discrimination against racial or color groups or at distinctions between whites and blacks alone. *Id.* Since persons of Mexican descent are obviously a "national origin" group, there was no need to reach the question of whether they were also a racial or color group.

120. In view of the fact that discrimination has been so extensive against Mexican Americans, commentators have suggested that the scarcity of early litigation against discrimination may have been the result of various factors, such as environments not conducive to integration, the scarcity of funds for litigation, and the absence of groups (comparable to the National Association for the Advancement of Colored People) who saw litigation as a viable means of ending discrimination against Mexican Americans. *See, e.g., Project Report, supra* note 109, at 335.

121. *See* text accompanying notes 213-385 *infra*.

122. *See* text accompanying notes 111-15 *supra*.

123. Recent litigation indicates that school segregation of Mexican American children is still widespread across the Southwest. *See* cases cited in note 299 *infra*.

124. Jury selection procedures which have excluded Mexican Americans have been a prevalent phenomenon in the Southwest. *See* text accompanying notes 369-77 *infra*. Even in New Mexico, where the people of Mexican descent remained strongest politically and socially during the nineteenth century and have been most antagonistic to attempts to classify them as nonwhite, *see* text accompanying notes 253-58 *infra*, the territorial supreme court was faced with a challenge to jury selection procedures alleged to be racially discriminatory. *Miera v. Territory*, 13 N.M. 192, 81 P. 586 (1905). The court concluded that one could not assume that members of the "American race" would allow their judgment to be swayed by race prejudice. *Id.* at 196, 81 P. at 587.

125. *Mathews v. Andrade*, 87 Cal. App. 2d 906, 198 P.2d 66 (1st Dist. 1948); *Clifton v. Putente*, 218 S.W.2d 272 (Tex. Civ. App. 1948).

126. *Lopez v. Seccombe*, 71 F. Supp. 769 (S.D. Cal. 1944); *cf. Lueras v. Town of Lafayette*, 100 Colo. 124, 65 P.2d 1431 (1937).

127. *See* cases cited in note 105 *supra*.

Examination of the legislative history, scientific definitions and classifications of race, state racial statutes, and state litigation has not answered the question whether Mexican Americans are nonwhite for purposes of sections 1981 and 1982. We will now turn our attention to another federal statute that spoke of "white" persons, but in a somewhat different context—naturalization. We shall look at the test developed under that statute, consider the reasons for applying the test utilized there to sections 1981 and 1982, and examine the one case involving the statute and a person of Mexican descent.

### *E. The Common Understanding Test*

In 1790, Congress passed the first naturalization statute. It provided that "any alien, being a free white person . . . may be admitted to become a citizen" of the United States.<sup>128</sup> The 1878 decision of *In re Ah Yup*<sup>129</sup> employed the test which was to become the accepted standard for determining whether one was white for purposes of naturalization. The court stated that the words "white person" should be construed in their ordinary sense, rather than in a technical one;<sup>130</sup> i.e., that those persons were white who were commonly understood to be white.<sup>131</sup>

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128. Act of March 26, 1790, ch. 3, 1 Stat. 103. The 1790 Act was subsequently repealed in 1795, Act of Jan. 29, 1795, ch. 20, § 4, 1 Stat. 415, but the limitation of naturalization to "free white" persons was carried forward in the 1795 Act, *id.* § 1, 1 Stat. 414, and in subsequent amendments and reenactments. See, e.g., Act of April 14, 1802, ch. 28, § 1, 2 Stat. 153. Since our concern is with the "white person" language, we will refer to the naturalization laws as they were amended and reenacted as the "1790 Act" or as simply the "naturalization statute."

An attempt was made in 1870, when a comprehensive revision of the naturalization laws was undertaken, to delete the word "white" from the statute. It failed, however, and the statute was amended instead to read: "That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent." Act of July 14, 1870, ch. 254, § 7, 16 Stat. 256. (The white person limitation was inadvertently omitted from section 2169 of the Revised Statutes of 1874, but was reinserted by the legislation correcting errors and omissions from the Revised Statutes, Act of Feb. 18, 1875, ch. 80, 18 Stat. 318.) See M. KOHLER, IMMIGRATION AND ALIENS IN THE UNITED STATES 393-94 (1936) [hereinafter cited as KOHLER].

The naturalization laws were amended at various times to specifically allow certain groups to be naturalized despite the fact that they did not meet the white person limitation, but the limitation itself was not removed until the Immigration and Naturalization Act of 1952, Act of June 27, 1952, ch. 477, 66 Stat. 163, which stated that the right to be naturalized "shall not be denied or abridged because of race." *Id.* § 311, 66 Stat. 239 (now codified as 8 U.S.C. § 1422 (1970)).

129. 1 F. Cas. 223 (No. 104) (C.C.D. Cal. 1878).

130. *Id.* at 223-24.

131. Over the ensuing years, the meaning of the term "white" was repeatedly litigated by persons of Hindu, Oriental or mixed ancestries. Hindus particularly contended that, as a Caucasian people who had preserved their blood lines for centuries by forbidding intermarriage, they were white people within the meaning of the statute. Although initially hesitant, the lower courts came to reject this contention. Compare *In*

In *United States v. Bhagat Singh Thind*,<sup>132</sup> the Supreme Court affirmed the use of what had become known as the "common understanding" test.<sup>133</sup> It concluded that the white person terminology required a group test.<sup>134</sup> Thus, persons were not entitled to become citizens merely because their own skin color was white. The answer turned on whether the group to which they belonged was generally regarded as white. Noting the lack of agreement among "ethnologists" as to the proper racial divisions,<sup>135</sup> the Court concluded that "white," as used in the 1790 Act, was not necessarily synonymous with Caucasian.<sup>136</sup> The terminology was to be interpreted "in accordance with the understanding of the common man from whose vocabulary [it was] taken."<sup>137</sup>

The language was intended to include those considered white—clearly the British and northwestern Europeans—and also those Europeans of various skin color who were received without question into the United States and considered part of its population when the 1790 Act was reenacted in 1870.<sup>138</sup> The Court described the policy of the Act in the following terms:

It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentages, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferi-

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*re* Akhay Kumar Mozumdar, 207 F. 115 (E.D. Wash. 1913) (admitting Hindu) *with* *In re* Sadar Bhagwab Singh, 246 F. 496 (E.D. Pa. 1917) (excluding Hindu although he was proven to be Caucasian). See also *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923). Japanese were consistently excluded. *Ozawa v. United States*, 260 U.S. 178 (1922); *In re* Saito, 62 F. 126 (D. Mass. 1894); *In re* Buntaro Kamagai, 163 F. 922 (W.D. Wash. 1908). Filipinos were initially excluded, *In re* Rallos, 241 F. 686 (E.D.N.Y. 1917); *In re* Alverto, 198 F. 688 (E.D. Pa. 1912), but some were admitted on the basis of a special exception to the "white person" requirement for Filipinos who had enlisted in the United States armed forces. *In re* Bautista, 245 F. 765 (N.D. Cal. 1917). Syrians and Armenians were held to be white for naturalization purposes. *In re* Najour, 174 F. 735 (N.D. Ga. 1909); *In re* Halladjian, 174 F. 834 (D. Mass. 1909); *In re* Ellis, 179 F. 1002 (D. Ore. 1910).

132. 261 U.S. 204 (1923).

133. *Id.* at 214-15; *accord*, *Ozawa v. United States*, 260 U.S. 178 (1922).

134. 261 U.S. at 208-09. See *Ozawa v. United States*, 260 U.S. 178, 197 (1922).

135. 261 U.S. at 208-09, 212.

136. *Id.* at 208-09, 211.

137. *Id.* at 209.

138. *Id.* at 213-14. See note 128 *supra*.

ority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.<sup>139</sup>

Although the common understanding test was derived for purposes of determining who were entitled to become naturalized citizens, several factors make it an appropriate test for interpreting the language of sections 1981 and 1982 as well.

First, as indicated earlier, the Civil Rights Act of 1866 was itself a grant of citizenship. The Supreme Court has characterized section 1981 as part of "a comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization."<sup>140</sup> Section one of the 1866 Act accomplished two goals: It made citizens of all persons born in the United States and granted those same persons equal rights with white citizens.<sup>141</sup> Apparently Congress was concerned with guaranteeing citizenship and equal rights to the same groups of people.

The common understanding test is also useful because sections 1981 and 1982 demand a group test. The purpose of the Civil Rights Act was not to ban all discrimination among individuals, but rather those discriminations founded on the belief that an individual was a member of a nonwhite group. Since racial prejudice and discrimination are based upon attitudes toward individuals because they are seen as members of a group,<sup>142</sup> the test employed should be based upon membership in a group commonly perceived as nonwhite. The Court's statement in *Bhagat Singh Thind* regarding the nature of the test under the naturalization statute seems therefore equally appropriate in the context of the Civil Rights Act: the "white citizens" terminology "imported a racial [*i.e.*, group] and not an individual test."<sup>143</sup>

Finally, the treatment of race underlying the naturalization act was essentially the same as that of the Civil Rights Act, albeit the goals to be served were seemingly opposed. While disclaiming any suggestion that nonwhites were inferior to whites, the Court in *Bhagat Singh*

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139. 261 U.S. at 215.

140. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948).

141. See text accompanying note 2 *supra*.

142. Prejudice is an attitude, often negative, which is directed toward persons and groups. Concepts often associated with prejudice include ignorance, stereotyping, and feelings of inferiority and superiority. The important factor in racial prejudice is that people in an ethnic group are consistently perceived as being in "that category" and their treatment largely depends upon the ratings for that group.

DANIELS & KITANO, *supra* note 76, at 14.

143. 261 U.S. at 208. A person subject to discrimination because *perceived* as a member of a nonwhite group should come within the protections of sections 1981 and 1982 even if not in fact a member of that group. Similarly whether the *group* is actually racially different from whites (or Caucasians) is irrelevant. See also text accompanying notes 72-80 *supra*.

*Thind* found that Congress intended to exclude persons perceived as racially different from the majority of Americans and with whom most Americans would "reject the thought of assimilation."<sup>144</sup> This concern with the effects of assimilating immigrants parallels what has been seen as the basic factor in race prejudice and discrimination in the United States. While it is felt that the cultural, religious, and linguistic characteristics of white immigrants can be absorbed into the "American whole" with minimal detrimental effect,<sup>145</sup> the physical (and "naturally inferior") characteristics of nonwhite peoples are seen as serving only to denigrate the quality of the American people if absorbed into it.<sup>146</sup> Similarly the basic force underlying racial segregation and discrimination is the desire to keep the groups perceived as nonwhite and inferior from mixing with whites so as to prevent amalgamation.<sup>147</sup>

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144. 261 U.S. at 215. Other persons and groups not only stressed "racial differences" but vehemently espoused the idea that nonwhites (meaning all but northwest Europeans and British) were inherently inferior to whites. See notes 74-75 *supra*. Their ideology, which called for severely restricted immigration from non-northwest European and British countries in order to prevent the degradation of the majority American character, was an important, if not decisive, argument in the successful efforts to establish quotas for immigration from outside the Western Hemisphere. See R. DIVINE, *AMERICAN IMMIGRATION POLICY, 1924-52*, 10-14 (1957) [hereinafter cited as *DIVINE*]; KOHLER, *supra* note 128, at 149-63.

145. See MYRDAL, *supra* note 29, at 53.

146. *Id.* at 53-55.

147. *Id.* at 57-61. Myrdal thus contends that miscegenation between colored persons and white persons is the most basic fear of whites and that discrimination is designed primarily to prevent that. *Id.* at 58.

His thesis seems borne out by the fact that the last express racial laws to be found unconstitutional by the United States Supreme Court were the anti-miscegenation laws. *Loving v. Virginia*, 388 U.S. 1 (1967). Some states which banned certain types of discrimination nevertheless maintained their anti-miscegenation laws. California, for example, banned racial discrimination in public accommodations in 1897 and provided civil liability in an action at law against those who violated the statute. Act of March 13, 1897, ch. 108, [1897] Cal. Stat. 137, but maintained its anti-miscegenation law, see note 92 *supra*, until it was declared unconstitutional in *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948). One of the major justifications which the respondents in *Perez* had put forth for the law was that: "[T]he prohibition of intermarriage between Caucasians and members of the specified races prevents the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians." *Id.* at 722, 198 P.2d at 23. Even after *Perez*, the California legislature refused to repeal the law. MURRAY, *supra* note 83, at 18.

As with other racial statutes, anti-miscegenation laws in the Southwest never expressly mentioned Mexican Americans. See text accompanying notes 92-95 *supra*. In *Perez*, Justice Traynor specifically noted that the California law did not "set up 'Mexicans' as a separate category, although some authorities consider Mexico to be populated at least in part by persons who are a mixture of 'white' and 'Indian.'" *Perez v. Sharp*, 32 Cal. 2d 711, 721, 198 P.2d 17, 22-23 (1948). (One reason for this may have been that applying an anti-miscegenation law—or any statute drafted in terms of racial groups—to Mexican Americans would have been rather difficult (and would have led to some absurd results) since a person can be pure Caucasian or pure Indian and nevertheless be of Mexican descent.)

But the failure of the states to explicitly outlaw marriages between Anglos and Mex-

Essentially the same rationale—the belief that mixing whites and nonwhites would be detrimental to the American people—therefore explained the desire to exclude nonwhites from the United States through the naturalization laws and the desire to keep whites apart from nonwhites once here, expressed in the various state racial laws, as well as in private, social, economic, and political discrimination. The attitude behind the state racial laws and private discrimination was, in turn, precisely that *against* which the Civil Rights Act was directed. Thus the policy embodied in the naturalization laws as to aliens was essentially that repudiated in the Civil Rights Act as to natives. Ironically, the groups defined by reference to “white” persons were the same.<sup>148</sup> The common understanding test is, therefore, the appropriate vehicle for determining whether persons of Mexican descent are nonwhite for purposes of section one of the Civil Rights Act of 1866.<sup>149</sup>

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icans did not mean that there were no social strictures against such marriages. Intermarriage between Anglos and Mexican Americans was quite common at certain times and in certain places, such as in New Mexico during the 1800's, coinciding with a general lack of discrimination. N. GONZÁLEZ, *THE SPANISH-AMERICANS OF NEW MEXICO* 80 (rev. ed. 1969) [hereinafter cited as GONZÁLEZ]. This changed during the twentieth century, however, and, as the perception of persons of Mexican descent as nonwhite increased as well as the discrimination based on that perception, *id.* at 80, 204, the rate of intermarriage decreased. *Id.* at 165. The same pattern appeared in southern Texas—early acceptance but later rejection of intermarriage. P. TAYLOR, *AN AMERICAN-MEXICAN FRONTIER* 257 (1934) [hereinafter cited as *AN AMERICAN-MEXICAN FRONTIER*]. By the 1930's, Professor Taylor found that, “At the present time Americans of Nueces County are almost unanimously opposed to intermarriage.” *Id.* at 258. In addition, an Anglo of either sex who married a Mexican was classed as a Mexican from then on by the Anglo community, *id.*, paralleling the same phenomenon among Anglos of ostracizing an Anglo who married a black person. MYRDAL, *supra* note 29, at 606. The rate of intermarriage between Anglos and persons of Mexican descent is now slowly increasing. MOORE, *supra* note 38, at 114-15.

148. Although the “free white person” terminology in the 1790 Act may very well have been designed to deny citizenship to the primary nonwhite groups inhabiting the United States at that time—blacks and Indians, KOHLER, *supra* note 128 at 395-98; *but see* *Ozawa v. United States*, 260 U.S. 178, 195-96 (1922)—limiting the definition of “nonwhite” to blacks and Indians for the Civil Rights Act would seem to be clearly inappropriate. The continuation of the “white person” limitation in the naturalization laws was debated in Congress when the naturalization law was revised in 1870, and the limitation was retained because of opposition to its elimination from members of Congress who feared the results of allowing the Chinese to be naturalized. *See* KOHLER, *supra* note 128, at 393-94; note 55 *supra*. Thus, while the precise groups which were the objects of restrictive naturalization policies changed, the fundamental attitude—that immigrants perceived as racially different would not mix with the majority population, or, worse yet, *would* mix and degrade the superior white population—remained the same. Racial fear was not the only “policy” underlying the attempts to restrict immigration, *see* text accompanying notes 172-75 *infra*, but it has been a major justification for such restrictions, *see* notes 74-75, 144 *supra*, as well as for racial discrimination generally inside the United States. MYRDAL, *supra* note 29, at 58.

149. Use of the common understanding test finds implicit support in *Hernandez v. Texas*, 347 U.S. 475 (1954). After holding that discrimination between blacks and

In the only naturalization case involving a Mexican, *In re Rodriguez*,<sup>150</sup> the court observed that Mexicans would probably be considered nonwhite from an anthropological viewpoint.<sup>151</sup> It took note, however, of the cession of the southwestern territories through treaties with Mexico and Spain and the admission of these areas as states. The court concluded that Congress intended that Mexicans be entitled to citizenship since they had been residents of these areas when incorporated under the various treaties and had been expressly allowed to become citizens.<sup>152</sup> Thus the court held that Mexicans were entitled to citizenship if they could meet the other, nonracial qualifications.<sup>153</sup>

The court's rationale undercuts the utility of *Rodriguez* for interpreting the naturalization statute (and its implications for our analysis of the Civil Rights Act) because the court did not apply the common understanding test.<sup>154</sup> The Supreme Court pointed this out in a footnote in *Morrison v. California*,<sup>155</sup> which appears to repudiate *Rodriguez*:

There is a strain of Indian blood in many of the inhabitants of Mexico as well as in the peoples of Central and South America.

Whether persons of such descent may be naturalized in the

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whites was not the only discrimination outlawed by the equal protection clause of the fourteenth amendment, the Court went on to say:

The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from "whites." One method by which this may be demonstrated is by showing the attitude of the community. Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between "white" and "Mexican." The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing "No Mexicans Served." On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here"). No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof.

347 U.S. at 479-80.

The Court left open the question of whether it would be appropriate to take judicial notice of the fact that Mexican Americans in Jackson County constituted a separate class for purposes of the equal protection clause. 347 U.S. at 479 n.9. In one sense, the conclusion we have reached is that courts *should* take judicial notice of the fact that Mexican Americans have been generally perceived as nonwhite throughout the Southwest.

150. 81 F. 337 (W.D. Tex. 1897).

151. *Id.* at 349.

152. *Id.* at 349-55.

153. *Id.* at 355.

154. The court specifically questioned *In re Ah Yup*, 1 F. Cas. 223 (No. 104) (C.C.D. Cal. 1878), discussed in the text accompanying notes 129-31 *supra*. *In re Rodriguez*, 81 F. 337, 348-49 (W.D. Tex. 1897).

155. 291 U.S. 82 (1934).



United States is still an unsettled question.

The subject was considered in *Matter of Rodriguez*, 81 Fed. 337, but not all that was there said is consistent with later decisions of this Court. *Ozawa v. United States*, and *United States v. Thind*, *supra*. Cf. *In re Camille*.<sup>156</sup>

The Court's reliance on *Ozawa v. United States*<sup>157</sup> and *Bhagat Singh Thind* in implicitly disapproving *Rodriguez* indicates that it felt that the *Rodriguez* decision could not be reconciled with the adoption of the common understanding test in those cases. In *In re Camille*,<sup>158</sup> the court had concluded that a person who was part American Indian was not white for purposes of naturalization.<sup>159</sup> Since the only court squarely faced with a person of Mexican descent and the naturalization act did not use the common understanding test, we turn our attention to historical and sociological material to ascertain whether persons of Mexican descent have been commonly understood by Anglos<sup>160</sup> to be nonwhite, and whether the discrimination they have encountered has been based upon that racial perception.

## II

### THE PERCEPTION OF MEXICAN AMERICANS

Determining how a large group of persons are commonly perceived by others is not easy. Some students of ethnic relations have characterized Mexican Americans as a group set off by their language, culture, and national origin, with race or color being of little significance in their relationships with other American groups.<sup>161</sup> Implied in that characterization is a belief that Mexican Americans are similar to other national origin or immigrant groups. For example, the Irish

156. *Id.* at 95-96 n.5 (1934) (dictum).

157. 260 U.S. 178 (1922).

158. 6 F. 256 (C.C.D. Ore. 1880).

159. The Court's citations to *Bhagat Singh Thind*, *Ozawa*, and *In re Camille* suggest that it was not ready to consider Mexicans to be white under the common understanding test because of their Indian extraction. Congress ended the controversy in 1940 when it amended the naturalization laws to provide for naturalization of "descendants of races indigenous to the Western Hemisphere" along with white persons and persons of African nativity or descent. Nationality Act of 1940, Act of October 14, 1940, ch. 876, § 303, 54 Stat. 1140. Since Canadians were basically European (and thus "white") and persons of African ancestry from areas such as the Caribbean were already entitled to naturalization, *see* note 128 *supra*, the "races" to which the Act refers must be Latin Americans who, because of their Indian blood might be considered nonwhite; and the phraseology indicates that Congress did consider them to be nonwhite racially.

160. We shall deal almost entirely with the perception of Mexican Americans held by Anglo Americans since it is the perception of the discriminator, not that of the person being discriminated against, which determines the nature of that discrimination.

161. *E.g.*, MYRDAL, *supra* note 29, at 53; D. MCENTIRE, *RESIDENCE AND RACE* 69 (1960). *But see* Forbes, *Race and Color in Mexican-American Problems*, 16 J. HUMAN RELATIONS 55 (1968).

and Italians have successfully assimilated into the American people despite initial hostility and discrimination. Similarly, it is argued Mexican Americans will merge into the main body of Americans after the passage of a few generations and will then no longer be subject to the discrimination now facing them.

The assumption in this analysis is that Mexican Americans are not subject to the racial discrimination that faces blacks, Indians, and Orientals. Racially based discrimination seems to endure in American life no matter how long the group has been present and manifests a prejudice which is much less sensitive to changes in economic status or the shedding of foreign, religious, and linguistic ties by the minority group.

What the inclusion of Mexican Americans with white immigrant groups ignores is that Mexican Americans are not comparatively new arrivals in this country. They have physical, social, and cultural roots in the area which is now the United States which antedate those of any minority group except the Indian.<sup>162</sup> The longevity of their presence and the continued intense discrimination against them suggests what histories of the Southwest and studies of Mexican Americans have repeatedly concluded: Mexican Americans have been commonly perceived as a nonwhite racial group in much the same way as have blacks, Orientals, and Indians, and the long history of discrimination against them stems largely from that perception.

#### A. *The Congressional Perspective*

We have already considered Congress in its primary role as author of the Civil Rights Act. But Congress can also play another important role in this inquiry: The views of its membership may reflect, to a certain extent, the state of national opinion on a particular topic. Thus, while in succeeding sections we shall consider popular opinion in the Southwest, we look first to how members of Congress viewed Mexican Americans during the nineteenth and early twentieth centuries.

The Indian racial background of the vast majority of Mexicans indigenous to the Southwest was recognized in Congress during the nineteenth century. The Mexican-American War and the attendant possibility of the United States annexing Mexico inspired Senator Calhoun to say:

[I]ncorporating her into the Union . . . would be unprecedented by any example in our history. . . . [We have never] incorporated

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162. Mexican immigrants, for example, settled in the upper Rio Grande valley of New Mexico a generation before the Plymouth colony was established. Their descendants remain in New Mexico today. MOORE, *supra* note 38, at 158.

into the Union any but the Caucasian race. . . . [M]ore than half of [Mexico's] population are pure Indians, and by far the larger portion of the residue mixed blood. I protest against the incorporation of such a people. Ours is the government of the white man . . . .

. . . . It is a remarkable fact . . . that, in the whole history of man . . . there is no instance whatever of any civilized colored race, of any shade, being found equal to the establishment and maintenance of free government . . . . Are we to associate with ourselves as equals, companions and fellow citizens, the Indians and mixed races of Mexico? I would consider such association as degrading to ourselves and fatal to our institutions.<sup>163</sup>

Senator Clayton echoed Calhoun's comments: "There are in Mexico not less than eight millions of human beings . . . of a race totally different from ourselves—a colored population, having no feelings in common with us, no prejudices like ours . . . ."<sup>164</sup> Other members of Congress relied on statistics, not only to show that Mexico was primarily Indian,<sup>165</sup> but also to establish that the inhabitants of what is now New Mexico and California were even more Indian than the inhabitants of Mexico in general.<sup>166</sup>

The subject of persons of Mexican descent inhabiting states of the Southwest cropped up from time to time in subsequent nineteenth century congressional debates. Speaker of the House Thaddeus Stevens, one of the champions of the rights of the newly freed black people, argued against admission of New Mexico to the Union because Anglo Americans were then in the minority there and would not control the government.<sup>167</sup> He offered the following characterization of the people of New Mexico: "The mass of the people are Mexicans, a hybrid race of Spanish and Indian origin, ignorant, degraded, demoralized and priest-ridden."<sup>168</sup> Similar arguments were offered in opposition to statehood for Arizona.<sup>169</sup>

The most intensive congressional interest in the Mexican people and their ancestry came after the turn of the century. The periodic

163. CONG. GLOBE, 30th Cong., 1st Sess. app. 51 (1848).

164. *Id.* at app. 75.

165. *Id.* at app. 144 (remarks of Sen. Downs), app. 195 (remarks of Sen. Bell).

166. *Id.* at app. 144 (remarks of Sen. Downs).

167. C. MCWILLIAMS, *NORTH FROM MEXICO* 121 (1948) [hereinafter cited as MCWILLIAMS].

168. *Quoted in id.*

169. MOORE, *supra* note 38, at 24 n.17. These nineteenth century views of Mexicans as nonwhite coincide with the view of the Supreme Court in *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923), that the term "white" had primarily a geographical connotation in 1790 when the naturalization act was first passed and in 1870 when it was reenacted, limited in meaning to Europeans. *Id.* at 213-15; see text accompanying notes 138-39 *supra*.

need for cheap labor in the United States and a succession of violent revolutions in Mexico had brought thousands of Mexican immigrants to the United States.<sup>170</sup> They settled primarily in the Southwestern states nearest their homeland, but to some extent overflowed into other areas where the social and economic conditions for the immigrants were less harsh. Congress had recently curtailed immigration from southern and eastern Europe partially in response to warnings of the doom of the Anglo-Saxon "race" if mixing with inferior peoples were not stopped.<sup>171</sup> Congressmen favoring immigration restrictions approached the problem of Mexican immigration in the same spirit. Undeniably the rationale was also partially economic. The immigrants represented a cheap source of labor which benefited primarily large agricultural and industrial interests.<sup>172</sup> They would work for less money than natives and allegedly do work which the natives, both black and white, would not do.<sup>173</sup> The advocates of restriction included small farmers who could not use the immigrants to as great an economic advantage.<sup>174</sup> In addition, organized labor saw the influx of immigrants as a threat to the standard of living of natives.<sup>175</sup>

Closely tied to the economic arguments, and perhaps more important, were the racial contentions.<sup>176</sup> Eugenicists had earlier proffered their "scientific" theories<sup>177</sup> to help establish the restrictions on immigration from outside northwestern Europe and Britain<sup>178</sup> embodied in the immigration statutes of 1921<sup>179</sup> and 1924.<sup>180</sup> They returned at the invitation of restrictionist legislators to "analyze" the nature of the Mexican immigrants.<sup>181</sup> Harry H. Laughlin of the Eugenics Record Office of the Carnegie Institution of Washington classified the influx of Mexican immigrants as the sixth "major racial problem" in United States history.<sup>182</sup> He noted that, "The common Mexican . . . is . . . of mixed racial descent—principally Indian and Spanish, with

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170. ACUÑA, *supra* note 29, at 132.

171. See notes 74-75, 144 *supra*.

172. DIVINE, *supra* note 144, at 55-56.

173. 72 CONG. REC. 7218 (1930) (remarks of Sen. Phipps); *id.* at 7421 (remarks of Sen. Kendrick).

174. See *id.* at 7220 (remarks of Sen. Kendrick); ACUÑA, *supra* note 29, at 141-42.

175. DIVINE, *supra* note 144, at 55.

176. DIVINE, *supra* note 144, at 56.

177. See HIGHAM, *supra* note 74, at 149-57. See note 73 *supra*.

178. See HIGHAM, *supra* note 74, at 313-14; DIVINE, *supra* note 144, at 56-57.

179. Act of May 19, 1921, ch. 8, 42 Stat. 5.

180. Act of May 26, 1924, ch. 190, 43 Stat. 153.

181. See *Hearings on H.R. 6465, H.R. 7358, H.R. 10955, H.R. 11687 Before the House Comm. on Immigration and Naturalization, 70th Cong., 1st Sess. 702 (1928).*

182. *Id.* at 711.

occasionally a little mixture of black blood."<sup>183</sup> He further asserted that if the man "on the street" were asked if he wanted cheap labor supplied by immigrants or would rather wait for good stock to "raise" the American people, he would "call for good seed stock of our own racial type."<sup>184</sup>

The restrictionists in Congress, however, needed little assistance from eugenicists in determining the nature of Mexican immigrants. Representative Box of Texas, one of the foremost proponents of restriction, quoted one leading nativist book<sup>185</sup> in describing the Mexican as "the little brown peon" who brings with him everywhere "his ignorance, dirt, disease, and vice which infect cities with slum plague spots, depress wages, and lower the general tone of the community."<sup>186</sup>

Representative Almon of Alabama stated on the House floor that, when natives could not get work:

[I]t is tragically wrong to permit aliens of a different race and lower standard of living to glut our labor markets. *But the essence of the Mexican immigration question is that the Mexicans are largely of a different race.* They are either Indian or mixed Indian and white, and their presence in this country has already created a serious new race problem.<sup>187</sup>

Representative Box went so far as to introduce into the record an extensive mail "survey" he had conducted on the "Mexican problem."<sup>188</sup> The survey responses clearly depict the color consciousness of Anglos toward Mexicans.<sup>189</sup> A deputy sheriff from Arizona had responded: "Mexican immigration is fast overwhelming and fast blotting out white civilization in this region."<sup>190</sup> A lawyer from Texas had written: "Ninety per cent of the Mexicans live in shacks and huts that a white man would not use for living quarters at all."<sup>191</sup> Box's own restrictionist and racist proclivities make any survey he conducted suspect, but his results are confirmed by studies of more objective observers revealing essentially the same attitudes and perceptions.<sup>192</sup> The racial nature of the drive to restrict Mexican immigration was further

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183. *Id.*

184. *Id.* at 712.

185. T.L. STODDARD, *REFORGING AMERICA* (1927).

186. *Hearings on H.R. 6465, H.R. 7358, H.R. 10955, H.R. 11687 Before the House Comm. on Immigration and Naturalization, 70th Cong., 1st Sess. 28* (1928).

187. 72 CONG. REC. 10844 (1930) (remarks of Rep. Almon, emphasis added). *See also id.* at 7126 (remarks of Sen. Johnson), 7215 (remarks of Sen. Heflin).

188. 74 CONG. REC. 3549-55 (1931).

189. *See id.*

190. *Id.* at 3551.

191. *Id.*

192. *See* text accompanying notes 231-38, 250-58, 272-76 *infra* and sources cited therein.

evidenced by the concern of many members of Congress that blanket restrictions on immigration would apply to Canadian immigrants who were "of our own kind and our own class."<sup>193</sup>

The debate outside of Congress on the question of Mexican immigration also demonstrated the importance of the racial argument. An editorial from the *Arizona Daily Star* compared the economic arguments given to support Mexican immigration with those proffered in support of slavery before the Civil War.<sup>194</sup> However, the paper emphasized its view of the social rather than the economic aspects of the problem:

The Mexican peon who is paid less than \$2 a day, who lives in a tent or mud hut, who wears few clothes, eats little food, gets little education, and could not use education if he had it, is a poor citizen. He is more than a poor citizen, he is a menace.

. . . .

In a few years, however, it may be too late. The time may come when infiltration of peon labor may reduce the intelligence, the resourcefulness, and the energy of Southwestern people. It is the preservation of the race that is at stake, not the preservation of any one industry.<sup>195</sup>

In a 1929 article in the scholarly periodical *Foreign Affairs*, one writer pointed out the predominantly Indian background of the Mexican immigrants<sup>196</sup> arguing that the classification of Mexicans as white in the census<sup>197</sup> resulted from a "tacit but universal understanding

193. 72 CONG. REC. 7327 (1930) (remarks of Sen. Dill). Then-Senator Hugo Black favored a total immigration restriction, race being irrelevant to the question of aliens taking jobs from natives when unemployment was high. But he also noted that: [i]f it were considered altogether from the standpoint of the possibility and certainty of race amalgamation and national absorption, then there would be no argument which could be advanced . . . to prohibit Canadian immigration." *Id.*

194. *Reproduced in id.* at 3742.

195. *Id.*

196. Hoover, *Our Mexican Immigrants*, 8 FOREIGN AFFAIRS 99 (1929) [hereinafter cited as Hoover].

197. The census classification of persons of Mexican descent presents a rather confusing and deceptive picture. For the 1970 census, a respondent's race was generally based upon self-identification, and persons listing themselves as "Mexican" were denominated "white." SPAN. ORIG. POP., *supra* note 38, at app. 5. As a result of this presumption that persons of Mexican descent were to be classified as white, the 1970 census found that 98.1 percent of all Mexicans were white. *Id.* at ix.

Prior to 1930, persons of Mexican descent were not classified separately except as to those who were foreign-born or had foreign-born parents. L. GREBLER, J. MOORE R. GUZMAN, *THE MEXICAN-AMERICAN PEOPLE* 601 (1970) [hereinafter cited as GREBLER]. The instructions to enumerators for the 1930 census stated:

Practically all Mexican laborers are of a racial mixture difficult to classify, though usually well recognized in the localities where they are found. In order to obtain separate figures for this racial group, it has been decided that all persons born in Mexico, or having parents born in Mexico, who are not

among government officials that the biological characteristics of the Mexican people shall be assumed to be what they are not in fact."<sup>198</sup> Furthermore, he contended, there were "competent and impartial observers who consider the peon inferior to the whites, both physically and mentally."<sup>199</sup>

Another writer claimed that the influx would "[build] up a new element of the American population, mostly Indian (since the Mexicans have very little Spanish blood), who will plague future generations very much as the South has suffered from the presence of unassimilable negroes."<sup>200</sup> Historical novelist Kenneth Roberts wrote a series of article for the *Saturday Evening Post* decrying the results of unlimited Mexican immigration.<sup>201</sup> He claimed that the farmers of the Southwest might benefit from immigration of Mexicans, but only "at the expense of saddling all future Americans with a dismal and distressing race problem."<sup>202</sup>

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definitely white, negro, Indian, Chinese, or Japanese, should be returned as Mexican.

Quoted in 72 CONG. REC. 7134 (1930) (remarks of Sen. Hayden). Thus, unlike the 1970 census instructions which presumed Mexicans to be white, the 1930 census presumed Mexicans to be nonwhite, unless "definitely white." This contrary presumption manifested itself in equally contrary results. Over 1.4 million persons were listed in 1930 as "Mexican" and therefore nonwhite, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, ABSTRACT OF THE FIFTEENTH CENSUS OF THE UNITED STATES 80 (1933), while only 65,968 persons of Mexican descent were listed as "white." T. WOOFER, RACES AND ETHNIC GROUPS IN AMERICAN LIFE 57 (1933).

Interestingly, this first attempt to classify Mexicans separately came about because of the efforts in Congress to restrict Mexican immigration. The absence of a separate classification for persons of Mexican descent in the census prevented an accurate picture of just how great the "problem" of Mexican immigration was. Since no one knew exactly how many Mexicans were in the United States, it was unclear whether quota restrictions were necessary or whether stricter enforcement of the existing laws and regulations was sufficient. See, e.g., 72 CONG. REC. 7133-34 (1930).

After the 1930 Census, the racial presumption was shifted and persons of Mexican descent were classified as various subcategories of "white." This came about at least partially because of protests from the Mexican government and the United States State Department as to the classification as nonwhite. GREBLER, *supra*, at 601.

Official records in the Southwest have often classified persons of Mexican descent separately from whites. For example, the prisoner record forms of the San Francisco County Jail use the term "Mexican American" as a racial designation in contradistinction to "white or Caucasian," "black or Negro," and "Oriental or Mongolian." In the author's experience as a legal officer for the San Francisco Sheriff's Department and as a practitioner for 8 years in various parts of California, the San Francisco County Jail practice is consistent with arrest and birth records in various California counties. Dr. Manuel Gamio has also noted that citizens of Mexican descent were generally referred to as "Mexicans" in courts and hospitals. M. GAMIO, MEXICAN IMMIGRATION TO THE UNITED STATES 54 (1930) [hereinafter cited as GAMIO].

198. Hoover, *supra* note 196, at 99.

199. *Id.* at 104.

200. Hart, *The National Origins Plan for Restricting Immigration*, 30 CURRENT HIST. 480, 481 (1929).

201. See DIVINE, *supra* note 144, at 61-62.

202. Quoted in *id.* at 62.

Many opponents of restriction admitted the partial validity of the social and racial charges of the restrictionists, but asserted that the economic benefits of allowing continued immigration from Mexico outweighed the sociological considerations.<sup>203</sup> Ironically, they also relied upon the racial stereotype of the Mexican: Mexicans were timid, knew their place, could be imposed upon, and would perform work—like stoop labor—that Anglos (or even blacks) could or would not do.<sup>204</sup> Senator Phipps of Colorado claimed that Mexicans who entered his state did not compete with natives for jobs and that, once there, “did not intermingle with the American citizens or with white families,”<sup>205</sup> nor intermarry with whites.<sup>206</sup> They thus would not present the social problems projected by the restrictionists.<sup>207</sup>

Strong opposition was raised to proposals for limiting immigration from Mexico and all of Latin America on the grounds that quotas would be considered a racial insult by the Latin Americans<sup>208</sup> and would harm economic and diplomatic relations with their countries.<sup>209</sup> But those who voiced this argument did not necessarily support unrestricted naturalization either. One of their spokesmen, Senator Hayden of Arizona, objected to quotas not applicable to all countries, but supported the right of Congress to limit *permanent* entrants to those who “look the same, act the same, and have the same ideals, as other Americans.”<sup>210</sup>

The restrictionists were temporarily victorious. While no new statute was passed, the immigration authorities were prevailed upon to enforce more stringently the existing entry qualifications, such as the prohibition against contract laborers, the literacy requirement, and the requirement that an entrant not be likely to become a “public charge.”<sup>211</sup> As a result, the number of immigrants legally entering the country plummeted.<sup>212</sup>

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203. *Id.* at 58.

204. *Id.* at 58-59.

205. 72 CONG. REC. 7218 (1930).

206. *Id.*

207. *Id.*

208. *Id.* at 6356, 7121-22 (remarks of Sen. Hayden), 6845-46, 6923-28 (remarks of Sen. Bingham).

209. *Id.* at 6845-46 (remarks of Sen. Bingham); ACUÑA, *supra* note 29, at 138.

210. 72 CONG. REC. 7149 (1930).

211. See DIVINE, *supra* note 144, at 62; Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 876-77.

212. During the first year that the stricter enforcement methods were employed, the number of immigrants was 12,703, as compared to 40,154 in the previous year. DIVINE, *supra* note 144, at 63. Between 1930 and 1939, approximately 28,000 Mexicans entered the country legally as compared with over 238,000 between 1925 and 1929. ACUÑA, *supra* note 29, at 140. While the drop in immigration after 1930 did not totally quiet the restrictionists, strict administrative efforts rather than a quota became the American policy toward Mexican immigration. DIVINE, *supra* note 144, at 66-67.



As the above material indicates, members of Congress appeared to perceive persons of Mexican descent as nonwhite during the nineteenth and early twentieth centuries. In the following material we will examine historical and sociological evidence which reveals a similar perception outside of Congress and seek to determine whether the discrimination which persons of Mexican descent have encountered has been based upon that perception.

### *B. The Perception of Mexican Americans in the Southwest*

The histories chronicling the nineteenth century American drive to extend its economic and political dominion to the Pacific indicate that Anglos participating in that movement were as well aware as members of Congress of the Indian racial background of the vast majority of Mexicans indigenous to the Southwest.

The *New York Daily Times'* correspondent F. L. Olmsted, although primarily concerned with the institution of slavery, also observed relations between Anglos and Mexicans in Texas and described them as follows:

There is, besides, between our Southern American and the Mexican, an unconquerable antagonism of character, which will prevent any condition of order where the two come together. . . . The mingled Puritanism and brigandism, which distinguishes the vulgar mind of the South, peculiarly unfits it to harmoniously associate with the bigoted, childish, and passionate Mexicans. They are considered to be *heathen*; not acknowledged as "white folks."<sup>213</sup>

While race and color consciousness regarding Mexican Americans was strongest in Texas,<sup>214</sup> it was characteristic of Anglos who came to other parts of the Southwest as well.<sup>215</sup> In California, some state legis-

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213. F. OLMSTED, A JOURNEY THROUGH TEXAS. . . . 455 (1857), *quoted in* AN AMERICAN-MEXICAN FRONTIER *supra* note 147, at 39. (emphasis and quotation marks in original)

The American consul at Matamoros described conditions in Texas in 1878 the following way:

[W]hen it is known that a Mexican has been hung or killed in the neighborhood of Brownsville, or along the frontier, there is seldom any fuss made about it; while on the contrary, if a white man happens to be despoiled in any way, there is generally a great fuss made about it by those not of Mexican origin.

*Quoted in id.* at 65.

214. See GAMIO, *supra* note 197, at 55; MOORE, *supra* note 38, at 79.

215. One historian expressed the feelings of Anglos toward the Mexicans of that area and neighboring Sonora, Mexico:

For this reason I think Sonora can beat the world in the production of villainous races. Miscegenation has prevailed in this country for three centuries. Every generation that population grows worse; and the Sonorans may now be ranked with their natural comrades—Indians, burros, and coyotes.

J. BROWNE, ADVENTURES IN APACHE COUNTRY 172 (1869), *quoted in* ACUÑA, *supra* note 29, at 84.

lators advocated exclusion of foreigners (who were principally Mexicans and other Latins) from the states' mines.<sup>216</sup> One described the Latin Americans thus:

Devoid of intelligence, sufficient to appreciate the true principles of free government; vicious, indolent, and dishonest, to an extent rendering them obnoxious to our citizens; with habits of life low and degraded; an intellect but one degree above the beast of the field, and not susceptible of elevation; all these things combined render such classes of human beings a curse to any enlightened community.<sup>217</sup>

During the constitutional conventions in both Texas and California, limiting suffrage to "white males" was debated but defeated because it was recognized that the language would result in attempts to prevent people of Mexican descent from voting.<sup>218</sup>

These depictions do not represent isolated viewpoints. As one student of Mexican Americans has summarized the Anglo perspective:

Racial myths about Mexicans appeared as soon as Mexicans began to meet Anglo American settlers in the early nineteenth century. The differences in attitudes, temperament, and behavior were supposed to be genetic. It is hard now to imagine the normal Mexican mixture of Spanish and Indians as constituting a distinct "race," but the Anglo Americans of the Southwest defined it as such.<sup>219</sup>

This perception remains strong throughout the Southwest where the vast majority of Mexican Americans reside.<sup>220</sup> Furthermore, it has been the major factor in discrimination against Mexican Americans. Just as the purported racial inferiority of blacks served to rationalize the economic exploitation of slavery,<sup>221</sup> the alleged racial inferiority of

216. The State Assembly of the first California Legislature voted 22 to two to ask Congress to ban all foreign-born persons—even naturalized citizens—from the mines. PITT, *supra* note 98, at 58. This was aimed almost exclusively at Mexicans and other Latin Americans who were working the mines. See generally *id.* at 48-68.

217. Quoted in ACUÑA, *supra* note 29, at 107.

218. AN AMERICAN-MEXICAN FRONTIER, *supra* note 147, at 230-32; PITT, *supra* note 98, at 45. See also Hargis, *supra* note 98.

219. MOORE, *supra* note 38, at 1. See also ACUÑA, *supra* note 29, at 7.

220. See note 38 *supra*.

221. [R]acism grew up as an American ideology partly in response to the need to maintain a reliable and permanent work force in the difficult tasks of growing cotton. While American Negro slavery was older than extensive cotton agriculture, it took on major economic and political significance in connection with the rise of "King Cotton" after the 1790's, and the patterns of discrimination and prejudice that have carried on until the present day took their form originally in the cotton-growing areas. Cotton agriculture remained as a dominant element in the economy of the Southern states until the 1930's, but then the diversification of agriculture and the rise of manufacturing significantly replaced it. The continuation of racism after cotton was no longer "king" is an example of the sociological principle that ideologies continue after the condition that gave rise to them no longer exist.

MYRDAL, *supra* note 29, at xxviii.

the Mexican served to justify the economic as well as the political and social subjugation of the Mexican American. This racial inferiority argument was put forth in support of annexing the state of Sonora, Mexico;<sup>222</sup> the continuation of peonage in the American territories;<sup>223</sup> paying Mexicans half the wages paid Anglos;<sup>224</sup> the attempt to exclude "foreigners" from the mines of California;<sup>225</sup> and even the effort to keep Tucson from becoming the territorial capital of Arizona because it did not have "a white population sufficiently numerous to be an exponent of the wishes of the majority of the inhabitants."<sup>226</sup> This is not to say that racism and the purported inferiority of Mexicans were always the only justifications for these occurrences, but rather that they provided an important, convenient, and continually utilized rationale in the minds of many Anglos.

The importance of the distinction between white foreigners who came to California to mine for gold and the Mexicans (both native and foreign to California) is exemplified in the following passage written by an historian of the period, describing the dispensation of "justice" in the mining areas:

[T]he foreign miners, being civilized men, generally received "fair trials" . . . whenever they were accused. It was, however, considered safe by an average lynching jury in those days to convict a "greaser" on very moderate evidence if none better could be had. One could see his guilt so plainly written, we know, in his ugly swarthy face, before the trial began. . . . It served him right, of course. He had no business as an alien, to come to the land that God had given us. And if he was a native Californian, or "greaser," then so much the worse for him. He was so much the more our born foe; we hated his whole degenerate, thieving, landowning, lazy and discontented race. . . . [It] was not our fault if they were not all rascals! So they deserved no better.<sup>227</sup>

The virulence of the above depiction might make it appear aberrational

222. ACUÑA, *supra* note 29, at 82-86.

223. *Id.* at 86-87. One historian of the era characterized the poorer Mexicans of the Sonora area as inherently suited to the status of peons:

The question of labor is one which commends itself to the attention of the capitalist: cheap, and under proper management, efficient and permanent. My own experience has taught me that the lower class of Mexicans, with the Opatá and Yaqui Indians, are docile, faithful, good servants, capable of strong attachment when firmly and kindly treated. They have been "peons" (servants) for generations. They will always remain so, as it is their natural condition.

S. MOWRY, *ARIZONA AND SONORA* 67 (2d ed. 1863).

224. ACUÑA, *supra* note 29, at 87-88.

225. See text accompanying notes 216-17 *supra*.

226. ACUÑA, *supra* note 29, at 93-94.

227. J. ROYCE, *CALIFORNIA* 363-64 (1886), quoted in DANIELS & KITANO, *supra* note 76, at 34-35.

were it not consistent with other contemporaneous accounts.<sup>228</sup> These writers, along with the colonists, traders, explorers, and soldiers who came to the early Southwest, shaped the stereotypical image of Mexicans for other Americans.<sup>229</sup> "Whatever their role, Anglos did not hesitate to record their scorn for what they felt to be a backward people in a backward land. They attributed the backwardness to *innate* Mexican traits . . . ."<sup>230</sup>

The above material indicates that Mexican Americans were widely perceived as a nonwhite group during the period immediately before and after the passage of the 1866 Act. Nor did the perception of Mexican Americans as nonwhite change with the advent of the twentieth century. If anything, it became stronger,<sup>231</sup> as has been documented by studies such as those of Professor Paul Taylor who examined aspects of Mexican labor in various sections of the United States during the late 1920's and early 1930's.<sup>232</sup> Professor Taylor himself chose to use the terms "white" and "Mexican" to characterize the groups in Texas because the vast majority of the people he interviewed used the terms without questioning them.<sup>233</sup>

In southern Texas, Mexican Americans were sometimes seen as superior to blacks, but nonetheless different from whites.<sup>234</sup> A landowner stated: "The mexican is a higher class person that [*sic*] the nigger. Some say that if we would let the Mexicans mix with the white people, many would mix and get out of this class, but mighty few Americans would let them associate. They look on them like the Negro. . . ."<sup>235</sup> A farmer noted: "Of course, they're Mexicans. They

228. See, e.g., PITT, *supra* note 98, at 69-71. See also text accompanying notes 163, 213, 215, 217 *supra*.

229. MOORE, *supra* note 38, at 2-6; MCWILLIAMS, *supra* note 167, at 131-32.

230. MOORE, *supra* note 38, at 3 (emphasis in original).

231. ACUÑA, *supra* note 29, at 121.

232. Among Professor Taylor's works are AN AMERICAN-MEXICAN FRONTIER, *supra* note 147, and a series of studies for the Department of Economics at the University of California on aspects of Mexican labor in the United States: Taylor, *Imperial Valley*, 6 UNIV. CALIF. PUBL. ECON. 1 (1928); Taylor, *Valley of the South Platte, Colorado*, 6 UNIV. CALIF. PUBL. ECON. 95 (1929) [hereinafter cited as *Valley of the South Platte, Colorado*]; Taylor, *Migration Statistics*, 6 UNIV. CALIF. PUBL. ECON. 237 (1929); Taylor, *Racial School Statistics*, 6 UNIV. CALIF. PUBL. ECON. 257 (1929); Taylor, *Dimmit County, Winter Garden District, South Texas*, 6 UNIV. CALIF. PUBL. ECON. 393 (1930); Taylor, *Bethlehem, Pennsylvania*, 7 UNIV. CALIF. PUBL. ECON. 1 (1931) [hereinafter cited as *Bethlehem, Pennsylvania*]; Taylor, *Chicago and the Calumet Region*, 7 UNIV. CALIF. PUBL. ECON. 25 (1932) [hereinafter cited as *Chicago-Calumet*].

233. AN AMERICAN-MEXICAN FRONTIER, *supra* note 147, at xi, n.†, 297. Even in Bethlehem, Pennsylvania, where Professor Taylor was able to discern little color discrimination against Mexicans, he noted that the Mexicans themselves "retained the custom of referring unconsciously to Americans and Europeans as 'whites.'" *Bethlehem, Pennsylvania*, *supra* note 232, at 16-17.

234. AN AMERICAN-MEXICAN FRONTIER, *supra* note 147, at 254-55.

235. *Id.* at 255.

are a brown and a Mongolian race. They are Mexican and dark, and not strictly white. In depots, etc., they go with the whites, but they are a long way from being white."<sup>236</sup> The importance of color was recognized by the Mexicans in the area, as well: "Does color make a difference? I should say it does. If a person is light, they say she's not a Mexican; they think if they call you 'Spanish' it doesn't hurt you like saying 'Mexican'."<sup>237</sup> Theaters and other places open to the public often segregated whites from Mexicans or were for "whites only," barring Mexicans altogether.<sup>238</sup>

An excellent example of the dichotomy between official policies and actual attitudes in the Southwest is provided by the experience with the *bracero* program in Texas during World War II. Because of a shortage of native labor during the War, the United States wanted to import Mexican workers. Before agreeing to what became known as the *bracero* program, the Mexican government demanded a guarantee that the Mexican workers would not be subjected to the discrimination they had encountered in the past.<sup>239</sup> Discrimination continued, however, and was particularly serious in Texas.<sup>240</sup> The Mexican Ministry of Labor therefore announced in 1943 that no more Mexicans would be allowed to go to Texas "because of the number of cases of extreme, intolerable racial discrimination."<sup>241</sup> As a result, the Texas legislature passed a concurrent resolution<sup>242</sup> and the Governor proclaimed the "good neighbor policy" to be the public policy of Texas, declaring discrimination against "Caucasians"—defined by various Texas statutes as including all but blacks<sup>243</sup>—to be contrary to that policy.<sup>244</sup> The discrimination continued,<sup>245</sup> however, and in a suit brought by a person of Mexican descent, the court held the proclamation insufficient to overcome the common law right of a proprietor of a place of public amusement to refuse service to anyone<sup>246</sup>—*i.e.*, to discriminate against Mexicans. As a result, a bill was introduced in the Texas legislature to expressly forbid discrimination against Mexicans, but it failed to

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236. *Id.* at 256.

237. *Id.*

238. GAMIO, *supra* note 197, at 213; AN AMERICAN-MEXICAN FRONTIER, *supra* note 147, at 250-54; Cooke, *The Segregation of Mexican-American School Children in So. Calif.*, 67 SCHOOL & SOCIETY 417, 418 (1948). See note 363 *infra*.

239. ACUÑA, *supra* note 29, at 169.

240. MCWILLIAMS, *supra* note 167, at 269.

241. Quoted in *id.* at 270.

242. H.C.R. No. 105, [1943] GEN. & SPEC. LAWS OF TEX. 1119.

243. See notes 92, 94 *supra*.

244. The governor issued the executive proclamation on June 25, 1943. Terrell Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824, 826 (Tex. Civ. App. 1944).

245. MCWILLIAMS, *supra* note 167, at 270-71.

246. Terrell Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824 (Tex. Civ. App. 1944).

pass,<sup>247</sup> and Texas remained excluded from the *bracero* program.<sup>248</sup> The proclamation that all "Caucasians" were to be treated equally and the fact that "white" in Texas legally meant all but persons of African descent were meaningless in face of the practical fact that "most Texans did not consider Mexicans . . . Caucasians."<sup>249</sup>

The importance of the color factor was emphasized by Dr. Manuel Gamio, a student of Mexican immigration:

The darkest-skinned Mexican experiences almost the same restriction as the Negro, while a person of medium-dark skin can enter a second-class lunchroom frequented also by Americans of the poorer class, but will not be admitted to a high-class restaurant. A Mexican of light-brown skin will not be admitted to a high-class hotel, while a white cultured Mexican will be freely admitted to the same motel, especially if he speaks English fluently.<sup>250</sup>

That *degree* of color should have such importance serves to underscore the importance of skin color in Mexican-Anglo relationships. Yet even persons of Mexican descent who were of white skin color could not totally escape the stigma of their ancestry. Dr. Gamio goes on to note:

As an extension or reflection of this racial prejudice, individuals of Mexican origin but of white skin are also socially discriminated against. *The stigma of indigenous blood is so deep that the word Mexicans, the whites are euphemistically called "Spanish," and they the corresponding pigmentation, has acquired in the South a derogatory character.* In general, to distinguish between white and brown Mexicans, the whites are euphemstically called "Spanish," and they themselves adhere to this distinction . . . .

American citizens of Mexican origin are, as a rule, called "Mexicans" in courts, hospitals, and theatres.<sup>251</sup>

This phenomenon of persons of Mexican descent referring to themselves as "Spanish" has been especially prominent in New Mexico, where persons of Mexican descent initially succeeded in maintaining the closest degree of social and political parity with the Anglo population. In the twenties, however, when the Anglos first achieved majority standing,<sup>252</sup> the status of the Mexican Americans deteriorated.<sup>253</sup> One commentator assigns two reasons for this change: 1) an influx of Texans and other southerners who tended to lump Mexican Americans and Indians together with blacks, and 2) the contemporaneous mi-

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247. McWILLIAMS, *supra* note 167, at 271.

248. *Id.*

249. ACUÑA, *supra* note 29, at 170.

250. GAMIO, *supra* note 197, at 53.

251. *Id.* at 54 (emphasis added).

252. GONZÁLEZ, *supra* note 147, at 204.

253. *Id.*

gration of large numbers of Mexican nationals following the Mexican revolution of 1910, many of whom were from the lower class and illiterate.<sup>254</sup> The Anglos tended to group the natives and immigrants together and assign an inferior status to all.<sup>255</sup> Commentators have thus analyzed this tendency of persons of Mexican descent to adhere to the label "Spanish Americans" as primarily a defensive reaction to the fact that the label "Mexican" has carried racial overtones<sup>256</sup> and as an attempt to avoid the detrimental social, economic, and political consequences of being considered nonwhite. Despite the homage given by Anglos to the Spanish heritage of the Southwest<sup>257</sup> (and the obvious importance of the Spanish language to Mexican Americans) the Spanish element has not significantly affected the Anglos' perception of persons identified as being of Mexican descent as nonwhite.<sup>258</sup>

254. *Id.* González postulates that it was at this time that the native New Mexicans began attempting to disassociate themselves from Mexico and the Mexican immigrants by referring to themselves as "Spanish-Americans" and eschewing the label "Mexican." *Id.* at 80-81, 204-05. See text accompanying note 256 *infra*.

255. GONZÁLEZ, *supra* note 147, at 204.

256. McWILLIAMS, *supra* note 167, at 43-44; ACUÑA, *supra* note 29, at 56-57. See also GONZÁLEZ, *supra* note 147, at 25-27, 204-05. McWilliams stated: "The native-born Spanish-speaking elements resent any attempt to designate them in a manner that implies a 'non-white' racial origin. Being called 'Mexican' is resented, not on the basis of nationality, but on the assumption of racial difference." McWILLIAMS, *supra* note 167, at 43. This attitude is exemplified by a speech made by Senator Cutting of New Mexico during the debates on various proposals to limit Mexican immigration. After praising the Mexican civilization and describing the Mexican people as "sturdy, virile, kindly, hospitable people of Indian stock . . . oppressed by foreign invaders and exploiters of their own race," 72 CONG. REC. 7699 (1930), he went on to say:

It is quite evident that the Mexicans who came to this country from old Mexico are apt to lose their own peculiar racial virtues by contact with our people without acquiring the virtues of the people into whose midst they come.

. . .

The state of New Mexico is composed in major part of the descendants of the original Spanish conquerors who came over in the sixteenth and seventeenth centuries. They have intermingled very slightly with the native Indian population. They are not composed of people of the same race as the inhabitants of old Mexico. . . .

. . . .

The people of New Mexico have always resented the fact that outsiders confuse them with the people of old Mexico. They are Mexicans only in the sense that they formerly formed part of the Mexican Republic. That is, they are Mexicans in the same sense in which the inhabitants of Massachusetts or Virginia are English and in no other sense.

*Id.* at 7700.

This fear of being associated with Mexico and Mexicans, with the connotation of Indian descent, is one of the best indicators of the fact that people of Mexican descent were not generally considered members of the white race.

257. McWILLIAMS, *supra* note 167, at 35-42.

258. McWilliams categorized both the superficial respect paid by Anglos to the Spanish culture of the Southwest and the tendency of some persons of Mexican descent to classify themselves as "Spanish-Americans" as the "fantasy heritage" of the Southwest. *Id.* at 35-47.

The author of a study of Mexican Americans in southern Texas during the early 1960's concluded that, "[t]o a large extent, the mistrust accompanied by subtle discrimination is a matter of class rather than race,"<sup>259</sup> but noted that "Anglos reserve[d] the racial term 'white' for their exclusive use . . . ."<sup>260</sup> Furthermore, class division generally followed ethnic lines:

The majority of Anglos in Hidalgo County are middle class while the majority of Latins are lower-class manual laborers. Class differences reflect cultural differences that distinguish the Hidalgo situation from the class hostilities found in regions of a common ethnic background. The recognizable physical differences between Anglos and Latins accentuate their separateness.<sup>261</sup>

In summarizing her study of Mexican Americans in New Mexico, Nancie González described the function of skin color in the following terms:

In general, the situation for most of New Mexico seems to be more like that described for the Negro in Latin America—the Hispano can rise to the top of the social scale and be accepted anywhere by accumulation of wealth, education, and the other symbols of upper-class status. However, it is harder for him to succeed than it would be for a lighter-skinned person with an Anglo name.<sup>262</sup>

Thus even in New Mexico, where the social status of Mexican Americans has traditionally been the highest, skin color has been a fundamentally important factor in the relations between people of Mexican descent and Anglos.<sup>263</sup>

Perhaps the most telling aspect of the racial perception of Anglos toward Mexican Americans and the stereotype attached to Mexican people is that both the "positive" aspects of the stereotype (docile, romantic, hard-working, simple)<sup>264</sup> and the often contradictory negative

259. W. MADSEN, *THE MEXICAN-AMERICANS OF SOUTH TEXAS* 10 (1964).

260. *Id.* at 13.

261. *Id.* at 8.

262. GONZÁLEZ, *supra* note 147, at 209 (footnote omitted).

263. Color consciousness toward people of Mexican descent was not limited to the Southwest. Professor Taylor described conditions in the Chicago, Illinois-Gary, Indiana area thusly:

Recognition of racial difference and the attitudes which so commonly attach to color of skin, hamper free assimilation of the Mexicans, but this barrier, too, is less effective than in the rural West and Southwest. It is less effective than the color barrier against the Negro, but it is a factor, distinctly additional to those which characteristically have stirred hostility against new groups of European immigrants to the same area.

*Chicago-Calumet*, *supra* note 232, at 280.

264. *See* DIVINE, *supra* note 144, at 59; Simmons, *The Mutual Images and Expectations of Anglo-Americans and Mexican-Americans*, 90 *DAEDALUS* 286 (1961) [hereinafter cited as Simmons].



aspects (lazy, cowardly, vicious, immoral)<sup>265</sup> have continued in great strength despite the fact that Mexican Americans and Anglo Americans have been in contact in the Southwest for over 125 years.<sup>266</sup> While racial pejoratives are now less commonly expressed (and are often camouflaged through use of less superficially derogatory means of rationalizing the inferior status of Mexican Americans today),<sup>267</sup> the perception of Mexican Americans as somehow fundamentally different—and inferior—to Anglo Americans continues.<sup>268</sup>

In short, the experience of the Mexican people in the United States has not been similar to those of groups who could, with the passage of time, shed the linguistic, cultural, or religious characteristics which initially set them apart from the main body of Anglo Americans. The Anglos' association of the Mexican people with their Indian heritage has presented the additional barrier of color and race which Mexican Americans, like all other groups perceived as nonwhite, are forced to overcome. As Carey McWilliams stated:

Uniformly his culturally conditioned traits have been interpreted in the Southwest as racial or biological. The Mexican was "lawless" and "violent" because he had Indian blood; he was "shiftless and improvident" because such was his nature; his excellence as a stoop-laborer consisted precisely in the fact that he did not aspire to land-ownership. Point by point, his cultural traits re-enforced the earlier stereotype of "the Mexican."

. . . A strong prejudice had existed in the region against Mexicans for many years; the tradition of dominance was interwoven into the fabric of the community; generations had been steeped in the Mexican stereotype. Almost by instinct Anglo-Americans equated the Mexicans with Indians.<sup>269</sup>

### III

#### DISCRIMINATION AGAINST MEXICAN AMERICANS

We have found that Mexican Americans were generally perceived as nonwhite by Anglos throughout the Southwest. To determine if the

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265. See MOORE, *supra* note 38, at 2-6; Simmons, *supra* note 264.

266. ACUÑA, *supra* note 29, at 1.

267. See text accompanying notes 295-98 *infra*.

268. In the words of one Chicano historian:

Anglo-Americans still exploit and manipulate Mexicans and still relegate them to a submerged caste. Mexicans are still denied political and economic determination and are still victims of racial stereotypes and racial slurs promulgated by those who feel superior.

ACUÑA, *supra* note 29, at 4. A social scientist attempted to measure changes in "racial distance" by asking respondents to his survey to list how close they felt to various racial, religious, and national origin groups in 1926 and again in 1946. The distance felt between respondent and "Mexicans" was greater in 1946 than that felt in 1926. Bogardus, *Changes in Racial Distances*, 1 INT'L J. OPINION & ATTITUDE RESEARCH 55, 56 (1947).

269. MCWILLIAMS, *supra* note 167, at 213.

discrimination they encountered was based upon that perception we now examine the experience of Mexican Americans in education, housing, employment, and the administration of justice.

### A. Education

The United States Commission on Civil Rights has reached three basic conclusions concerning Mexican Americans in southwestern schools:

(1) [P]ublic school pupils of this ethnic group are severely isolated by school district and by schools within individual districts; (2) for the most part, Mexican Americans are underrepresented on school and district professional staffs and on boards of education, i.e., they constitute a substantially lower proportion of both staff and board membership than they do of enrollment; and (3) the majority of Mexican American staff and school board members are found in predominantly Mexican American schools or districts.<sup>270</sup>

As the following material documents, the isolation which the Commission found stems directly from the perception of children of Mexican descent as nonwhite, a perception which served to justify their segregation despite the absence of statutory authority.<sup>271</sup>

In Texas, Professor Taylor noted that, despite the fact that Mexican children were legally classed as white,<sup>272</sup> the general practice in the area he studied was to segregate the children.<sup>273</sup> Indeed, schools were built and busing used to keep Mexican children separate.<sup>274</sup> A school official stated: "Schools are put out in the district so we can comply with the law and not have to take Mexicans into the white schools."<sup>275</sup> Another stated: "We segregate for the same reason that the southerners segregate the Negro. They are an inferior race, that is all."<sup>276</sup>

A study of Texas schools in the 1940's further documents Professor Taylor's description. Segregation of Mexican American children was a fixed practice in many school districts,<sup>277</sup> although the grade through which the segregation continued varied.<sup>278</sup> That the segrega-

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270. U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATION STUDY (Report I: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest) 59 (1971 ed.).

271. See note 92 *supra*.

272. AN AMERICAN-MEXICAN FRONTIER, *supra* note 147, at 215. See note 92 *supra*.

273. AN AMERICAN-MEXICAN FRONTIER, *supra* note 147, at 215.

274. *Id.* at 215-16.

275. *Id.*

276. *Id.* at 219.

277. P. KIBBE, LATIN AMERICANS IN TEXAS 96 (1946) [hereinafter cited as KIBBE].

278. *Id.*

tion was generally concentrated in the earlier elementary school years was often justified on the ground that Mexican American children needed more assistance with English during those years in order to compete with Anglo children later.<sup>279</sup> But that explanation is belied by the fact that, in most cases, all Mexican American children were placed in separate schools, regardless of their English language skills.<sup>280</sup> In addition, the schools they attended were inferior both in quality of facilities and teaching.<sup>281</sup>

A more plausible explanation for the finding that segregation was concentrated in the earlier years is that segregation in the later grades was unnecessary because most of the Mexican-American children dropped out of school during those early years.<sup>282</sup> And in some school districts, Mexican-American children were simply not allowed to attend school after a certain age.<sup>283</sup> The 1940's study found that 37,000 Mexican-American children were enrolled in the first grade, while only 19,000 were enrolled in the second grade.<sup>284</sup> By the eighth grade, enrollment had dropped to 6,000.<sup>285</sup> Over 40 percent of the school-aged children of Mexican descent in Texas were not enrolled at all.<sup>286</sup>

In California, too, de facto school segregation was justified on racial grounds. In *Mendez v. Westminster School District*,<sup>287</sup> although the parties eventually stipulated that there was no question of "racial discrimination,"<sup>288</sup> one of the initial justifications put forth by the school officials for the segregation was that Mexican Americans are a distinct and inferior race.<sup>289</sup> A 1967 study by the California Department of Education found that 57 percent of the Spanish-surnamed children in school districts of 50,000 or more pupils attended "minority

279. *Id.*; MOORE, *supra* note 38, at 78-79.

280. MOORE, *supra* note 38, at 79. See, e.g., *Hernandez v. Discoll Consolidated Independent School Dist.*, 2 Race Relations Rptr. 329 (D. Tex. 1957); *Gonzales v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951); *Independent School Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930), *cert. denied*, 284 U.S. 580 (1931).

281. KIBBE, *supra* note 277, at 98, 102-03.

282. *Id.* at 86-88. In *Hernandez v. Texas*, 347 U.S. 475 (1954), the Supreme Court noted:

The reason given by the school superintendent for this segregation [through the first four grades] was that these children needed special help in learning English. In this special school, however, each teacher taught two grades, while in the regular school each taught only one in most instances. Most of the children of Mexican descent left school by the fifth or sixth grade.

*Id.* at 479 n.10.

283. *Project Report*, *supra* note 109, at 314-15.

284. KIBBE, *supra* note 277, at 87.

285. *Id.* at 87.

286. *Id.* at 86-87.

287. 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947) (en banc), discussed in text accompanying notes 111-15 *supra*.

288. 64 F. Supp. at 546.

289. McWILLIAMS, *supra* note 167, at 281-82.

schools,"<sup>290</sup> and that 51 percent of the Spanish-surnamed employees were assigned to those schools.<sup>291</sup>

Studies of Mexican American school children served to "document" their alleged racial inferiority.<sup>292</sup> One such study, performed through the University of Southern California in 1938, stated: "The Mexicans, as a group, lack ambition. The peon of Mexico has spent so many generations in a condition of servitude that a lazy acceptance of his lot has become a racial characteristic."<sup>293</sup> Nor have these attitudes died away. A study performed between 1964 and 1966 of a California school system which was 65 percent Mexican-American concluded that, while Mexican-American children did not view themselves as inferior, "it was very obvious that teachers and administrators believed them to be inferior and to conclude they saw themselves that way."<sup>294</sup>

Often more sophisticated and acceptable rationalizations are used to express perceptions of racial inferiority. A Colorado state study in 1967, for example, found that the prevailing opinion among many school administrators was that "because of their cultural value system . . . [Mexican-American youth] do not aspire to educational success."<sup>295</sup> Differing cultural values may, of course, be a factor in the ability of recent immigrant groups to relate to majority American institutions; but most Mexican Americans are not recent immigrants,<sup>296</sup> and this is particularly true in Colorado.<sup>297</sup> The Colorado study itself recognized that the use of such rationalizations may simply be a means

290. Cal. State Dep't of Educ., *Racial and Ethnic Survey of California Public Schools* (Part One: Distribution of Pupils) 11 (1967).

291. Cal. State Dep't of Educ., *Racial and Ethnic Survey of California Public Schools* (Part Two: Distribution of Employees) 26 (1967). We do not pass judgment on the argument currently put forth by many minority group members that minority group students and school employees *should* be concentrated in the same schools in order that the students may better learn how to deal with their situation in America today. It is clear that this philosophy had nothing to do with the fact that students and employees were concentrated in certain schools in past years.

292. An analysis of these studies concluded: "Frequently attitudes were tinged with racial prejudice. . . . The typically low intelligence test scores were used as "evidence" of innate inferiority. This in turn was used to justify the common-place segregation in the schools. . . ." *Untitled study by Thomas Carter, quoted in MOORE, supra note 38, at 77.*

293. L. Graeber, *A Study of Attendance at Thomas Jefferson High School, Los Angeles, California* (master's thesis, Univ. So. Cal., 1938) 97, *quoted in MOORE, supra note 38, at 77.*

294. Carter, *The Negative Self-Concept of Mexican-American Students*, 96 *SCHOOL & SOCIETY* 217, 218 (1968).

295. *Quoted in Rowan, supra note 19, at 28.*

296. *See GREBLER, supra note 197, at 106-07.*

297.. *Id.* at 106.

of using modern concepts to express the same attitude formerly expressed in terms of racial characteristics:

The lack of aspiration in any Spanish-surnamed student is probably not his failure to accept prevailing cultural goals, but his awareness that he cannot make it. Assuming he has the ability, as do many Spanish-surnamed students who drop out of school, it is the educational system and the majority society which kill his aspiration, not an inner deficiency.<sup>298</sup>

Professor Joan Moore summarizes the educational situation for Mexican-American children in the Southwest in the following way:

In the past the physically segregated school was a natural reflection of the prevailing belief in Mexican racial inferiority. No southwestern state upheld legally the segregation of Mexican American children, yet the practice was widespread. Separate schools were built and maintained, in theory, simply because of residential segregation or to benefit the Mexican child. He had a "language handicap" and needed to be "Americanized" before mixing with Anglo children. His presence in an integrated school would hinder the progress of white American children . . . .

Segregation practice, however, often belies the theory. "Mexican schools" generally had vastly inferior physical plants, poorly qualified teachers, and larger classes. Negro children were sometimes assigned to these schools (implying their low social status), and there was a notable lack of effort to enforce the weak school attendance laws. At secondary level schools, students were often simply discouraged from attending school at all. . . . Further, separate classification was made in some instances on the basis of a child's Spanish name rather than by any test of English language competence.<sup>299</sup>

The disparity in educational attainment between persons of Mexican descent, Anglos, and blacks is significant. The 1960 census<sup>300</sup> indicated that, among individuals 14 years of age and older, Spanish-surnamed persons<sup>301</sup> in the Southwest had completed a median 8.1 years

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298. Quoted in Rowan, *supra* note 19, at 28.

299. MOORE, *supra* note 38, at 78-79. It is thus not surprising that courts in the Southwest have increasingly begun to focus upon segregation of Mexican Americans in schools. *E.g.*, *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Soria v. Oxnard School Dist. Bd. of Trustees*, 328 F. Supp. 155 (C.D. Cal. 1971), *vacated and remanded*, 488 F.2d 579 (9th Cir. 1973) (remand for determination in light of *Keyes* as to whether segregation was intentional); *Ross v. Eckels*, 468 F.2d 649 (5th Cir. 1972); *United States v. Texas Education Agency*, 467 F.2d 848 (5th Cir. 1972) (*en banc*); *Cisneros v. Corpus Christi Independent School Dist.*, 467 F.2d 142 (5th Cir. 1972) (*en banc*).

300. The 1960 census data to which we refer (and which gives data for 1959) was taken from GREBLER, *supra* note 197, or MOORE, *supra* note 38.

301. The 1960 census usually included persons of Mexican descent in the category of "white persons with Spanish surnames." In the Southwest, only a little over 11 per-

of schooling, compared with 9.7 years for other nonwhites and 12.0 for Anglos.<sup>302</sup> In 1969, Mexican-American family heads across the country had completed a median 8.5 years,<sup>303</sup> compared with a median 9.9 years for blacks;<sup>304</sup> and 26.1 percent had completed high school,<sup>305</sup> compared with 32.2 percent of the family heads who were black.<sup>306</sup> The incidence of functional illiteracy (zero to four years of schooling) among Mexican Americans was seven times that of Anglos and nearly twice that of other minority groups in 1960.<sup>307</sup> And while the status of Mexican Americans in California is probably the highest among Mexican Americans in the Southwest, no branch of the University of California had more than 100 Mexican Americans enrolled in 1967.<sup>308</sup>

To quote Professor Moore again: "By any standards other than those of rural schools in underdeveloped countries, the output for Mexican Americans is very poor."<sup>309</sup>

### B. Housing

In the area of housing, anti-Mexican racial segregation has been widespread. A newspaper article in 1944 described the Mexican area of Dallas:

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cent of the "white persons with Spanish surname" category were of non-Mexican descent and only a little over eight percent of the Mexican stock did not have Spanish surnames or were classified as nonwhite. GREBLER, *supra* note 197, at 606. Therefore the census data for 1960 for Spanish-surname persons give an accurate picture of the status of Mexican Americans. As to the classification of Mexican Americans as "white" in the census, see GREBLER, *supra* note 197, at 601-02 and note 197 *supra*.

302. GREBLER, *supra* note 197, at 143.

303. SPAN. ORIG. POP., *supra* note 38, at 107.

304. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION: LOW-INCOME POPULATION (Subject Report PC(2)-9A) 165 (1973) [hereinafter cited as LOW-INC. POP.].

305. SPAN. ORIG. POP., *supra* note 38, at 107.

306. LOW-INC. POP., *supra* note 304, at 165.

307. GREBLER, *supra* note 197, at 18.

308. MOORE, *supra* note 38, at 69.

309. MOORE, *supra* note 38, at 65. To a certain extent, figures on Mexican American educational attainment are deceptive because of the presence of immigrants who have completed very few years of schooling—4.5 years for immigrant males and 5.0 years for females, compared with 8.6 median years for second-generation (native-born) males and 8.4 years for females, in 1959. GREBLER, *supra* note 197, at 149. But the presence of the foreign-born does not hold the final answer, because there is little improvement in the next generation (native of native-born) where the male median was still 8.6 years and the female median 8.8 years, in 1959. *Id.*

In addition, the fact that the descendants of native-born are better educated than recent immigrants does not necessarily translate into a higher income as compared to that of descendants of later arrivals. *Id.* at 191-92. Indeed, for urban Spanish-surname males between the ages of 35 and 44 in 1959, the median income of natives of native parentage was lower than for natives of foreign-born or mixed parentage (\$4654 as compared to \$4664). *Id.* at 192.

Squalor is the lot of many of those who live in that area where almost 100 per cent of the houses are substandard and many in a condition hardly fit for housing livestock on a farm. Most of them have had no repairs for years; they are not worth the expense to the owners, but bring a rental income far beyond their value. Many of the places that people call home appear on the verge of collapse. Most have no plumbing. Water is obtained from outside community hydrants, frequently close beside a filthy, disease-breeding outside dry toilet. Unpaved streets are quagmires when it rains, and filth abounds despite the efforts and desires of many residents to try to put up a better front.<sup>310</sup>

After quoting the foregoing, one commentator went on:

These conditions, of course, are not peculiar to Dallas. They prevail in all Texas towns and cities where any sizable Latin American population resides. The usual pattern is for Latin Americans to live, more or less, in one section of town, partly because they are a gregarious people and like to live close to one another; partly because their language handicap makes it more convenient for them to live among those who speak the same tongue; but often because they are not permitted to rent or own property anywhere except in the "Mexican colony," regardless of their social, educational, or economic status.<sup>311</sup>

A California state commission studying Mexican labor during the 1930's commented:

The fact that in many localities in California the Mexicans are prevented from living in the same districts with natives, or with already assimilated groups of foreign-born, is militating against Americanization efforts. The same is true of the social isolation to which Mexicans are subjected in many communities.<sup>312</sup>

Just as with blacks and Orientals, Mexican Americans seeking to purchase or rent property frequently encountered restrictive covenants.<sup>313</sup> In 1955 a Los Angeles real estate board expelled a member realtor for selling to a Mexican-American family.<sup>314</sup> A recent census-based study of residential housing patterns in the Southwest concluded that while Mexican Americans were less segregated from Anglos than were

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310. Quoted in KIBBE, *supra* note 277, at 123.

311. *Id.* at 123-24.

312. MEXICANS IN CALIFORNIA, REPORT OF GOVERNOR C.C. YOUNG'S MEXICAN FACT-FINDING COMM'N 72 (1930).

313. See, e.g., KIBBE, *supra* note 277, at 229. Even in the Chicago area, where Professor Taylor found racial discrimination to be a less significant factor in relations between Mexicans and Anglos, see note 263 *supra*, there was an abortive attempt in 1929 to formally segregate Mexicans in housing because of "race, economic competition, and lower standards of living." *Chicago-Calumet*, *supra* note 232, at 225.

314. D. McENTIRE, RESIDENCE AND RACE 241-42 (1960).

blacks, the level of segregation for both groups has remained high.<sup>315</sup>

The residential isolation of Mexican Americans has not been accidental:

On the contrary, there is a sense in which it would be accurate to say that the location of the *colonias* has been carefully planned. Located at just sufficiently inconvenient distances from the parent community, it naturally became most convenient to establish separate schools and to minimize civic conveniences in the satellite *colonia*.<sup>316</sup>

Thus housing discrimination has ramifications which extend beyond the area of housing itself: by relegating persons to poorer schools and fewer community facilities, housing discrimination serves to increase the barriers to the improvement of economic and social conditions.<sup>317</sup>

The housing picture for persons of Mexican descent is little better than that in education. The 1960 census indicated that 29.7 percent of the metropolitan area housing units occupied by Spanish-surname households in the Southwest were deteriorating or dilapidated, com-

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315. J. Moore & F. Mittelbach, Residential Segregation in the Urban Southwest (Advance Report 4, Mexican-American Study Project, Division of Research, Graduate School of Business, University of California at Los Angeles) 38 (1966) [hereinafter cited as *Resid. Seg.*]. While the study pointed to various factors which correlated to the degree of segregation of Mexican Americans from Anglos—size of city, proportion of large households among the minority population, and income differentials between Anglo and minority populations, *id.* at 34-35—the inability to statistically measure “discrimination” prevented a conclusion as to the importance of discrimination as a determinant of the segregation. *Id.* at 35. The report did, however, take note of the fact that discrimination against both blacks and Mexican Americans is documented. *Id.* at 32.

316. McWILLIAMS, *supra* note 167, at 218-19 (emphasis omitted).

317. Professor Moore also took note of the symbiotic relationship between housing segregation, school segregation, and poor educational attainment:

The educational disparities . . . probably reflect primarily then the degree of isolation imposed by a community and confirmed by the schools of the community. This degree of general social isolation may very well be the unknown variable in median educational attainment. There is evidence . . . that the degree of segregation in a community is indeed reflected inside its schools. No broad-ranging studies of residential segregation and its association with school achievement exist for Mexican Americans in the Southwest, although, in a general way, it seems that highly segregated cities tend to educate their children less effectively. . . . In general, the variations from state to state [in educational attainment] can be at least partly explained in terms of the historical position of the Mexican Americans in combination with the general effort made by the individual states to educate all their children. . . .

MOORE, *supra* note 38, at 70. Professor Moore goes on to note that minority educational attainment is broadly consistent with the amount that each state expends per pupil for all its students. In other words, the states that spend more money for their schools tend to educate minority students better. *Id.*

Recent court decisions finding southwestern schools illegally segregated have also stressed the relationship between housing patterns and school district policies fostering dual school systems. See, e.g., *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *United States v. Texas Education Agency*, 467 F.2d 848, 863, n.22 (5th Cir. 1972) (en banc); *Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972) (en banc).



pared with 7.5 percent of those occupied by Anglos and 27.1 percent of those occupied by other minority groups.<sup>318</sup> In addition, 13.1 percent of the units occupied by persons of Spanish-surname were without exclusive bath or shower, compared with 4.4 percent of the Anglo-occupied units and 12.4 percent of the units occupied by other minority groups.<sup>319</sup> The 1970 Census indicated that nearly 10 percent of the dwellings occupied by households whose head was of Mexican origin lacked some or all plumbing facilities,<sup>320</sup> compared with the figure of 5.5 percent for all housing units in the United States.<sup>321</sup> The 1970 Census also indicated that overcrowding remains a serious problem for Mexican-American families. Six percent of all occupied housing units in the United States were occupied by between 1.01 and 1.50 persons per room and two percent were occupied by more than 1.50 persons per room.<sup>322</sup> But 19 percent of all households with heads of Mexican origin occupied units with between 1.01 and 1.50 persons per room and 13.6 percent occupied units with more than 1.50 persons per room.<sup>323</sup> The situation was worse for Mexican-American than for black families.<sup>324</sup>

### C. Employment

In the area of employment, as well, Mexican Americans have faced substantial discrimination based upon race. Indeed, several commentators have concluded that the pattern of employment of the Mexican American, dictated through the discrimination encountered, has been the major factor contributing to the isolation of the Mexican American from the majority population.<sup>325</sup> In addition, discrimination in employment, as in other fundamental areas of inter-group contact,

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318. GREBLER, *supra* note 197, at 251.

319. *Id.*

320. SPAN. ORIG. POP., *supra* note 38, at 136.

321. LOW-INC. POP., *supra* note 304, at 411.

322. *Id.* The percentages were obtained by adding the statistics for occupied units with all plumbing facilities to those for units without all plumbing facilities and dividing the sum by the total number of occupied units.

323. SPAN. ORIG. POP., *supra* note 38, at 136. The figures for Mexican Americans are percentages of households occupying units while the figures for the country as a whole, see text accompanying note 322 *supra*, and for black households, see text accompanying note 324 *infra*, are percentages of units occupied by certain types of families. Percentages of households can be compared with percentages of units, however, because the Census Bureau defined "occupied housing units" in such a manner that each occupied housing unit contained one household. *Id.* at app. 13.

324. Approximately 12.5 percent of all units occupied by black households had between 1.00 and 1.50 persons per unit and 6.9 percent of all units occupied by black households had more than 1.50 persons per unit. LOW-INC. POP., *supra* note 304, at 417. See note 322 *supra* for method of computation.

325. MCWILLIAMS, *supra* note 167, at 215; KIBBE, *supra* note 277, at 157.

such as housing and education, serves to reinforce the stereotypes upon which it is based:

To keep Mexicans earmarked for exclusive employment in a few large-scale industries in the lowest brackets of employment, their employers have set them apart from other employees in separate camps, in company towns, and in segregated *colonias*. Traditionally, Mexicans have been paid less than Anglo-Americans for the same jobs. These invidious distinctions have re-enforced the Mexican stereotype and placed a premium on prejudice. By employing *large* numbers of Mexicans for *particular* types of work, employers have arbitrarily limited the immigrants' chance for the type of acculturation that comes from association with other workers on the job. The pattern of employment has, in turn, dictated the type and location of residence. Segregated residential areas have resulted in segregated schools; segregated schools have re-enforced the stereotype and limited opportunities for acculturation. In setting this merry-go-round in motion, the pattern of employment has been of crucial importance for it has stamped the Mexican as "inferior" and invested the stereotype with an appearance of reality.<sup>326</sup>

The racial stereotype of the Mexican as willing to do work which others would not do, but also as lazy and ignorant, has served to justify employment discrimination both by employers and labor unions.<sup>327</sup>

During World War II, proceedings were brought against three copper companies before the National War Labor Board.<sup>328</sup> The Board found that Mexicans were paid lower starting wages<sup>329</sup> than Anglos and noted:

The problem with which the commission is confronted in these cases is one which is woven into the fabric of the entire community, indeed of the entire Southwest. Unions and employers alike have had a part, and a significant part, in its creation and continuation. All the forms in which contemporary society is organized are in varying degrees affected.<sup>330</sup>

The general situation in Texas during the 1940's was described in the following manner:

Basic to all other problems of Latin Americans in Texas is the economic situation with which they are confronted. Since the beginning, the lot of the Latin American worker employed in Texas industry has been an unhappy one. His opportunities for employment have been, and are now, extremely limited. His chances for promotion in his occupation are curtailed, and his wage rates are generally

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326. *Id.* at 215-16.

327. *Id.*

328. *In re Miami Copper Co.*, 18 War Lab. Rep. 591 (1944).

329. *Id.* at 592-93.

330. *Id.* at 592 n.2.

established on a discriminatory basis. Some improvement was noted during the war; however, it is an indisputable fact that a majority of Texas industries still follow the practice of discriminating against Latin American workers, with regard to employment, wage scales, and opportunities of promotion.<sup>331</sup>

In 1945, less than three percent of the employees in Texas' major industry, petroleum, were Mexican-American.<sup>332</sup> Even when hired, Mexican Americans were either refused promotion entirely (regardless of education, ability, or length of service) or limited in promotion to lower paying, semiskilled jobs.<sup>333</sup> Mexican Americans were subjected to the same conditions as blacks: lower wages for the same work performed by Anglos, segregated drinking fountains, toilets, and bathing facilities, fewer safety and sanitary provisions, and even separate pay windows.<sup>334</sup> Similar conditions existed on the railroads, in the unorganized portion of the meat packing industry, in aircraft plants, and in school districts.<sup>335</sup>

Unions were also involved in the discrimination. In 1945, the President's Committee on Fair Employment Practices ordered the Shell Oil Company to upgrade three Mexican Americans on the basis of seniority. The contract between the company and union specified that Mexican American workers could hold only certain jobs. When the workers were upgraded, the union called a wildcat strike to protest the action.<sup>336</sup>

A study of a southern Texas town in the 1950's indicates both the continuing vitality of the perception of Mexican Americans as racially inferior and the relationship of that perception to the relegation of Mexican Americans to poorer jobs:

The assumption that Mexican-Americans will be ultimately assimilated was not uniformly shared by all the Anglo-Americans who were our informants in Border City. Regardless of whether they ex-

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331. KIBBE, *supra* note 277, at 157.

332. *Id.* at 159.

333. *Id.*

334. *Id.* at 160.

335. *Id.* at 161-64.

336. *Id.* at 161. Not all labor unions were antagonistic toward Mexican Americans. The proceedings against the copper companies during World War II, see text accompanying notes 328-30 *supra*, were initiated by the International Union of Mine, Mill and Smelter Workers, CIO. McWILLIAMS, *supra* note 167, at 197. The American Federation of Labor, however, had opposed Mexican immigration in the debates during the 1920's, see DIVINE, *supra* note 144, at 10-11, and viewed Mexicans as "cheap labor," competing with their membership. The Federation's concern was well-founded since many employers wanted continued Mexican immigration precisely because Mexican immigrants would work for less. See text accompanying notes 172-73 *supra*. However, the Federation also allowed affiliates to bar Mexican Americans from membership. McWILLIAMS, *supra* note 167, at 216.

pressed adherence to this ideal [of ultimate assimilation], however, *most Anglo-Americans expressed the contrasting assumption that Mexican-Americans are essentially inferior*. . . . As in the case of their adherence to the ideal of assimilability, not all Anglo-Americans hold the same assumptions and expectations with respect to the inferiority of Mexican-Americans; and even those who agree vary in the intensity of their beliefs. Some do not believe in the Mexican's inferiority at all; some are relatively moderate or sceptical [sic], while others express extreme views with considerable emotional intensity.

*Despite this variation, the Anglo-Americans' principal assumptions and expectations emphasize the Mexicans' presumed inferiority.* In its most characteristic pattern, such inferiority is held to be self-evident. . . . Since they are so obviously inferior, their present subordinate status is appropriate and is really their own fault. There is a ready identification between Mexicans and menial labor, buttressed by an image of the Mexican worker as improvident, undependable, irresponsible, childlike, and indolent. If Mexicans are fit for only the humblest labor, there is nothing abnormal about the fact that most Mexican workers are at the bottom of the occupational pyramid, and the fact that most Mexicans are unskilled workers is sufficient proof that they belong in that category.<sup>337</sup>

Although wealthy persons of Mexican descent maintained a relatively high social status in New Mexico during the 1800's,<sup>338</sup> a study of several New Mexico communities during the early 1960's stated: "The factor of skin color is hard to assess, but . . . nevertheless, it seems certain . . . that as one descends the occupational ladder, the skin color gets darker."<sup>339</sup> This pattern has even existed in the northern New Mexico cities, such as Albuquerque and Santa Fe, where Mexican Americans in New Mexico have traditionally retained the highest status relative to Anglos.<sup>340</sup>

337. Simmons, *supra* note 264, at 289 (emphasis added).

338. See text accompanying notes 252-54 *supra*. Despite this fact, Nancie González noted that the *Albuquerque City Directory and Business Guide* listed no Mexican-Americans in any profession in 1907. GONZÁLEZ, *supra* note 147, at 157. She was unable to account for this fact but concluded that it probably reflected the increased discrimination against New Mexicans of Mexican descent and the more common identification of them with their Indian blood which occurred during the twentieth century and reached their peak in 1930's. *Id.* at 157.

339. D'Antonio & Samora, *Occupational Stratifications in Four Southwestern Communities*, 41 SOCIAL FORCES 18, 24 (1962), quoted in GONZÁLEZ, *supra* note 147, at 206.

340. GONZÁLEZ, *supra* note 147, at 158. González performed an analysis of the telephone directories of a number of New Mexican cities, which indicated a tremendous sparsity of Mexican-American professionals. Albuquerque had a population of 201,189 according to the 1960 census, *id.* at 159, with a Mexican-American population of 68,101 in the metropolitan area. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, U.S. CENSUS OF POPULATION: 1960—SUBJECT REPORTS: PERSONS OF SPANISH SURNAME (PC(2)-1B) 134 (1963) [hereinafter cited as 1960 CENSUS REPORT]. González found 14 Spanish-surname dentists, eight physicians, and 32 lawyers, compared with 131 Anglo dentists, 293 physicians, and 222 lawyers. GONZÁLEZ, *supra*, at 159. Santa Fe had a

The disproportionately low number of Mexican Americans in higher-paying and high-skilled fields and disproportionately high number in lower-paying and lower-skilled jobs is typical of the country as a whole. The 1970 census indicated that 4.2 percent of all employed Mexican-American family heads were engaged as "professional, technical or kindred workers,"<sup>341</sup> compared with 6.2 percent of all black family heads<sup>342</sup> and 14.4 percent of all family heads employed in 1969.<sup>343</sup>

An analysis of 1960 census data shows that Mexican Americans not only held a lower percentage of professional and managerial positions, but also lower-paying positions within these categories,<sup>344</sup> e.g., they tended to be medical technicians rather than surgeons. In California and Texas, where the vast majority of Mexican Americans reside,<sup>345</sup> they are underrepresented in highly unionized, better-paying jobs and in service work, such as fire and police protection.<sup>346</sup>

In 1959, the unemployment rate for Mexican Americans was 8.5 percent of the national civilian labor force, compared with 9.1 percent for blacks and 4.5 percent for Anglos.<sup>347</sup> In addition, Mexican Americans experienced a higher incidence of underemployment (working fewer weeks per year) than either blacks or Anglos.<sup>348</sup> In 1969, this was still the case: 58 percent of all employed Mexican family heads worked 50-52 weeks per year,<sup>349</sup> compared with 63 percent of all black<sup>350</sup> and 76 percent of all Anglo employed family heads.<sup>351</sup>

As one would expect, holding fewer jobs, poorer jobs, and working less result in lower income for Mexican Americans. The per capita income in 1959 for Mexican Americans was the worst for any group

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Spanish-surname population of 17,635, 1960 CENSUS REPORT, *supra*, at 197, out of a total population of 33,394, yet had only nine Spanish-surname dentists, two physicians, and 14 lawyers, compared with 29 Anglo dentists, 54 physicians, and 82 lawyers. GONZÁLEZ, *supra*, at 159. Roswell, the second largest city in the state, had no Spanish-surname professionals at all listed in the directory out of a total population of 39,593. *Id.* Las Cruces, whose population of 29,367 was approximately half Mexican American, had no dentists or physicians and one lawyer of Spanish surname. *Id.* at 158-59.

Furthermore, while the number of Mexican-American professionals was increasing in both Albuquerque and Santa Fe, both cities were also experiencing the growth of a lower-class made up almost entirely of Mexican Americans. *Id.* at 159.

341. SPAN. ORIG. POP., *supra* note 38, at 107.

342. LOW-INC. POP., *supra* note 304, at 280.

343. *Id.*

344. MOORE, *supra* note 38, at 61.

345. See note 38 *supra*.

346. MOORE, *supra* note 38, at 62. This situation is more true in Texas than California. *Id.*

347. GREBLER, *supra* note 197, at 208.

348. *Id.* at 208-09.

349. SPAN. ORIG. POP., *supra* note 38, at 107.

350. LOW-INC. POP., *supra* note 304, at 280.

351. *Id.*

in the Southwest except the Indian.<sup>352</sup> Spanish-surname males earned 57 cents for every dollar earned by Anglo males in the Southwest.<sup>353</sup> The median income for Spanish-surname families was \$4,164; for other minority families, \$3,644; and for Anglo families, \$6,448.<sup>354</sup> (The larger size of Mexican-American families accounts for the fact that their per capita income is lower than for other minority groups except Indians.)<sup>355</sup> By 1969, the median income of Mexican-American families had increased to \$6,962<sup>356</sup>—about \$500 more per year than Anglos earned ten years earlier.<sup>357</sup> Nor is lack of education the only cause of these disparities: Mexican Americans earned consistently less in 1959 than Anglos with comparable educations,<sup>358</sup> and as educational attainment increased, the income differential did as well.<sup>359</sup>

It is perfectly obvious from the most superficial examination of the data that in general Mexican Americans hold the less desirable jobs in the Southwest because of lack of education, lack of business capital, cultural dissimilarity to the majority, and their obvious role as a low-prestige group. Further, Mexicans are disproportionately forced to work in low-wage or marginal firms—in the less profitable, non-unionized fringes of the high-wage industries. . . .

. . . There is no evidence, however, that Mexicans are any less productive on the job than Anglos. On the other hand, it is very plain that the southwestern labor market reflects fairly substantial discrimination however it may be disguised.<sup>360</sup>

#### D. Law Enforcement

A final area to consider is law enforcement and the administration of justice. Again what emerges is a pattern of treatment by the majority Anglo population based upon an early perception of Mexican Americans as nonwhite which has continued to the present, manifesting

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352. MOORE, *supra* note 38, at 60.

353. *Id.*

354. GREBLER, *supra* note 197, at 181.

355. MOORE, *supra* note 38, at 60, 71.

356. SPAN. ORIG. POP., *supra* note 38, at 121.

357. See text accompanying note 354 *supra*.

358. GREBLER, *supra* note 197, at 194-96.

359. *Id.* At the highest educational levels, the income differential did not increase. *Id.* at 196.

360. MOORE, *supra* note 38, at 63-64. Employment discrimination, whether based on race or national origin, is of course illegal today for the most part; but Mexican Americans may still be excluded from better fields of employment and job advancement through various devices, such as seniority systems which "lock in" past patterns of discrimination, *see, e.g.,* *Sabala v. Western Gillette, Inc.*, 362 F. Supp. 1142 (S.D. Tex. 1973), or job qualifications unrelated to job fitness. *See* MOORE, *supra* note 38, at 62. *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

itself both in unequal application of the law and unequal participation in the administration of the legal system.

During an investigation connected with the largest mass-murder trial held until that time in the United States (which resulted in the conviction of 17 Mexican-American youths<sup>361</sup>) a captain of the Los Angeles Sheriff's Department prepared a report for submission to the grand jury on the problem of "Mexican juvenile delinquency."<sup>362</sup> After accurately noting that serious discrimination existed against Mexicans in employment, public accommodations and other areas,<sup>363</sup> he proceeded to discuss the respective fighting habits of the Anglo and Mexican youths:

The Caucasian, especially the Anglo-Saxon, when engaged in fighting, particularly among youths, resort to fisticuffs and may at time kick each other, which is considered unsportive: but this Mexican element considers all that to be a sign of weakness, and all he knows and feels is a desire to use a knife or some lethal weapon. In other words, his desire is to kill, or at least let blood. That is why it is difficult for the Anglo-Saxon to understand the psychology of the Indian or even the Latin, and it is just as difficult for the Indian or the Latin to understand the psychology of the Anglo-Saxon or those from northern Europe. When there is added to *this inborn characteristic* that has come down through the ages, the use of liquor, then we certainly have crimes of violence.<sup>364</sup>

The racial attitude indicated in this report found expression in the law enforcement policies of the time. A study of the files of the Los Angeles Superior Court in 1938 showed that 5.3 Mexican Americans were arrested for every one convicted of a felony, while the ratio for Anglos was 2.7.<sup>365</sup> Probation was awarded almost three times as often

361. McWILLIAMS, *supra* note 167, at 229.

362. *Id.* at 233-34.

363. Mexicans as a whole, in this county . . . are restricted in the main only to certain kinds of labor, and that being the lowest paid. It must be admitted that they are discriminated against and have been heretofore practically barred from learning trades. . . . This has been very much in evidence in our defense plants, in spite of President Roosevelt's instructions to the contrary. . . . Discrimination and segregation, as evidenced by public signs and rules, such as appear in certain restaurants, public swimming plunges, public parks, theaters, and even in schools, cause resentment among the Mexican people. . . . There are certain parks in this state in which a Mexican may not appear, or else only on a certain day of the week. There are certain plunges where they are not allowed to swim, or else only on one day of the week, and it is made evident by signs reading to that effect, for instance, "Tuesdays reserved for Negroes and Mexicans." . . . Certain theaters in certain towns either do not allow Mexicans to enter, or else segregate them in a certain section. Some restaurants absolutely refuse to serve them a meal and so state by public signs. . . . All this applies to both the foreign and American-born Mexicans.

Quoted in *id.* at 233-34.

364. Quoted in *id.* at 234.

365. MOORE, *supra* note 38, at 93. A study of one town in Texas indicated that people of Mexican descent were arrested four times as frequently as Anglos. KBBB,

for Anglos as for Mexican Americans.<sup>366</sup>

Nor is this genetic explanation for crime among Mexican Americans simply the product of a bygone age. The Chief of the Los Angeles Police Department stated in 1960:

The Latin population that came in here in great strength were here before us, and presented a great problem because I worked over on the East Side when men had to work in pairs—but that has evolved into assimilation—and it's because of some of these people being not too far removed from the wild tribes of the district of the inner mountains of Mexico. I don't think you can throw the genes out of the question when you discuss behavior patterns of people.<sup>367</sup>

A 1970 report by the United States Commission stated:

The Commission's investigation found widespread discrimination against Mexican Americans by law enforcement officials which ranged from verbal abuse to actual physical violence. Evidence shows that it is a fact of the Mexican American's life to be subjected to unduly harsh treatment by police, to be frequently arrested on insufficient grounds, to receive harassment and penalties disproportionately severe compared to those imposed on Anglos for the same acts.<sup>368</sup>

In another aspect of the administration of justice—participation on jury panels—Mexican Americans have also been subjected to discrimination typical of that experienced by nonwhite groups, especially blacks. A study of conditions in Texas into the 1940's indicated that in approximately 50 counties in which the Mexican-American inhabitants comprised 15 to 40 percent of the population, no persons of Mexican descent had ever been called for jury service.<sup>369</sup>

While discrimination against Mexican Americans in the selection of grand jury panels was found violative of the fourteenth amendment in *Hernandez v. Texas*,<sup>370</sup> various devices still serve to perpetuate the exclusion of Mexican Americans. For example, the "key man" system, under which jury commissioners ask prominent people in the community to suggest persons for the grand jury, is still used by most states (although banned for federal juries).<sup>371</sup> This results in the exclusion of the primarily lower and middle-class Mexican Americans who are

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*supra* note 277 at 229-30.

366. MOORE, *supra* note 38, at 93.

367. U.S. COMM'N ON CIVIL RIGHTS, HEARINGS BEFORE THE U.S. COMM'N ON CIVIL RIGHTS (San Francisco, Cal., January 27, 1960), *quoted in* MOORE, *supra* note 38, at 92-93.

368. U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (SUMMARY) 2 (1970) [hereinafter cited as ADMIN. OF JUSTICE].

369. KIBBE, *supra* note 277, at 229.

370. 347 U.S. 475 (1954).

371. ADMIN. OF JUSTICE, *supra* note 368, at 9.



unknown to the community leaders.<sup>372</sup> In Nueces County, Texas, the site of Professor Taylor's study, the United States Commission on Civil Rights was told that of 288 grand jurors selected over a nine year period, only 16 had been Mexican-American.<sup>373</sup> In another Texas County where Mexican Americans comprised 45 percent of the population, the petit jury panel consisted of 48 persons, only two of whom were of Mexican descent, and one of those two was dead.<sup>374</sup> A study of grand jury service in California found that, although there were 500,000 persons of Spanish surname in Los Angeles County in 1960, only four had served as grand jurors over a 12-year period.<sup>375</sup> Only one Spanish-surnamed person had served in Orange County over the same period.<sup>376</sup>

Literacy requirements for placement on grand juries are universal; and the "language barrier" is often given as the rationale for the failure of Mexican Americans to appear in the panels. The Civil Rights Commission rejected this argument by pointing out that as poorly educated as Mexican Americans are by southwestern schools, they nevertheless have a working knowledge of English in most cases.<sup>377</sup>

Mexican Americans also have a very low rate of employment in law enforcement and related fields. The Civil Rights Commission sent a questionnaire to law enforcement agencies in the Southwest. The responses indicated that over a two-year period, only 25 agencies had recruited through Spanish language newspapers, and 16 had used radio or television.<sup>378</sup> The Director of the Texas Department of Public Safety testified before the Commission that only 38 Mexican Americans were employed by the Department, and even this figure included uniformed officers serving in the drivers' license and motor vehicle inspection services.<sup>379</sup> A staff report to the Commission indicated that there were no Mexican-American police officers in some cities in Colorado in which Mexican Americans comprised over 20 percent of the total population.<sup>380</sup>

The Commission found that there were two Spanish-surnamed federal judges out of 58 and 32 Spanish-surnamed state judges out of

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372. *Id.* at 9-10.

373. Rowan, *supra* note 19, at 20.

374. *Id.*

375. California Rural Legal Assistance, A Study of Grand Jury Service by Persons of Spanish Surname and by Indians in Selected California Counties 120 (1968) (Appendix B to U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMIN. OF JUSTICE IN THE SOUTHWEST (1970)).

376. *Id.*

377. ADMIN. OF JUSTICE, *supra* note 368, at 9.

378. *Id.* at 13.

379. *Id.* at 13-14.

380. Rowan, *supra* note 19, at 18.

a total of 961.<sup>381</sup> Similarly only three percent of the state district attorneys, public prosecutors, and their assistants were Spanish-surnamed.<sup>382</sup> The United States Department of Justice employed 6,079 persons, of whom 448 (or 7.36 percent) were Mexican Americans, and they were mostly in lower-level jobs.<sup>383</sup> Only one-third of one percent of the executive and higher supervisory positions were held by Mexican Americans.<sup>384</sup>

The Commission concluded:

[A] great abyss separates the Mexican American and the Anglo communities in the five Southwest States [the Commission] studied. On the one hand, it found that the Mexican American community felt itself intimidated and, based on personal experience of harassment, had become hostile to law enforcement agencies. On the other hand, *it found that the Anglo community, which traditionally has regarded the Mexican American people and culture as inferior, has treated them with indifference and disrespect.*<sup>385</sup>

#### E. Racism and Other Explanations

As the above material indicates, persons of Mexican descent have been commonly understood to be nonwhite. As a result of this racial perception, Mexican Americans not only have encountered substantial discrimination but also, "by all measures of income, occupational distribution, and housing are America's second largest disadvantaged minority."<sup>386</sup> Professor Moore has described the unique position of the Mexican people in the United States as being somewhere between that of the typical immigrant and that of the black American.<sup>387</sup> While it is difficult to assess the importance of any one factor in intergroup relations, it is nonetheless clear that the Anglo perception of Mexican Americans as nonwhite has been the major factor affecting their status in the United States today.

Undoubtedly, other factors may be important in Mexican-Anglo relationships. For example, Mexicans have been the largest immigrant group since 1930,<sup>388</sup> and Americans have been traditionally antipathetic toward new immigrant groups no matter what the perceived race. Yet the low social and economic status of Mexican Americans cannot be explained by the fact that many Mexican Americans are recent im-

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381. ADMIN. OF JUSTICE, *supra* note 368, at 14.

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.* (emphasis added).

386. MOORE, *supra* note 38, at 157.

387. *Id.* at 159-60.

388. *Id.* at 158.

migrants or descendants of recent immigrants. First, by 1960 almost 85 percent of the Mexican-American population in the Southwest was native-born and 55 percent was third generation (native-born of native-born parentage).<sup>389</sup> Second, while the third generation tends to be better educated and to earn more than the *foreign-born*, as well as to have penetrated more deeply into the majority population,<sup>390</sup> it does not have a higher income than the second generation (native-born of foreign-born or mixed parentage).<sup>391</sup> Thus, in contrast with most immigrant or minority groups, except blacks, it appears that even three generations is insufficient to bring Mexican Americans into a position of income parity with the general southwestern population.<sup>392</sup>

Perhaps the traditional Anglo antagonism toward new immigrants has been applied to *all* Mexican Americans because of a failure to distinguish between the new immigrants and nonimmigrants. But this blanket attitude would only be possible because of the distinct physical appearance, and particularly the skin color, of most Mexican Americans. This suggests the importance of skin color as the basis of the discrimination to which they have been subjected.<sup>393</sup>

Another factor which may have facilitated such a transfer of attitude from the immigrants to the nonimmigrants is the retention of the use of Spanish by the immigrants' descendants. This too, however, is related to the perception of Mexican Americans as nonwhite. The social isolation to which they have been subjected has made it impossible for Mexican Americans in general to assimilate into the English-speaking population, as have Italians, Jews, and other immigrant groups which have also faced discrimination.

The "language" rationale for the status of Mexican Americans is the result of a particularly vicious cycle. School districts justified segregated schools for Mexican-American children on the grounds that their

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389. GREBLER, *supra* note 197, at 107.

390. MOORE, *supra* note 38, at 56-57.

391. GREBLER, *supra* note 197, at 191-92.

392. MOORE, *supra* note 38, at 57; GREBLER, *supra* note 197, at 192-93. This is exemplified by the situations in Colorado and New Mexico, which have by far the highest concentrations of native Mexican Americans in the Southwest and where the descendants of the Hispano-Mexican settlers have always been concentrated. *Id.* at 106. The incomes of Mexican-American families in these states is not the highest among Mexican Americans in the Southwest, indicating that longevity of presence is not the factor which determines the ability of Mexican Americans to earn a living. (Nor can this be explained by the fact that the general incomes in these two states is not the highest in the Southwest. While New Mexico had the second highest and Colorado the fourth highest income for Anglos in the Southwest in 1959, New Mexico had the fourth highest income and Colorado the third highest income for Mexican-Americans in the region. *See id.* at 181.)

393. This appears to be precisely what happened in New Mexico during the 1920's and 1930's. *See* text accompanying notes 253-55 *supra*.

English language deficiency required special attention, and that integrated education would unnecessarily retard the progress of Anglo children and adversely affect the Mexican Americans by making them feel inferior to their Anglo counterparts. But the Mexican-American schools were inferior both in terms of facilities and personnel, and many children dropped out of school in the early years.<sup>394</sup> Later forms of discrimination, *e.g.*, in employment and jury panels, were then justified by the inability of many Mexican Americans to speak and write English as effectively as Anglos—precisely the reason they had been placed in segregated schools in the first place. Of course, as we have already seen, Mexican-American children were actually put in segregated schools because they were not white; the language explanation was utilized only when school officials were forced to defend segregatory policies for which there was no statutory authority. Thus, the language rationale provides an excellent example of the use of non-racial justifications for actions based on essentially racial prejudice.

Of course, as with other groups generally perceived as nonwhite, individuals of Mexican descent “pass” into the majority population.<sup>395</sup> And both the existence and virulence of discrimination has varied in different geographic areas and different times. But this does not negate the fact that the discrimination which *has* existed against Mexican Americans has been, to a large extent, initiated and perpetuated because of the perception that they are not white.

Indeed, the longevity of the discrimination which Mexican Americans have encountered itself suggests that which the rest of the material we have examined serves to demonstrate—that Mexican Americans are the victims of a color-caste system deeply rooted in American society.<sup>396</sup>

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394. See text accompanying notes 282-86 *supra*. In *Hernandez v. Texas*, 347 U.S. 475 (1954), the Supreme Court appeared to take notice of the relationship between the inferior facilities, high drop-out rate, and the “language rationale.” 347 U.S. at 479 n.10. See note 282 *supra*.

395. The fact that this often occurred through persons of Mexican descent referring to themselves as Spanish, rather than Mexican, see text accompanying notes 252-58 *supra*, is a strong indication that being labeled as Mexican was equivalent to being labeled as nonwhite. *Id.* Thus social mobility was possible for persons of Mexican descent despite the fact that strong race prejudice exists against persons identified as being of Mexican descent in general, but it was limited primarily to those who do not have the physical appearance (and particularly the dark skin) of the Mexican people in general. See text accompanying notes 250-51 *supra*. The requirement that a person of Mexican descent in effect deny his or her racial heritage through disavowing of the label “Mexican” is one indication that what persons of Mexican descent have encountered in this country are “caste” barriers based on race and skin color, rather than merely “class” barriers. See note 396 *infra*.

396. ACUÑA, *supra* note 29, at 4. Myrdal describes the class-caste distinction as it relates to blacks and whites thus:

The boundary between Negro and white is not simply a class line which can

In the course of the general westward shift of population, a geographical segregation of racial "color groups" has taken place in the United States: the Negro in the South; the Mexican in the Southwest; and the Orientals on the Pacific Coast . . . . Mexican immigration brought to the Southwest . . . a racially colored population which, over a period of years, has come to be fitted into a status system not distinguishable, in all respects, from that which prevails throughout the Deep South.<sup>397</sup>

### CONCLUSION

We have thus reached three major conclusions. First, Mexicans were generally perceived as nonwhite, both in and out of Congress, when the predecessor to sections 1981 and 1982 was enacted in the Civil Rights Act of 1866. Second, that perception has continued during this century. Third, Mexican Americans have encountered serious, widespread discrimination, based to a major extent on that racial perception.

In *Jones v. Alfred H. Mayer Company*,<sup>398</sup> the Supreme Court noted:

[W]hatever else they may have encompassed, the badges and incidents of slavery—its "burdens and disabilities"—included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens . . . . And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

. . . At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.<sup>399</sup>

Racial discrimination is not a "relic of slavery" only as it affects

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be successfully crossed by education, integration into the national culture, and individual economic advancement. The boundary is fixed. It is not a temporary expediency during an apprenticeship in the national culture. It is a bar erected with the intention of permanency. It is directed against the whole group. Actually, however, "passing" as a white person is possible when a Negro is white enough to conceal his Negro heritage. But the difference between "passing" and ordinary social climbing reveals the distinction between a class line, in the ordinary sense, and a caste line.

MYRDAL, *supra* note 29, at 58.

397. C. McWILLIAMS, *BROTHERS UNDER THE SKIN* 120 (1st ed. 1943).

398. 392 U.S. 409 (1968).

399. *Id.* at 441-43.

black people in the United States today.<sup>400</sup> The use of racism as a justification for the economic, social, and legal subservience of black people through slavery and the post bellum caste system<sup>401</sup> led to its use as the justification of the similar subservience for other groups perceived as racially distinct. The majority has tolerated the presence of these groups in this country on condition that they contribute their labor to the country's growth, but confine their interaction to themselves. In large part, slavery spawned the racial attitude toward Mexican Americans, as well as toward other groups perceived as nonwhite, in the same manner that it did toward blacks. We have traced the basis of this attitude as it has manifested itself in the Anglo perceptions of Mexican Americans. In addition, we have examined the legacy of this attitude—the submerged status of Mexican Americans in American society. It is important to recognize what some have overlooked: Mexican Americans have not simply encountered the temporary barriers met by nearly all groups who come to this country; they have been faced with the additional barrier of racism.<sup>402</sup>

Sections 1981 and 1982 represent important vehicles for combating both private and public racial discrimination. The history of the Anglo perception of the people of Mexican descent and the modern ramifications of that perception compel the conclusion that the statutes should be available to Mexican Americans as they struggle to combat the legacy of that perception.

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400. *Ranjel v. City of Lansing*, 293 F. Supp. 301, 308 (W.D. Mich. 1969), *rev'd on other grounds*, 417 F.2d 321 (6th Cir. 1969).

401. MYRDAL, *supra* note 29, at 87-90.

402. In the words of another commentator who examined the problems of race and color for persons of Mexican descent:

Those scholars and leaders, on whatever side who ignore the racial aspect of the "Mexica's" struggle for equality, or of any other colored group, are not helping to solve the problem; they are merely giving tacit approval to an escapist avoidance of all the issues, and thereby contributing to the postponement of any final or human solution.

Forbes, *Race and Color in Mexican-American Problems*, 16 J. HUMAN RELATIONS 55, 67 (1968).