La Raza Latina?: Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the Twentieth Century

Tom I. Romero II
¿LA RAZA LATINA?: MULTIRACIAL AMBIVALENCE, COLOR DENIAL, AND THE EMERGENCE OF A TRIB-ETHNIC JURISPRUDENCE AT THE END OF THE TWENTIETH CENTURY

TOM I. ROMERO, II

PROLOGUE: HOW I RODE THE BUS INTO MICHIGAN

Imagine, if you will, my surprise when my grandmother and I were having a conversation about my grandfather a few months after his death and she revealed to me that she was not aware of my grandfather’s indigenous roots. Knowing that I had a passion for history, she regaled me with stories about my grandfather’s youth, his perilous passage from Mexico into the United States, and my grandparents’ hard but satisfying lives building a farm and raising a family of five girls in southwestern Colorado. Although she quietly and quickly spoke of the various acts of intolerance and discrimination that she and my grandfather encountered as “Mexicans” who knew only rudimentary English, my grandmother nevertheless took great pride in

1. The stories recounted in this prologue are my recollection of oral exchanges between my maternal grandmother, me, and other members of my immediate family during the course of my lifetime. In this vein, I am indebted and profoundly shaped by the work of Critical Legal scholars who have documented the personal experiences of their grandparents and families to frame their legal analyses. See, e.g., Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1709 (1993); Michael A. Olivas, The Chronicles, My Grandfather’s Stories, and Immigration Law: The Slave Traders Chronicle as Racial History, 34 St. Louis U. L.J. 425 (1990). Despite a turn away from such narrative accounts in legal scholarship for what some critics describe as their unreliability, such ambiguity should be regarded as “their strength: errors, inventions, and myths lead us through and beyond facts to their meanings.” Alessandro Portelli, The Death of Luigi Trastulli and Other Stories: Form and Meaning in Oral History 2 (1991) (emphasis added). Because this Article is about how concepts such as race, ethnicity, and color derive current and contested legal meanings, the stories in this prologue are symbolic of the ways that one Spanish-surnamed family has come to understand and navigate the nation’s color fault lines. Moreover, oral tradition has long been a rich cultural resource for Latino communities, families, and community groups. Mario T. Garcia, Memories of Chicano History: The Life and Narrative of Bert Corona 20–21 (1994). In “cuéntos (stories), corridos (folk songs), chistes (jokes), dichos (proverbs), and testimonios (testimonies),” oral tradition has served to sustain a distinct and often oppositional identity in a multicultural and multiracial United States. Id. The testimonio, in particular, is a “cooperative process” because it represents a form of “joint-authorship” and shared meaning between the scholar and those that he or she claims to represent. See, e.g., id. at 1–26. Because I am choosing to represent one voice that is by no means my own in framing the subsequent legal analysis, I take on the responsibility and dilemma of not wanting to reproduce the same silences, hierarchies, and forms of ideological and cultural oppression that any study of social difference necessarily implicates. See generally Joan Sangster, Telling Our Stories: Feminist Debates and the Use of Oral History, 3 Women’s Hist. Rev. 5 (1994).

2. The meanings ascribed to racial and ethnic terms are not subject to precise definitions but rather are themselves constitutive of context, history, and questions of power. See infra Part I. I therefore attempt to identify groups (1) in the manner that contemporaries have labeled them as populations and (2) how individual groups have distinguished themselves both from one another and from other ethnic and racial groups in the particular historical era under evaluation.
her heritage as she recounted the formative details of her life, including meeting my grandfather in his hometown of Aguas Calientes, Mexico and their collective journey into Colorado. Then all of a sudden she stopped, grasped my hands, looked me squarely in the eye, and said: “Mijito, él nunca me dijo que él fuera Indio.”

My grandfather’s indigenous roots did not seem, at least through my immature and uncritical eyes, like such a revelation. His skin was a deep and weathered bronze. He did not have any facial hair. His head, even in advanced age, still had wisps of the black coal hair of his youth. And although he had long ago embraced Pentecostal Christianity as his chosen faith, he would often speak of the profound and enduring relationship that we, as human beings, had with an equally important trinity: the earth, the water, and the sky. Yet, my grandmother had chosen to ignore and even deny the racial meanings ascribed to such physical and cultural characteristics, while she herself had recognized his and her collective differences from their American, English-speaking neighbors. Perhaps, and this is only speculation, my grandmother inexplicably recognized that my grandfather’s mixed-race indigenous background, and to a lesser extent her own, explained the social differences and color line that they encountered in the United States, no matter how much they tried to acculturate or assimilate into the mainstream of their community.

My grandmother’s comment surprised me because her own racial cognizance was not my experience. Born in Denver, Colorado in 1973, I came of age in a metropolitan area divided along what the U.S. Supreme Court described as the “tri-ethnic” lines of Anglos, African Americans, and Hispanos. During the early years
of my primary school education, I was bussed to schools with students from all of these groups. I came to associate and differentiate myself in relation to these social divisions. Yet, being Chicano held a particular resonance. I knew of El Movimiento\(^4\) and my city’s prominent role in articulating not only Chicano politics\(^5\) but also a distinct Chicano racial identity. In 1969, for instance, Denver’s Chicana/os hosted the first of several National Youth Liberation Conferences.\(^6\) It was during this inaugural event that delegates drafted El Plan Espiritual de Aztlán.\(^7\) As a Mexican American Declaration of Independence, El Plan emphasized that Chicana/os and other Latina/os were neither White nor Black nor a fully indigenous group but were instead the amalgamation of all; they were a “bronze” people with a historical trajectory centered squarely in the United States.\(^8\) Though I learned very little formally about the Chicano Movement and its racial politics in the Denver Public Schools—a decision that I would later discover was the result of a rejected desegregation decree\(^9\)—its spirit reverberated in the Mexican American community, from the handshakes that I learned at an early age to the compelling and wrenching testimony that I often heard from my parents, my family, and our family friends about being Brown in a White world.

Such experiences impacted me in a very profound way and drove my decision to enter graduate school at the University of Michigan. First as a graduate student in the Department of History and later in the law school, I had an unprecedented opportunity to study, explore, and make my own contribution toward understanding the dynamics of Latina/os, race, history, and the law.\(^10\) Little did I realize that my own life and experiences would become a formative case study. Not long after I entered law school, I discovered that I was part of the admitted University of Michigan Law School first year class that Barbara Grutter wanted to join. Soon

---

4. “El Movimiento” refers to the Chicano Movement and is used as an umbrella term to describe the variety of civil rights measures pursued by Mexican Americans during the 1960s and 1970s. For a brief discussion of El Movimiento’s diverse politics, see David Montejano, Introduction: On the Question of Inclusion, in CHICANO POLITICS AND SOCIETY IN THE LATE TWENTIETH CENTURY, at xi, xvii–xviii (David Montejano ed., 1999).
6. VIGIL, supra note 5, at 95–97.
7. Id. at 97–98.
8. Id. at 97–100.
9. See infra Part III.
10. In addition to having the opportunity to study with Professors George Sánchez and María Montoya, my graduate student colleagues included the current New Mexico State Historian, Estevan Raedal Gálvez, and current Professors John McKieman-Gonzales (University of Texas), Natalia Molina (University of California-San Diego), Adrian Burgos (University of Illinois), Pablo Mitchell (Oberlin College), Elena Gutierrez (University of Illinois-Chicago), and Frank Guridy (University of Texas).
after, lawyers for the Center for Individual Rights filed Grutter v. Bollinger, and Grutter and her legal team successfully subpoenaed my admissions file to the law school. Most striking in this regard was the litigation’s fixation on my self-identified membership in a “minority” group. Rather than asking the trial court to subpoena the admissions files of all students, the litigation intentionally targeted only certain “minority” students and assessed our admissions vis-à-vis Grutter based solely on this fact. This litigation strategy mirrored a common tendency to lump members of all “minority” groups together despite being racialized in very different ways. In what may have been the most representative example of this process during my time in law school, one of my fellow law students declared the following in a “public forum” held by two Michigan lawmakers opposing the university’s admissions program: “[M]aybe they’re really not my equal. Do I want to be in a study group with this person? I just don’t know anything about them anymore.”

As part of “them,” racialized “minorities” on campus, including myself, sought to embrace and exclaim our differences based upon our understanding of who we were in relation to a White/non-White color line. In a public statement about Grutter, for instance, the Latino Law Students Association (LLSA) at the University of Michigan, an organization of which I was a part, emphasized that “Latinos, along with other people of color, continue to be discriminated against as individuals, as a group, personally, and institutionally.” Thus, when the U.S. Supreme Court finally decided the merits of Grutter v. Bollinger in 2003, Justice O’Connor’s statement that “race unfortunately still matters” in the United States represented perhaps the biggest understatement and most obvious part of the decision. Although many commentators have refused to recognize the contemporary impact of race in the United States, Barbara Grutter’s case against the University of Michigan Law School, along with the subsequent tensions and conditions that it caused, highlighted the way that race and color—in all of their complexities and protean meanings—matter for all of us in receiving a primary, secondary, and higher education in this country.

11. 539 U.S. 306, 343 (2003) (holding that a law school admissions process that considered race as one factor among many did not violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because the program was narrowly tailored to serve the compelling interest of attaining a diverse student body).
12. Jon Swartz, Remarks at the Public Forum in Shelby Township, Michigan (Sep. 30, 1997), quoted in Trevor W. Coleman, Editorial, Stereotypical Thinking Mars the Debate on Affirmative Action, DETROIT FREE PRESS, Oct. 2, 1997, at 14A. Another person at the rally, who was described as a “soft-spoken” and “congenial” woman, made the following troubling statement in denouncing affirmative action: “Even during the days of slavery, the [white] indentured servant had it much more difficult than the slaves...Indentured servants had to work during pregnancy. The slave had the time off because the slave carried the master’s baby. So, there were preferences for blacks even back then!” Rebecca Paquette, Remarks at the Public Forum in Shelby Township, Michigan (Sept. 30, 1997), quoted in Coleman, supra, at 14A (first alteration in original).
I. INTRODUCTION: LATINA/OS, LAW, RACE, AND COLOR IN-BETWEENESS BEFORE AND BETWIXT KEYES AND GRUTTER

My personal experiences recounted in the prologue of this Article, similar to the experiences of countless other Latina/o students and educators in the United States since the 1970s, highlight the complicated, inconsistent, and dramatic transformation of the legal meanings and consequences of color and race in the final decades of the twentieth century.15 Perhaps nowhere in U.S. law is this process more perceptible than in the interaction of the nation’s courts with its Latina/o student population during this era in which the judiciary has designed desegregation orders, evaluated bilingual education programs, and appraised the constitutionality of affirmative action admissions plans.16 Indeed, litigation in each instance has demonstrated a fundamental reevaluation of the boundaries between Whiteness and non-Whiteness in American culture and life along with a substantial degree of apprehension regarding the racial placement of Latina/os in relation to this color line in the nation’s legal order.

Accordingly, this Article is an exploration of the legal construction of the racial identity of Latina/os in the years between the Keyes19 and Grutter20 decisions. While these cases are jurisprudential bookends to my personal understanding of race, color, law, and Latina/os in the United States, the legal efforts of Latina/os to achieve educational equality via litigation provide a coherent, if inconsistent, body of jurisprudence through which we can understand the racial construction and color positioning of Latina/os in contemporary U.S. legal discourse about Whiteness and non-Whiteness.

To make better sense of these arguments and those that will follow, it is critical to conceptualize the distinction between race and color. As one recent study reinforces, the idea of race and its meaning is so imprecise that it is a "pernicious concept"—particularly in its application in law and its interpretation in jurisprudence.21 As countless other scholars have demonstrated, race is still too often...
talked about and understood as simply a physical and genetic construct\(^2\) rather than a social and historical construct based on ideas, attitudes, consciousness, identity, ideology, and, most importantly, power.\(^3\) To be sure, one’s access to power in the United States has been fundamentally dependent upon his or her racial position in a social system defined by a seemingly precise color line.\(^4\) Color, as I propose to use it in this Article, like other reputable scholarly conceptions of race,\(^5\) is not a physical description of Whiteness and non-Whiteness. Rather, it is a legal and extra-legal category that has been used to extend or deny countless resources, rewards, and benefits. In U.S. history, one’s social relationship (often defined by law) to a White color line has been the penultimate marker of access to opportunities and rewards.\(^6\) Thus, despite contested, changing, and multiple conceptions of race in U.S. history that create, in the words of one scholar, “discursive messiness” between race and color,\(^7\) the distinction is “crystal clear” when it comes to whether one’s color categorization gives him or her access to legal remedies and the rewards of Whiteness.\(^8\)

---

22. E.g., Jonathan Kahn, How a Drug Becomes “Ethnic”: Law, Commerce, and the Production of Racial Categories in Medicine, 4 YALE J. HEALTH POL’Y. L. & ETHICS 1 (2004) (discussing a drug company’s consideration of race in creating a heart medication that was intended to be marketed exclusively to African Americans).


25. See supra note 23.

26. See, e.g., GUGLIELMO, supra note 24, at 7–9; see also MATTHEW FRYE JACOBSON, WHITENESS AND THE DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1998) (documenting the ways in which European immigrants to the United States claimed and were accorded the privileges of identifying as White); IRA KATZNEJLSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2005) (exploring how the New Deal preserved a strict racial hierarchy by benefiting almost exclusively poor and middle class Whites); GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS (rev. ed. 2006) (detailing historical policies and legislation that expressly excluded non-White groups from entitlements); Eric Amesen, Whiteness and the Historians’ Imagination, 60 INT’L LAB. & WORKING-CLASS HIST. 3 (2001) (challenging the assertions by some historians of the non-White status of various immigrant groups because members of such groups had tremendous color privileges and advantages).

27. GUGLIELMO, supra note 24, at 9.

28. For example, in his study of late nineteenth and early twentieth century Italian immigration to Chicago, Professor Thomas Guglielmo argued that “while Italians suffered greatly for their putative racial undesirability as Italians...they still benefited in countless ways from their privileged color status as whites.” Id.
Because this analysis focuses on the post-\textit{Brown v. Board of Education}\textsuperscript{29} era of school desegregation, it is helpful to briefly discuss how race, color, and ethnic understandings came to be distinguished during this formative time. In an attempt to distance themselves from the violent consequences of biological determinism in the wake of World War II,\textsuperscript{30} scholars, social scientists, and policy makers of that era simplified the "messy" distinction between race and color in the United States, often with the best intentions.\textsuperscript{31} The resulting terminology jointly, if unevenly, settled into our current nomenclature that collapses color and racial designations: the Black (African American) race, the Brown (Latino) race, the Red (American Indian) race, and the Yellow (Asian American/Pacific Islander) race.\textsuperscript{32} Accordingly, "new terms like 'ethnicity' and old ones like 'nationality' emerged to explain differences previously thought to be based on race but not color."\textsuperscript{33} Moreover, such terms carried very different understandings about power for different people as expressed by one's position in relation to a color line. Whereas race/color distinctions came to be understood as being based largely upon subjective and involuntary physical characteristics and were almost always based on hierarchical and exploitative relationships, ethnicity came to be conceptualized as a manifestation of language and religion, which is based on one's ability to voluntarily associate, and is constitutive of a pluralistic egalitarian social order.\textsuperscript{34} Significantly, a new discursive messiness appeared in such racial and ethnic distinctions. If the color line in the United States had historically been drawn between Whites and Blacks,\textsuperscript{35} where

\textsuperscript{29} 347 U.S. 483 (1954).

\textsuperscript{30} ALEXANDRA MINNA STERN, \textit{EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA} 4–5, 13 (2005) (explaining the shift in scientific discourse away from one based on racial taxonomies "that placed whites and Europeans at the apex of civilization, blacks and Africans on the bottom rungs, and nearly everyone else" in the middle).

\textsuperscript{31} See Romero, supra note 5, at 115–25, 135–41.

\textsuperscript{32} Id.; see generally MATTHEW PRATT GUTERL, \textit{THE COLOR OF RACE IN AMERICA 1900–1940} (2001); JACOBSON, supra note 26.

\textsuperscript{33} GUGLIELMO, supra note 24, at 9. Professor Guglielmo describes this as the "'ethnicizing' of a racial identity" rather than the racialization of ethnic identity. Id. at 178 n.8; see also Victoria Hattam, \textit{Ethnicity: An American Genealogy}, in \textit{NOT JUST BLACK AND WHITE}, supra note 23, at 42, 45–52 (assessing changing terminology in ethnic and racial categorization of American Jews after World War II); RICHARD D. ALBA, \textit{ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA} (1990) (documenting the decline of recognizable ethnic differences among Americans who descended from European immigrants and their subsequent embrace of a White identity). Critically, this process would, in the post-war period, work both ways for Latina/os. See infra notes 46–50 and accompanying text.


\textsuperscript{35} The primary and secondary literature in this regard is extensive. For a general overview of works that have been extremely useful for me in understanding the legal construction of Whiteness and Blackness in the history of the United States, see RICHARD DELGADO, \textit{THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE} (1995) (utilizing narrative to understand the legal formation and reification of racial categories); A. LEON HIGGINbotham, Jr., \textit{IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD} (1978) (detailing the emergence of color considerations in colonial legislation and jurisprudence); A. LEON HIGGINbotham, Jr., \textit{SHADES OF FREEDOM: RACIAL POLITICS AND THE PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS} (1996) (outlining the inconsistent logic of color in U.S. law and jurisprudence into the twentieth century). While no one can deny the centrality of the White/Black color line in U.S. history, other racialized color lines have profoundly shaped the nation as well. See generally TOMÁS ALMAQUIER, \textit{RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA} (1994) (detailing the differential racialization of Mexicans, Asians, American Indians, African Americans, and Whites in nineteenth century California); STUART BANNER, \textit{HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER} (2005) (documenting the primary role of legal
would the nation’s fastest growing “ethnic” groups fall in relation to a color line that had inconsistently treated members of each of those groups as White, Black, or neither?

That such issues would occupy the nation’s legal machinery is indicative of the very different understanding about the meaning of color in the late twentieth century. This is evidenced by the contradictory reactions of my grandmother and myself to my grandfather’s racial identity, as well as to our own. Indeed, these reactions are not very surprising given the legal restructuring of color and racial categorization during our lifetimes. My grandparents came of age in a time when almost all federal and state laws either accepted people of Latin American descent as White or did not explicitly define them as non-White, Black, or Indian. Although this theoretically entitled many Spanish-surnamed residents to all the benefits of Whiteness—from the ability to naturalize as free White people and to attend “Caucasian” schools to the ability to marry Anglo partners, to ride with Whites on public railroads, or to feel secure in their property—there were many Latina/os who found that legalized “Whiteness” had its limits. Indeed, law and jurisprudence systematically worked to move Latina/os to the non-White side of the color divide. Such a shift is apparent in the systematic dispossession of Mexicans’ land in the decades following the end of the Mexican American War in 1848, the physical marking of Mexican bodies as they crossed the border (or were denied institutions in shifting the balance of power to White settlers in land struggles with American Indians); ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT (1998) (highlighting the ways that race contributed to the first federal law that banned a group of immigrants from settling in the United States); PEDRO A. MALAVET, AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (2004) (discussing the role of U.S. Supreme Court jurisprudence in making Puerto Ricans second-class citizens); LINDSAY G. ROBERTSON, CONQUEST BY LAW: How THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLE OF THEIR LAND (2005) (detailing how legal doctrines become far removed from their contextual moorings and have disastrous consequences for non-White groups); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995) (describing the centrality of Chinese immigrants in shaping and being shaped by immigration law, jurisprudence, and policy); STERN, supra note 30 (documenting the role of eugenic law and jurisprudence in maintaining a color/race line in the United States).


38. See Guglielmo, supra note 36, at 1216.

entry) in the early decades of the twentieth century, their exclusion or segregation from White public facilities, and the intense policing and surveillance of Mexican neighborhoods and young men. These realities reinforced "powerful ideas, attitudes, assumptions, and stories about [Latina/os]...that not only demeaned and dehumanized them but also explained, justified, and nurtured the system of inequality." While there is much debate about the extent to which Latina/os ever encountered the systematic disfranchisement, segregation, exclusion, and violence that African Americans did, there is little doubt that the majority of Latina/os never enjoyed the full power and privilege of Whiteness during the formative years of my grandmother's life. In the dominant Black/White color order of the early to mid-twentieth century in the United States, Mexicans and Mexican Americans, like my grandmother, were legally viewed, as Professor Thomas Guglielmo persuasively argues, as "a truly in-between people, neither black nor white, and truly disadvantaged." The civil rights movement of the Cold War years, however, fundamentally reconfigured the color "in-betweeness" that Mexicans, Mexican Americans, and other Latina/os encountered between social practice and the legal categorization of their racial identities. Particularly, as Latina/os moved in large numbers and settled in the urban metropolises of the United States during and after World War II, the law slowly came to formally recognize their non-White status. To be sure, this was an ambivalent development. On the one hand, such categorization merely institutionalized long-standing social practices, such as the racial profiling of Latina/os by criminal justice professionals. On the other hand, such categorization provided marginally tangible benefits, which included the distribution of resources to the Latino community in federal poverty programs and the ability to bring a

40. See Stern, supra note 30, at 57–72; see also John McKiernan-Gonzalez, Bodies of Evidence: Representation and Recognition on the Mexican Border (Nov. 21, 2002), http://latino.si.edu/researchandmuseums/presentations/pdfs/mckiernan_presentation.pdf (discussing the compulsory vaccination of Mexicans crossing the U.S. border in the early twentieth century).

41. See Martha Menchaca, Recovering History, Constructing Race: The Indian, Black, and White Roots of Mexican Americans 287–90 (2001); Sheridan, supra note 3, at 135–36.

42. See generally Edward J. Escobar, Race, Police, and the Making of a Political Identity: Mexican Americans and the Los Angeles Police Department, 1900–1945 (1999) (describing the events that led to the "Zoot Suit" riots in Los Angeles in 1943).

43. Guglielmo, supra note 36, at 1216. As Professor Guglielmo points out, "[n]ot all Mexicans and Mexican Americans experienced this system the same way; gender, class, nationality, skin color, and other factors all mattered." Id.; see also Neil Foley, The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture (1997) (exploring the impact of racial, social, and economic forces in the discriminatory experiences encountered by Mexican Americans from the Civil War to World War II); Linda Gordon, The Great Arizona Orphan Abduction (1999) (describing the factual circumstances behind the U.S. Supreme Court's decision to uphold Protestant White women's abduction of White orphans who had been delivered to Catholic Mexican American families at the end of the nineteenth century); George J. Sánchez, Becoming Mexican American: Ethnicity, Culture and Identity in Chicano Los Angeles, 1900–1945 (1993) (detailing the role of citizenship, class, and gender in the ability of Mexicans to become Americans).

44. Guglielmo, supra note 36, at 1216.

45. Id.

46. Romero, supra note 5, at 147–61.

47. Id.; see also Escobar, supra note 42, at 104–31; López, supra note 36, at 56–87.

cause of action for discrimination in housing, education, and employment. As a result of such developments, a highly truncated and extremely limited possessive investment in color emerged among Latina/os, who for once had an opportunity to reconcile their social and historical experiences with their treatment under the law. As people of color, both in social practice and in legal recognition, the later decades of the twentieth century represented a potential watershed moment regarding the racial identity of Latina/os and the meaning of the color line in U.S. law.

This Article examines in great detail the judicial interpretation of the U.S. Supreme Court’s reasoning in 1973 in Keyes that “though of different origins Negroes and Hispanos... suffer identical discrimination in treatment when compared with the treatment afforded Anglo students” and its more recent statement in Grutter in 2003 that “race... still matters.” By focusing on the color construction of Latina/os in educational equity and related jurisprudence since the 1970s, I explore how and in what ways racial and ethnic conceptions have mattered for Latina/o students and educators in litigating their rights in the years since Keyes legally recognized their non-White status. Building upon scholarship that has explored the racial and ethnic in-betweeness of Latina/os in contemporary U.S. law, I argue that courts have failed to come to grips with the color re-positioning of Latina/os that Keyes indicated, which has been subsequently internalized by Latina/os of my generation. Instead, courts have pursued arguments, analyses, and remedies that have categorized Latina/os as similar to Blacks, immigrants, and/or an undifferentiated ethnic minority but very rarely recognize Latina/os as a distinctly racialized and non-White group.

To make my argument, I trace the legal history of Latina/os and the struggle for educational equity from the early 1970s until the present day. In particular, I examine three cases decided by the U.S. Supreme Court and their progeny to explore the role of Latina/os in shaping what I refer to as a “tri-ethnic” jurisprudence in U.S. law. Part two of this Article focuses on the challenge that Latina/os posed to school desegregation jurisprudence in the 1960s and 1970s. At the center of such litigation was the issue of whether Latina/o students should be grouped with the Black or the White students. While the U.S. Supreme Court eventually indicated that it was entirely appropriate to consider Latina/os as non-White in cases involving multiple racialized groups, subsequent jurisprudence indicated that it was not appropriate to treat Latina/os as their own distinct non-White racial group. Part three focuses on the difficulties presented by bilingual education and language discrimination litigation on Latino students. As courts framed their analyses in terms of ethnic identity and acculturation, they disregarded the color dynamics of the

50. See generally Romero, supra note 48.
issue. By indicating that language matters, courts have collapsed the racialization of Latina/os as non-White into a more broadly based ethnic model. Part four analyzes the racial positioning and placement of Latina/o students in affirmative action litigation. In contrast to bilingual education jurisprudence, courts in these cases have consistently classified Latina/os as non-Whites in ways that have made their experiences either less compelling or no different than other non-White racialized groups. Collectively, such jurisprudence reinforces the dichotomies of U.S. law (i.e., Black/White, minority/non-minority, English speaking/non-English speaking, American/non-American) without confronting the distinct racialization of Latina/os in American culture and without acknowledging the emergence of multiple color lines in a racially diverse country. As a consequence of such inconsistent and ill-conceived jurisprudence, the idea of la raza latina has proven to be a troubling concept for the U.S. legal system to embrace.

II. WHAT CAN BROWN DO FOR YOU?

In the late 1960s, the Denver Public Schools (DPS) faced intense dissatisfaction and discord from Mexican American students, parents, and activists. A prominent figure in the public discussion was Chicano activist Rodolfo “Corky” Gonzales, whose epic poem Yo Soy Joaquin resolved for many young Mexican Americans ambiguities in their own racial identities. In one meeting with the DPS Board of Education in the late fall of 1968, for example, Gonzales argued that “Anglo” teachers, administrators, and parents had “psychologically destroyed” Denver’s “Mexican American” youth. In order to counter decades of prejudice, discrimination, and disrespect, Gonzales explicitly questioned whether busing would achieve meaningful integration in the school district. Instead, Gonzales demanded that the DPS Board’s plan include a philosophy to “enforce the inclusion in all schools...the history of our people, our culture...language and contributions to this country.” Less than a year later, a group of Latino, Black, and White students filed suit against the DPS Board for maintaining separate and unequal schools.

The inclusion and participation of Latina/os in the lawsuit that followed would prove to be just as troubling and divisive for the various courts litigating the case as it was for the DPS Board in the fall of 1968. Indeed, it is likely that one of the reasons that this case reached the U.S. Supreme Court had much to do with the fact that, in the decades since Brown v. Board of Education was written in 1954, the

55. Id. at 73–74; VIGIL, supra note 5, at 81–87.
57. Romero, supra note 5, at 412.
58. According to Gonzales, the integration plan that the school board was considering for implementation was “obviously not a panacea” and would not “solve the problems of Mexican American youth.” Romero, supra note 54, at 73 (quoting Charles Carter, Rights Leader: Integration Plan Talks Disrupted, DENVER POST, Oct. 27, 1968, at 1).
59. Romero, supra note 5, at 412.
60. Romero, supra note 54, at 96–97.
Court had never decided a school desegregation case that involved a significant number of Latina/o students. Vilma Martinez, General Counsel and President of the Mexican American Legal Defense and Education Fund (MALDEF), highlighted some of the challenges that Latina/os faced in standard school desegregation litigation when she stated, "because no state-wide statute has ever formally segregated Mexican Americans in public schools, MALDEF has to spend many hard-earned dollars in the courts of this country to prove what we all knew: that Mexican American children throughout the southwest have been segregated." As a threshold matter in the Keyes litigation, Latina/o litigants needed to explain such segregation in color conscious terms:

[T]he anomalous position of the Chicano—not white, yet not, in the old-style parlance, "colored"—has been one of the roots of Chicano tragedy in this country and has produced a history of legal struggle for equal educational opportunity that has been as difficult as, and at the same time, significantly different from, that waged by black Americans.

Because of this legal "tragedy," perhaps it was no surprise that for the first time in its post-Brown jurisprudence the Court was not in complete agreement about how the desegregation issues would ultimately be balanced.

This Part examines the manner in which the principles of Brown v. Board of Education were applied to Latina/o students in Keyes v. School District No. 1 and in subsequent cases. Significantly, at precisely the same time that Latina/os began to appear as litigants and participants in the major school desegregation cases, many other Latina/os came to recognize the symbolic, didactic, and protean meanings of Brown in the struggle for civil rights. To be sure, the racial re-imagination within the Latino community in the late 1960s manifested itself in a struggle by courts in the early 1970s to precisely define the boundaries of race, color, and ethnicity in constitutional law. As this Part explores, this struggle would have tremendous consequences as courts spent a great deal of time and energy trying to determine the most appropriate and effective measures to understand and respond to the
LA RAZA LATINA?

segregation of a diverse student body. Paradoxically, while embracing a “brown” racial identity allowed Latina/os to claim the constitutional guarantees of Brown, their involvement in school desegregation jurisprudence reinforced their identity as neither White nor Black and neither fully ethnic nor absolutely racialized. Meanwhile, the rigid and increasingly formulaic line separating public schools’ minority and majority populations was cemented.

A. Conceptualizing a “Tri-Ethnic” Student Body

When eight “Negro,” “Hispano,” and “Anglo” families filed suit against the Denver Public School Board and its administration on June 19, 1969 for unconstitutionally perpetuating a policy of segregation, they entered the uncharted waters of the nation’s post-Brown school desegregation jurisprudence. At the time that the plaintiffs filed their case, there were no reported school desegregation cases that specifically involved representatives from all of these groups. Accordingly, at the center of the court’s deliberations would be the extent to which “Hispano” and “Negro” students could be jointly counted in determining whether segregation existed in the school district.

In evaluating the case, Judge William Doyle recognized that a firm legal definition of “segregation” would be hard to achieve. Having grown up and built his career in a city where racial lines were not constructed solely along Black and White lines, Judge Doyle pointed out that any attempt to place Latina/os and African Americans “all in one category and utilize the total number as establishing the segregated character of the school....is often an over-simplification....and [to] lump them into a single minority category...remains a problem and a question.”

Although conceding that African Americans and Latina/os shared economic and cultural deprivation and discrimination, Judge Doyle argued that “Hispanos have a wholly different origin, and the problems applicable to them are often different.”

Judge Doyle’s early written opinions in the case suggest that he conceptualized these disparate origins as the difference between racial and ethnic animi. Whereas Judge Doyle indicated that the concentration of Black students in the city was the result of the conscious maintenance of the city’s Black/White color line, the segregation of Latina/o students was the result of bias against the culture of

68. I have previously explored the emergence of Mexican Americans in school desegregation litigation, particularly in Keyes. Romero, supra note 54, at 97–120. I revisit and recast portions of that analysis in this Article. See infra Part II.A–B.
70. The only other case involving all three groups that was filed in the same time period was Cisneros v. Corpus Christi Independent School District, 324. F. Supp. 599 (S.D. Tex. 1970). That case, arising in Texas, involved a district that was largely “Mexican-American” but also included “Anglos” and a small number of “Negro” students. Id. at 608–12 n.37.
72. See Romero, supra note 54, 136–37 n.262.
73. Keyes, 313 F. Supp. at 69.
74. Id.
75. See id. at 64–67; see also Romero, supra note 54, at 80–90; Frederick D. Watson, Removing the Barricades from the Northern Schoolhouse Door: School Desegregation in Denver (1993) (unpublished Ph.D. dissertation, University of Colorado at Boulder) (on file with author).
Denver’s Spanish-surnamed population. Perhaps recognizing that the line between racial and ethnic discrimination was not all that precise, Judge Doyle noted that the mission of federal courts in school desegregation cases was to determine “inequality based upon race or ethnic origin.” Accordingly, Judge Doyle found the schools in question to be segregated “to the extent that Hispanics, as a group, [were] isolated in concentrated numbers.”

Although Judge Doyle’s opinion collapsed substantive constitutional differences between racial and ethnic discrimination, it nevertheless maintained an important line of color demarcation between White and non-White groups. In doing so, Judge Doyle described the so-called “minority factor” that exacerbated the problem of racial concentration. He stated that “minority citizens are products, in many instances, of parents who received inferior educations and hence the home environment which is looked to for many fundamental sources of learning and knowledge yields virtually no educational value.” Regardless of the racial or ethnic origins of such a condition, “the only hope,” in Judge Doyle’s estimation, was to bring Latina/o, African American, and other “minority citizens” into contact with “knowledgeable” (i.e., White) students. According to this reasoning, an integrated school would include approximately equal numbers of White and non-White students.

Judge Doyle’s conflation of racial and ethnic terminology in the Keyes district court opinion highlighted the different approaches that other courts took or would take regarding the racial positioning of Latina/os in the nation’s legal order. In Judge Doyle’s own circuit, for instance, the U.S. District Court for the District of New Mexico, roughly three months before the initial Keyes decision was made, refused to certify “Mexican-Americans” as a class in a school desegregation complaint. In Lopez Tijerina v. Henry:

The plaintiffs allege[d] that the “Indo-Hispano” class is generally characterized by having Spanish surnames, Mexican, Indian, and Spanish ancestry, and that

---

76. Keyes, 313 F. Supp. at 73, 77.
77. Judge Doyle’s first desegregation order is instructive in this regard. Indeed, his plan included elements meant to address both racial and ethnic discrimination in the system such as instituting a voluntary transfer policy out of “inferior” schools to better schools, initiating limited busing to integrate the core city and Park Hill schools with minority concentrations, and offering compensatory education—including “[h]uman relations training,” “Spanish language training,” and “[c]lasses in Negro and Hispanic culture and history.” Keyes v. Sch. Dist. No. 1, 313 F. Supp. 90, 96, 99 (D. Colo. 1970).
78. Keyes, 313 F. Supp. at 77 (emphasis added).
79. Id. at 69. Judge Doyle thus tentatively established that a “concentration of either Negro or Hispano students in the general area of 70 to 75 percent is a concentrated school likely to produce the kind of inferiority which we are here concerned with.” Id. at 77 (emphasis added).
80. Judge Doyle made the following observation: “The plaintiffs have accomplished this by using the name ‘Anglo’ to describe the white community.” Id. at 69.
82. Id.
83. Id. at 96–97. Thus, “complete desegregation” sufficient to fulfill “the constitutional requirement” would be achieved when each of Denver’s segregated schools had “an Anglo composition in excess of 50 percent.” Id. at 98 (discussing the desegregation of elementary schools).
84. Although Judge Doyle recognized that such a balance “is probably not constitutionally required,” he pointed out that “the desirability of having the minority student population in each of these [elementary] schools apportioned equally between Negro and Hispanic children is apparent.” Id.
the class speaks Spanish as a primary or maternal language. In connection with this class, the complaint also designate[d] a class of “non-Indo-Hispano” meaning only white or Caucasian, or Anglo-American. The classes of “Indo-Hispano” or “non-Indo-Hispano”, [sic] as designated in the complaint, do not include either Negroes or Indians.

The plaintiffs’ attempt to complicate the racial identity of Mexican Americans proved to be their undoing. Indeed, because they described their racialization in multiethnic and multiracial terms, the court concluded that their own self-definition was legally unworkable. Unless the plaintiffs could establish that the students in the class clearly, unambiguously, and exclusively belonged to an “Indian,” “Negro,” or “Caucasian” group, they could not claim to be the victims of racial discrimination. In a place like New Mexico, which has both a rigid multiracial hierarchy and permeable color lines, the Latino “Indo-Hispano” was, at least for that court, beyond the pale of constitutional recognition.

In contrast to the treatment of the New Mexican children in Lopez Tijerina, a Texas federal district court case decided a few months later undertook a more critical and sustained exploration of the racial positioning of Latina/os in school desegregation jurisprudence. Cisneros v. Corpus Christi Independent School District, like Keyes, challenged the maintenance of a dual-school system erected against both “Mexican-American” and “Negro” students. Accordingly, the existence of “Mexican-Americans” in the case compelled Judge Woodrow Seals to squarely confront whether Brown and its progeny applied to “Mexican-Americans,” and, if so, what constituted a segregated school when “Negroes” and “Anglos” were involved.

To begin his analysis, Judge Seals dealt with the inconsistency surrounding the terms others used to differentiate between groups and to define discrimination. As Judge Seals aptly pointed out, such terms were subject to change and re-definition over time, and all group identification labels—from Anglo, Chicano, and Black to “ethnic-minority”—were misnomers, dependent upon variances in time, place, and context. Nevertheless, Judge Seals’ opinion could not ignore an overwhelming litany of historical and social evidence of discrimination by “Anglos” against Corpus Christi’s “Mexican-American” community. Notably, Judge Seals highlighted the racial consciousness of Latina/os as an important factor in his decision to consider the group legally non-White: “It seems to this court that [several] Mexican-American organizations...were called into being in response to

86. Id. at 275–76.
87. Id. at 276–77.
88. See id.
90. See id.
92. Cisneros, 324 F. Supp. at 605 n.27; see also Romero, supra note 54, at 110.
this problem.”

Also informative for Judge Seals was a larger bureaucratic and social cognizance of the distinct challenges confronting the Latino community. According to Judge Seals, “if there were any doubt in this court’s mind, this court could take notice, which it does, of the congressional enactments, governmental studies and commissions on this problem.” Collectively, such evidence led Judge Seals to conclude that “Mexican-Americans” were a socially distinct “ethnic minority” group, who, like “Negroes,” had suffered a long history of past and present discrimination in Corpus Christi.

Attempting to provide language that would have avoided the pitfalls of racial and ethnic definitions, Judge Seals could not escape describing a very real color line in the school system:

The constitutional inquiry is concerned with whether a particular disadvantaged group is being substantially segregated from the more advantaged group; the constitutional ill is not cured simply by commingling two similarly disadvantaged groups (the Negroes and the Mexican-Americans), both of which are substantially segregated from the more advantaged group, which in this case is the Anglo-American population.

Due to the fact that Mexican American and Black students had educational experiences that were inferior to White students, Judge Seals found that the entire Corpus Christi school system was unconstitutionally segregated regardless of the concentration and ratios in particular schools. At the end of his opinion, Judge Seals remarked, “We are not a homogeneous people; we are a heterogeneous people; we have many races, many religions, many colors in America.” Indeed, a reconsideration of race and color differences in places like Denver and San Antonio allowed these courts to recognize more effectively the inherently unequal and therefore unconstitutional education and educational facilities in those school districts.

At the same time, Judge Ben C. Connally opened what he called “another chapter” in the desegregation of the Houston Independent School District in Ross v. Eckels. Although the school district in that case enrolled 235,000 students, of which two-thirds were designated White and one-third Black, 36,000 students (fifteen percent) were “Spanish-surnamed Americans.” Because only fifteen percent of the students enrolled in the school district were “Spanish-surnamed Americans,” the Mexican American Legal Defense and Education Fund (MALDEF) sought to intervene in the case.

94. Id. at 615 (listing LULAC, the G.I. Forum, and MAYO).
95. Id. at 608 (emphasis added).
96. Id. at 615.
97. Id. at 616 n.48.
98. Id. at 627.
99. Id. (emphasis added).
Founded in 1967, MALDEF played a prominent role in the Texas desegregation suits. From its inception, MALDEF was deeply concerned about the segregation of Mexican Americans from White students. In a 1968 memorandum from José Ángel Gutiérrez to Pete Tijerina and Mario Obledo, Gutiérrez highlighted the “ethnic” triangulation of Texas schools where “Mexicano” and “Negro” students were segregated on the basis of language and color from “Anglo” students. The emergence of MALDEF in school desegregation and other suits provoked correspondingly intense discussions among its supporters about the imprecise meanings and operations of race and color within the Latino community. In one letter to the organization in 1968, a person described “professionalized” Puerto Ricans and Mexican American Volunteer in Service to America (VISTA) organizers as “White” and “Anglicized ‘Gringo[s].’” When the letter writer suggested that the organizers utilize the phrase “viva la raza” to organize Mexican Americans, the VISTA organizers replied that using the phrase “is the same as a negro saying I am a NIGGER.” Deeply concerned, the letter writer concluded with the following: “I say to you VIVA LA RAZA. I mean long live your race, and thanks for the great contribution your race has given to Our America.” Others also recognized Latina/os as a non-White racial group. For instance, the Southwest Intergroup Council noted that the American Southwest “contains a basic minimum of five distinct racial groups: Anglo, Asian, Black, Chicano and Indian. These groups each have distinctive cultural attitudes....Instead of the question of administration of law, a more fundamental question of the substance of law dominates this region.”

Despite the increasing recognition of Mexican Americans as non-White, which was buttressed by decisions such as Keyes and Cisneros, Judge Connally attacked MALDEF’s challenge to the color line in Ross v. Eckels: “Content to be White for these many years, now, when the shoe begins to pinch, the would-be Intervenors wish to be treated not as Whites but as an identifiable minority group.” Judge Connally subsequently denied MALDEF’s petition to intervene. Without a Latino
voice in the case, Judge Connally concluded that the Spanish-surnamed students were “White” and, in turn, approved a plan that considered those schools that combined Mexican American with African American students as integrated.112 The Fifth Circuit review of the ruling reinforced Judge Connally’s decision and, in the process, “adjudicated [Latina/os] to be statistically white.”113

*Keyes, Lopez Tijerina, Cisneros, and Eckels*, all written within months of each other, demonstrate how Latina/os were situated squarely in between conceptions of Whiteness and Blackness in the U.S. racial order. While the trial courts in *Keyes* and *Cisneros* highlighted the racial repositioning of Latina/os as coterminous with Blackness in U.S. constitutional law, *Lopez Tijerina* and *Eckels* indicated the continued legal association of the group with Whiteness. It is quite clear in these late 1960s and early 1970s Latino school desegregation cases, however, that both a potentially more sophisticated language of racial discrimination and a distinct operation of the color line appeared in the legal discourse. Indeed, one contemporary study of the *Cisneros* decision highlighted how “Chicanos”—as “80 percent Native American,” bilingual or exclusive Spanish-speakers, Spanish-surnamed, Catholics who experienced exclusion in jobs, housing, schools, restaurants, theaters, and swimming pools as a result of “white superiority”—constituted an identifiable minority group subject to the full protection and guarantees of U.S. law.114

Ironically, however, arguably the most accurate description of Latina/os, as detailed in *Lopez Tijerina*, proved to be unworkable, while the imprecise terms and understandings of “Hispanos” in *Keyes* and of “Mexican-Americans” in *Cisneros* were sufficiently acceptable “ethnic minority” categories that distinguished Latina/os from their “Negro” and “Anglo” counterparts.115 Therefore, the question of the Anglo or White race” and that even if Mexican Americans were an identifiable minority group they were not entitled “to escape the effects of integration [with blacks].” Jorge C. Rangel & Carlos M. Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 349 n.254 (1972) (alteration in original) (quoting Ross, Civ. A. No. 10-444).


113. Ross v. Eckels, 434 F.2d 1140, 1150 (Clark, J., dissenting). Judge Clark argued that “it is mock justice when we force the numbers by pairing disadvantaged Negro students into schools with members of this equally disadvantaged ethnic group.” Id. (emphasis added) (internal quotation marks omitted).

114. Rangel & Alcala, supra note 111, at 350–55. Another contemporary account noted that Mexican-Americans are considered by some to be a non-white racial group. However, the predominant view is that Mexican-Americans are white, even though many are mestizos (a hybrid of white and Indian). Nevertheless, like other white nationality groups who have been victims of discrimination, for example, the Jewish and Italian-Americans, Mexican-Americans have inherent characteristics which make them easily identifiable and susceptible to discrimination. Among these characteristics are brown skin color, a Spanish surname, and the Spanish language. Guadalupe Salinas, Comment, *Mexican-Americans and the Desegregation of Schools in the Southwest*, 8 HOUS. L. REV. 929, 929 (1971) (first emphasis added).

115. This point may be further refined by the importance of city and neighborhood boundaries in the *Keyes* and *Cisneros* cases as opposed to their importance in the *Lopez Tijerina* case. In both cases, historical patterns of neighborhood development (so-called de facto patterns) provided a literal containment and identification of racialized groups for each court to conceptualize as distinct ethnic “minority groups.” See Keyes v. Sch. Dist. No. 1, 313 F. Supp. 61, 64–82 (D. Colo. 1970); Cisneros v. Corpus Christi Indep. Sch. Dist., 324 F. Supp. 599, 606–15 (S.D. Tex. 1970). For critical perspectives of the racialization of urban space, see generally THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA (Xavier de Souza Briggs ed., 2005); LIAM KENNEDY, RACE AND URBAN SPACE IN CONTEMPORARY AMERICAN CULTURE (2000); EDWARD W. SOJA, POSTMETROPOLIS: CRITICAL STUDIES OF CITIES AND REGIONS 95–155 (2000).
remained as to where Latina/os would fall in relation to the color line. Subsequent desegregation litigation would answer this question and, in turn, suggest the constitutional limits of being an identifiable “ethnic minority group” in a White and non-White constitutional order.116

B. Applying a Tri-Ethnic Jurisprudence in Color Conscious Desegregation Law

The emergence of Mexican Americans and other “ethnic minorities” in school desegregation jurisprudence compelled the U.S. Supreme Court to address the substantive meaning of ethnic terminology in a body of law that had been dominated by Black and White racial distinctions. Settling on the Keyes case—because it also addressed the issue of de facto versus de jure segregation—the Court heard oral arguments in October 1972 and issued a decision in June 1973.117 The various opinions that were expressed in the case made it clear that a more complex understanding of race and color would animate the nation’s legal discourse. Justice Brennan’s majority opinion pointed out that, unlike cities in the American South, “Denver [was] a tri-ethnic, as distinguished from a bi-racial, community.”118 For that reason, according to Justice Powell’s concurrence in part and dissent in part, the Court needed to “formulate constitutional principles of national rather than merely regional application.”119 As a threshold matter, the Court was asked to address the color positioning of Latina/os to determine what constituted a segregated school.120 In other words, were Latina/os White, Black, or uniquely Latino?121

Like some of his lower court brethren, Justice Brennan pointed out the complexity of the social situation. He wrote:

What is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school’s student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration.122

Further reinforcing this analysis, Brennan noted that “‘Hispano’ is the term used by the Colorado Department of Education to refer to a person of Spanish, Mexican, or Cuban heritage. In the Southwest, the ‘Hispanos’ are more commonly referred to as ‘Chicanos’ or ‘Mexican-Americans.’”123 Finally, Justice Brennan reiterated the underlying point made by Judge Doyle that discrimination directed against Latina/os and Blacks has different origins, thus making Denver’s schools “tri-ethnic” as opposed to “bi-racial.”124

116. See infra Part II.B.
118. Id. at 195.
119. Id. at 219 (Powell, J., concurring in part and dissenting in part).
120. Id. at 195–97 (majority opinion).
121. Justice Brennan asked whether Judge Doyle was correct in not aggregating “Negroes and Hispanos” in order “to establish the segregated character of a school.” Id. at 196.
122. Id.
123. Id. at 195–96 n.6 (citation omitted).
124. See id. at 195–98.
Brennan’s linguistic shift from race to ethnicity was one explicitly captured in Judge Seals’ decision in *Cisneros* to identify Mexican Americans and African Americans as identifiable ethnic minority groups. The ethnicity paradigm used by both courts, however, revealed a much less complicated, if not more restrictive, understanding about discrimination in post-World War II culture and life in the United States. As Michael Omi and Howard Winant point out in their study of racial formation in the United States, “the ethnicity paradigm represents the mainstream of the modern sociology of race,” while during the post-World War II period the ethnic paradigm highlighted the “triumph of liberalism” over “biologist” views of difference. Yet, as Omi and Winant’s research warned, the paradigm “was solidly based in the framework of European (white) ethnicity, and could not appreciate the extent to which racial inequality differed from ethnic inequality.” Ultimately, this allowed European immigrants, as “ethnics,” to “take their places as ‘Americans’ despite the existence of considerable nativist hostility and prejudice against them.”

*Brown v. Board of Education* and its mandate for integration (i.e., assimilation) represented the constitutional entrenchment of the ethnicity paradigm, at least in relation to the Black/White color line. In this regard, ethnicity proponents were likely to believe that the *Brown* decision and the corresponding 1950s and 1960s civil rights movement, of which it was a part, “was trying to create for blacks the same conditions that white ethnics had found: ‘opportunity’ and relative equality (i.e., the absence of formal discriminatory barriers, however much attitudinal prejudice may have existed).”

As the struggle to desegregate the nation’s schools moved to the northern and western states, courts found not only a very different color line than the one operating in the American South but also perceived an absence of legal (de jure) discriminatory restrictions. According to the ethnicity model, the absence of formal legal barriers in conjunction with the judicial and administrative enforcement of recently passed equal opportunity legislation required Black and other non-White “ethnics” to “follow in their [European] ‘predecessors’ footsteps. Through hard work, patience, delayed gratification, etc., blacks [and other minority groups] could carve out their own rightful place in American society.... Race relations would thus continue in what Nathan Glazer was later to call the ‘American ethnic pattern.”

Critically, the Supreme Court’s shift from a “bi-racial” to a “tri-ethnic” approach, as well as its ultimate decision in *Keyes* to maintain the de jure/de facto distinction

---

127. Id. at 16.
128. Id. at 17. Omi and Winant refer to this process as the “European immigrant model of assimilation.” Id.
131. OMI & WINANT, supra note 23, at 19.
132. See id.
133. Id. (citing NATHAN GLAZER & DANIEL P. MOYNIHAN, BEYOND THE MELTING POT (2d ed. 1970)).
in its equal protection jurisprudence, thus becomes explainable given the ethnicity paradigm's dominance in American intellectual, social, and public thought.

The ethnicity model also explains another important move made in Justice Brennan's majority opinion in *Keyes*, namely his decision to count Blacks and Latina/os as a single "minority" group in order to establish the existence of segregated schools. Relying on a series of studies on Mexican American students undertaken by the U.S. Commission on Civil Rights, the Court found that "Negroes and Hispanics in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanics included in the category of 'segregated' schools." By combining Black and Latina/o students as undifferentiated and "identical" members of a minority group, the Court reinforced the predominant ethnic model and assumed that all so-called minority groups would share a similar process of integration. Yet, by collapsing the language of race into that of ethnicity, the Court redefined what had once been an ambivalent color line for Latina/os. Whereas in *Hernandez v. Texas* constitutional law had allowed Latina/os to become an "identifiable class" as an "other-White" group in the same year that *Brown v. Board of Education* was decided, *Keyes* unmistakably placed Latina/os on the non-White side of the nation's color line. For this reason, the decision further declared that discrimination against one non-White group—of which Latina/os were now a

---

134. Justice Brennan described the holding in *Keyes* as follows:

[We] hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions....We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation...is purpose or intent to segregate. Where school authorities have been found to have practiced purposeful segregation in part of a school system, they may be expected to oppose system-wide desegregation, as did the respondents in this case, on the ground that their purposefully segregative actions were isolated and individual events, thus leaving plaintiffs with the burden of proving otherwise. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973).

135. The courts in *Keyes* and *Cisneros*, however, were not unique in this regard. Other federal institutions, as they became acutely aware of the nation's Spanish-surnamed population, contributed heavily to a tangled race, color, and ethnic discourse. In the 1970s, for instance, the Federal Office of Management and Budget (OMB) institutionalized the use of the term "Hispanic" to collectively describe "a person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin." *OFFICE OF MGMT. & BUDGET, OMB DIRECTIVE NO. 15, RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING* (1977); *see also U.S. BUREAU OF THE CENSUS, PERSONS OF SPANISH ORIGIN IN THE UNITED STATES* (1979). Although OMB guidelines indicated that race played no role in the classification of "Hispanics," the very act of amalgamating highly diverse social and cultural groups was unambiguously a racial process guised in pan-ethnic terms. *See OMI & WYANT, supra note 23, at 17-19. Indeed, this was part of the nomenclature of the intellectual community of the time and indicated an ideological move to re-imagine race. *See supra* notes 126-133 and accompanying text; *see also* David E. Hayes-Bautista & Jorge Chapa, *Latino Terminology: Conceptual Bases for Standardized Terminology*, 77 AM. J. PUB. HEALTH 61, 61-68 (1987).


137. *Id.* at 197 & n.8, 198; *see also* Romero, *supra* note 54, at 113-14.

138. *See supra* note 3; *see also infra* note 322 and accompanying text.

139. As Justice Brennan declared, there was "much evidence that in the Southwest Hispanics and Negroes have a great many things in common." *Keyes*, 413 U.S. at 197.
part—created a presumption of discrimination against other non-White groups in the "tri-ethnic" city. While such reasoning allowed the Court to use a more expansive definition of discrimination than that which was applicable to the rest of the United States, it also collapsed important differences between racialized groups around a color line while further obscuring the extent to which racial inequality differed from ethnic inequality. The deployment of the language of race and color in such ethnic terms would invariably complicate any attempt to provide an effective and multifaceted remedy to a "tri" or "multi" racial student body.

Such complications, however, were not so obvious after the U.S. Supreme Court's 1973 Keyes decision. Indeed, what Judge Doyle failed to accomplish in establishing standards for a segregated school by treating Latina/o and Black students as their own separate and distinct student bodies, he attempted to accomplish at the remedial phase of the litigation by providing one remedy for Blacks (busing) and another for Latina/os (bilingual and bi-cultural education). This bifurcation, moreover, was the position explicitly endorsed by a new actor in the Keyes litigation: the Mexican American Legal Defense and Education Fund. As early as 1969, MALDEF understood that "the goal of school integration [for Chicana/os] possibly conflicted with another goal sought to be effected by MALDEF, that of bilingual education." Particularly, MALDEF believed that "[a]s the goal of a unitary school system is approached the difficulties for providing a bilingual education are compounded and perhaps impossible to overcome. It would seem, then, that only one of these goals [busing or bilingual education] can be vigorously pursued." The Supreme Court's decision in Keyes, however, provided a unique opportunity to reevaluate such an analysis based fundamentally on the proposition that Latina/os were neither "other-White" nor "other-Black."

An analysis of MALDEF's emergence in Keyes provides a revealing insight into how Latina/os began to conceptualize race, color, and ethnicity. Perhaps most important, the organization publicly took the position that Latina/os were a distinct racial group. For instance, in the preamble to their creation of the National Institute for Law and Justice, MALDEF noted, "We, the people of La Raza...hereby declare the National Institute for Law and Justice will serve as a national and local advocate [sic] for La Raza Rights guaranted [sic] by the constitution of the United States." Accordingly, such race consciousness highlighted MALDEF's reasons for wanting...

140. See id. at 195-99.
141. Justice Brennan ordered Judge Doyle to instruct the Denver Public School Board "to desegregate the entire [school] system 'root and branch.'" Id. at 213 (quoting Green v. County Sch. Bd., 391 U.S. 430, 438 (1968)).
143. Id.
144. Id.
145. Id.
146. Preamble to Articles of Incorporation, La Raza Nat'l Inst. for Law and Justice (emphasis added) (on file with the Special Collections and University Archives, Stanford University).
to intervene in *Keyes*. According to the organization, the "issues presented to the Court [had] been clearly Black dominated," and as a result, the federal judiciary lacked sufficient exposure to the unique and diverse problems that confronted the Chicano community. \(^{147}\) Notably, MALDEF's petition to intervene in *Keyes* rejected ethnic nomenclature that had long been used in the case (i.e., "Hispano") in favor of a more explicitly racial discourse (i.e., "Chicano"). In its memorandum in support of its motion to intervene, MALDEF argued that the U.S. Supreme Court's decision in *Keyes* made it clear that "Chicanos cannot be counted as whites for any purpose" in school desegregation litigation.\(^{148}\) And although the issues facing Blacks and Chicanas/os shared common questions of law and fact, MALDEF argued that Chicanas/os could not be considered another Black group.\(^{149}\) Indeed, MALDEF unambiguously indicated that a remedy appropriate for one non-White group of students was not necessarily appropriate for another.\(^{150}\)

Once the court granted MALDEF's petition to join the litigation, MALDEF created an integration policy to specifically address the needs of Denver's Chicana/o students. The MALDEF policy, known as the "Cardeñas Plan," proposed a seemingly ethnic remedy but one that offered to reinforce the non-Whiteness of Chicanas/os students.\(^{151}\) At the center of the Cardeñas Plan rested a commitment to bilingual and multicultural programs at every educational level.\(^{152}\) According to Dr. Cardeñas, such programs would positively and effectively foster a *social identity*, which he hoped would help non-White students develop a meaningful sense of self-worth.\(^{153}\) In a very important sense, the Plan rejected one of the major premises of school desegregation litigation—the idea that white students and their culture would lift minority students out of poverty, indifference, and inferiority. Instead the Cardeñas Plan advocated that... Chicano students would be best served by allowing them to learn about, identify with,


\(^{148}\) Id. at 13.

\(^{149}\) Id. at 18.

\(^{150}\) Id.; see also Romero, supra note 54, at 115–17.

\(^{151}\) The "Cardeñas Plan" adopted the following as its rationale:

- An instructional program developed for a white Anglo-Saxon, English-speaking, middle class school population cannot be and is not adequate for non-white, non-Anglo-Saxon, non-English-speaking, or non-middle class population.
- To reverse the pattern of failure for non-typical children, it is necessary that the instructional program and the characteristics of the learner be compatible.
- In order to develop such an instructional program, it is necessary that incompatibilities be identified and eliminated.


\(^{152}\) Cardeñas, supra note 151, at 24. The bilingual approach was not just a desegregation approach advocated by MALDEF but was a color conscious strategy pursued by a variety of Mexican American activists and organizations. See, e.g., Sw. Intergroup Relations Council, *Leadership Report, A Bilingual Approach: Education for Understanding* (on file with the Special Collections and University Archives, Stanford University). Critically, bilingual education was conceptualized in color conscious terms as an alternative to schools that had been controlled by Anglo-American curricula. See generally id.

\(^{153}\) Cardeñas, *supra* note 151, at 15–16.
and eventually emulate and celebrate their own [non-White] racial and cultural heroes.\textsuperscript{154}

In turn, according to advocates of such programs, "the minority child and the Anglo child" would have unprecedented opportunities for "enlarging their cultural universe and perceiving each other as acceptable and \textit{equally good}.\textsuperscript{155} In these terms, true "integration" of the nation's schools required the introduction of curricula that recognized Chicana/os as members of a legally distinct non-White group. MALDEF's influence, at least on the trial court in \textit{Keyes}, was profound. One indicator of this influence is apparent in the language that Judge Doyle began to use after the U.S. Supreme Court remanded \textit{Keyes}. "No longer referring to Mexican American students as 'Hispanos' in his decisions after 1973," Judge Doyle adopted the term "Chicano" in identifying Denver's Spanish-surnamed community.\textsuperscript{156}

Judge Doyle's attempt to provide a remedy that recognized distinct differences in the experiences of Chicana/o students proved fleeting.\textsuperscript{157} Although guised in ethnic terms, the Cardeñas Plan proved incompatible with the color vision of desegregation established in the years and decades since \textit{Brown}. As the Tenth Circuit held in reversing Judge Doyle's remedy, the "clear implication of arguments in support of the court's adoption of the Cardenas [sic] Plan is that minority students are entitled under the fourteenth amendment to an educational experience tailored to their unique cultural and development needs. Although enlightened educational theory may well demand as much, the Constitution does not."\textsuperscript{158} In short, the Tenth Circuit's opinion made it clear that courts were to consider Chicana/os solely as an indistinguishable "non-White" group.\textsuperscript{159}

The Tenth Circuit's rejection of the Cardeñas Plan and the U.S. Supreme Court's decision not to grant certiorari to review the rejection\textsuperscript{160} represented the end of a robust but highly problematic era in the racial construction and color positioning of Latina/os in U.S. law. Represented most prominently in \textit{Keyes} and \textit{Cisneros}, the articulation of Mexican Americans as a "readily identifiable, ethnic-minority group"\textsuperscript{161} in each instance was subsequently constitutionalized in the U.S. Supreme Court's decisions to combine Black and Latina/o students in relation to White students in the "tri-ethnic" school district. Although Judge Doyle in \textit{Keyes} and Judge Seals in \textit{Cisneros} suggested the extent to which Latina/o students were racialized differently from Blacks by experiencing a different "origin" of discrimination, the subsequent aggregation of Latina/os and Blacks by the U.S. Supreme Court as an

\textsuperscript{154} Romero, \textit{ supra} note 54, at 117 (footnote omitted). As Chief Justice Earl Warren noted in \textit{Brown}, to separate Black and White students "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." \textit{Brown v. Bd. of Educ.}, 347 U.S. 483, 494 (1954).


\textsuperscript{156} Romero, \textit{ supra} note 54, at 117.

\textsuperscript{157} \textit{Id}. at 118–19 (describing the Tenth Circuit Court of Appeals' disapproval of Judge Doyle's "tri-ethnic remedy").

\textsuperscript{158} Keyes v. Sch. Dist. No. 1, 521 F.2d 465, 482 (10th Cir. 1975).

\textsuperscript{159} See Romero, \textit{ supra} note 54, at 119.


undifferentiated non-White group reinforced the legal in-betweeness of Latina/os in constitutional understandings of race, color, and ethnicity.

As a matter of law, Latina/os appeared to be clearly on the non-White side of the color line, yet their “ethnic” status as a “minority” severely limited the remedies available to combat their segregation. In districts with “tri-ethnic” and “multi-ethnic” student bodies, a newly expansive color line constitutionalized in Keyes (i.e., the minority/non-minority line) ironically truncated the terms and conditions upon which integration could be achieved. In this type of litigation, these terms would be defined in reference to Whiteness and Blackness but never in reference to Latinoness. In such a framework, the nation’s school desegregation jurisprudence, despite its attempt to apply to a “tri-ethnic” student body, fundamentally denied the “different” origins and remedies of Latina/os’ non-White racial construction. Particularly, when it came to the issue of language discrimination, such denial obscured altogether the centrality of race and color to the analysis.

III. NO SÓLO PALABRAS PERO ACCIONES

In 1974, the Denver Commission on Community Relations compiled a reader on the “Mexican and Spanish American.”162 In this collection of materials, University of Denver Professor Arthur Campa addressed the problematic correlation between Latina/os, race, culture, and language in the United States. According to Professor Campa, “[W]e have become accustomed to think of man as a member of a particular race, with a corresponding language, and with a culture that represents his biological and linguistic origin.”163 In the post-World War II United States, Campa further explained, this had a simplistic and overly mechanical application: “If a person is blond he must be Anglo, if he is Anglo he can’t be dark, if he is dark he is Spanish[,]…if he speaks Spanish he eats Spanish food, he eats enchiladas, the latter must be Spanish food, and ad infinitum or ad absurdum.”164 Although Campa’s subsequent analysis attempted to unravel this problematic correlation, he nevertheless highlighted the understanding held by many of his contemporaries about the centrality of language to the maintenance of the color line in U.S. culture and life.165 Particularly, in a United States that was being rapidly transformed by migration from Latin America, Asia, and the Pacific,166 and as the remedy of bilingual education was contemplated as a legitimate response to the nation’s racially segregated schools, non-English language programs and language discrimination highlighted precisely how these issues could not be considered only in terms of ethnic acculturation.167

---


164. Id. at 70. Interestingly, Campa’s own understanding of racial differences in the United States noted the absurdity of collapsing racial and ethnic distinctions around color. Thus, he stated that “French or Italian” must be included in the language race logic because these “Latin races are dark!” Id.

165. See id. at 70–72.


167. See supra notes 126–135 and accompanying text.
This Part assesses the role that bilingual education litigation in the 1970s and 1980s played in the racial construction and color positioning of Latina/os in U.S. law and jurisprudence. In contrast to the school desegregation cases, which were based on the Fourteenth Amendment equal protection jurisprudence, many of the Latino bilingual education cases were litigated under various and inter-related provisions of federal law. While such legislation was based on eradicating racial and ethnic discrimination, it served as a poor proxy for Latina/os to the recently articulated “tri-ethnic” color guarantees of constitutional jurisprudence. Indeed, in related language rights cases, the racial construction and color positioning of Latina/os lost all relevant and contextual meaning as both monolingual and bilingual Spanish-speaking students came to be treated and understood as an ethnic “language minority” group.

A. Bilingual Education Policy and Jurisprudence in the 1970s and the De-Conflation of Race and Ethnicity

One year after the U.S. Supreme Court attempted to formulate principles of national application with its “tri-ethnic” holding in Keyes, it considered for the first time the role of bilingual education in its educational equality jurisprudence. Lau v. Nichols was brought by a class of non-English speaking Chinese against the San Francisco Unified School District for failing to provide any type of English language instruction. To further complicate the situation, the School District had been under a desegregation decree since 1971, although the district court denied a petition by the parents of Chinese students to intervene in the case. Partially as a result of the 1971 decree to integrate its schools, some Chinese students were receiving a bilingual education while others were not. For the first time in its post-Brown v. Board of Education educational jurisprudence, the U.S. Supreme Court did not consider whether such inequity was a violation of the Equal Protection Clause of the Fourteenth Amendment. Instead, the Court framed its analysis under Title VI of the Federal Civil Rights Act of 1964, thus avoiding the constitutional issue when the same end could theoretically be achieved by statutory means.

168. See infra notes 236–238 and accompanying text.
170. Id. at 564–65. For a thorough overview of the factual details of Lau, see STEPHANIE SAMMARTINO McPherson, LAU V. NICHOLS: BILINGUAL EDUCATION IN PUBLIC SCHOOLS (2000).
173. In Lau, the U.S. Supreme Court noted a report by the Human Rights Commission of San Francisco, which demonstrated that there were 3,457 Chinese students in the school system who spoke little or no English. The document further showed 2,136 students enrolled in Chinese special instruction classes, but at least 429 of the enrollees were not Chinese but were included for ethnic balance. Thus, as of April 1973, no more than 1,707 of the 3,457 Chinese students needing special English instruction were receiving it.
174. Id. at 571 & n.3 (Stewart, J., concurring). Notably, Justice Douglas’s majority opinion initially
As part of the federal government’s response to discrimination in the post-World War II United States, Title VI of the Civil Rights Act of 1964 represented the first of a series of federally sponsored initiatives to promote and achieve educational equality. The Act stipulated that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 175 One year later, as part of President Lyndon B. Johnson’s War on Poverty, Congress enacted the Elementary and Secondary Education Act of 1965 (ESEA) 176 in order to meet the needs of educationally deprived children, especially through compensatory programs for the poor. 177 Shortly thereafter, Senator Ralph Yarborough of Texas secured the passage of the Bilingual Education Act of 1968. 178 The Act, which became Title VII of the ESEA, was largely spurred by evidence in Yarborough’s own state of Texas where “80 percent of Spanish-speaking children had to repeat first grade, and there were twelve times as many Mexican Americans in first as in twelfth grade (the overall ratio for Texans was three to one).” 179 Yarborough and other proponents believed that the Bilingual Education Act was passed exclusively for Latina/os. 180 Although language education programs had long emphasized the benefits of “de-ethnicization,” 181 their emergence in national policy discourse specifically relating to Spanish-speaking Latina/os in the late 1960s indicated a subtle recognition of their color status. 182

Precisely because the law provided for an expanded application of non-White legal protection and remedies to other groups, federal bureaucrats, spearheaded by the Department of Health and Welfare’s (HEW) Office of Civil Rights (OCR), took...
an active role in extending the powers of the federal government to Latina/os in racial terms. Established in 1965 to enforce Title VI, OCR employees focused their initial energies on intensely fighting school desegregation in the American South.\(^8\) The culmination of their enforcement efforts in this regard were guidelines that the HEW promulgated in 1968 that placed an affirmative duty upon school systems receiving federal funding to assure “that students of a particular race, color, or national origin [were] not denied the opportunity to obtain the education generally obtained by other students in the system.”\(^9\) Shortly thereafter, OCR staffers refocused and reprioritized the HEW’s enforcement efforts as the agency became increasingly conscious of discrimination directed at Latina/o students.\(^10\) Indeed, in May of 1970, the HEW placed an affirmative obligation on school districts with students of national origin-minority groups “to rectify the language deficiencies in order to open the instruction to students who had ‘linguistic deficiencies.’”\(^11\) While in one sense this was a pragmatic response to the increasing political visibility of Latina/o activists,\(^12\) it also reflected the changed racial landscape of school desegregation litigation as demonstrated by an emerging “tri-ethnic” jurisprudence.\(^13\) Importantly, this was a regulatory landscape that was increasingly shaped by the nation’s Latino community. As the OCR memorandum announced, the regulations were formulated after “Title VI compliance review conducted in school districts with large Spanish-surnamed student populations...revealed a number of common practices which have the effect of denying equality of educational opportunity to Spanish-surnamed pupils.”\(^14\)

In a very important sense, the 1970 HEW regulation anticipated the attempt in Keyes to develop principles of “national application” by expanding its regulatory

---

183. See Davies, supra note 179, at 1416.
185. See Davies, supra note 179, at 1416–19.
187. Gareth Davies notes the increasing visibility and lobbying efforts of Latina/os in many aspects of the federal government. See Davies, supra note 179, at 1410–15. Such visibility, Davies argues, was not the result of Latino grass-roots efforts, but that “federal policy makers and foundation executives sometimes seemed to be creating, rather than responding to, constituency demand.” Id. at 1418. I would suggest that Davies reading of history is too narrow and the analysis is made more complex by the intensity of Latino lobbying efforts at the state and national level since World War II. See generally JULIE LEININGER PYCIOR, LBJ AND MEXICAN AMERICANS: THE PARADOX OF POWER 111–82 (1997) (documenting the various ways that Mexican Americans, not only in Texas but throughout the Southwest, actively attempted to achieve political influence at the local, state, and national levels).
188. See supra Part II.A–B; see also Diana v. Bd. of Educ., No. C-70-37 (N.D. Cal. settled 1973) (discussing an IQ test administered in English to Spanish-speaking children that was used to place Latina/o students in classes for the mentally disabled), cited in Davies, supra note 179, at 1417.
189. Identification of Discrimination, 35 Fed. Reg. at 11,595. The HEW guidelines, moreover, were given their substance as a result of the agency’s close collaboration with Latina/o activists. Martin Gerry, the senior staffer who outlined detailed enforcement instructions for the HEW regulation, “emphasized that they had been drawn up in consultation with ‘outstanding Mexican-American and Puerto Rican educators, psychologists, and community and civil rights leaders.’” Davies, supra note 179, at 1422–23 (quoting LEON PANETTA, BRING US TOGETHER 174–75 (1971)). The influence of Latina/o activists would further be solidified on “a panel created to advise noncompliant [school] districts [that] was comprised of ‘75 Mexican American, Puerto Rican, and Native American educators, psychologists, and community leaders.’ As for the future,...HEW would ‘continue to place primary reliance on the policy development capabilities’ of those [Latina/o] individuals.” Id. at 1423 (quoting Panetta, supra, at 193–94, 274).
reach to protect previously neglected groups. Indeed, as HEW bureaucrats looked beyond the South to enforce Title VI, they discovered that the nature of inequality was fundamentally different. Particularly when it came to Spanish-surnamed individuals, language—as Latina/o activists had long maintained—served as a barometer of the different origins of discriminatory color treatment in U.S. society. As one MALDEF proposal succinctly stated, “Mexican-Americans also have some unique problems shared by few of the other minorities. Of these, the language barrier is perhaps most difficult.”

Though some students of the Act maintain that “[n]othing in the legislative history of the 1964 debate suggests that supporters of the Civil Rights Act anticipated so broad a construction,” Title VI specifically prohibited discrimination based upon imprecise and poorly articulated distinctions of race, color, and national origin status. Significantly, in the racially charged political arena of the late 1960s, the HEW regulation, in contrast to Keyes, conceptualized national origin (i.e., ethnic) discrimination as essentially different from race and color discrimination. In other words, the regulation suggested that language discrimination directed at Spanish-surnamed students was not only evidence of a different origin of discrimination than that which confronted Black

192. Davies, supra note 179, at 1420.
193. The congressional debates regarding the Civil Rights Act reveal how imprecisely legislators understood and conceptualized the lines between race, color, and national origin. For example, in a discussion regarding the addition of “national origin” as a bona fide occupational qualification, the following exchange occurred:

Mr. Dowdy: . . . Do I understand that it will be perfectly all right for a person advertising for employees to express a preference for a white person?

Roosevelt: No. “National origin” has nothing to do with the color of one’s pigment.

Mr. Rodino: It goes to the question of what is a bona fide occupational qualification. There may be some instances where a person of a certain national origin may be specifically required to meet the qualifications of a particular job.

Mr. Dowdy: Use the words “Anglo-Saxon.”

Mr. Rodino: No, of course not. The gentleman thoroughly understands that that is not included under a definition of “national origin.”

Mr. Dowdy: No, I do not understand it. When you say “national origin” that is a national origin is it not?

Mr. Rodino: “National origin” does not apply to color or race.

Mr. Dowdy: I said “Anglo-Saxon.”

Mr. Rodino: What “national origin” is Anglo-Saxon?

Mr. Dowdy: It is English.

Mr. Roosevelt: May I just make very clear that “national origin” means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country. It has nothing to do with broad terms such as the gentleman has referred to.

Mr. Dent: National origin, of course has nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person. I refer the gentleman to the book just put out by the Census Bureau which gives data on origin and yet covers all races only by country of origin.

110 CONG. REc. 2549 (1964).
students but that it also had very different effects and required a different remedy in integrating the nation’s schools.

By focusing on the ethnic origin of the discriminatory treatment, the HEW memorandum implicitly obscured the role that language discrimination (regardless of proficiency) played not only in the racialization of Latina/os but also in their social and legal placement on the non-White side of the color line. Indeed, the identification of Spanish-surnamed students as a national origin group had long been used to deny Latina/o students their legal right to make a non-White color claim. According to Clare Sheridan, courts in the early twentieth century consistently considered Mexican Americans to be a “nationality” group that was subject to a lower degree of legal protection. Following this line of reasoning, “nationality groups” did not carry the same constitutional meaning as racial groups did, and because ‘Mexicans’ were a nationality group, the equal protection clause did not apply to them.” This theory was especially powerful in Texas in the early twentieth century where courts consistently allowed the segregation of Mexican Americans from “other white races” as a result of ostensibly ethnic “migrant work patterns, English-language deficiencies, and the need to ‘Americanize’ Mexican students.” Although the 1970 HEW regulation was intended to remedy such inequities and patterns of discrimination, it had the effect of taking the issues of racialization and the color line out of the analysis. Indeed, in a 1972 Title VI compliance review of the New York public school system, the HEW inquired into the “services being provided to Italian, Greek and French speaking minorities as well as Spanish and Asian language speaking minority groups.” The fact that the issue of language and equality of educational equity in the HEW directive was framed exclusively in ethnic terms would prove especially troublesome for Latina/o litigants who themselves could not consistently articulate the color dimensions of the issue.

Amici briefs submitted to the U.S. Supreme Court in the Lau litigation in 1972 reveal the tortured and problematic de-conflation of ethnicity from race and color in the nation’s emerging “tri-ethnic” equality of educational opportunity jurisprudence. Specifically, the briefs of the Puerto Rican Legal Defense and Education Fund (PRLDEF) and the collective efforts of MALDEF, the American G.I. Forum, the League of United Latin American Citizens, and the Association of Mexico.

195. The OCR memorandum compared the experience of Spanish-surnamed students “with respect to disadvantaged pupils from other national origin-minority groups, for example; Chinese or Portuguese.” Id.
196. As Professor Davies noted, “Although the May 1970 memorandum made no specific reference to bilingual education, it was the most obvious remedy.” Davies, supra note 179, at 1421. Sheridan, supra note 3, at 120.
198. Id.
199. See id. at 120–21 (discussing Mexican Americans and the jury selection process).
American Educators (MALDEF brief)\textsuperscript{203} underscore the inconsistent manner in which Latina/os have highlighted their "national origin" ethnic status while at the same time speaking in clearly color-conscious terms.

The PRLDEF participation in \textit{Lau} emphasized the ethnic dimensions of the litigation.\textsuperscript{204} The PRLDEF originally attempted to shape the law in this regard by filing its own lawsuit on behalf of 182,000 Puerto Rican and other Spanish-speaking children against the New York City public school system for its denial of equal educational opportunities.\textsuperscript{205} This lawsuit, accordingly, informed the PRLDEF's analysis as an amici to \textit{Lau}. In its brief, the PRLDEF argued that "the unequal treatment to which [Spanish-speaking children] are subjected is based on language, which is inextricably a part of their ethnicity and national origin."\textsuperscript{206} Implicitly utilizing the "tri-ethnic" framework of \textit{Keyes}, the PRLDEF explained the differential treatment by comparing Spanish-speaking Puerto Rican students to "Anglo American or Black youngsters."\textsuperscript{207} The PRLDEF collapsed racial and color differences into an ethnic difference by asserting that the "threshold [constitutional] question" was "whether children of one ethnic or national origin group, who do not understand the language of instruction, receive an equal educational opportunity as compared to children of another ethnic or national origin group who \textit{do} understand that language."\textsuperscript{208} Importantly, the Puerto Rican experience highlighted the limitations of the national origin category as applied to Latina/os and other groups in this time period. Although Puerto Ricans have been citizens of the United States since 1917, the language differences between the dominant English-speaking culture in the United States and Spanish-speaking Puerto Ricans has produced "a racialization" of the Puerto Rican people as both non-White and non-Black foreigners incapable of assimilation into the U.S. mainstream.\textsuperscript{209} In this sense, language discrimination has constituted a critical but by no means determinative part of the process of racialization for Latina/os.

This point was further refined in the MALDEF brief in \textit{Lau}. According to MALDEF,

\begin{quote}
[the] denial of an equal educational opportunity presently taking place in the Chinese community in San Francisco is but a microcosm of the situation facing Spanish-speaking communities in the United States today. From towns as
\end{quote}

\textsuperscript{204} Brief of Puerto Rican Legal Defense & Education Fund, Inc., supra note 202, at 3.
\textsuperscript{206} Brief of Puerto Rican Legal Defense & Education Fund, Inc., supra note 202, at 3.
\textsuperscript{207} Id.
\textsuperscript{208} Id. at 4 (emphasis added). This point is later reemphasized in the PRLDEF brief in relation to the \textit{Lau} litigation: "By failing to take reasonable steps to teach petitioners English, respondents have erected a classification between school children who receive instruction in a language they understand and those who do not, and such classification is based upon the prime national origin characteristic of Asian-Americans— their language." Id. at 9.
diverse as Laredo, Texas to New York City, Spanish surnamed children come to school with...a cultural heritage entirely different than that of Anglo Americans.\textsuperscript{210}

MALDEF argued that this problem has persisted since the first Mexican immigrants began to work in mining, railroads, and "other such laboring work" at the end of the nineteenth century.\textsuperscript{211} Critically, MALDEF argued that ethnic difference alone, as expressed by language, was insufficient to explain the century-long exclusion of Latina/os from the American "melting pot" by stating that, "[i]f this large mass of people had become integrated into American society as ethnic groups from Europe had, then the Spanish language, in all likelihood, would not have flourished."\textsuperscript{212} Although continuing waves of immigration from Mexico explained this outcome, most determinative in MALDEF's analysis was the fact that "Mexican Americans have suffered the same type of social, economic and political discrimination as the black American."\textsuperscript{213} The color line "forced on [Latina/os] by the dominant Anglo society" created the conditions for the formation of racialized and insular non-White urban communities that "contributed significantly to this group clinging to its cultural heritage to an extent greater than other ethnic groups."\textsuperscript{214}

Not coincidently, MALDEF minimized any similarity between Latina/os and the Chinese students in \textit{Lau} while embracing the Latino community's Blackness.\textsuperscript{215} Although this was seemingly in opposition to the position taken by MALDEF in the \textit{Keyes} litigation, it demonstrated an explicit and increasing "interdependence of racial formations"\textsuperscript{216} among communities that had long been on the non-White side of the color line.\textsuperscript{217} Comparisons to Blackness thus allowed the Latino amici in \textit{Lau}—particularly those represented by the PRLDEF and MALDEF—to articulate the ways in which language contributed to a unique but constitutionally comprehensible form of color oppression.

The fact that \textit{Lau}, which focused exclusively on Chinese-speaking people, would eventually settle similar claims involving Spanish-speaking people in the nation’s lower courts,\textsuperscript{218} however, undermined this connection between language, color, and Latina/os. Critically important in this regard was an increasingly popular association of Asian Americans, namely Japanese and Chinese Americans, as "model" ethnic minority groups that had effectively assimilated into the U.S. mainstream. As Professor Daryl Maeda points out, such claims could not have been made prior to the 1960s:

From the beginning of large-scale migrations to the United States in the mid-1800s through the beginning of World War II, Asians faced legal barriers to

\begin{footnotes}
\textsuperscript{210} Brief of Mexican American Legal Defense & Education Fund et al., \textit{supra} note 203, at 5.
\textsuperscript{211} See id. at 7.
\textsuperscript{212} \textit{Id.} at 9.
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.} at 12.
\textsuperscript{215} \textit{See id.} at 9–10.
\textsuperscript{216} \textit{See Maeda, \textit{supra} note 209, at 1081.}
\textsuperscript{217} \textit{See Brief of Mexican American Legal Defense & Education Fund et al., \textit{supra} note 203, at 9–10.}
\textsuperscript{218} See, e.g., Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3, 587 F.2d 1022, 1029 (9th Cir. 1978); Serna v. Portales Mun. Sch. Bd., 499 F.2d 1147, 1153 (10th Cir. 1974).
\end{footnotes}
assimilation in the form of immigration restrictions, bars to naturalization, and antimiscegenation laws. In addition, the Yellow Peril discourse positioned Asians as inherently inassimilable perpetual foreigners.219

The political imperatives of the Cold War world, however, forced the United States—at least at a national level—to reevaluate its racial domestic and foreign relations policy and jurisprudence.220

Liberalized naturalization and immigration laws, as well as an increasingly robust equal protection discourse, “suggested the possibility of Asian American assimilation”222 in European ethnic terms.223 Indeed, this was an image, as Professor Maeda discusses, that was nationalized in 1966 with two publications in the New York Times Magazine224 and in U.S. News and World Report.225 According to Professor Maeda, “Both articles compared Asian Americans favorably to blacks, arguing that unlike ‘Negroes,’ Asian Americans had overcome racial discrimination and were on the verge of achieving assimilation.”226 In contrast, a very different image of assimilability, or lack thereof, emerged regarding the Latino population in popular discourse. Nationally read publications such as U.S. News and World Report increasingly highlighted the threat that Latina/os posed to U.S. culture and life.227 Although such magazine articles framed the problem almost exclusively as one of immigration, they very powerfully reinforced the long-standing assumption of Latina/os’ inability to assimilate in the United States.228

Precisely because the racialization of Asians at this moment was fundamentally different than that of Latina/os, Lau was a troubling case for Latina/os to support. In a letter to MALDEF, one attorney noted: “I am now more certain than before, that this is the wrong case to go to the Supreme Court first. A case involving the vast


221. Maeda, supra note 209, at 1083.


223. Maeda, supra note 209, at 1083 (citing William Petersen, Success Story, Japanese-American Style, N.Y. TIMES, Jan. 9, 1966 (Magazine)).


225. Id.


227. One study on similar types of newspaper articles and public discourse documented how metaphors used to describe Latino immigrants (e.g., “sneak,” “invade,” “surge,” and “hard to control”) highlight precisely the media’s power to render Latino/a migrants as fundamentally incapable of joining the nation’s body politic. OTTO SANTA ANA, BROWN TIDE RISING: METAPHORS OF LATINO IN CONTEMPORARY AMERICAN PUBLIC DISCOURSE 257–94 (2002). The policy dimensions of such public opinion is explored in DAVID G. GUTIÊRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY 188–89 (1995) (highlighting concerns that Mexican immigrants were “stealing jobs” from Americans).
majority of the 5,000,000 children involved—Spanish speaking children—should go up first. Instead, Lau, which focused on the children of recent Chinese immigrants, converged seamlessly with the "model minority myth," the larger "ethnicity paradigm," and the legal implications of the 1970 HEW National Origin guidelines to make the racialized origins of language discrimination—articulated by Latino groups such as MALDEF—irrelevant to the legal analysis. This, in turn, forged an equality jurisprudence that effectively severed color considerations from ethnic discrimination. Indeed, MALDEF General Counsel and President Vilma Martinez was troubled by an opinion that would "substitute a constitutional mandate for bilingual education for a statutory one" that would largely impact three to five million students, most of whom were Spanish-speaking and of Mexican or Puerto Rican descent. For these reasons, Martinez warned, "Lau is going to be as hard to enforce as Brown v. Board of Education." The implication that language discrimination was temporary and even limited in effect made Lau's implementation even more difficult. Justice Blackmun's concurrence makes this point clear:

Against the possibility that the Court's judgment may be interpreted too broadly, I stress the fact that the children with whom we are concerned here number about 1,800....We may only guess as to why they have had no exposure to English in their preschool years. Earlier generations of American ethnic groups have overcome the language barrier by earnest parental endeavor or by the hard fact of being pushed out of the family or community nest and into the realities of broader experience.

Although Justice Blackmun's concurrence suggested that there may be a categorical difference between the assimilation of "earlier generations of American ethnic groups" and the current group of non-English-speaking students, he nevertheless highlighted the limited dimensions of the Lau decision, along with its subsequent codification in the Equal Educational Opportunities Act of 1974, as well as the dramatic expansion of bilingual education enforcement, funding, and programs

---

229. See Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1532 & n.218 (2005); see also supra notes 218–225 and accompanying text.
230. See supra notes 126–128 and accompanying text.
231. See supra notes 194–196 and accompanying text.
232. Martinez, supra note 64, at 8.
236. In the wake of the Lau decision, Congress enacted legislation that required every school district to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, § 204(f), 88 Stat. 484, 515 (codified at 20 U.S.C. § 1703(f) (2000)).
237. The HEW issued informal guidelines that came to be known as the "Lau Remedies." Beatrice F. Birman
at both the federal level and the state level. The impact of such ethnic statutory remedies on the constitutional rights of Latina/o students was profound. For example, the Ninth Circuit in a 1978 case signaled its legal priorities in its “tri-ethnic” jurisprudence where “[t]here exists no constitutional duty imposed by the Equal Protection Clause to provide bilingual-bicultural education.” Two years later, the Sixth Circuit’s 1980 decision in Bradley v. Miliken made evident the preference in those “tri-ethnic” school systems divided by color: “[W]hen the choice is between maintaining optimal conditions in a bilingual educational program [for Spanish speakers] and desegregating all-black schools, desegregation must prevail.” As Latina/os soon discovered in subsequent language rights cases, their national origin language status in the law proved not only a poor proxy to their color positioning in the nation’s public schools but also provided a means in the 1980s to further position them beyond the nation’s color line.

B. English Only, Post-Ethnic American Color Dreams, and Multiracial Realities in the 1980s

In 1977, Professor Gary Orfield, a long-time activist for equality of educational opportunity, testified before Congress about the role of bilingual education in creating more just and equal schools. Repeating a theme that would soon become commonplace, Professor Orfield lamented the federal government’s implementation of bilingual education:

There is nothing in the research to suggest that children can effectively learn English without continuous interaction with their [sic] children who are native English speakers, yet the Federal money has supported programs with only about one-tenth Anglos in the average class. In a society where Spanish-surname children are now more segregated than blacks... and where the Supreme Court has found such segregation unconstitutional, a program that tends to increase separation, raises serious questions.

Like the “tri-ethnic” school desegregation cases, bilingual education—on its own—increasingly came to be understood not only to be inconsistent with but also to be at complete odds with the color vision of desegregation (and assimilation) established in the decades since Brown. As the language in Professor Orfield’s testimony indicates, it was a legal and political regime that racialized Latina/os and

---

the ethnic trait of language in color-conscious terms. By maintaining an educational system that prevented Latina/os from becoming White (through acquiring English proficiency), Professor Orfield suggested that the state had a role in creating the conditions that made Latina/os worse off than Blacks.

Consequently, many believed that such “ethnic” policies, and not racial discrimination, contributed directly to the segregation of Latina/os.

Beginning with the passage of an English-only law in Virginia in 1981, state governments and the federal legislature contemplated, for the first time since the 1920s, comprehensive legal regimes designed to stigmatize non-English speakers. Indeed, in the same year that Virginia passed its English-only law, California Senator Samuel Ichiye Hayakawa introduced the English Language Amendment in Congress. During the rest of the decade, fourteen more states adopted English-only statutes or constitutional amendments. In many cases, contemporaries saw such initiatives as a way to challenge bilingual educational programs. Critically, much as in the 1920s, concerns regarding “immigration” animated much of the redeployed racialized discourse.

243. See id.
244. See id.
245. See infra notes 257–259 and accompanying text.
248. S.J. Res. 72, 97th Cong., 127 CONG. REC. 7444 (1981). It is not insignificant for this analysis that Senator Hayakawa was of Japanese descent and thus represents a personification of the very different politics of racialization between Asians and Latinos that surfaced in the Lau litigation. See supra notes 215–234 and accompanying discussion.
249. Santoro, supra note 247, at 890–91 (listing Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Indiana, Kentucky, Mississippi, North Carolina, North Dakota, South Carolina, and Tennessee). Such efforts continued in the 1990s. Id. at 891 (stating that the state legislatures of Montana, New Hampshire, South Dakota, and Wyoming adopted English-only statutes in the 1990s).
250. Note, supra note 247, at 1346–47; Leibowitz, supra note 247, at 524.
251. See Leibowitz, supra note 247, at 533–39; see also GERSTLE, supra note 23, at 104–14 (discussing the relationship between science and racialized restrictions that emerged in federal immigration law in the 1920s). According to Gerstle, we do not usually think of the 1920s, the easygoing Jazz Age, as a time when the racialized character of the American nation intensified, reinforcing barriers separating blacks and Asians from whites, eastern and southern Europeans from “Nordics,” and immigrants from natives. Yet these developments were central to the age.
252. Initially, such concerns were couched in nationalistic terms. For example, Representative Jim Wright, in a debate regarding a proposed requirement to force immigrants seeking citizenship to study English, argued that “language is the common thread that ties us all together.” 130 CONG. REC. 17,050 (1984) (statement of Rep. Wright). The Senate Judiciary Committee, in a statement supporting a declaration in the Immigration Reform Act that English is the official language of the United States, argued that “if language and cultural separation rise above a certain level, the unity and political stability of the nation will—in time—be seriously diminished.” S. REP. No. 98-62, at 7 (1983); see also Bill Ong Hing, Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society, 81 CAL. L. REV. 863, 870–75 (1993).
At the same time, multicultural education again emerged as a major pedagogical mission in the nation's educational institutions. Once a prominent part of the learning landscape in the years immediately following Brown v. Board of Education, multicultural education rested on the premise that, "if persons are to understand each other, they must know about one another." As a result, multicultural education models attempted to address this knowledge gap by "providing information about various cultures, their histories, their customs, their languages, and their traditions." This pedagogical philosophy, however, had some extremely vehement critics. Some commentators have noted the very real sociological limitations of the multicultural ethnic model for understanding differences, some have made it a prominent pariah of the so-called "culture wars," and others have indicated their preference for a "post-ethnic" U.S. nation state. Indeed, Professor David Hollinger, the progenitor of the "post-ethnic" vision, was himself an acute observer of the collapse of ethnic, racial, and color categories in contemporary U.S. culture and life. Hollinger nevertheless struggled to reconcile a proper role for the maintenance of difference in the nation's future: "Insofar as there is an ideal nation from a postethnic point of view, it is a democratic state defined by a civic principle of nationality in the hands of an ethno-racially diverse population and possessed of a national ethos of its own." Such initiatives, criticisms, and calls for a "post-ethnic" United States meshed well with a larger "tri-ethnic" jurisprudence that, in its application, was erecting increasingly rigid lines between permissible ethnic categorization as opposed to

254. See Romero, supra note 54, 77–80 (analyzing the role of cultural pluralism on primary school pedagogy during the 1950s).
255. Contreras & Valverde, supra note 253, at 477.
256. Id.
257. See generally MARY C. WATERS, ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA (1990). In her very provocative study, Waters assessed the voluntary nature of ethnic identity for White ethnics in the United States in relation to a persistent notion that ethnicity is an immutable characteristic. Id. Accordingly, European ethnics maintained that there was a formal "equivalence between the African-American and say, Polish-American heritages," thus negating very real differences in the construction and voluntary nature of non-European immigrants in choosing their ethnicity. Id. at 167.
258. Literature regarding the intense discord and promise provoked by multicultural education is extensive. For a representative sampling, see MARY DILG, RACE AND CULTURE IN THE CLASSROOM: TEACHING AND LEARNING THROUGH MULTICULTURAL EDUCATION 104–06 (1999); THOMAS J. LA BELLE & CHRISTOPHER R. WARD, MULTICULTURALISM AND EDUCATION: DIVERSITY AND ITS IMPACT ON SCHOOLS AND SOCIETY 29–47 (1994) (describing debates taking place between and within dominate and subordinate groups about multicultural education); James A. Banks, The Canon Debate, Knowledge Construction, and Multicultural Education, 22 EDUC. RESEARCHER 4, 4–5 (1993) (discussing the very different interpretations about what aspects of ethnic and cultural diversity should be taught in schools); Christine E. Sleeter & Carl A. Grant, An Analysis of Multicultural Education in the United States, 57 HARV. EDUC. L. REV. 421, 436–39 (1987) (assessing the inconsistent ways that the term "multicultural education" is interpreted and implemented).
259. E.g., DAVID A. HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM 169–72 (1995). Tied to such calls for a "post-ethnic" United States were arguments to dramatically constrain non-European (i.e., non-White) immigration to the United States. See, e.g., Peter Brimelow, Time to Rethink Immigration? The Decline of the Americanization of Immigrants, NAT'L REV., June 22, 1992, at 30 (arguing against current immigration patterns from Asia and Latin America as a direct threat to the nation's European racial "stock").
260. See HOLLINGER, supra note 259, at 19–61. Hollinger describes this phenomenon as the "Ethno-racial Pentagon." Id. at 19.
261. Id. at 132 (emphasis added).
impermissible racial discrimination. This was most noticeable in a series of language discrimination cases litigated by Spanish-speaking people in the 1980s regarding employment, voting and related First Amendment cases, and jury selection. These Latina/o litigants found their "ethnic minority status," much like in the education cases, of little consistent conceptual or analytical value. Instead, these cases summarily rejected the observation in _Keyes_ that Latina/os, though having unique origins, suffered the effects of non-White discrimination. Entrenched firmly in the jurisprudence as members of a national origin ethnic group, Latina/o litigants were beyond color recognition in a legal system that tenaciously clung to a bi-racial vision of equity and justice despite the multi-racial transformation of the nation.

No case demonstrates this ambivalence more vividly than the U.S. Supreme Court’s decision in _Hernandez v. New York_ in 1991. When a New York State criminal prosecutor used his peremptory challenges to reject the only two Latina/os as potential jurors in the criminal proceeding of Dionisio Hernandez, it brought into focus the discursive messiness of the nation’s “tri-ethnic” jurisprudence for Latina/os. At issue in the case were the bilingual abilities of the rejected Latino jurors. According to the prosecutor,

> my reason for rejecting the—these two jurors—I’m not certain as to whether they’re Hispanics. I didn’t notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter.

Both the trial court and a sharply divided New York State Court of Appeals found that "the prosecutor had stated a race neutral reason for the challenges to the Latino jurors." Despite having to meet a poorly defined threshold of race discrimination in the case, Hernandez’ legal team spoke of Latina/os almost exclusively in ethnic terms. According to Hernandez’ attorneys, “Because of the integral relationship between speaking Spanish and being Latino, a decision based on Spanish language is tantamount to a decision based on Latino national origin.” Further emphasizing the “integral connection between language and national origin,” Hernandez’ legal team cited the codification of the _Lau_ Title VI opinion in U.S. statutory law.

In a similar vein, MALDEF and the Department of Puerto Rican Community Affairs for the Commonwealth of Puerto Rico, in a joint amici brief to the U.S. Supreme Court, highlighted the extent to which other Latino legal organizations had...
come to accept their ethnic minority status in the law. According to the MALDEF brief,

the inextricable correlation between the native language of national origin groups and national origin itself which comprise the identifiable characteristic upon which it is impermissible to discriminate. In the case of Hispanics, this country’s second largest minority population and largest linguistic minority group, Spanish is the native language at issue. Whether disparate treatment based upon the linguistic identity of Hispanics equals national origin discrimination is immediately evident from even summary reviews of the historical presence of Spanish in the United States, the nature of bilingualism, and the continued adverse treatment Hispanics are subjected to because they retain their sociolinguistic identity.

While such a statement suggests that MALDEF had retreated dramatically from the color claims that it advanced in earlier school desegregation and bilingual education cases, a more plausible reading draws attention to the way in which MALDEF and its allies, including Hernandez’ legal team, believed that racial and ethnic national origin distinctions had become irrelevant and interchangeable in legal discourse. Although the bilingual education cases suggested a change in this regard, there seemed to remain an unspoken assumption about the racialized non-Whiteness of Latina/os. Particularly when the prosecutor’s challenge targeted bilingual Spanish speakers—when the ability to speak Spanish “represents an immutable characteristic of the Hispanic community on the whole”—there could be no doubt, at least in the arguments of MALDEF, of the non-White color positioning of the Latino community.

Importantly, the Hernandez Court made it plain that a racial and not an ethnic animus must be proven in order to find a violation of equal protection.

271. Id. at 4.
272. See supra notes 136-144 and accompanying text.
273. Jurisprudence that collapsed terminology for Latina/os began as early as Chief Justice Earl Warren’s opinion in Hernandez v. Texas, 347 U.S. 475 (1954), which was decided two weeks after Brown v. Board of Education, 347 U.S. 483, 494 (1954). In Hernandez, Chief Justice Warren noted that “[t]he exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.” Hernandez, 347 U.S. at 479 (emphasis added). This was the first time in the post-Brown era that the Court clarified that a “national origin” classification could violate the Fourteenth Amendment. According to Professor Juan Perea,

The Court, however, was dealing with a classification based upon ancestry, the systematic exclusion of persons of Mexican descent. For those persons who were U.S. citizens by birth, their national origin—their place of birth—was the United States. The Hernandez v. Texas opinion refers to the terms “ancestry” and “national origin” as though they meant the same thing when they do not.

Juan F. Perea, Ethnicity and the Constitution: Beyond the Black and White Binary Constitution, 36 WM. & MARY L. REV. 571, 587-88 (1995). This loose use of terms continued in the “tri-ethnic” school desegregation cases, where concepts of race and ethnicity were used interchangeably. See supra Part II.A.
274. See supra Part III.A.
275. Brief for the Mexican American Legal Defense & Educational Fund & the Commonwealth of Puerto Rico, Department of Puerto Rican Community Affairs in the United States, supra note 270, at 3.
276. See id.
277. Ironically, while purporting to distinguish racial discrimination from ethnic discrimination, the words
Justice Kennedy’s plurality opinion conceded that language discrimination may sometimes be treated as a “surrogate for race under an equal protection analysis,”278 it contributed to a jurisprudence that excluded many of the ways in which Latina/os, as well as other bilingual groups, had historically been racialized as non-White in the United States.279 Ultimately, Hernandez represented the culmination of an ineffective struggle that began immediately after the attempt in Keyes to move beyond “bi-racial” terminology. Beginning with Lau, the nation’s courts began to explicitly sever the connection between ethnic discrimination, the process of racialization, and the role of the color line in U.S. culture and life. While Latina/o litigants maintained that there was no difference between racial and ethnic animi, courts employed language to focus almost exclusively on the permissible ethnic dimensions of the issue. In a post-ethnic English-only United States, such cases revealed just how far outside of the color line Latina/os had been placed in the legal imagination. Such a development, in turn, would have profound consequences in attempts by institutions of higher education to diversify the color of their student bodies.

IV. A PEOPLE OF COLOR: DIVERSITY AND DISCRIMINATION IN HIGHER EDUCATION

In the summer of 1970, the Rocky Mountain Chapter of the Anti-Defamation League of B’nai B’rith (ADL) was investigating discriminatory hiring practices at the Gates Rubber Company in Denver, Colorado. When asked if the company discriminated against Jews, one manager noted “that he had never thought of Jews in recent times in terms of minority status in the same way as blacks and Hispanics.”280 The manager’s comment reflected a color reorientation of the ADL’s mission. Indeed, one ADL document from the early 1970s indicated that the highest number of complaints received by the Denver office of the ADL involved the issue of “Reverse Discrimination.”281 The issue, according to the ADL, forced the organization to reconsider “the heart of what should be the ADL-B’nai B’rith-Jewish Community-position, posture and responsibility in the struggle of disadvantaged racial minorities to achieve equality.”282

Such tensions in the ADL spoke volumes about the dramatic reconfiguration of the color line in U.S. culture and life during that time. Whereas Jews, like Latina/os and in some cases other European ethnics, Southeastern Asians, and Asian ethnics, had occupied an ambiguous and at times highly contested position between conceptions of ethnicity, race, and color in the socio-legal history of the United

---

279. See Perea, supra note 273, at 595–98.
States, the beginning of the 1970s saw a new color understanding emerge that seemed to place Latina/os, in contrast to Jews and other European ethnics, firmly on the non-White side of the color line. Despite legal and political attempts through school desegregation litigation, affirmative action, and other government programs to protect and provide access and opportunities to non-White groups, being non-White carried very few of the benefits of Whiteness. Particularly as Latina/os came to be identified and to identify as a people of color in the nation’s workplaces and college campuses, a newly expansive color line was re-stigmatized by legal attempts to deny the historical deployment of color privilege in the United States.

This final section briefly assesses the color positioning of Latina/os in affirmative action and higher education jurisprudence litigation. While bilingual education and language discrimination cases were de-conflating race and ethnicity, the categorical distinction that courts made between racial (i.e., color) discrimination as opposed to national origin (i.e., ethnic) discrimination became impossible to maintain on campuses that attempted to reflect the multicolor hues of the nation. Instead, Latina/os, along with other legally non-White African Americans, Asian Americans, Pacific Islanders, and American Indians, sought to defend the constitutionality of various schools’ affirmative action programs. As part of a broad coalition of people of color who had a “common nature of problems, interests and needs” in seeking redress from “a white racist society,” Latina/os sought to preserve the limited legal recognition of their non-White status. Similar to the U.S. Supreme Court’s treatment of language discrimination in the bilingual education cases, the loose and inconsistent use of terminology in the nation’s “tri-ethnic” affirmative action jurisprudence provided one means by which the color line and a color conscious remedy came to be denied in U.S. law. Though Latina/os were legally conceptualized as a people of color on the nation’s multiracial campuses, it had little judicial meaning when Whites just as easily claimed to be the victims of racial discrimination.

A. Ethnics All: Multicolor Denial and the Diversity Rationale

When admissions officers at the University of California-Davis Medical School received an application from Allan Bakke in late November 1972, little did they realize that their admissions program would set into motion what the New York

283. See, e.g., KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998) (examining how Jews came to be viewed, by themselves and others, as White in the decades following World War II); DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (rev. ed. 1999) (exploring how European working class immigrants utilized the “wages” of labor power and hierarchy to become considered White); DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA’S IMMigrants BECOME WHITE (2005) (detailing the process by which Eastern and Southern European immigrants to the United States “became” White in the twentieth century). Other scholars argue that such “new” European immigrants to the United States at the end of the nineteenth century immediately held important social, political, and legal advantages that put into question each group’s claim to non-Whiteness. E.g., GUGLIELMO, supra note 24, at 5–7; JACOBSON, supra note 26, at 42–44.


Times would eventually describe as “the most important matter affecting race relations and minority groups in the United States since the [Brown] school-desegregation ruling of 1954.”\(^{286}\) The admissions program at issue in Regents of the University of California v. Bakke\(^{287}\) not only put to the test the constitutionality of highly contested and controversial programs designed to take “affirmative action” to redress inequities in U.S. culture and life, but it also placed squarely before the U.S. Supreme Court, and the nation at large, the meaning of the color line. As one account declared, “If, as some people might say, this is a case where one man is carrying the ball for all white males, they could not have picked a more representative specimen. Bakke is just under six feet tall, has blond hair, blue eyes—'very white,' some might say.”\(^{288}\) That Bakke, as a phenotypically “exact” representative of White America, could unabashedly claim his Whiteness yet deny his color privilege in claiming racial discrimination by the medical school spoke volumes about what had emerged as an inconsistent, confusing, and inarticulate discourse of ethnicity, race, and color in the United States.\(^{289}\) The litigation of the case and its ultimate outcome cemented the irrelevance of race and color to an equality discourse that emerged out of Keyes and Lau. To be sure, Bakke, as the third foundational case in the nation’s “tri-ethnic” jurisprudence, powerfully demonstrated the U.S. Supreme Court’s commitment to the ethnicity paradigm in understanding discrimination in a multiracial and color conscious nation.

Nowhere was the contest over the legal consequence of ethnicity, race, and color clearer than in the briefs submitted to the U.S. Supreme Court before it decided Bakke. Indeed, alone among the foundational “tri-ethnic” cases surveyed in this Article, the Bakke briefs represented the full range of voices that make up the United States’ rich and troubling history of ethnic variety, racialized difference, color consciousness, and color denial. Despite this, the briefs were organized along color lines (i.e., White ethnics versus racialized non-Whites). As a result, the briefs indicated the degree to which a newly restructured color line had manifested itself paradoxically in both color-conscious and color-blind terms in the nation’s constitutional and legal order.

\(^{286}\) Robert Lindsey, White/Caucasian—and Rejected, N.Y. TIMES, Apr. 3, 1977 (Magazine), at 42.
\(^{288}\) Lindsey, supra note 286, at 42 (emphasis added). What is perhaps the most troubling aspect of the New York Times description of Bakke is that the terms and imagery are not too different from the White Aryan ideal of the Nazi state. Though such an ideal had seemingly been discredited with the defeat of Nazi Germany in World War II, a discourse of physical perfection, based on the division between Whiteness and non-Whiteness, percolated deep into the twentieth century in the United States with a particular resonance that impacted Latina/os. See STERN, supra note 30, at 199–209 (analyzing the forced sterilization of Mexican women in the United States during the 1960s and 1970s and the state’s endorsement of such practices as seen in the class action law suit Madrigal v. Quilligan).
\(^{289}\) See supra Parts II–III. This conceptual collapse and confusion appeared very early in the factual scenario leading to Bakke’s lawsuit. Peter C. Storandt, Assistant to the Dean for Student Affairs and Admissions at the University of California-Davis Medical School, and others would say that Bakke’s eventual suit was a response to Bakke’s frustration about “quotas” for racial minorities. Lindsey, supra note 286, at 45–46. Storandt’s reply letter, in which he indicated that he believed that Bakke deserved a straight answer, described the program as one for “members of ethnic minority groups.” Brief of Amici Curiae for The National Urban League et al. app. a at 2a, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811); see also Ira S. Lowry, The Science and Politics of Ethnic Enumeration 1–2 (Jan. 1980) (unpublished manuscript, on file with the Special Collections and University Archives, Stanford University) (questioning the ability of the Bureau of Census to conduct a rigorous “scientific ethnic census” while at the same time the author defines ethnicity as an identity in which members share a “common race, religion, language or national origin”).
In an amicus brief in support of Bakke’s claim submitted by the Order Sons of Italy in America (OSIA), for instance, that organization noted the history of its constituents’ transition into Whiteness by stating that Italian Americans are a “minority group which, although it has suffered discrimination for many years, has now become part of the [White] ‘majority’ discriminated against by preferential admissions programs.”

Hence, the OSIA brief articulated an ethnic theory of discrimination that disregarded the legacy of color. Whiteness, according to the OSIA amicus brief, conferred no privileges:

“[T]he white majority is pluralistic, containing within itself a multitude of religious and ethnic minorities—Catholics, Jews, Italians, Irish, Poles—and many others who are vulnerable to prejudice and who to this day suffer the effects of past discrimination. Such groups have only recently begun to enjoy the benefits of a free society and should not be exposed to new discriminatory bars.”

In a similar vein, the joint amici brief of a collection of Jewish American, Greek American, Italian American, Polish American, and Ukrainian American organizations noted that their individual constituents, like “people of color,” could “credibly claim to have been subject to generalized societal discrimination.” And although one amici brief submitted by an assortment of organizations that included organizations representing Jewish and Italian-American groups indicated a willingness to embrace Whiteness, it was an identity, according to their argument, that had little social utility:

All “whites” are consigned to the same category deserving of no special consideration. That is not the way “whites” see themselves, or indeed are, in social reality. Some may be “whites,” pure and simple. But almost all have some specific ethnic or religious identification, which, to the individual involved, may mean a distinctive history of past—and perhaps some present—discrimination.

Another brief, submitted by the Polish American Congress, argued that racial, ethnic, and color animi were one and the same:

We ask this Court whether there is a substantial difference between a Black being called a “Nigger” and a Polish American being called a “Polack”, [sic] whether telling a Black or Mexican American he cannot qualify is substantially more degrading than telling a Polish American the same thing; whether the lack of recognition of Blacks and Latins in senior levels of corporate management is more serious than the lack of recognition of Polish and Italian Americans.

290. Brief Amicus Curiae for the Order Sons of Italy in America in Support of Respondent at 2, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811). The brief went on to note that “[t]he experience of the Italian in this country has been too often that of a minority excluded from positions in the corporate and professional world.” Id.

291. Id. at 22 n.16 (quoting Larry M. Lavinsky, DeFunis v. Odegaard: The “Non-Decision” with a Message, 75 COLUM. L. REV. 520, 527 (1975)).


294. Brief of the Polish American Congress et al. as Amici Curiae at 10, Regents of the Univ. of Cal. v.
Though the brief spoke in racialized color terms, these Polish Americans, like other White ethnics, nevertheless unashamedly claimed that Whiteness bestowed no special privilege.\(^{295}\)

All of the White ethnic briefs submitted before \textit{Bakke} was decided referenced their arguments in relation to the color line in the United States but rejected its value to the legal analysis. One brief suggested that the color line only had regional significance:

\begin{quote}
\textit{In} some areas of the nation, statewide segregated education never existed and, in many states, laws prohibiting discrimination in employment, housing and public accommodations were enacted as early as 1945, nine years before \textit{Brown}. The years since then have been marked by significant black progress. Many members of minority groups have been able to achieve a substantial measure of affluence and professional recognition and to live and work in \textit{unsegregated} milieus.\(^{296}\)
\end{quote}

In another brief, a Polish American organization noted that California "represents the great mosaic [sic] that makes up America. Its climate, location and other desirable characteristics attracted and still attract all kinds of people: farmers, actors, retired persons, youngsters, adventurers, settlers, Italian Americans, Mexican Americans, Polish Americans, Blacks, White [sic], Orientals and on and on."\(^{297}\)

Collectively, the amici briefs submitted by such White ethnic groups indicated that the United States is a nation of minorities and, as a result, unequivocally rejected the necessity of a color analysis in the equal protection claims of what they understood as a multiethnic, as opposed to a multiracialized, society.\(^{298}\)

What is most striking in the White ethnic \textit{Bakke} briefs is the collective articulation of a "stigma" that would be attached to non-Whites who claimed—with

---

\(^{295}\) Brief of American Jewish Committee et al., supra note 292, at 36 (emphasis added). The brief went on to use evidence of "black progress" in rejecting the "diversity in higher education" rationale:

The post-\textit{Brown} white medical student has had twelve years of primary and secondary education and four years of college as well as exposure to newspapers, radios, television and everyday living in our multi-racial society. It is fatuous to say that the presence of some black faces in medical school will develop in white students an an-hanced [sic] awareness of the medical concerns of minorities and of the difficulties of effective delivery of health care services in minority communities.

\textit{Id.} at 29 (emphasis added) (internal quotation marks omitted).

\(^{297}\) Brief of the Polish American Congress et al., supra note 294, at 6.

\(^{298}\) The Anti-Defamation League brief articulates this point most clearly:

\begin{quote}
Does equal protection by the State, commanded by the Fourteenth Amendment, mean one thing as applied to whites and another when applied to nonwhites? Since whites and nonwhites, by definition, exhaust the universe, to what are the rights of nonwhites to be equal, if not the rights of whites? To what are the rights of whites to be equal if not to those of nonwhites?
\end{quote}

Brief of Amici Curiae of Anti-Defamation League of B'nai B'rith et al., \textit{supra} note 293, at 13.
the sanction of the state—some of the privileges of Whiteness. Indeed, such arguments made it absolutely clear that any legal claims to non-Whiteness would always be inferior to Whiteness. To illustrate, the brief of the Order Sons of Italy in America noted that some “state preferences for whites...carry with them the badge of superiority.”\(^\text{299}\) In contrast, the same brief argued that a state preference for non-Whites carries the “inevitable assumption” that the preferred races are inferior to the non-preferred races. A stigma will attach to all members of the preferred races in all professions. In particular, it will create a class of doctors viewed by the public as “second-rate”. The stigma attaches to all members of the preferred race to the detriment of all persons, many of whom may be reluctant to use the services of minority professionals.\(^\text{300}\)

Although such a “stigma” had historically worked to the detriment of those racialized as non-White, regardless of either their credentials or the state’s involvement, such arguments clarified the power and perseverance of color consciousness in claiming “reverse discrimination.”

In contrast, a broad coalition of Latino, Asian American, and Black groups, both collectively and individually, sought to defend the non-White status of “people of color.” In every instance, the relevant comparison was not between ethnic groups, but rather in relation to the fierce maintenance of a White/non-White color line throughout the history of the United States. A collection of Mexican American organizations, for instance, recounted the “PERVASIVE AND SYSTEMMATIC [SIC] RACIAL PREJUDICE” directed against Latina/os.\(^\text{301}\) Beginning as early as 1849, “[a]n undercurrent of the desire to insure white dominance was the desire to insure that the Mexican (who was generally of Indian stock) did not interfere with the ‘manifest destiny’ of the Anglo settlers coming from the East.”\(^\text{302}\) Over time, according to the brief, Latina/os were consistently racialized as non-White.\(^\text{303}\) Accordingly, when measured against Whites, Latina/os and Blacks performed at much lower levels in segregated schools,\(^\text{304}\) had a much higher incidence of poverty...

---

\(^{299}\) Brief of Amicus Curiae for the Order Sons of Italy in America, supra note 290, at 11.

\(^{300}\) Id. at 21 (emphasis added). Another brief argued that minority students will perceive that they are beneficiaries of a double standard, which is apt to play havoc with their own self-esteem, not to mention the impact it may have on others who manage to graduate without any favoritism.

A significant adverse side effect of preferential treatment is likely to be that those minority students of high ability and accomplishment who excel strictly on merit will nevertheless carry the stigma upon graduation that they, too, were beneficiaries of a double standard.

Brief of American Jewish Committee et al., supra note 292, at 43 (footnote omitted) (emphasis added).

\(^{301}\) Id. at 7 (emphasis added). The impact “was the decision by the [California Constitutional] Convention to leave to the legislature the right to admit to suffrage ‘Indians or descendants of Indians.’” Id. (quoting CAL. CONST. of 1849, art. II, § 2). Later, it was noted that the “Indian....also was the victim of an officially sanctioned policy of genocide.” Id. at 9.

\(^{302}\) For example, although California explicitly allowed for the segregation of Blacks, Asians, and Indians, Mexican school children found themselves in segregated schools because they were racialized based “upon either [their] ‘Mongolian’ features or [their] Indian ancestry.” Id. at 11 (quoting CHARLES M. WOLLENBERG, ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS, 1855–1975, at 118 (1976)).

\(^{303}\) Id. at 15.
and unemployment,305 lived in dramatically higher proportional numbers in substandard housing,306 and were overrepresented in the criminal justice system.307

Along the same lines, the Asian American Bar Association of the Greater Bay Area (AABA) detailed a vicious and systematic history of color discrimination in its Bakke amicus brief.308 From anti-Chinese legislation that culminated in the exclusion of Chinese immigrants from the United States309 to anti-Japanese laws and jurisprudence that came to a sordid crescendo in Japanese American internment and segregated schools,310 the AABA highlighted the systematic non-White legal construction of the Asian American community. Perhaps responding to the “model minority” myth,311 the AABA brief noted that “Asian Americans have yet to reach parity with white Americans in many areas,”312 including in education,313 employment and income levels,314 and in direct legal services to a bilingual community.315

Finally, the Puerto Rican Legal Defense and Education Fund and Aspira of America sought to defend the UC-Davis Medical School affirmative action program.316 Accordingly, their brief focused on the relationship between law and color and noted that, “as [the] equal protection doctrine has evolved,” the relevant comparison has shifted to whether “other victimized minorities” were “in positions comparable to that of blacks.”317 Citing the Court’s observation in Keyes that “Hispanos” and “Negroes” share “economic and cultural deprivation,”318 the brief argued that

[the persons or groups on whose behalf the “strict scrutiny” standard has been applied share three significant characteristics. First, they labor under the continuing effects of previous discrimination and deprivation. Second, they share immutable characteristics, those of race or national origin, which have been used to stigmatize and set them apart from members of the majority group. Finally, they historically have been powerless within the political arena.319

For these reasons, the brief indicated that historical discrimination against Latina/os and Blacks was fundamentally different than that experienced by White ethnics.

305. Id. at 17–23.
306. Id. at 23–25.
307. Id. at 26–27.
309. Id. at 6–8.
310. Id. at 8–11.
311. See supra note 229.
312. Brief of Amicus Curiae Asian American Bar Association of the Greater Bay Area, supra note 308, at 12 (emphasis added).
313. Id. at 12–13.
314. Id. at 13–14.
315. Id. at 14–16.
317. Id. at 10.
318. Id. at 11 n.21 (quoting Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 197–98 (1973)).
319. Id. at 11 (citation omitted).
Collectively, the legal arguments made by the various Latina/o organizations indicated a very different understanding about the consequences of color, race, and ethnicity as a matter of law. By describing long, yet different, systematic histories of discrimination directed at Latina/os, Blacks, and Asian Americans as non-Whites, the briefs framed the consideration as one of a color/race hierarchy rather than one of ethnic pluralism. Indeed, it was their racialization as non-Whites, according to the briefs, that had effectively made Latina/os, Asian Americans, American Indians, and Blacks a "people of color" constitutionally distinguishable from the White ethnics that Allan Bakke represented.

Perhaps for these reasons, the U.S. Supreme Court was deeply divided over the precise dimensions of the constitutional and legal issues that Bakke presented. Justice Lewis Powell’s plurality opinion became the determinative analysis in the case. Most important, Justice Powell’s opinion plainly stated that discrimination based on ethnic, racial, and color distinctions were functionally the same. According to Justice Powell:

> It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. "The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro."

In making this point, Justice Powell cited language directly from the U.S. Supreme Court’s opinion in Hernandez v. Texas, which addressed the long-standing exclusion of people of "Mexican descent" from juries in Texas.

Ironically, the color in-betweeness of Latina/os, as articulated in Hernandez, gave Justice Powell the language that he needed to argue that Fourteenth Amendment jurisprudence had become expansive enough to allow most "whites"—based on their ethnicity—to "lay claim to a history of prior discrimination at the hands of the State and private individuals." Nonetheless, Justice Powell indicated that an institution of higher education had a distinct and constitutionally permissible interest in maintaining an ambiguously diverse and multicolor student body. According to Justice Powell, it "is of paramount importance" to the nation’s universities to recruit "students who will contribute most to the robust exchange of ideas." As a result,

---

321. Id. at 295 (footnote omitted) (quoting Hernandez v. Texas, 347 U.S. 475, 478 (1954)).
322. Hernandez, 347 U.S. at 476. The fact that this case was decided at the same time as Brown has not been lost on legal scholars. As one author has noted:

> [T]he Court was considering the issues of Latino [racial] identity and of school desegregation concurrently. Because the Court carefully dodged the question of Latinos' racial identity in Hernandez...it is not surprising that the Court did not address the question of Latino school segregation in Brown. After all, Brown occurred within the familiar Black-White binary. Bowman, supra note 200, at 1776. Recent scholarship, however, has called into question the "other White" thesis and the suggestion that Warren could not comprehend Mexican American non-Whiteness. See Johnson, supra note 3, at 170–78.

323. Bakke, 438 U.S. at 295. The groundwork had already been laid in McDonald v. Santa Fe Trail Transportation Co. in which the U.S. Supreme Court held, in an opinion authored by Justice Thurgood Marshall, that White persons could maintain a section 1981 suit. 427 U.S. 273, 286–87 (1976). McDonald, however, involved alleged discrimination against a White person in favor of a Black individual. Id. at 275.

324. Bakke, 438 U.S. at 313 (internal quotation marks omitted).
Justice Powell made it clear that universities could continue to consider color and ethnicity, among other factors, for purposes of diversity when evaluating a student’s academic credentials, musical ability, academic gifts, and other individual skills and traits. Justice Powell argued that in such a diversity scheme, the “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all the other candidates for the available seats.” Although Justice Powell did not define what he meant by a “plus,” he indicated that an acceptable diversity program would be one in which an “applicant who loses out on the last available seat to another candidate receiving a ‘plus’ on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.” In these terms, non-Whiteness carried the nearly equivalent value of every individual skill, characteristic, or trait. One essay, written a decade after the Bakke decision, underscored the problematic nature of treating racial identity as little different from such mutable characteristics.

[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend... that the issue presented in Bakke was the same as the issue in Brown is to pretend that history never happened and that the present doesn’t exist.

After Bakke and the emergence of a diversity rationale in the higher education admissions process, it became apparent that the nation’s “tri-ethnic” education jurisprudence had changed dramatically in a few short years. The U.S. Supreme Court had shifted from recognizing that Latina/os suffered “identical discrimination in treatment” to that of Blacks—and were thus entitled to some of the limited privileges of non-Whiteness in the nation’s constitutional regime—to the position that there was no fundamental difference between the historical and contemporary discriminatory experiences of non-White groups in relation to those of Whites. Vilma Martinez, the president of MALDEF, lamented the “national amnesia” regarding the very real differences in racial inequality that threatened to “annihilate[]” all of the “civil rights gains of the [19]50’s and [19]60’s” made on behalf of people of color. Though the litigation catalyzed by Allan Bakke convinced the Court that everyone potentially could be discriminated against as an

325. See id. at 316–17. Justice Powell, moreover, was careful to emphasize that in his view “[e]thnic diversity...is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.” Id. at 314.
326. Id. at 317.
327. Id. at 318 (emphasis added). Justice Powell further wrote: “It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.” Id.
330. Vilma S. Martinez, President, Mexican Am. Legal Def. & Educ. Fund, The Current Crisis in Education, Address at the University of California-San Francisco Medical Center 5 (May 26, 1978) (transcript available in the Special Collections and University Archives, Stanford University).
ethnic minority, Bakke’s own limited triumph as the “representative specimen” of Whiteness highlighted how paradoxically color conscious and color unconscious the nation’s tri-ethnic jurisprudence had become.

B. Color [Dis]Entitlement and the Possibility of a Post-Racial United States at the Turn of the Twenty-First Century

One year after Bakke was decided, Professor William Van Alstyne wrote a scathing critique of the continued operation of racial consciousness in U.S. constitutional law. Van Alstyne was particularly disparaging of the nation’s tri-ethnic school jurisprudence and indicated his view that race and color should be stricken from the nation’s legal vocabulary:

[O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one’s own life—or in the life or practices of one’s government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

Though color-blindness, as re-proposed by Van Alstyne, had long been a lofty ideal, the nation’s legal system would continue to struggle with the very real impact of a nation divided along racialized color lines.

That ethnic, racial, and color considerations would continue to animate legal discourse beyond Bakke should come as no surprise given the continued inconsistent use of these terms in legal discourse. And, as a result of such inconsistent use, these categories continue to have little analytical value. In the much discussed case of Saint Francis College v. Al-Khazraji, decided in 1987, Justice Byron White addressed whether persons of Arab descent should be considered to be non-White in order to receive protection under section 1981 of the Civil Rights Act of 1866. The case seemingly provided an opportunity to unravel the meaning of ethnic, racial, and color distinctions for persons of a group, like Latina/os, who were not receiving the benefits of Whiteness. Because the language of ethnicity, race, and color had become so entangled and confused, however, the Court made some troubling observations. Justice White, quoting with approval the opinion of the

331. Lindsey, supra note 286, at 42.
332. William Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. Chi. L. Rev. 775 (1979).
333. Id. at 809–10 (second emphasis added).
334. E.g., Plessy v. Ferguson, 163 U.S. 537, 559 (Harlan, J., dissenting) (“Our constitution is color-blind, and neither knows nor tolerates classes among citizens.”).
335. 481 U.S. 604 (1987). In Al-Khazraji, a plaintiff of Arab descent brought a civil rights claim against his employer under section 1981, which provides that “[a]ll persons...shall have the same right...to make and enforce contracts, to sue, be parties, [and] give evidence...as is enjoyed by white citizens....” 42 U.S.C. § 1981(a) (2000).
336. Al-Khazraji, 481 U.S. at 609–10. Framed in this manner, the question in the case revolved around whether “the assumption that all those who might be deemed Caucasians today were thought to be of the same race when § 1981 became law in the 19th century, and it may be that a variety of ethnic groups, including Arabs, are now considered to be within the Caucasian race.” Id. at 610.
Third Circuit, noted that at "a minimum," section 1981 "reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens.'" In other words, Whiteness, as envisioned by the U.S. Supreme Court, was literally about the color of one's skin.

Yet, remarkably similar to much of the school desegregation discourse regarding Latina/os, Justice White rejected such a biological explanation and instead specified that section 1981's language about color was really about ethnicity. Justice White accordingly reasoned that at the time the legislation was drafted, in the years immediately following the Civil War, contemporaries commonly referred to the "Scandinavian" race, the "Spanish" race, the "German" race, the "Arab" race, and other races, who were all referenced in relation to the "Anglo-Saxon" race. In language that could have been taken straight from the pages of the White ethnic briefs in Bakke, Justice White concluded "that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." Whiteness, as envisioned by section 1981, was not about the color line; it was about ethnic differentiation.

The Al-Khazraji decision is especially problematic because it suggests that every ethnic group can be racialized as non-White, which leaves color (outside of its strict physiological sense) devoid of any substantive analytical meaning. Al-Khazraji thus allowed color to reemerge in an expansive national "tri-ethnic" jurisprudence—one that is seemingly limited to its "distinctive physiognomy." Importantly, Justice Brennan, architect of the "tri-ethnic" language in Keyes, wrote a separate concurrence to Justice White's opinion in Al-Khazraji:

I write separately only to point out that the line between discrimination based on ancestry or ethnic characteristics, and discrimination based on place or nation

---

337. Id. at 613 (emphasis added) (quoting Al-Khazraji v. Saint Francis Coll., 784 F.2d 505, 517 (3d Cir. 1986)).
338. In his opinion, Justice White highlighted the problematic nature of racial categorization and, interestingly enough, chose not to include Latina/os in the equation:
There is a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.
Id. at 610 n.4.
339. Id. at 611–12.
340. Id. at 613.
341. See id. at 613 ("[W]e have little trouble concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.").
342. Id. at 613. However, Justice White's opinion specifically explained that "a distinctive physiognomy is not essential to qualify for § 1981 protection." Id. (emphasis added).
of...origin, is not a bright one. It is true that one’s ancestry—the ethnic group from which an individual and his or her ancestors are descended—is not necessarily the same as one’s national origin—the country “where a person was born, or, more broadly, the country from which his or her ancestors came.” Often, however, the two are identical as a factual matter: one was born in the nation whose primary stock is one’s own ethnic group. Moreover, national origin claims have been treated as ancestry or ethnicity claims in some circumstances....I therefore read the Court’s opinion to state only that discrimination based on birthplace alone is insufficient to state a claim under § 1981.343

Justice Brennan’s concurrence indicated an attempt to refine his own “tri-ethnic” jurisprudence. Indeed, if birthplace alone was insufficient as a matter of law, his concurrence indicated that there were certain groups—such as Arabs and Latina/os—whose “ethnic ancestry” in the United States had become the basis for some form of unlawful discrimination. Unfortunately, Justice Brennan did not elaborate further on what this actually means. Perhaps read in tandem with Justice White’s opinion, Justice Brennan’s concurrence signified the extent to which ethnic discrimination should be evaluated in racial terms. And in these terms, racial discrimination could be evaluated only in relation to a White/non-White color divide.

The rhetorical devices used by Justices White and Brennan in Al-Khazraji are significant because Latina/os themselves, in the joint amici brief submitted by the Mexican American Legal Defense and Education Fund and the Puerto Rican Legal Defense and Education Fund (MALDEF/PRLDEF brief), contributed much to the language that was ultimately used in the opinion.344 Indeed, acting in concert for one of the first times in the history of the nation’s “tri-ethnic” jurisprudence, MALDEF and PRLDEF explicitly argued that Latina/os were a “[d]istinct ‘race.’”345 At the time that section 1981 was drafted, according to the brief, “the word ‘race’ was repeatedly used, not simply to signify groups identifiable by color or physiognomy, but also to describe the various national or ethnic groupings that were commonly recognized then and still are recognized today.”346 Yet the MALDEF/PRLDEF brief indicated that the relevant comparisons should be accomplished in a strictly “tri-ethnic” color framework of Latina/os, Blacks, and Whites.347 To further emphasize this point, the brief cited the U.S. Supreme Court’s “tri-ethnic” equal protection jurisprudence as demonstrative proof that a significant distinction exists between discrimination based on race and discrimination based on national origin or ethnicity.348 While the MALDEF/PRLDEF brief in Al-Khazraji suggested that

343. Id. at 614 (Brennan, J., concurring) (first alteration in original) (citations omitted) (internal quotation marks omitted) (quoting Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973)).
346. Id. at 9 (emphasis added).
347. See id. at 12-14.
348. Id. at 23-25.
Latina/os had not been racialized as either White or Black, the nation’s tri-ethnic jurisprudence left litigants like MALDEF and the PRLDEF little choice but to argue Latina/os’ national origin and ethnic status in the law.

During the late 1980s and 1990s, “tri-ethnic” discourse and jurisprudence catalyzed a scarcely noticed de-coupling of the language of ethnicity and race in the systematic limitation and dismantling of color conscious programs in employment and in government contracting. However, just as in the foundational “tri-ethnic” jurisprudence cases, education emerged as the primary battleground over the legal significance ascribed to the operative meaning of race and color in a multihued United States. In fact, the language of ethnicity disappeared almost completely from the legal discourse involving, most prominently, the University of Texas and the University of Michigan. Though the plaintiffs in these cases (Cheryl Hopwood, Jennifer Gratz, and Barbara Grutter) unabashedly claimed discrimination based on their own self-identified Whiteness, much as Allan Bakke did, the cases contained almost none of the White ethnic posturing found in the Bakke litigation. Instead, the appropriate line between the White majority and the non-White minority shaped much of the legal discussion. The analysis accordingly turned not on whether schools could discriminate against ethnic Whites, but rather on who could be legitimately counted as a “person of color” for a narrowly tailored affirmative action admissions program.


350. E.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The emergence in Croson of a “strict scrutiny” standard to evaluate “racial classifications” by the state suggested the extent to which courts increasingly understood that race and ethnicity, as legal categories, were not necessarily one and the same. Croson, 488 U.S. at 493–94. Justice O’Connor, writing for the plurality indicated as follows:

Absent searching judicial inquiry into the justifications for such race-based measures, there is simply no way of determining what classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to “smoke out” illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id. at 493 (emphasis added).

Justice Antonin Scalia’s concurrence in Croson is particularly revealing: “Racial preferences appear to ‘even the score’...only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white.” Id. at 528 (Scalia, J., concurring) (emphasis added). While Justice Scalia condemned color consciousness in such contexts, he curiously indicated an “appropriate” role for color cognition: “[W]here state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb” will justify color cognizance. Id. at 521.

351. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).


353. See supra Part IV.A.

354. See Hopwood, 78 F.3d at 926 n.4.


In *Hopwood*, for example, Judge Jerry Smith of the Fifth Circuit Court of Appeals derided the University of Texas Law School admissions “classification scheme” that distinguished between White “minorities” and non-White “non-minorities.” According to Judge Smith, “While the law school application form segregated racial and ethnic classification into seven categories—‘Black/African American,’ ‘Native American,’ ‘Asian American,’ ‘Mexican American,’ ‘Other Hispanic’ (meaning non-Mexican descent), ‘White,’ and ‘Other (describe)’—only American blacks and Mexican Americans received the benefit of the separate admissions track.” Comparing conceptually Texas’s admissions form with the property and school segregation that had animated post-*Brown* equal protection jurisprudence, the court questioned such a narrowly tailored program that “decided that a black citizen of Nigeria would not get preferential treatment, but a resident alien from Mexico, who resided in Texas, would. Likewise, Asians, American Indians, Americans from El Salvador and Cuba, and many others did not receive a preference.” Although the plan seemed to be in compliance with the U.S. Supreme Court’s mandate that such a plan be “narrowly tailored” to address a past-history of discrimination to specific groups, the *Hopwood* court’s derision suggested that such a scheme would be more legitimate if it classified by White, Black, Indian, and Hispanic. Indeed, for the court, the differentiation among Hispanic groups was made even more problematic because Mexican Americans in Texas, unlike Blacks, had never been subject to de jure discrimination. Unintentionally highlighting the precise process of racialization and the corresponding importance of the color line to U.S. law, the court nevertheless stipulated: “For the sake of simplicity and readability, however, we sometimes will refer to two broad categories: ‘whites’ (meaning Texas residents who were considered both White and non-preferred minorities) and ‘minorities’ (meaning Mexican Americans and [B]lack Americans).”

Council’s minority set-aside government contract program was in view of those ‘minority’ groups designated as eligible for such programs.”). As I have argued elsewhere, there is something troubling about the static conception of racial and color discrimination envisioned by the U.S. Supreme Court in relation to a specific history of past discriminatory treatment, regional difference, and social change. Romero, supra, at 854–56. Although in the American South the greatest historical racial/color divide has been the one between White and Black, cities like Richmond are subject to a new color triangulation. The multiracial demographic transformation of the American South—particularly regarding the rapid rise of its Latino population—suggests a massive redeployment of the color line. See, e.g., William H. Frey & Reynolds Farley, *Latino, Asian, and Black Segregation in U.S. Metropolitan Areas: Are Multiethnic Metros Different?*, 33 *DEMOGRAPHY* 35, 38–41 (1996) (exploring increasing neighborhood segregation of Latina/os and Asians in comparison to decreasing Black segregation); Jorge Mariscal, *The New “New South”: Latin American Immigrants Are Changing the U.S. Political Landscape*, SOJOURNERS MAG., Aug. 2004 (examining the challenge that Latina/o migrants to the South are having on the racial politics of the region). Nevertheless, under the rationale set forth by the Court in *Croson*, such change and its impact on those non-Blacks who are racialized as non-White is not sufficient evidence of discriminatory treatment.

357. *Hopwood*, 78 F.3d at 936 n.4.
358. Id. (emphasis added).
359. Id.
361. *Hopwood*, 78 F.3d at 955 n.50. The court further noted as follows: “[T]he law school’s argument is even weaker than that of the university in *Podberesky*, as there is no dispute that the law school has never had an admissions policy that excluded Mexican Americans on the basis of race.” Id. at 953 (comparing the University of Texas School of Law admission program to an African American scholarship program at issue in a Fourth Circuit case decided one year earlier).
362. Id. at 936 n.4. The disappearance of Asian Americans and Pacific Islanders from some selection programs generated a great deal of anxiety about the meaning of color in the United States. Indeed, the “model
Moreover, the Hopwood court could not conceptualize the non-White "minority" status of Mexican Americans. Focusing in particular on the admission goals of the law school that sought to admit a student body that included a minimum of five percent Black students and ten percent Mexican American, Judge Smith bluntly stated:

There is no history either of de jure discrimination against Mexican Americans in education at any level in Texas or of de facto discrimination against Mexican Americans by the law school. Therefore, it is puzzling that the law school would set an admissions goal for Mexican Americans that is twice that of blacks, as to whom the history of de jure discrimination in Texas Education in general, and by the law school in particular, is irrefutable.

Although the late 1960s and early 1970s Texas school "tri-ethnic" school desegregation cases put into doubt the "irrefutability" of Judge Smith's assertions, it is clear that by the mid-1990s he and his brethren did not consider Mexican Americans to be an "ethnic minority group" comparable either in degree or scope to the state's "most" discriminated against group, African Americans. Ironically, the de jure/de facto distinction that was constitutionalized in Keyes came back to deny Latina/os, at least in Texas, any claim to non-Whiteness that had been made in the nation's tri-ethnic jurisprudence.

Despite the clear color consciousness displayed in Judge Smith's opinion, he declared that the goal of the Fourteenth Amendment is "to render the issue of race irrelevant in governmental decisionmaking." Though Mexican Americans were ostensibly considered a non-White "race" in Justice Smith's formulation of the law school's admissions scheme, Mexican Americans were insufficiently "of color,"

---


363. Hopwood, 78 F.3d at 955 n.50.

364. Id. Significantly, the Fifth Circuit's analysis completely rejected the argument made by the Mexican American Amici that the Mexican American community in Texas had been subject to a long history of racial and color discrimination in the state—ranging from bias in jury selection to their exclusion from White primaries to the operation of segregated schools. See Brief of Mexican American Amici Curiae at 4–16, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (No. 94-50664). Moreover, the "Mexican American Amici," a group that collectively represented MALDEF, the Mexican American State Employees Association, the Hispanic Bar Association of Austin, the Mexican American Bar Association of Texas, the Hispanic Pre-Law Student Association, the Chicanx Law Students Association, and the Texas League of United Latin American Citizens, compared such discrimination throughout in multicolor terms in a matrix that juxtaposed the experiences of Texas's Mexican Americans, Blacks, and American Indians in relation to those benefits and privileges accorded to the state's White community. Id. at 15–24.

365. See supra notes 89–103 and accompanying text.

366. According to Judge Smith:

If fashioning a remedy for past discrimination is the goal, one would intuit that the minority group that has experienced the most discrimination would have the lowest college graduation rate and therefore would be entitled to the most benefit from the designed remedy. The goals established by the law school are precisely the reverse of that intuitive expectation and are more reflective of a goal of diversity (which we hold is not compelling) than of a goal of remediating past discrimination.

Hopwood, 78 F.3d at 955 n.50 (emphasis added).

367. Id. at 940.
which placed the University of Texas School of Law's affirmative action admissions program beyond the realm of constitutional protection.

The Fifth Circuit's policing of the White majority and non-White minority in the admissions policy of the University of Texas highlighted the color stakes in affirmative action litigation. Significantly, Latina/os, by choosing to identify and be identified as "people of color," had a "possessive interest" that fundamentally challenged the "ethnics all" paradigm that seemed to emerge triumphantly in Bakke. 368 Yet, a "possessive investment" in color made by Latina/os was in no way the equivalent of a "possessive investment" in Whiteness. 369

The emergence of Whiteness in legal academic discourse was indicative of a major challenge to the ethnicity paradigm, which was presented by Critical Legal Scholars (CRITS) and other scholars studying race in the United States. 370 Indeed, a distinct Latino critical race theory (LatCrit) arose out of this intellectual synergy and claimed a position for Latina/os in discussions of race and the operation of the color line. 371 Fundamentally rejecting any conception of a post-ethnic or post-racial United States, 372 these commentators challenged others to recognize not only the entrenchment of "Whiteness as property" but to reconcile the operation of color against a wide-variety of inconsistently racialized non-White groups.

Perhaps it was fitting that the University of Michigan, whose administration openly and proudly endorsed programs designed to bring more people of color into the academy while at the same time failing to appreciate its own historic marginalization of a Native community, ended up being the legal battleground to determine this issue. While Jennifer Gratz and Barbara Grutter filed separate class action lawsuits against the University of Michigan Literature Science and Arts Program (LSA) and the Law School in 1997 for ostensibly denying them admission based on their White identity, 373 in the year 2000 the Students of Color Coalition—

368. See supra Part IV.A.
369. George Lipsitz, The Possessive Investment in Whiteness: Racialized Social Democracy and the "White" Problem in American Studies, 47 AM. Q. 369 (1995). In his groundbreaking article, Professor George Lipsitz first developed the terminology to understand the continued maintenance of a highly unequal and oppressive color line in the United States. Id. In addition to Lipsitz, other scholars have carefully explored this "investment." See supra note 26. I have explored an emerging, but by no means equivalent, "possessive investment" in color made by Latina/os made in context of the War on Poverty. See Romero, supra note 48. As Professor Cheryl Harris argued in her influential essay, Whiteness as Property, non-White: "possessive investment" in color conscious programs such as affirmative action are fundamentally different. Acknowledging [non-White] identity does not involve the systematic subordination of whites, nor does it even set up a danger of doing so. Affirmative action is based on the principles of antisubordination, not principles of Black superiority. The removal of white privilege pursuant to a program of affirmative action would not be implemented under an ideology of subordination, nor would it be situated in the context of historical or present exploitation of whites. Harris, supra note 1, at 1785 (footnote omitted).
370. This body of literature is long and extensive. For an overview of the intellectual development of Critical Legal Studies, see CRITICAL RACE THEORY (Kimberlé Crenshaw et al. eds., 1995).
371. This body of literature is also long and extensive, as is evidenced by the fact that it has been the subject of eleven symposiums since 1995. For an overview of the LatCrit movement as well as the extent of this literature, see Francisco Valdes, Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latino Self-Empowerment, 2 HARV. LATINO L. REV. 1 (1997).
372. See supra Part III.B.
373. According to Justice O'Connor, the University of Michigan Law School admissions program was based on a commitment "to racial and ethnic diversity with special reference to the inclusion of students from groups
comprised largely of the University’s Latino and American Indian communities—
confronted the University about its tacit support of a “secret society” known as
“Michigamua,” the name of which was derived from a supposedly extinct band of
Michigan American Indians. In existence for nearly a hundred years and including
such distinguished alumni as Fielding Yost, ex-President Gerald Ford, and late U.S.
Supreme Court Justice Frank Murphy, the Michigamua “wigwam” was housed by the
University in the tower of the Michigan Student Union. For most of its history,
members of Michigamua had engaged in a long and racialized “playing Indian”
discourse; its membership employed demeaning and stereotypical rituals, language,
and attire as part of their initiation ceremonies and regular society activities.
According to one account, such “exclusionist, racist and detrimental . . . rituals were
reminiscent of the black-face minstrel shows from the 1950s.” Although members
of Michigamua had signed a contract with American Indian students and groups to
stop all such practices in 1989, vestiges of its troublesome past remained vivid
enough to call into question the meaning of and commitment to diversity of a
multiracial school and a multiracial United States. Expectedly, while students of
color banded together to support the University of Michigan’s attempt to dismantle
White privilege, they also came together to confront the University about its own
implicit support of an organization that worked to racialize and ultimately demean the
culture, history, and values of its American Indian students.

Thus, by the time that Grutter and Gratz made it to the docket of the U.S. Supreme
Court in 2002, the color line had definitively been drawn. However, even those in the
best position to challenge the privileges of Whiteness drew the line in inconsistent
and often contradictory ways. For Latina/o litigants the case once again provided an
opportunity to proclaim their own distinct non-Whiteness. The joint amici brief of the
Hispanic National Bar Association and the Hispanic Association of Colleges and
Universities emphasized the following:

The generation contemplating law school or higher education today has enjoyed
freedom from slavery and involuntary servitude, but the process of equalization

which have been historically discriminated against, like African-Americans, Hispanics, and Native-Americans, who
without this commitment might not be represented in [the] student body in meaningful numbers.” Grutter v.
374. Tiffany Maggart & Robert Gold, Student Coalition Leaves Union After 37 Day Stay, MICH. DAILY, Mar.
376. See generally PHILIP J. DELORIA, PLAYING INDIAN (1998) (detailing the various ways in which White
Americans have utilized American Indian imagery and iconography to meet their own political or social ends).
378. Id. (internal quotation marks omitted).
379. One report noted this inconsistency:

Groups of faculty and staff have signed statements of support for the SCC. But U.M. President
Lee Bollinger has met only once and inconclusively with the protesters, made misleading
statements, reduced the issue to one of “space allocation,” and offered no concessions. Recently
he said he never would have supported the 1989 agreement if he had been on campus at the time,
pointing to the society’s First Amendment rights. He has called the SCC action unreasonable yet
he yielded in 24 hours to an all-white group that had occupied another building to demand U.M.
cease purchasing from sweatshop manufacturers.

Elizabeth Martinez, Students of Color Fight Racism at Univ. of Mich. with Month-Long Occupation, ZNET DAILY
contemplated by the Fourteenth Amendment continues. Disparities between whites and non-whites are found at virtually every level of society.…

It is of particular importance for the Hispanic community to have multilingual representation. The brief highlighted the fact that

[the nation’s two largest Latino subgroups [Puerto Ricans and Mexican Americans] share an experience that only two other racial minority groups claim—namely the forcible and involuntary introduction of the group to United States residency. While the ranks of those forcibly introduced have been swelled by numerous subsequent immigrants, these newcomers join communities long viewed as non-white and subjected to discrimination on the basis of their difference.

Remarkably, in the U.S. Supreme Court’s first extended discussions about the meaning of diversity since Bakke, neither in Gratz nor Grutter did the majority opinion attempt to address the meaning of ethnicity, race, or color. Though a color line in each case was drawn between African American, Latina/o, Native American, and White students, that line had significance only in relation to enrolling a “‘critical mass’” of “‘minority [non-White] students.” This was a “race-conscious” line, as Justice O’Connor pointed out, on which “‘public and private universities across the Nation [had] modeled their own admissions programs” in the twenty-five years since the Bakke decision. Despite claiming that race continued to play a significant role in the operation of equality and justice in the United States, the Court—like the Court in Bakke twenty-five years earlier—rendered this observation meaningless by indicating that a “broad range of qualities…may be considered valuable contributions to [achieve the compelling state interest of] student body diversity.”

---

382. Id. at 6 (footnote omitted).
384. Id. at 323.
385. Id. at 333.
386. Id. at 338. According to Justice O’Connor:

[T]he 1992 policy…provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.…

What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this flexible approach, the Law School sufficiently takes into account, in practice as well as in theory,
In her dissent in *Gratz*, Justice Ginsburg questioned whether "[t]he stain of generations of racial oppression [that was] still visible in our society" could be so easily considered one and the same with other traits and characteristics. Particularly for Latina/os, African Americans, and American Indians who "historically have been relegated to inferior status by law and social practice" and whose "members continue to experience class-based discrimination to this day," Justice Ginsburg questioned an admissions system that

may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents.

By refusing to diminish the debilitating consequence of "race" or the empty gestures of ethnicity in the subsequent enforcement of a "caste"/color distinction, Justice Ginsburg's dissent made evident the fundamental failure of the nation's "tri-ethnic" jurisprudence.

**V. CONCLUSION: BEYOND A TRI-ETHNIC JURISPRUDENCE**

When the U.S. Supreme Court, in *Keyes v. School District Number One*, assessed for the first time the role that Latina/os would play in school desegregation and equal protection litigation, it intimated that the color line of the American South would prove incompatible with national transformations in the country's racial order. Although the decision unambiguously indicated for many a more nuanced and sophisticated understanding of race and color, the Court's use of the terms "bi-racial" and "tri-ethnic" to describe Denver's social complexity contributed to a fractured and inconsistent understanding of Latina/os racial position in U.S. culture and life.

While *Keyes* promised to supersede the Black/White color line in American constitutional jurisprudence by replacing its "bi-racial" lens with a "tri-ethnic" one, it ironically contributed to a new in-betweeness for Latina/os in the law. Within one year, the nation's courts began the process of reformulating the line between race and ethnicity with the emergence of bilingual education and the national origin classification in the nation's equality of educational opportunity jurisprudence. Indeed, the U.S. Supreme Court signaled in *Lau* the nation's legal priorities when ethnic traits such as language were pitted against the condition of race, rather than as an interrelated component in the process of racialization and the subsequent construction and maintenance of the color line.

As a result, by the 1980s, various courts set up a fallacious dichotomy between permissible ethnic differentiation and impermissible racial discrimination. The

---

a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.

*Id.* at 338–39 (citation omitted).


388. *Id.* at 303.

389. *Id.* at 304 (emphasis added).
question, as it emerged in the language discrimination cases in the 1980s, was not whether Latina/os were "other White" or "other Black," but rather whether they constituted an ethnic or a racial group subject to a lower standard of legal protection when the discrimination was ostensibly based on "bona fide" ethnic considerations. Finally, Bakke's challenge to the use of affirmative action to dismantle White privilege only served to further reinforce the repositioning of Latina/os squarely on the non-White side of the color divide. Justice Powell's plurality opinion, however, seemingly rendered this distinction meaningless by treating as nearly identical individual discrimination, systemic discrimination, and other skills associated with the recruiting of a diverse student body. Yet, by preserving the prerogative of institutions of higher education to use one's non-White minority status as one of many factors in their admissions decisions, it signified the continued importance of the content and meaning of the color line in achieving social justice and equality in the United States.

By the time that Grutter and Gratz made their way to the U.S. Supreme Court, it was not so obvious that race served any conceptual value in the legal determination. Because racial and ethnic terminology had become so disjointed, it was nearly impossible to evaluate Justice O'Connor's observation that "race unfortunately still matter[ed]" in the United States. Indeed, what was the significance of African American, Latina/o, and Native American students being classified together in order to increase "diversity" at the University of Michigan Law School? What if the diversity program only targeted Latina/os? Did it matter to the Court that in the year prior to its decision the "law school had an entering class with a total minority population of about 25 percent, but with no Mexican-Americans among its 6.8 percent Hispanics and 6 percent African Americans"?

By ultimately recognizing the University of Michigan's "compelling state interest" to achieve "diversity" by recruiting Latina/os—as students of color—Grutter reinforced Keyes' basic understanding of Latina/os as a non-White group. As in other "tri-ethnic" cases, however, this was at best an incomplete victory. While Keyes and Grutter established that Latina/os could be racially classified as non-White to establish the segregated character of a school as a permissible effort to increase diversity, or to dismantle a past pattern and practice of discrimination, the nation's tri-ethnic jurisprudence, as a whole, made it abundantly clear that

390. Grutter, 539 U.S. at 333.
392. As Professor Juan Perea has argued, the Grutter decision was designed to "legitimize, in the eyes of all, educational and professional processes that yield, at the national level, remarkably little diversity and remarkably unequal results." Juan Perea, Buscando América: Why Integration and Equal Protection Fail to Protect Latinos, 117 HARV. L. REV. 1420, 1453 (2004). Professor Perea strongly noted that the Court in Grutter chose to emphasize the value of diversity in terms of benefiting those on the White side of the color line. Id. at 1452-53.

According to Justice O'Connor, These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, [based on [their] decades of experience, a highly qualified, racially diverse officer corps...is essential to the military's ability to fulfill its principle mission to provide national security.

Grutter, 539 U.S. at 330-31 (alterations in original) (citations omitted) (internal quotation marks omitted).
Latina/os, on their own, remained an in-between group. The parameters of this interstitial position are thus defined not only by conceptions of Blackness and Whiteness but also by jurisprudential and social confusion arising between the use and definition of race and ethnicity. Without the ability to bring meaningful clarity to the use and deployment of such terms in the nation's jurisprudence, Justice O'Connor's hope that “the use of racial preferences will no longer be necessary” by 2028 remains nothing more than an empty aspirational goal for most Latina/os as well as other inconsistently racialized non-Whites. 393

Only three years after Grutter and Gratz seemed to settle the continued use of racial “preferences” in education for the next quarter century, 394 the U.S. Supreme Court granted certiorari in a collection of affirmative action public school desegregation cases involving school districts in Seattle, Washington and Louisville, Kentucky. 395 Ironically, these cases “could put the court on the opposite side of an old issue. Having once told school officials that the Constitution says they must desegregate their classrooms, the court will now consider whether the Constitution forbids official efforts to maintain integration.” 396 As one commentator noted, the Court’s decision “could signal a historical shift on the role of race in education,” putting into doubt not only the Court’s decision in Grutter, but also the continued viability of Brown and its related jurisprudence. 397

For these very reasons, these cases represent an opportunity that is similar in many respects to the one confronted by the nation’s courts as a result of the Latina/os that challenged public school segregation in the late 1960s and early 1970s. 398 The U.S. Supreme Court will have the opportunity to critically examine the use, deployment, and historical meanings of racial categories in a multicolored United States. The opinions of the lower courts in each case demonstrated the linguistic netherworld to which Latina/os and other non-White and non-Black groups have been assigned in understanding racial classification schemes. In Judge O’Scannlain’s Ninth Circuit opinion, for instance, the court highlighted the geographic concentration of Seattle’s student population, noting specifically that Asian, Black, Hispanic, and American Indian students are non-White. 399 Chief Judge Heyburn’s Western District of Kentucky memorandum opinion, on the other hand, explained a Louisville, Kentucky school district’s practice of identifying “the race

393. Grutter, 539 U.S. at 343.
397. Id.
398. See supra Part II.

Seattle’s student population is approximately 40 percent white and 60 percent non-white. Splitting Seattle along a north-south axis, data introduced by the School District indicates that 74.2 percent of the District’s Asian students, 83.6 percent of its black students, 65.0 percent of its Hispanic students, and 51.1 percent of its Native American students live in the southern half of the city. By contrast, 66.8 percent of the District’s white student population lives in the northern half of the city. Overall, approximately 77.2 percent of students in the southern half of the city, and just 35.7 percent of students in the northern half of the city, are non-white.

Id.
of each student as Black or African-American and Other. According to Judge Heyburn:

This particular practice of distinguishing only Black and non-Black students and referencing non-Black students as “Others” was discussed rather extensively during the hearing...[because the contested school district] is a school district almost entirely populated by only Black and White students. Students of other races and backgrounds, such as Latino and Asian students, are represented only in very small numbers, e.g., less than five percent of the total student population is neither non-Hispanic Black nor White.

Indicating that the racialization of Latina/os and Asians could only be recognized if students from each group were represented in larger numbers, Chief Judge Heyburn placed this small number of students on the “other-White” side of the color divide.

While it may be true that many school districts remain split along dichotomous lines like the one found in Louisville, Kentucky, such districts are becoming noticeably the exception and not the rule. Even in those districts where segregation is unquestionably bi-racial, the increasingly more salient color line is the one between Whites and Latina/os. Yet, because the nation’s jurisprudence on racial and ethnic categorization has become so far removed from questions of history and power, courts have lost the ability to evaluate the operation of systemic inequities in a diverse U.S. culture. As Gary Orfield and Chungmei Lee have noted:

If segregation were just about race or ethnicity, it might be only of academic interest. However, segregation is rarely only by race or ethnicity. It is almost always double or triple segregation, involving concentrated poverty and, increasingly, linguistic segregation, and this multiple segregation is almost always related to many forms of tangible inequality in educational opportunity on multiple dimensions.

Simply put, the nation’s equality jurisprudence, resting on a “tri-ethnic” foundation in which race, ethnicity, and color distinctions are used interchangeably, is ill-suited for meaningful discussions of, much less providing cognizable legal remedies for, such modern segregation in the contemporary United States.

Thus, remarkably similar to my Grandparents’ generation, Latina/os in the twenty-first century continue to bear the burden of double or triple segregation by receiving lower wages, working more difficult jobs, and living in less desirable

---

401. Id.
402. See id.
403. As Gary Orfield and Chungmei Lee have documented, “since the 1990s, the percentage of students of every race in multiracial groups has increased. Segregation is no longer black and white but increasingly multiracial.” Press Release, The Civil Rights Project of Harvard Univ., Racial Transformation and the Changing Nature of Segregation (Jan. 15, 2006), available at http://www.civilrightsproject.harvard.edu/news/pressreleases/deseg06.php.
neighborhoods than other groups in U.S. society. In a pattern established long ago, political opportunism contributes to the continued racialization of Latina/os as non-White as a result of citizenship and language differences. Such realities have fallen heaviest on the institution conceived of as best able to propel individuals up the social ladder. Latina/o students are disproportionately represented among students in poorer, substandard, and segregated school districts; face substantial differences in language skill and social discrimination; and, as a result, are more likely than their White and African American peers to drop out of primary school and are less likely to matriculate in institutions of higher education. As long as courts continue to be mired in the premises of “tri-ethnic” jurisprudence, Justice O’Connor’s observation in *Grutter* that “race unfortunately still matters” will remain an immeasurable fact. To be sure, without the resolve to arrive at a more nuanced and sophisticated understanding of race, ethnicity, and, most importantly, color in our equality jurisprudence, Latina/o students will face the same sense of racial confusion and color dislocation that I, along with my family, have experienced. In the end, this might be the most defining feature of a Latino race in modern law.

---


