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Clockwise from top left:
Colonia neighborhood, South Texas (Affordable Housing Institute); "Water is Life" banner, New Mexico (New Mexico Acequia Association); "Land or Death" sign, 1967, Tierra Amarilla, New Mexico (National Museum of American History); Rancho Jamul, a Mexican land grant owned by General Henry Stanton Burton and his wife, María Amparo Ruiz de Burton, Rancho Jamul Ecological Preserve, California (California Department of Fish and Game); La Canova acequia, near Velarde, New Mexico (Creative Commons by Markabq, 2008)



Latinos and the Law

Margaret E. Montoya*

The United States is a society that is crisscrossed by law, legality, and illegality. Law—with its legal structures, such as courts and legislatures, its strictures about social norms and values, its stilted jargon and rigid hierarchies about who or what matters and who or what doesn't—determines many borders and boundaries of our lives, just as it did for our *antepasados*, our ancestors. Historically, in the U.S. law is revered as a force and an instrument for emancipation, justice, autonomy, and equality.

Paradoxically law must also be recognized as a force and an instrument for oppression, injustice, subordination, and inequality. For example, the Treaty of Guadalupe Hidalgo granted federal citizenship to thou-

sands of Mexicans who gradually gained full citizenship through the admission of the various states. The conquest of half of Mexico's territory in 1848 is both a story of an unjust war and one of new beginnings for many who became U.S. citizens and whose children and grandchildren lived to enjoy lives of opportunity and improved fortunes.

The push and pull of justice and injustice, these contradictory tensions in the law, deepen our understanding of what it means to make a democracy, the broader theme for this essay about Latinos and the Law. On the one hand, making a democracy has nation-building dimensions exemplified by the consolidation of the landmass comprising the transcontinental federation of states. On the other hand, making a democracy also encompasses the project on cultural citizenship, which, in the words of Professors Renato Rosaldo and William V. Flores, is the right to be different (in terms of race, ethnicity, or native language) with respect to the norms of the dominant national communi-

ty, without compromising one's right to belong, in the sense of participating in the nation-state's democratic processes.¹

Making a Democracy: Latinos' Demand for Cultural Citizenship

Latinos, like other racial, ethnic, color, and language minorities, have struggled over the decades to have a say on issues and take part in shaping the common destiny of the nation while asserting, winning, and maintaining cul-

tural citizenship, thus, transforming the characteristics of the polity and diversifying the faces that are emblematic of the larger society. Latinos have fought for the same economic, political, and social rights and

freedoms as others enjoy and often have done so while also fighting to preserve their cultural and linguistic heritage. The courts have often interpreted Latino cultural differences through the discourse of racial inferiority. For example, once the U.S. became an explicitly imperial power with the possession of Puerto Rico and the Philippines, the issue of the constitutionality of colonialism, and specifically the applicability of the Bill of Rights within the territories, was answered in *Downes v. Bidwell* (1901)², one of the *Insular Cases* (1901-1904). The Supreme Court concluded those possessions are inhabited by alien races, differing from us and thus belong to the U.S. but are not a part of it. Therefore, Puerto Ricans would be denied cultural citizenship, i.e., denied constitutional protections because of the racial and cultural differences of its people. To this day, Puerto Rico has neither representation in the Congress nor votes in the Electoral College.

A brief overview of the wins and the losses by Latinos over many decades, legal claims usual-

Law constructs the multiple identities that constitute the Latina/o mosaic and help make up this "American" democracy.

ly decided through the courts, illustrates this quest for cultural citizenship.³ One fundamental right that is integral to citizenship is voting, and literacy tests have been used to limit access to the ballot box. The Supreme Court decided two New York cases challenging literacy tests in 1966 pursuant to the Voting Rights Act. New Yorkers who sought to continue to exclude Latino voters brought *Katzenbach v. Morgan* (1966). In the companion case, *Cardona v. Power* (1966), the Court discarded such tests and secured the voting rights of Puerto Ricans and other language minorities with limited English skills, a ruling that eventually led to bilingual ballots. Language differences have continually raised barriers for full democratic participation and compromis[ed] the right to belong, in the words quoted above of Professors Rosaldo and Flores. One such barrier is the ability to speak, read, and write English, a requirement for naturalization as a citizen. Another barrier is so-called English Only laws, declaring English the official language, passed by over twenty states since the 1980s.

When the U.S. Supreme Court decided *Hernandez v. Texas*, the Court extended the protections of the 14th Amendment to Latinos.

Making a democracy entails the preparation of citizens for civic engagement through public education and open political debate as well as immigration and naturalization processes for entry by newcomers into the society as full citizens. Because Latinos are seen as different, their right to belong fully as citizens remains at issue. The U.S. Supreme Court in deciding that unequal financing of public schools did not violate the Equal Protection clause of the 14th Amendment in *San Antonio Independent School District v. Rodriguez* (1973) also concluded that education is not a fundamental right under the Constitution. Even so, language-minority children won the right to equal educational opportunity in *Lau v. Nichols* (1974), a case dealing with Chinese students that was the basis for

Serna v. Portales Municipal Schools (1974), extending the right to Spanish-surnamed children in New Mexico. Another important case involving both education and immigration is *Plyler v. Doe* (1982) in which the U.S. Supreme Court concluded that Texas could not deny free public education to undocumented school-age children. The Court relied upon the Equal Protection clause of the 14th Amendment and found that the Texas school district had violated the rights accorded to undocumented aliens under the Clause.

Two intertwined rights—the right to be different and the right to belong and exercise political agency—are at the heart of the cultural citizenship concept. In 1954, when the U.S. Supreme Court decided *Hernandez v. Texas*, the Court extended the protections of the 14th Amendment to Latinos. In doing so, the Court had to contend with the legal status of Mexican-Americans as racially white (which is explained at greater length below) but nonetheless subjected by the local community to Jim Crow-like mistreatment as a group. This case is precisely about the denial of cultural citizenship, a situation in which Latinos were seen as different and consequently were not allowed to belong or participate in democratic processes, in this instance as members of local juries. Judicial opinions contain stories about the dispute involving the parties, the court picks through the facts to create a narrative that reflects the judge's or judges' worldview as well as a logical argument about social norms and collective values. What follows is part of the story told by the Supreme Court about Latinos in Texas in 1954.

The petitioner, Pete Hernandez, was indicted for the murder of one Joe Espinosa by a grand jury in Jackson County, Texas. He was convicted and sentenced to life im-

prisonment. He alleged that persons of Mexican descent were systematically excluded from service as jury commissioners, grand jurors, and petit jurors, although there were such persons fully qualified to serve residing in Jackson County. [R]esidents 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"). 14 percent of the population of Jackson County were persons with Mexican or Latin-American surnames, and that 11 percent of the males over 21 bore such names. The County Tax Assessor testified that 6 or 7 percent of the freeholders on the tax rolls of the County were persons of Mexican descent. The State of Texas stipulated that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County."⁴

By claiming distinctive identities and invoking culturally salient expressions of rights, the Latino communities have made a major contribution in expanding the public imagination with respect to democracy and its embrace of those outside of the dominant majority. These contributions have often been led by community activists and facilitated by lawyers steeped in the cultural norms and sharing the worldview of the Latinos/as involved in these legal disputes. The transformation of the legal profession has been championed by legal organiza-

tions such as MALDEF (Mexican American Legal Defense and Education Fund) and LatinoJustice PRLDEF (Puerto Rican Legal Defense and Education Fund); legal academics such as Professor Gerald López who espouses a form of "rebellious" lawyering on behalf of underserved communities;⁵ and legal academic organizations such as LatCrit, Inc.⁶ (Latino/a Critical Legal Theory) that, over 15 years, has developed a community of multiracial progressive scholars and educators that use Law to expose and end the subordination of communities of color.

These contradictory tensions in the law, the just and unjust outcomes alluded to above, are revealed when we briefly examine aspects of Latinos' historical and contemporary encounters with the law and its treatment of land, water, and housing as well as the forces the law has brought to bear on the identities of Mexican-American people as one illustration of the law's treatment of different Latino subgroups. (About two-thirds of all Latinos are Mexican-Americans, by far the largest of the Latino subgroups, and much of the law affecting Latinos has developed from disputes involving Mexican-American individuals and/or communities.) The section on land begins with the U.S.-Mexico War that, as mentioned above, ended with the Treaty of Guadalupe Hidalgo and concludes with a description of the marital property rules corresponding to the ten community property states, which are also a vestige of the Spanish and Mexican civil law systems.

The section on water briefly describes the raging disputes over the rivers in the west and the corresponding compacts and agreements to divide the scarce water in a region that is largely desert. This section on water and law also describes the *acequia* culture of New Mexico, a quasi-legal system of irrigation ditches and water management that has persisted and proven resilient, since the earliest days of the Spanish occupation.

The final section on law and housing briefly examines the mortgages that were made available under the G.I. Bill after World War II and the extent to which Latino veterans were benefited. Recently, many immigrants have been forced to live in border communities called *colonias* that lack basic utilities, blighting the lives of workers and their families. On the other hand, the last decades saw millions of Latino families reach for the American Dream by moving into the ranks of homeowners. However, when the financial system collapsed in 2008, the subprime mortgage debacle fell heaviest on Latino and African American communities that had been targeted by the megabanks with predatory lending practices.

Note to the reader: In 1999 there were 241 Latina/o law professors in about 184 law schools throughout the country. As of 2009, Latinas/os comprised 337 or 3.1 percent of total number of law professors.⁷ One of the key contributions we have made to development of legal knowledge is the use of stories, *cuentos y recuerdos*. In this essay, I write in two different voices: I use a neutral voice to describe the legal environment. I use a more localized storytelling voice in the sections that are in italics to describe the ways in which the law has constructed the cultural and racial identities of the Mexican-American community. I identify as Mexican-American and my racial/ethnic identity has been informed by stories situated in that reality, history, and heritage. The stories that I tell are meant as placeholders for the many stories that can be told from other Latino/a perspectives.

Latinos, Law, and Land: Expanding the Meaning of “America” and “American”

Historically, for Latinos, land has been livelihood—land allows for the growing of food and the space for cattle and horses, land contains minable resources and supports train tracks, highways, and ports. For Latinos, land is also about place, about *raíces*, our roots of identity,

family, faith, and community. Land and place are about belonging (*¿De donde eres?* we are asked by *los ancianos* (Where are you from? old-timers ask). Over time, land acquires sacred meaning as ancestral burial grounds and as it is traversed by religious processions and political marches. Land, the location for wars, struggles, births, and dreams becomes inscribed with story and counter-story.

President James Polk agreed with the concept of Manifest Destiny and in March 1846, gave orders to General Zachary Taylor to invade Mexico for the purpose of seizing its northern lands. Taylor marched his 4,000 troops from Corpus Christi at the mouth of the Nueces River, which Mexico claimed as its northern border, toward the Rio Grande, which President Polk claimed was the border. The disputed boundary provided the pretext for this armed intervention that led to the U.S.’s eventual conquest of 525,000 square miles, including what is now California, Nevada, Utah, most of Arizona, New Mexico, and Texas, as well as parts of Colorado, Wyoming, Kansas, and Oklahoma.

The War ended with the signing of the Treaty of Guadalupe Hidalgo, which gave Mexican citizens one year to choose U.S. or Mexican citizenship. Approximately 115,000 people chose to remain in the U.S. and become citizens by conquest. Almost immediately, controversies developed over the content of the treaty that were only resolved through further negotiations in the Senate and subsequently with Mexico. Article IX, dealing with the granting of U.S. citizenship to those who remained in the ceded territory, was revised and Article X, pertaining to the Spanish and Mexican land grants, was excluded altogether from the treaty by the U.S. Senate and then replaced through the Protocol of Querétaro.

The ceded territory was divided into California and New Mexico. California would quickly become a state, mostly because of the discovery

of gold. New Mexico, however, would remain a federal territory and be carved into several states but would not enter the Union for 64 years. Latina/o scholars, such as Professor Laura Gómez, attribute the delay to New Mexico's racial make-up, given that Congress acquiesced in the collective grant of *federal* citizenship to Mexicans.

In 1897, a federal judge in Texas decided *In Re Rodriguez*,⁸ a case in which a Mexican was seeking naturalization. Under the Treaty of Guadalupe Hidalgo, Mexicans (including mestizos with varying Indian ancestry) were collectively naturalized—even though naturalization after the Civil War was limited to whites and persons of African descent. The outcome in the case turned on the Court's conclusion that Rodriguez (although not strictly scientifically, anthropologically White) was nonetheless “white enough” in Professor Gómez's terminology, to fit within the allowable racial category and therefore was eligible for naturalization. This legal precedent, that Mexicans are white persons under the law, was greatly influenced by the Treaty's interpretation. A recently discovered case from 1935 concluded that a person with half Indian and half Spanish blood was not entitled to naturalization under the federal code, and it wasn't until the person was determined to have “only 2 percent Indian blood,” that he was granted citizenship.⁹

These legal precedents would continue to have great significance, even until today, because Mexicans and their progeny, while legally white, would frequently not be treated as equal to Whites in social, economic, and political terms and be subjected to *de jure* and, more

often, *de facto* segregation. (Although there were social and sometimes familial prohibitions to marriages between whites and Mexicans, especially if the Mexican was poor and dark skinned, the anti-miscegenation laws that applied to Blacks, Malays, Asians, and American Indians criminalizing such unions typically did not apply to Mexicans, although some southern states also proscribed whites from marrying mestizos.¹⁰ The 1948 California case of *Perez v. Sharp* pertained to a Mexican female who

identified as white and an African-American man who were denied a marriage license based on the anti-miscegenation laws. The California Supreme Court ruled this unconstitutional.¹¹) Ultimately, the Mexicans who became U.S. citizens would be denied the more important status of *state* citizenship until the territories were carved into smaller areas and admitted as states but only after more English-speaking Whites had moved in.

The effect of the law (in the form of judicial decisions, naturalization statutes, bureaucratic forms, etc.) on the individual and collective identities of Latinos cannot be over-emphasized. The 1930 census was the only one in which the U.S. Census Bureau used “Mexican” as a category for race or color. I have recently been researching the story behind my given name, Margaret Elizabeth Montoya. Because I was named for my maternal grandmother, I set out to find my grandparents' census documents to see whether my grandmother's name was listed as Margarita or Margaret, knowing that she was one-quarter Irish but culturally nuevomexicana.



Mexico and the United States, disputed boundaries between 1836 and 1848 (Mexicanhistory.org)

What I learned from the Census documents is that race resides in the transitory categories of the government perhaps as well as in the mind of the bureaucrat. Twelve families, with names such as Flores, Carrillo, Bustos, Lopez, and Kerker are listed on the same page as my paternal grandparents (the Montoyas) from Santa Rita in southern New Mexico. All are shown as belonging to the Mexican race or color; the census taker is named Mrs. Russell S. Enos. Sixteen families, with such names as Chavez, Aragon, Padilla, Bustos, Montoya, are listed on the same page as my maternal grandparents (the Alarids) from the northern New Mexico town of Bernalillo. All are shown as belonging to the white race or color. The census taker is named Romelia Garcia. It is hard to know without more probing who decided to identify some nuevomexicano families as racially Mexican and others as racially white. This government document does however offer some explanation for the chaos of the racial and ethnic categories applied to Latinos, Mexicanos, Hispanos, nuevomexicanos as well as the complex choices available to today's Latinas/os in their expression or performance of identity.

I was surprised to learn that my grandmother's name was listed as Margaret. I had always known her as Margarita and assumed that my parents had anglicized my name in their own back-and-forth struggles with assimilation and the resistance to assimilation similar to those of other families with outsider identities.



*The Tejon Ranch from the Tehachapi Mountains Crest
The California ranch is made up of four Mexican land grants
(Creative Commons by RangerX, 2009)*

Spain and later Mexico encouraged the settlement of sparsely populated and remote lands by offering lands to individuals and groups of grantees. The Spanish crown bestowed land grants from about 1750 until 1810, and the Mexican government followed suit between 1810 and 1836. Although Article VIII of the Treaty of Guadalupe Hidalgo guaranteed the property rights of Mexican citizens, the status of land grants would remain disputed, even to the present day. The U.S. government instituted programs (such as the Homestead Act) to populate the land, which hampered the ability of the land grantees to preserve their claims.

Land ownership under the laws of Spain and Mexico were markedly different from those of the U.S. One of the most difficult questions involved determining what land was within the public domain and thus available to be redistributed.

Just after the end of the U.S.-Mexico War, the population of California grew exponentially be-

cause of the discovery of gold; some of the best farmland was held as *ranchos* under Mexican land titles. Grantees were given two years under the California Land Act to have their claims confirmed and patented; otherwise the land would fall into the public domain and be open to preemption by settlers. The legal proceedings were expensive and ruled by local custom rather than by law. Moreover, the meanings ascribed to land were deeply cultural and therefore differed between Californios and Euro-Americans, so-called Anglos.¹² Californio claimants were largely cattlemen who saw the land as their livelihood with religious significance while Anglos saw the land in terms of its sale value. Ultimately, Californios and Mexicans

lost most of their land through the technicalities of the patenting process coupled with a relentless market for salable land.

The land grant confirmation process was more rigorous in New Mexico than in California. In the New Mexico territory, Congress adjudicated the land claims after receiving a report from the Surveyor General. This case-by-case legislation process could take decades and proved so unwieldy that, by 1891, the Congress created the Court of Private Land Claims. The Court heard claims involving over 36 million acres but less than 10 percent were confirmed. These percentages are contested; the 2004 Government Accountability Office (GAO) report concluded that 55 percent of the land involved in New Mexico claims was awarded, compared to 73 percent in California.¹³ Despite the guarantees of the Treaty of Guadalupe Hidalgo, most grantees were ultimately unable to prove their ownership because of faulty documents, varying land measurements, and outright fraud by lawyers and other officials. One particular problem involved the ownership of community grants, which under Spanish and Mexican law were collectively owned by the grantees, but under U.S. law such lands would become, through decisions made by the Court of Private Land Claims and later the Supreme Court, the property of the “sovereign,” in this case the U.S. Over 13 years, the courts considered 282 claims to land grants in New Mexico but confirmed only 82 of them.

The resistance to the loss of ownership and control of the land grants was not confined to legal avenues. *Las Gorras Blancas* (“the white hoods”), nightriders who cut the barbed wire

fences that enclosed the common land in Las Vegas, New Mexico, was one of the most effectively organized resistance movements.¹⁴ From 1889 through 1890, the local Mexicano population, greatly outnumbering the Anglos, as well as the younger Anglo politicians and businessmen supported the rebellion of *Las Gorras Blancas*. This success led to the emergence of a political party, *el Partido del Pueblo Unido* (“A United People’s Party”) that, in 1891, was able to pass legislation protecting the land grants. Despite the resourcefulness, persistence, and organization of the land grantees, by 1902, the common lands had fallen into the hands of speculators.



Sign relating to still prevalent land grant issues in the Tierra Amarilla area of northern New Mexico (Creative Commons by Carptrash)

This resort to extra-legal means would happen once again in 1967 when Reies Lopez Tijerina led the Alianza Federal de

Mercedes (the Federal Alliance of Land Grants) in a raid of the Rio Arriba County Courthouse in northern New Mexico. Tijerina sought to make a citizen’s arrest of the district attorney for usurping Hispanic land grant properties. Tijerina’s armed rebellion ended after a pursuit by the National Guard, the FBI, and New Mexico State Police.¹⁵

Legal battles have continued into the 21st century over the ownership of the land grants. The GAO issued a report in 2001 concluding that there still exist 154 community land grants in New Mexico out of a total of 295 that were studied, including the 23 grants given to the indigenous pueblos. In 2004, the GAO issued a second report concluding that the procedures used to decide ownership of land grants in New Mexico complied with statutory and constitutional requirements. Moreover, the government did not owe a fiduciary duty to the

claimants (which it does owe to the Indian pueblos) who lost over 5.3 million acres after the confirmation of 84 non-pueblo community grants through voluntary transfers, tax foreclosures, contingency fee agreements with lawyers, and lawsuits to break up the community grants into individual shares.¹⁶

Over the ages, Latino land grantees struggled to retain their lands embedded with both the secular meaning of ownership and the sacred meaning derived from a collective identity imbued with place and displacement, with faith and experience. Religious rituals, such the processions that sanctify the earth as it is traversed by the praying faithful, as well as the *descansos*, the crosses that mark fatalities on roadways, connect the land to the people, and provide venues for family and group narratives across generations. Land and place contribute to identity-formation for Latinos, whether it is the desert southwest or the Caribbean islands.

The contemporary quality of these claims can best be illustrated by this dispute described in a lawsuit filed in Federal Court in New Mexico on January 20, 2012, contesting the use of federal lands controlled by the U.S. Forest Service, and specifically land designated by Congress for special treatment for the benefit of the local communities. The lawsuit involves the loss of grazing permits issued by the Forest Service.

The plaintiffs in this case are Hispanic stockmen whose families have been grazing livestock in this area for many generations. Grazing livestock is integral to their existence and a central part of life in the villages of Northern New Mexico. Sebedeo



*El Rito Ranger District, Carson National Forest, New Mexico
(US Forest Service)*

Chacon, Michael Peña, Juan Giron, Gabriel Aldaz, Arturo Rodarte, Thomas Griego, Donald Griego, Joe Gurule Jr., Diego Jaramillo, Lorenzo Jaramillo, Jeffrey Chacon, and Gloria Valdez are permittees on the Jarita Mesa Allotment. Plaintiffs Thomas Griego, Donald Griego, Carlos Ortega, Leon Ortega, Daniel Rael, Horacio Martinez, Ronald Martinez, Fernando Gurule, Jerry Vasquez, Jerry Vasquez Jr., and Alfonso Chacon are permittees on the Alamosa Allotment and former permittees Steve Chavez, Vangie Chavez and John Valdez. Prior to the U.S. exercising sovereignty over

what is now Northern New Mexico in 1848, most, if not all, of the land which now constitutes the El Rito Ranger District of the Carson National Forest, including the land where the Jarita Mesa and Alamosa Allotments are located, was community land grant land that

supported the local communities. Ownership of most or all of the common lands of the grants passed to the new sovereign, the United States of America. The Department of Agriculture was placed in charge of administering these lands, which were made part of the National Forest system.

The Hispanic people of Northern New Mexico, along with the Hispanic people of the San Luis Valley in Colorado, constitute a unique, distinctive culture in the U.S. and as such are an important cultural resource for the entire nation. The Forest Service policy recognizes the dependence of Northern New Mexico communities on forest resources and declares the Spanish-American/Hispanic culture of the area to be a "resource" in much the same sense as Wilderness. The Forest Service's continuing

*policy of reducing the livestock permits granted to the permittees has served to destabilize and degrade the cultural/social fabric of the communities in which Plaintiffs reside. Reductions to the grazing permits were motivated by a racial animus and an outrageous bias against Hispanic culture and its traditional agro-pastoral way of life. The lawsuit asks the Federal Courts, inter alia, to compel the Forest Service to follow its regulations and protect the local culture and restore the grazing permits.*¹⁷

Gender relations were also deeply affected by land and its cultural significance. Even before the Mexican cession in 1848, economic alliances between wealthy Mexican women – Californianas, Tejanas, and Nuevomexicanas – and Anglos were facilitated through racial intermarriage. In California (and the Latino southwest,) these unions, according to historian Antonia Castañeda, would add complexity to the state’s gendered, racial, and social history as well as the identity narratives constructed within this period.¹⁸

Yet another vestige of Spanish and Mexican civil law, going back to the Visigoths, is the community property regimes applying to marital property, both real and personal, in ten, primarily western, states (plus Wisconsin.) In these states, with distinctive provisions in their respective codes, property acquired during the marriage (except for gifts or inheritances) is owned by both spouses and is divided when the marriage ends by divorce, death, or annulment. By definition, this means that there can be separate property owned by only one of the spouses.

The justification for community property is that both spouses make equal contributions to the marital estate (working *hombro a hombro*

or “shoulder to shoulder.”) One of the stark differences between the civil law system and the common law jurisdictions is that the husband and wife are treated as equal economic partners, giving the wife some agency as a separate legal person. In the common law system, the husband and wife became one legal person under the law. Another significant difference is that title to property does not determine whether the property is deemed community or separate property as between the two spouses; it is the source that determines classification.¹⁹

In California, an important justification for the maintenance of community property system was the desire by the California constitutional convention to protect women and families from the wild speculation that occurred as a result of the gold rush and to shield the family’s

resources against the husband’s overly zealous creditors. In general, as compared to common law systems, community property regimes benefit women and engender their independence.

Latinos, Law, and Water: Borders, Scarce Resource, and Acequias

Agua es vida (water is life) is a widely known *dicho* or aphorism throughout Latin America and the Spanish southwest. Latinos have special concerns about water for several reasons: 1) the water of the Rio Grande has weighted meanings and contested claims along the U.S.-Mexico border, especially in the *colonias*, communities of largely immigrant Latinos that lack basic infrastructure; 2) water is a scarce resource in a prolonged drought in southwestern cities that have large and growing concentrations of Latinos, and, 3) like land, water has ancestral resonances.

Water in rivers marks the southern border drawn from the Rio Grande to the Colorado River through the Continental Divide to the Pacific Ocean; water in dams and aqueducts

El agua es vida, Defiende tu vida

(Water is life, Defend your life)

created the conditions for the development of the Denver, Phoenix, Las Vegas, and Los Angeles metropolises; water as weather periodically displaces and relocates large populations, including the thousands of Hondureños who lived in or near New Orleans when the failure of the levees after Hurricane Katrina destroyed the city in 2005; and water in *acequias*, the centuries-old irrigation ditches that have greened deserts, meadows, and valleys, can be a source of identity, community, conflict, and cohesion.

Water law is largely based on precedents that harken back to the English or Spanish settlers. In the eastern U.S., state law that incorporates the English system of riparian rights, which assumes river water is regularly replenished by rainfall, regulates the use of water. Thus, landowners along rivers and other water sources have the right to use the water since upstream users are not likely to harm downstream users. In the arid west, state law melded riparian rules with Spanish and Mexican water law principles including prior appropriation, which is often summed up in the saying, “first in time, first in right.” In other words, whatever is left after the first user is available to the next, on down the line. These hybrid state law systems applying to surface waters exist next to both federal and Indian water rights. Underground and atmospheric water also have different sets of legal rules.

The allocation of water in the western rivers, such as the Colorado, Platte, and Rio Grande, created controversy even when the western states were sparsely populated. As major population centers developed and as climate change has created new rainfall patterns, the cross-

border claims on river water have intensified. For example, from 1848 until 1970 the U.S. and Mexico signed seven agreements providing for the location of the international border and the equitable distribution, the environmental protection of the waters of the Rio Grande and the Colorado River, and the creation of the International Boundary and Water Commission. Even though this Commission has become an international model for dispute resolution, conflicts over surface water and groundwater (shared aquifers) continue to the present day.²⁰

Climate change models are predicting an extended period of drought in the western states, which will affect agri-business, by far the largest water user, and drive jobs away from what

are now irrigated lands. Because Latinos often gain entry into the workforce through farming and reside primarily in the arid west, changing climate conditions and the claims on water sources will burden Latino communities. Latino advocates and policy-makers are already responding to these conditions. For example, since 2007, the California Latino Water Coalition has been promoting legisla-

tion to address the state’s water supply and infrastructure. In 2011, the National Latino Water Conservation Campaign was launched to protect the Colorado River from the effects of drought and climate change. In 2011, the Latino Sustainability Institute conducted a survey of 500 New Mexican Hispanic voters who expressed high levels (over 90 percent) of concern about water scarcity and increased forest fires.²¹

Water rights, as they pertain to land grants, are of particular importance to Latinos in rural



*Sign for acequia water rights, New Mexico
(New Mexico Acequia Association)*

areas. Under Spanish and Mexican land grants, water rights were granted according to the category of land use. For example, grazing lands usually did not come with water rights and often the question of water was not mentioned, resulting in disputes that were resolved by the various states in different ways. The most long-lasting feature of the water rights and usage system established under Spanish and Mexican rule is the *acequia* system of irrigation, which depends on communal control and maintenance.

In southern Colorado and New Mexico, *acequias* continue to be community institutions with effective water use norms and customs. As anthropologist Sylvia Rodríguez reminds us, *acequias* began as a colonizing project in which the Spanish Conquistadores used subordinated Indigenous workers to dig the first ditches. Over centuries, this system of water movement and water management was transformed into an infrastructure that incorporated agropastoral, religious, and quasi-legal aspects. A body of law and custom emerged that melded the structures and practices of the Indigenous Pueblos with the structures and practices that had passed from the Moors to the Spaniards who arrived in the Upper Rio Grande Valley. For millennia, local *acequia* associations comprised of *parciantes*, the water right owners and irrigators, have elected a *mayordomo* and commissioners to oversee the maintenance of the ditches and allocate water. The *mayordomo*, perceived as a highly respected community leader, is entrusted to secure the water and adjudicate the conflicts that arise. As we consider how a democracy is made, the *acequia* culture represents the fusion of local democratic structures with contemporary issues regarding the allocation of scarce resources.

To limit the description of *asequia* culture to water management would distort one's understanding of the multiple functions served by these institutions. As explained by Sylvia

Rodríguez, water in an arid society and its uses become ritualized, embedded with norms of *respeto*, and emblematic of other features of the moral economy. Consequently, the *acequias* involve many aspects of religious ceremonies, such as processions, masses, special hymns, and patron saints. Particularly in rural areas, *acequias* are identity-constructing structures as they connect groups of Latinos to each other through shared experiences and collective narratives told from specific places with reference to common customs, consensual decision-making, and an organic leadership.

Latinos, Law, and Housing: An Illusive American Dream

In the U.S., the location of housing is correlated with access to such social resources and public accommodations as jobs, neighborhood schools, health care, grocery stores, public utilities, and religious and cultural institutions. Through most of the last century, housing was a primary target of policy makers who were intent on the separation of races. Consequently, residential segregation was widespread and written into law. Even after such laws were ruled unconstitutional by the Supreme Court and responded to by Congress with major legislation,²² Latinos and other communities of color were subjected to and continue to suffer from the lingering effects of different forms of housing segregation and discrimination.

Attorney Christopher Arriola described the social separation of Anglos and Mexicans in El Modena, California, the setting for *Mendez v. Westminster* (1946),²³ one of the leading cases on school segregation:²⁴

It was more common than not during the 1920s for southern California towns to be segregated. Segregation in the citrus society encompassed many harsh and unjust realities, from segregated housing and public places, to inferior social status and political and economic exploitation. Mex-

icans and Anglos lived in truly separate worlds...

This type of segregation was institutional and was visible in all aspects of daily life. Two common examples of segregation were the movie theaters in the larger towns and the swimming pools in almost every community. The five theaters in downtown Santa Ana were segregated. Oscar Valencia remembered that, "the bottom [the main floor of the theater] was for the Americans, the top [balcony] was for the Mexicans. They had all kinds of segregation." The "plunge," as the swimming pool in nearby Orange was called, had a "Mexican Day" on Mondays. It was the only day Mexicans were allowed to swim. The pool was drained that night and was closed on Tuesday for cleaning and re-filling...

The town became two separate worlds in one place. Mexicans were sold "miserable little houses" on cheap lots in the center of town "for a good profit," according to a long time resident. Anglos left the downtown area as more and more Mexicans arrived until the town was virtually all Mexican. Most Anglos in the community lived in small family-owned or rented citrus or walnut ranches in the plots adjacent to the town. El Modena had developed a doughnut shaped segregation. The Mexican community resided in the middle, clustered into the town, and the Anglos surrounded them living dispersed on the various nearby farms.

The separation went beyond the type and location of the houses. Mexicans and Anglos lead separate lives. They went to dif-

ferent churches, Anglos attending the Friends Church on the main street of Chapman, while Mexicans attended makeshift Catholic services in each other's homes until the first Catholic church was established. Mexicans had a different cultural life. The Mexican/Chicano community in El Modena brought in "teatro" groups from Mexico, had their own dances, ran their own restaurants and small stores, and organized mutual aid societies which sponsored both Mexican and American patriotic organizations.

Communities of color were largely excluded from the mortgages that were available to returning veterans after World War II. These mortgages (with the GI Bill's college benefits) helped anchor a predominantly white middle class that expanded in the 1950s and 1960s as homeownership in segregated enclaves became the hallmark of social and economic ascendancy, the symbol of the American dream. Homeownership also became the most important asset of most American workers; the only wealth that most parents could hope to pass on after death.

During the early 21st century, another generation would suffer from blatant racial housing discrimination as Latinos (and African-Americans) were disproportionately targeted by the banks' predatory lending practices during the subprime mortgage debacle. Housing boom jobs drew many immigrants from Mexico and Central America. In 2007, before the housing bubble burst, Latino workers made up 30 percent of the construction workforce; 25 percent were foreign born (including undocumented workers), and most of them (62 per-



*The Plunge, Orange City Park, California
(Orange County Historical Society)*

cent) did not speak English or did not speak it well.²⁵ Many immigrants, driven north during the 1990s because of worker displacements caused by globalization and trade arrangements such as NAFTA as well as changes in the *maquiladora* (Mexican assembly plant) workforce, were having difficulty finding adequate housing. Thus, thousands of Latino immigrants located along the four-state border with Mexico are living in abject poverty in *colonias* that lack electricity, fuel sources, running water, fire and police services, and paved streets. Latinos were deeply engaged at different points of the housing crisis as construction workers, subprime mortgagees, and colonia residents.

In 1977, Congress passed the Community Reinvestment Act (CRA) to counteract redlining and other discriminatory banking practices. When the housing bubble burst, many would unfairly blame the CRA as well as families of color for the housing crisis rather than the banks for blatantly fraudulent practices. Latinos were twice as likely to receive a subprime loan and three times as likely to refinance with a subprime lender.²⁶ By 2010, nearly 8 percent of Latino homeowners, compared with 4.5 percent of Whites, had lost their homes and another 17 percent were at imminent risk of foreclosure.²⁷ Latino communities lost over \$177 billion.²⁸ More seriously, these Latino families lost their foothold in the middle class and the opportunities that better neighborhoods afford residents in terms of access to better jobs, schools, child-care, health care, and a cleaner environment. The burden of the subprime mortgage crisis fell particularly hard on communities of color, thwarting the mobility of Latino families, destabilizing home prices, and exposing homeowners to the risk of foreclosure and the at-

tendant loss of creditworthiness for years to come.

The structural difficulty of finding adequate and affordable housing is most acute in the border communities of mostly Mexicano immigrants known as *colonias*. By 2010, Texas had the largest number of *colonias*, about 2,300 with some 500,000 residents.²⁹ Since the 1990s, the *colonias* have proliferated and resulted in many challenges both for the inhabitants and for the governmental entities due to the lack of water and sewer systems, which pose public health and environmental dangers.³⁰ The Texas State Energy Conservation Office (SECO), like agencies in other states, has a number of projects addressing such *colonia* issues as schools, water and sewer access, and land title protections. Often the residents own

small plots of land or are in the process of paying off land contracts usually sold by speculators. Latino residents have proven to be highly resilient, and many have organized locally to improve their living conditions and gain opportunities for their children. One such example is the Colonias Development Council of southern New Mexico

established in 1994. Inequality has found its way into the global consciousness through the efforts of the Occupy Movement (a protest movement begun in 2011 against social and economic inequality). The Latino families in the border *colonias*, the so-called Forgotten Americans,³¹ are one of the most deplorable examples of inequality and grinding poverty in the richest nation that ever existed in the history of mankind.

Conclusion

This essay is an overview of the way that Law forms, deforms, and transforms the lived expe-



Houses in a colonia, San Juan, Texas, 2012
(Vanderbilt University)

periences of Latino/a individuals and communities over the centuries. This examination of the effects of law on Latinos is also an exploration of Latino identity and how identity is a social as well as a legal construction. The theme “Making a Democracy” is examined by juxtaposing descriptions of the processes and effects of law with stories that elucidate the struggles of Latino communities to exercise full citizenship while retaining their cultural norms. Specifically, the stories about the mistreatment of Mexican Americans in Texas, the challenges to the reduction of grazing permits by the national Forest Service, the imposition of racial categories by the Census Bureau, and the struggle against residential segregation are examples of the Latino communities reinscribing the meaning of democracy and expanding its embrace. Like other racial and ethnic minorities, Latinos’ moral and legal claims upon the larger society have resulted in a more perfect union to use the phrase popularized by President Barack Obama.³¹

A number of issues raised in the essay remain unresolved. The 2004 GAO report on the New Mexico land grants identifies the options available to Congress, including the transfer of federal lands to grantees, should it decide to vindicate further the rights secured by the Treaty of Guadalupe Hidalgo. Water rights will become increasingly more contentious as the effects of global change intensify. We can hope that the economic disparities and social inequality that are summed up by the taunts of the Occupy Movement against the so-called one percent will bring renewed focus on the burdens borne by Latino communities in the boroughs of New York as well as the *colonias* along the border.

Latinos have engaged with many different legal structures and legal debates, and in so doing have been actively involved in key developments related to borders, education, immigration, citizenship, women's rights, and civil

rights. Such involvement has increased over the last century as the Latino population has grown and diversified. And these group histories—and the personal stories that echo them—can be found, and remembered, in many different places throughout the U.S.—court houses, schools, acequias, law offices, and more, some of which should be of interest to historic preservationists committed to addressing the absence of Latino landmarks in many states and locales. Finally, I have stretched the boundaries of the essay format to include auto/biographical stories as a way of creating niches for other voices to provide details about how Law constructs the multiple identities that constitute the Latina/o mosaic and help make up this “American” democracy.

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Endnotes

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