A Selective Review of the Development of Latino Civil Rights in California and the Western United States

By Thomas A. Saenz[1]

Despite a significant undercount of Latinos,[2] the 2020 Census demonstrated the continued growth and dispersion of Latinos in the United States. Overall, the Latino community accounted for over 51 percent of the nation's total population growth between 2010 and 2020,[3] cementing Latinos' status as the nation's largest racial minority group, a status initially attained almost 20 years ago in 2003 when the Census Bureau reported that the Latino population had surpassed that of African Americans.[4]

Moreover, the 2020 Census also reinforced the fact that Latinos have transitioned from a regional population to the most significant national minority population, with substantial numbers in all regions of the country. According to the Census count, as of 2020, 26 states had Latino residents exceeding ten percent of the total state population, with Hawaii not far behind at 9.5 percent Latino.[5] In addition to Hawaii, several more states are likely to cross that threshold in the current decade as Latino growth continues to exceed that of the majority white population nationwide.

Of course, the national growth and dispersion of the Latino population does not negate the fact that certain regions and states of the nation continue to lead when it comes to the development of civil rights and policy in relation to the Latino community. At the national forefront, historically and today, is the western United States and the dominant state within the region, California, the nation's most populous state for over half a century.[6] With a population that is now 40 percent Latino, California, of

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[2] On March 10,2022, the Census Bureau reported undercount estimates from its Post-Enumeration Survey (PES). The PES showed that Latinos had an estimated 4.99 percent undercount, significantly higher than the 2010 Latino undercount (1.54 percent). Latinos also had the highest undercount of all racial minority groups, though a subset of Native Americans -- those living on reservations -- had a slightly higher undercount, an estimated 5.64 percent. *See* Census Bureau, *National Census Coverage Estimates for People in the United States by Demographic Characteristics: 2020 Post-Enumeration Survey Estimation Report*, at 7, Table 4 (Mar. 2022); *Census Bureau Releases Estimates of Undercount and Overcount in the 2020 Census*, Release No. CB22-CN.02, Mar. 10, 2022, https://www.census.gov/newsroom/press-releases/2022/2020-census-estimates-of-undercount-and-overcount.html.

[3] Census Bureau, *2020 Census Illuminates Racial and Ethnic Composition of the Country*, Aug. 12, 2021, https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html (51.1 percent of U.S. growth came from Latino population). The Latino population grew by 23 percent in the decade, while the non-Latino population grew by only 4.3 percent. *Id.*

[4] *See, e.g.,* Lynette Clemetson, *Hispanic Now Largest Minority, Census Shows*, N.Y. Times, Jan. 22, 2003.

[5] Data on individual states derived from Census Bureau P.L. 94-171 data release for Census 2020; these are the data released for use in redistricting, which provide information on race/ethnicity, voting age, and total population. *See* Census Bureau, *2020 Census Statistics Highlight Local Population Changes and Nation's Racial and Ethnic Diversity,* Release No. CB21-CN.55, Aug. 12, 2021, https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html.

[6] *See California Takes Population Lead*, N.Y. Times, Sept. 1, 1964.

all the states, has by far the largest number of Latinos residing within it.[7] In 2014, Latinos surpassed whites to become the largest racial group in California,[8] a majority-minority state since the turn of the millennium.[9]

The western region also remains the most prominent nationally for the Latino community. In terms of the federal judicial structure, in 2020, the Ninth Circuit, which covers nine western states,[10] served about one third of all Latinos in the United States, with over 20 million Latinos in the circuit's population.[11] In 2020, about 31 percent of the Ninth Circuit population was Latino; of the regional circuit courts, only the Fifth Circuit – comprised of only three states, and dominated by heavily-Latino Texas -- had a larger proportion of Latinos in its population, at 32 percent.[12]

Within the western region of the United States, three states have the largest Latino proportions of their total population: California at 39.4 percent in the 2020 Census, Arizona at 30.7 percent, and Nevada at 28.7 percent.[13] Emblematic of the growth and dispersion of the Latino population in the region, Census 2020 indicated that three other states exceeded 13 percent Latino in population: Oregon, Washington, and Idaho.[14] Interestingly, the three states in the region with the smallest Latino population percentages are also the three smallest states in total population: Hawaii, Montana, and Alaska.

Coinciding with Latino population growth have of course been increases in political potential, through prominence in the states' electorates. In California, Latinos now account for more than one quarter of all registered voters.[15] Moreover, indicative of a longstanding and maturing Latino population, Latinos accounted for over two-thirds of California's total growth in citizen, voting-age population (CVAP), and for about half of Arizona's CVAP growth, in the last decade.[16] In at least the region's two most heavily Latino states, Arizona and California, the Latino population has the potential

[7] According to the 2020 Census, California was home to 15.6 million Latinos; in numbers, the next state was Texas, with 11.4 million Latino residents. *See supra* note 5 and explanation.

[8] *See* Javier Panzar, *It's Official: Latinos Now Outnumber Whites in California*, L.A. Times, July 8, 2015 (reporting Census estimate for July 1, 2014).

[9] *See, e.g.*, Soraya Sarhaddi Nelson & Richard O'Reilly, *Minorities Become Majority in State, Census Officials Say*, L.A. Times, Aug. 30, 2000 (release of 1999 estimates).

[10] The U.S. Court of Appeals for the Ninth Circuit includes the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as certain territories in the Pacific Ocean. For purposes of this paper, the western region will be defined as the Ninth Circuit states, but the emphasis in development of Latino civil rights law here will be on California and Arizona.

[11] *See supra* note 5 and explanation.

[12] *See supra* note 5 and explanation.

[13] *See supra* note 5 and explanation.

[14] *See supra* note 5 and explanation.

[15] The Census Bureau estimates that about 27.9 percent of all reported California registered voters were Latino in November 2020. *See* Table 4b: Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2020, in Census Bureau, *Voting and Registration in the Election of November 2020* (Apr. 2021), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html.

[16] Citizenship data from the Census Bureau is only available from the American Community Survey (ACS), a sample survey. These proportions for CVAP were derived by MALDEF staff from five-year averages on CVAP for each state released by the Census Bureau.

to play an increasingly decisive role in politics, and therefore in policymaking, in the immediate years to come.

Demography is not destiny, but these demographic data demonstrate not only the prominence of the western region in the Latino national civil rights policy experience, but also the particular importance of two states – California and Arizona – within the region. In addition, as explained further below, demography -- or more specifically, reaction to demographic change -- has played a central role in the development of politics and policy affecting the Latino community in California and Arizona in recent history. Indeed, those two states were the sites of nationally prominent and influential spasms of anti-Latino and anti-immigrant policy – in California in the 1990s and in Arizona 15 years or so later. Because of the western region's importance in anticipating changes in demography that will soon affect other parts of the country, the west's history on the subject of Latino politics and policy may be a harbinger of what will occur elsewhere and, more important, may provide insights on how to avoid some of the most negative aspects of that history. Of course, the entire nation has already seen an obvious exploitation of fears of Latino population growth at the presidential and congressional level in recent years, so the west's history may certainly have more immediate lessons to impart.

Latino Civil Rights in the West from Incorporation to *Brown*

It is not surprising that the three states in the west with the highest proportions of Latinos in their populations -- California, Arizona, and Nevada – are also the three states in the region whose territory was almost entirely acquired through conquest in the mid-nineteenth-century U.S.-Mexico War.[17] That war, a central part of the so-called "Manifest Destiny" ideology of many in the nineteenth-century United States ruling classes, resulted in the incorporation of substantial territory that once pertained to Mexico.[18] The three western states of Arizona, California, and Nevada thus trace their origins to an imperialistic war, rhetorically justified by government-sponsored and officially-sanctioned, racialized arguments that demonized the Mexican citizenry in order to justify the denial of their right to self-determination. This was of course important to explain and justify costly actions that otherwise contradict the nation's founding principles of self-determination, at least for propertied white men.

Mexicans were depicted as "savage," barely civilized, and, due to the mestizo origin of most of the Mexican population, no better than the North American Native/Indian population already being subjected to genocidal practices in the territory pertaining to the expanding United States.[19] For example, former Vice President John Calhoun argued on the floor of the Senate in 1848 that, "[t]o incorporate Mexico, would be the very first instance of the kind of incorporating an Indian race; for more than half of the Mexicans are Indians, and the other is composed chiefly of mixed tribes."[20]

This conception of Mexicans and Mexican Americans rapidly made it into United States jurisprudence. Two dissenting justices in the notorious 1857 case of *Scott v. Sandford* cited the post-war

[17] *See, e.g.,* Andrew Glass, *This Day in Politics: U.S. and Mexico Sign Treaty of Guadalupe Hidalgo, Feb. 2, 1848*, Politico, Feb. 2, 2019 (describing states with territory ceded by treaty).
[18] *See id.* (noting that, if Texas is included, Mexico lost 55 percent of its territory).
[19] *See* Albert K. Weinberg, Manifest Destiny: A Study of Nationalist Expansionism in American History 361 (1935) (describing and illustrating general "apprehension of the political danger of amalgamation with a dissimilar racial stock"). *See generally* Brief of Latino Organizations as Amici Curiae in Support of Respondents, Grutter v. Bollinger, 2003 WL 399228 at *8 to *10.
[20] Cong. Globe, 30th Cong., 1st Sess. (1848) (Statement of Sen. Calhoun).

treaty governing incorporation of parts of Mexico as exemplifying that the nation had previously accorded citizenship to non-whites.[21] This rhetorical and racialized depiction of Mexicans as far less worthy of respect and dignity than white Americans laid the foundation for a racialized experience for nearly all Latinos in the United States in subsequent decades and continuing to the present. The rhetoric was reinforced and reinvigorated through the later conquest of Puerto Rico in the Spanish-American War,[22] and the treatment of nations in Central America as client states subjected to regular American government and corporate intervention and manipulation.

Latinos continue in the modern civil rights era to suffer from many elites' ignorance of this historical experience of racialized oppression.[23] Nonetheless, the western states with the largest Latino populations were birthed out of racialized demonization of the Latino community, and those origins have had continued resonance in law and policymaking with respect to the civil rights of Latinos living in these states, including in the largest and most important state, California.

Many historians have documented the early history of California and the widespread violation of rights purportedly guaranteed in the Treaty of Guadalupe-Hidalgo that ended the U.S.-Mexico War,[24] resulting in the taking of property and other rights from Mexican Americans and leading to their clear subjugation as oppressed minorities by the twentieth century in California and Arizona. Consistent with its active judicial system, both federal and state, California was at the forefront of many critical civil rights developments through court rulings that emerged from Latino experiences with ongoing societal discrimination.

For example, the U.S. Supreme Court outlawed racially restrictive real property covenants early in the civil rights era, even prior to its decision in *Brown v. Board of Education*, in the case of *Shelley v. Kraemer* in 1948.[25] Technically, the unanimous decision for a six-justice Court, authored by Chief Justice Fred Vinson, held that enforcement of such covenants by government would violate the Fourteenth Amendment, but did not rule the covenants as imposed by private parties a direct constitutional

[21] *See* Scott v. Sandford, 60 U.S. (19 How.) 393, 533 (1857) (McLean, J., dissenting) ("Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors."); *id.* at 586, 587 (Curtis, J., dissenting) ("by solemn treaties, large bodies of Mexican and North American Indians . . . have been admitted to citizenship.").
[22] *See* Albert M. Camarillo, *Expert Report of Albert M. Camarillo*, 5 Mich. J. Race & L. 339, 343 (1999) ("The war with Mexico and the Spanish-American War, respectively, set the stage for the incorporation of Spanish-speaking peoples from Mexico, Puerto Rico, and Cuba into the U.S. and, at the same time, established a set of economic, political, and social conditions which resulted in Hispanics emerging as yet another 'racialized' minority in nineteenth-century America.").
[23] *See, e.g.,* Guido Calabresi, *Bakke: Lost Candor,* N.Y. Times, July 6, 1978 (arguing that special consideration should be limited to Blacks and "perhaps American Indians") (Calabresi later disavowed this argument).
[24] *See, e.g.,* Camarillo, *supra* note 22, 5 Mich. J. Race & L. at 345 ("For the most part, the large majority of Mexicans in the decades following the war, despite the rights guaranteed them by the Treaty of Guadalupe Hidalgo, were dispossessed of their lands through legal and extra-legal means, disenfranchised from the new political institutions brought by Americans, relegated to the lower class of workers in the emerging labor markets, and maligned socially and culturally as 'foreigners and outsiders' by Anglo newcomers to the Southwest.").
[25] 334 U.S. 1 (1948).

violation.[26] The 1911 St. Louis-area covenant at issue specifically targeted African Americans and Asian Americans for exclusion from a community that was residentially restricted to "the Caucasian race."[27]

Latinos had been subject to exclusion through such covenants in states and regions where they were more prominent and known. In California, the Latino community experienced housing segregation and discrimination accomplished through multiple means, including racially restrictive covenants.[28] Five years before the Supreme Court's *Shelley* decision, a Mexican American couple successfully challenged a racially restrictive covenant in state superior court in Orange County as the couple defended against white residents seeking to prevent them from buying a home.[29] The covenant at issue specifically targeted Latinos: "That no portion of the said property shall at any time be used, leased, owned, or occupied by any Mexicans or persons other than of the Caucasian race."[30]

Doss v. Bernal resulted in a superior court decision declaring the covenant to be null and void, and a violation of the U.S. Constitution.[31] Interestingly, the attorney representing the Bernal family argued that the covenant wrought a pernicious intra-racial discrimination, asserting that Mexicans are Caucasian,[32] and also contended that the covenant violated U.S. foreign policy toward Mexico.[33] The case represents only one instance of successful Latino civil rights battles in California that pre-dated nationwide relief through U.S. Supreme Court decisions addressing discrimination against Blacks in cases emanating from other regions of the country, as in *Shelley*.

In 1944, in the case of *Lopez v. Seccombe*, five Latinos – four Mexican Americans and a Puerto Rican – challenged the City of San Bernardino, California for its ongoing exclusion of Mexican American and other Latino residents from using the swimming pool and associated facilities at a public park.[34] The plaintiffs, including students, a priest, a veteran, and a newspaper editor, secured victory against the

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[26] *See id.* at 19-20; *id.* at 20 ("The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.")

[27] *See id.* at 4-5 (excerpting 1911 agreement). This was most likely simply a product of the prevailing race taxonomy of the times. The covenant also uses outdated terms for the two expressly excluded groups.

[28] *See, e.g.,* Luna v. County of Kern, 291 F.Supp.3d 1088, 1134 (E.D. Cal. 2018) (summarizing testimony of historian expert Dr. Albert Camarillo on "Jaime Crow" "de facto system of racial exclusion of Mexican-Americans" including racially restrictive covenants); Robert Chao Romero & Luis Fernando Fernandez, Doss v. Bernal: *Ending Mexican Apartheid in Orange Count*y, CSRC Research Report No. 14 (Feb. 2012) at 2 (describing mechanisms of segregation of Mexican immigrants).

[29] *See generally id.*

[30] *Id.* at 1 (citing court findings excerpting covenant).

[31] *Id.* at 3-4 (excerpting court judgment).

[32] *See id.* at 3. The argument – essentially that intra-racial discrimination should not be permitted even if interracial discrimination is permitted – would also be used *against* Latinos in other cases, most notably in *Hernandez v. Texas*, where Texas essentially argued that even if interracial discrimination is prohibited, intra-racial discrimination should still be permitted. *See generally* Hernandez, 347 U.S. 475 (1954); *see also* Thomas A. Saenz, Mendez *and the Legacy of* Brown*: A Latino Civil Rights Lawyer's Assessment*, in Symposium, Rekindling the Spirit of B*rown v. Board of Education*, 6 Afr.-Am L. & Pol'y Rep. 194, 198-99; 11 Asian L.J. 276, 280-81; 15 Berkeley La Raza L.J. 67, 71-72; 19 Berkeley Women's L.J. 395, 399-400; Calif. L. Rev. (2004) (discussion of *Hernandez* case and Texas strategic use of supposed white race classification).

[33] *See* Chao Romero & Fernandez at 3. This argument resonates decades later in the primary court argument against the anti-immigrant California Proposition 187 – federal preemption and invasion of exclusive federal prerogative. *See* discussion below.

[34] *See* Lopez v. Seccombe, 71 F.Supp. 769 (S.D. Cal. 1944).

exclusion when a federal judge struck down the practice as a violation of the Fourteenth Amendment of the U.S. Constitution and issued a permanent injunction.[35] Exclusion from use of public pools was a ubiquitous practice against Blacks in the Jim Crow south and against Mexican Americans in the southwest.[36]

The *Lopez* case not only further illustrates the widespread practice of racialized social exclusion, in its many aspects, against Latinos in the pre-civil-rights era, it also further demonstrates that California court-driven law was ahead of the nation as a whole in taking steps to reduce and eliminate these practices. The court system's nationwide elimination of racial exclusion from pools and other recreation facilities had to await the Supreme Court's overruling of the "separate but equal" doctrine of *Plessy v. Ferguson* in the landmark case of *Brown v. Board of Education.* One week after the *Brown* decision, the Supreme Court remanded a case involving exclusion of Blacks from a park amphitheater for reconsideration in light of the holding in the school segregation case.[37] Even so, this Supreme Court jurisprudence followed *Lopez* by a decade.

Perhaps the most renowned of the California Latino civil rights cases pre-dating nationwide Supreme Court developments is *Mendez v. Westminster School District*, decided in the Ninth Circuit Court of Appeals some seven years before *Brown*.[38] The *Mendez* case, commemorated on a United States postage stamp in 2007, has begun to receive greater recognition and awareness in the last decade and a half.[39] The case, of course, challenged the segregation of Mexican American students in Orange County public schools. Notably, while not part of the NAACP Legal Defense and Educational Fund's (LDF) steady campaign to eliminate school segregation in the Jim Crow south, the case on appeal in the Ninth Circuit garnered an *amicus* brief from Robert L. Carter on behalf of LDF.[40]

In *Mendez*, the district court and the court of appeals ruled for the plaintiffs, and held that the school districts' practices were a violation of the students' constitutional rights. This holding was ahead of the Supreme Court, which had not yet even decided to hear *Brown* and its associated cases. The California-based federal courts in *Mendez* felt free to disregard *Plessy* precisely because the case involved Mexican Americans. The Ninth Circuit distinguished the prevailing law on Jim Crow segregation

[35] *See id.* at 772 ("respondents' conduct is illegal and is in violation of petitioners rights and privileges as guaranteed by the Constitution of the United States, and as secured and guaranteed to them as citizens of the United States, by the Constitution of the United States of America, as particularly provided under the Fifth and Fourteenth Amendments.")

[36] *See, e.g.,* Brief of Latino Organizations as Amici Curiae in Support of Respondents, Gratz v. Bollinger, 2003 WL 536740 at *14 ("In both Texas and California, Latinos were denied service in restaurants, swimming pools, barber shops and theaters.").

[37] *See* Muir v. Louisville Park Theatrical Ass'n., 347 U.S. 971 (1954); *see also* Palmer v. Thompson, 403 U.S. 217, 243-44 (White, J., dissenting ("In a series of opinions following [*Brown v. Board of Education*] closely in time, the Court emphasized the universality and permanence of the principle that segregated public facilities of any kind were no longer permissible under the Fourteenth Amendment.") (citing *Muir* remand); *id.* at 272 (Marshall, J., dissenting) ("since *Brown v. Board of Education*, public schools and public recreational facilities such as swimming pools have received identical Fourteenth Amendment protection" (citation omitted) and citing *Muir* remand).

[38] Mendez v. Westminster Sch. Dist., 64 F.Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947).

[39] *See* Philippa Strum, *Mendez v. Westminster:* School Desegregation and Mexican-American Rights 161 (Univ. Press of Kansas, 2010) (describing postage stamp); *id.* at ix (Ed.'s Preface) ("Few of us – even scholars – knew about *Mendez v. Westminster School District*. That is about to change.").

[40] *See id.* at 133-36 (describing amicus brief).

on two bases: 1) that California state law did not sanction the segregation being practiced; and 2) that the segregation was intra-racial rather than interracial in nature.[41] The latter conclusion came from a stipulation by the parties in the case, a strategic decision reflected in the parties' respective arguments on appeal.[42]

The former conclusion rested on faulty grounds, but the conclusion was bolstered by the stipulation. In fact, California law at the time permitted the segregation of "Indian children, excepting children of Indians who are wards of the United States Government and children of all other Indians who are descendants of the original American Indians of the United States, and for children of Chinese, Japanese, or Mongolian parentage."[43] The historical and continuing characterization of Mexicans as Indian indicates that this statute was designed, in fact, to permit the segregation of Mexican American children.[44]

Nonetheless, the *Mendez* decision presents yet another circumstance in which California civil rights law for Latinos, framed through court jurisprudence, anticipated the U.S. Supreme Court in working to eliminate or reduce the prevailing pattern of racialized discrimination for all people of color. The cases collectively demonstrate the importance of Latinos and the western region, and California in particular, as civil rights law developed nationally, an importance that would continue and expand in subsequent years.

Post-*Brown* Civil Rights Era

Of course, once the Supreme Court began to catch up with California law through the unanimous decision in *Brown v. Board Education*, the Jim Crow practices of the south -- and related discrimination nationally -- began to face the removal of legal support in favor of some protection of racial minority rights. The pace of elimination, at the nationwide level, of court sanction for racial discrimination accelerated. The western region, together with the rest of the nation, saw dramatic changes in both Court jurisprudence and in protective federal legislation, with the enactment of sweeping and hard-fought laws like the Civil Rights Act of 1964, the Elementary and Secondary Education Act of 1965, the Immigration and Nationality Act of 1965, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and others.

Even if the focus in the development of civil rights writ large, including the civil rights of Latinos, shifted eastward, that is not to suggest that the west and California did not still have a significant role to play. There are at least four western developments worth noting in the civil rights era from the decision in *Brown* to the beginning of the Reagan Administration. These developments were critical to the western region and the nation, and important precursors to the backlash against Latino civil rights to come.

[41] *See* Mendez, 161 F.2d at 779-80 ("Nowhere in any California law is there a suggestion that any segregation can be made of children within one of the great races.").
[42] *See generally* Thomas A. Saenz, Mendez *and the Legacy of* Brown, *supra* note 32, 15 La Raza L.J. at 69-71 (discussing "white race" stipulation and state law in school segregation).
[43] *See* Mendez, 64 F.Supp. at 548 n.5 (excerpting Cal. Educ. Code section 8003).
[44] *See* Thomas A. Saenz, Mendez *and the Legacy of* Brown, *supra* note 32, 15 La Raza L.J. at 70 & n.22 (citing multiple sources on segregation Mexican Americans in California as "Indians" beginning in 1930 or even earlier).

First to note is the Supreme Court's decision in *Lau v. Nichols*,[45] a crucial expansion on the civil-rights guarantees in *Brown*, rendered all the more significant in coming less than a year after the Court's disastrous decision in *San Antonio Independent School District v. Rodriguez*,[46] in which a majority held that education is not a fundamental right under the U.S. Constitution. The *Lau* case, of course, came out of San Francisco, California. The Supreme Court held that Title VI of the Civil Rights Act of 1964 requires public schools to provide services to English learners to enable them to meaningfully access the public education provided to all students. The impact of the *Lau* decision for English learners everywhere in the nation cannot be overstated. Although the plaintiffs in *Lau* were Chinese American,[47] the case obviously came up through a California-based federal court system with judges and other key court personnel almost certainly aware of the large Latino English-learner community in California and throughout the western United States.

Unfortunately, later legal developments have severely undermined *Lau* and its important holding. Most critical, the Court later determined that the federal regulations under Title VI, including those that underlay the *Lau* decision, cannot be enforced by private parties.[48] Second, the congressionally enacted statutory protections for English learners in the Equal Educational Opportunities Act (EEOA) of 1974 have been weakened by lackluster court interpretation and enforcement of those guarantees.[49] Nonetheless, it is important to note the role of California residents in establishing the principles in *Lau* during the civil rights era.

Second, as the reaction to the 1973 *Rodriguez* decision illustrates, California could and did step in to protect rights when the Supreme Court failed to issue rulings true to the civil-rights principles it had established in the period following *Brown*. The *Rodriguez* Court majority, by failing to recognize a constitutional right to education equity, effectively closed the federal courts to education reform efforts except where the plaintiffs could prove intentional discrimination in the education system.[50] The California state-court system was among the first to act in the aftermath of the *Rodriguez* debacle, establishing a fundamental state-constitution right to a basic and equal education in 1976 in *Serrano v. Priest* (*Serrano II*).[51] Indeed, in doing so, the California Supreme Court was reiterating its earlier conclusion in the same case, rendered prior to *Rodriguez*, that education is a fundamental right under

[45] Lau v. Nichols, 414 U.S. 563 (1974).
[46] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
[47] Proceeding with Asian American plaintiffs, rather than Latinos, was apparently a strategic choice based on a perceived racial hierarchy in California that had Latinos ranking below Asian Americans. *See* Rachel F. Moran, *The Story of Lau v. Nichols: Breaking the Silence in Chinatown*, in Education Law Stories 111 (Michael A. Olivas & Ronna Greff Schneider, eds., 2008).
[48] *See* Alexander v. Sandoval, 532 U.S. 275 (2001) (5-4 holding that there is no private right of action to enforce Title VI regulations that prohibit unintentional discriminatory effects). The *Alexander* case involved a Latina plaintiff challenging Alabama's provision of driver's license examinations solely in English, a practice adopted after the state added a provision to its constitution declaring English the official language of Alabama. *See id.* at 278-79.
[49] *See* 20 U.S.C. §§ 1701 et seq., 1703(f) (violation to fail "to take appropriate action to overcome language barriers that impede equal participation"). *See also* Castaneda v. Pickard, 648 F.2d 989, 1004-1015 (5th Cir. 1981) (framework for evaluating EEOA claims against English-learner programs, establishing substantial school district discretion and leeway).
[50] Of course, there are other statutes that may provide federal-court access, such as the EEOA, which has itself been weakened as described above.
[51] *See* Serrano v. Priest (Serrano II), 18 Cal.3d 728, 765-66 (1976) (under "our state constitutional provisions guaranteeing equal protection of the laws . . . education is a fundamental interest.").

the U.S. Constitution and, by extension, also under the California Constitution.[52] This early move by the California courts in the arena of education rights has played a significant role in aiding public school students in California, a significant majority of whom are now Latino.[53] The quick action following *Rodriguez* is a key milestone for Latino civil rights in the west and nationally.

The third important Latino-specific issue of note in the civil-rights era lies in the initial failure of the Voting Rights Act of 1965 (VRA) to provide protections to the vast majority of Latinos in the nation, including all of those in the western region. Today, many forget (or never knew) that the VRA initially provided its full protections only to Blacks and, through section 4(e), provided some limited protections to Latinos educated in schools in Puerto Rico.[54] Thus, in effect, the original VRA did little to address voting problems faced by Latinos in the west,[55] where migrants from Puerto Rico were not present in large or concentrated numbers. Only through the lead efforts of MALDEF (Mexican American Legal Defense and Educational Fund), in opposition to other legacy civil rights groups, did the 1975 reauthorization of the VRA include "language minorities" in the protections previously limited to African Americans.[56]

Since the 1975 reauthorization, the Latino community in California has achieved numerous significant victories in challenging redistricting violations of the VRA in particular, opening up significant governing bodies in local government to Latino elected leaders selected by Latino voters.[57] Based upon the growth and concentration of the Latino population in the west, particularly in California, there was significant potential for gains in equal representation for Latinos following the 1970 Census. The ten-year gap between the original VRA and its amendment to cover Latinos thus had a suppressive effect on potential gains in equal representation in the west for the Latino community. Without the VRA, Latinos were limited to constitutional claims of intentional racial discrimination in voting.[58]

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[52] *See* Serrano v. Priest (Serrano I), 5 Cal.3d 584, 596 n.11, 608-10 (1971).

[53] According to the California Department of Education, in the 2021-22 school year, Latinos comprised about 56 percent of all public school students from Kindergarten to 12th grade (3.3 million Latino students out of 5.9 million total). *See* Cal. Dept. of Ed., 2021-22 Enrollment by Ethnicity and Grade, at https://dq.cde.ca.gov/dataquest/dqcensus/EnrEthGrd.aspx?cds=00&agglevel=state&year=2021-22.

[54] Section 4(e) in the original VRA prohibits the denial of the right to vote, on the basis of lack of English proficiency, to anyone educated in an American-flag school in which "the predominant classroom language was other than English." *See* VRA of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (1965).

[55] Of course, Latinos in the southwest and west faced extensive barriers to electoral participation. *See, e.g.,* Latino Amicus Brief in Gratz, *supra* note 36, 2003 WL 536740 at *15.

[56] *See* MALDEF in History, *MALDEF Successfully Pushed to Expand the Voting Rights Act to Language Minorities* (Mar. 19, 2020), https://www.maldef.org/2020/03/maldef-successfully-pushed-to-expand-the-voting-rights-act-to-language-minorities/.

[57] *See, e.g.,* Luna v. County of Kern, 291 F.Supp.3d 1088 (E.D. Cal. 2018) (holding that county board of supervisors violated Latino voting rights in failing to draw second Latino-majority district); Garza v. County of Los Angeles, 756 F. Supp. 1298 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) (holding that county board of supervisors violated Latino voting rights in failing to create first-ever Latino-majority district); Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989) (holding that at-large elections system for city council violates Latino voting rights). *But see* Cano v. Davis, 211 F. Supp. 2d 1208 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003) (three-judge panel rejecting claims that congressional and legislative redistricting violate Latino voting rights).

[58] Of course, the suppressive harm from the ten-year Latino coverage gap was attenuated by lingering questions about whether the VRA itself, parallel with the Constitution, required proof of racial intent. Those questions

A final note on the post-*Brown* period and the role of Latinos in the west relates to the beginnings of Supreme Court retrenchment on civil rights. While the Warren Burger Court had already begun to slow down and even reverse on civil rights issues,[59] many would assert that one of the first and most disappointing indications of the approaching end of the Supreme Court's civil rights era came in the 1978 *Bakke* decision.[60] Because the earlier *DeFunis* case resulted in no decision on the merits,[61] the *Bakke* case became the Supreme Court's first opportunity to address the developing jurisprudential backlash against post-*Brown* civil rights progress in the form of claims of "reverse discrimination" against whites, a theory that continues to manifest in the federal courts today.[62]

In *Bakke*, addressing a special admissions program at the University of California at Davis medical school, the Court, through a split set of plurality opinions and the deciding opinion of Justice Lewis Powell, effectively held that quotas or set-asides are not legally permissible, but that limited consideration of race as one element in a comprehensive review of each applicant is allowed.[63] For purposes here, two circumstances warrant note. First, although the media has consistently presented challenges to affirmative action admissions programs as primarily of concern to Blacks -- even as the cases and national demography indicate a greater impact on Latinos -- in this first Supreme Court affirmative-action case, the admissions program challenged in *Bakke* had benefitted more Chicanos than Blacks. The data set forth in the case showed that 30 Chicanos had been admitted under the special admissions program in the classes of 1971 through 1974, while only 21 Blacks had been admitted through the program.[64]

Second, and perhaps more important, the *Bakke* case came to the U.S. Supreme Court from the California Supreme Court, which had taken an even more conservative position than deciding Justice Powell. The California court not only overturned the special admission program, but also barred any

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limited the success of the VRA for Blacks in the law's initial years. The issue was not fully resolved until the 1982 VRA amendments and the subsequent 1986 Supreme Court interpretation of them. *Cf.* City of Mobile v. Bolden, 446 U.S. 55, 61 (1980) (plurality op.) (VRA section 2 is co-extensive with Fifteenth Amendment, which requires racial intent) *with* Thornburg v. Gingles, 478 U.S. 30, 43-44 (1986) (recognizing 1982 amendments' rejection of intent test for VRA). Nonetheless, the Latino community's involvement in resolving those interpretive questions was limited by its exclusion from the original VRA.

[59] In the civil rights realm, there is a very convincing argument that *Washington v. Davis*, establishing the "intent doctrine" under the U.S. Constitution, represents the most significant retrenchment, with the longest-lasting deleterious impact. *See* 426 U.S. 229 (1976) (holding that it was plain error not to require showing of racial intent to prove violation of Constitution).

[60] Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).

[61] DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam) (holding challenge to law school admissions program moot). The *DeFunis* case also came out of the west: it involved a challenge to an affirmative action program in admissions to the University of Washington law school. Like *Bakke*, the case came to the U.S. Supreme Court from the state supreme court. In *DeFunis*, the Washington Supreme Court had upheld the law school admissions program against the constitutional challenge. DeFunis v. Odegaard, 82 Wash. 2d 11 (1973).

[62] In the current 2022-23 term, the Supreme Court considers two cases challenging admissions programs as race-conscious and violative of federal law. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 142 S.Ct. 895 (Mem.) (Jan. 24, 2022) (granting certiorari); Students for Fair Admissions, Inc. v. University of North Carolina, 142 S. Ct. 896 (Mem.) (Jan. 24, 2022) (granting certiorari).

[63] *See* 438 U.S. at 269 (Powell, J.) (explaining split outcome and differing set of five justices on each issue).

[64] *Id.* at 275 & n.6. Adding the class of 1970 shows 33 Chicanos and 26 Blacks admitted through the program over five years. *See id.* (chart in footnote).

consideration of race in admissions to the Davis medical school.[65] There was only one dissent in the California Supreme Court[66] from a decision that could have immediately eliminated race-conscious admissions in California public universities, with swift and devastating effect on Latinos, but for the U.S. Supreme Court's partial reversal. Thus, the *Bakke* case was perhaps an early indicator of California's pivot against Latino civil rights, in contrast to its more progressive role in the pre-*Brown* era.

Civil Rights Retrenchment in the Reagan Era

Perhaps unsurprisingly, three of the six California Supreme Court justices in the majority in *Bakke* were appointed by conservative Governor Ronald Reagan, who would soon become the only western governor to ever attain the office of president. Even more conservative as president than as governor, Reagan's inauguration in 1981 marked the beginning nationally of further retrenchment and backlash against civil rights, with appointments to positions enforcing civil rights who viewed "reverse discrimination" as a greater threat.[67] California followed the conservative nationwide trend, narrowly electing a conservative Republican governor in 1982 over a Black Democrat who was leading in the polls through election day,[68] and electing a future conservative governor to the U.S. Senate, defeating an outgoing progressive state governor.[69] Still, with Reagan and many of his leading advisors from California transplanted to the nation's capital, the west and California did not have particularly significant, independent developments during this period, at least with regard to Latino civil rights, with only a few exceptions.

For purposes here, the rise and success of anti-immigrant lawmaking, focused on the Mexican and Central American immigrant community, and Latino community challenges to such lawmaking are of note. In this era, such lawmaking came in the form of exclusionary "official English" measures. Proposition 63, an initiative qualified for the ballot by elector signatures, appeared on the November 4, 1986 California ballot. The initiative proposed a state constitutional amendment to establish English as the state's official language. Despite many in the Latino community perceiving it as racially-motivated, the proposition passed overwhelmingly, with over 73 percent voting in favor.[70] The argument in support of Proposition 63 in the official California ballot pamphlet was signed by former U.S. Senator S.I.

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[65] *Id.* at 270 (Powell, J.) ("The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant.").

[66] Bakke v. Regents of the Univ. of Calif., 18 Cal. 3d 34, 64 (1976) (Tobriner, J., dissenting).

[67] For example, the appointment of William Bradford Reynolds to head the Civil Rights Division at the Department of Justice was controversial throughout Reagan's tenure. *See, e.g.,* Juan Williams, *In His Mind but Not in His Heart*, Wash. Post, Jan. 10, 1988, (quoting former Attorney General Nicholas DeB. Katzenbach describing Reynolds: "Rights for Americans seems to him to mean rights for white males."); Philip J. Garcia, *Assistant Attorney General William Bradford Reynolds, the Justice Department's Controversial Civil Rights Chief, Resigned Wednesday Effective Dec. 9*, UPI Archives, Nov. 9, 1988, https://www.upi.com/Archives/1988/11/09/Assistant-Attorney-General-William-Bradford-Reynolds-the-Justice-Departments/2764595054800/ (Reynolds "led the Reagan administration's assault on affirmative action and busing").

[68] Los Angeles Mayor Tom Bradley's narrow loss has led to debate on the "Bradley effect," a theory positing that some white voters misled pollsters about plans to support Bradley only to succumb to racism in casting their actual votes. *See* Ballotpedia, *Index of Terms – Bradley Effect*, https://ballotpedia.org/Bradley_effect.

[69] San Diego Mayor Pete Wilson handily defeated outgoing governor, Jerry Brown, to succeed Senator S.I. Hayakawa.

[70] *See* Michael D. Myers, A Study of California Initiatives, 1976-1986 (Rose Institute, 1988) at 15 (table of results), available at http://roseinstitute.org/wp-content/uploads/2016/06/A-Study-of-California-Initiatives-1976-1986.pdf.

Hayakawa,[71] a cofounder, with known anti-immigrant and anti-Latino activist John Tanton,[72] of the national lobbying organization for such laws, U.S. English.

In 1984, even prior to the enactment of Proposition 63, a Latina deputy court clerk challenged her employer's imposition of a rule barring employees from speaking any language other than English except when interpreting for a member of the public.[73] Among other contentions, the employer subsequently defended its rule as mandated by Proposition 63's addition of Article III, section 6 to the state constitution.[74] In 1988, the federal Ninth Circuit Court of Appeals rejected the defense, concluding that "[w]hile section 6 may conceivably have some concrete application . . . if and when the measure is appropriately implemented by the state legislature, it appears otherwise to be primarily a symbolic statement concerning the importance of preserving, protecting, and strengthening the English language."[75] Although the decision was ultimately vacated as moot, the threat of Proposition 63, in the absence of legislative implementation, was largely eliminated through litigation by a member of the Latino community.

Two years after California enacted Proposition 63, the neighboring state of Arizona enacted its own "official English" voter initiative, Proposition 106, at the November 8, 1988 election. The constitutional provision, Article XXVIII, added to Arizona's constitution was more explicit in its prohibitions than California's predecessor; it also barely passed with 50.5 percent of the vote in contrast to the electoral landslide in California.[76] Arizona's law was almost immediately challenged in court, also by a Latina state employee, soon joined by a Latino state legislator.[77] The federal court rejected state-proffered limiting constructions, and struck down the law as a violation of the First Amendment's protection of free speech.[78]

The successful challenge by a member of the Arizona Latino community endured a tortured appellate history, and the district court ruling was ultimately vacated by the U.S. Supreme Court as moot. Following that federal-court history, a coalition of Latino elected officials, teachers, and state employees challenged the proposition in state court, and through that action, the Arizona Supreme Court ultimately also rejected proffered limiting constructions and, like the federal court, struck the state constitutional provision as a violation of the First Amendment.[79]

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[71] *See* California Sec'y of State, *California Ballot Pamphlet, General Election, November 4, 1986*, at 46, available at https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1970&context=ca_ballot_props.

[72] *See, e.g.,* Linda Chavez, *When Humans Are Seen as Pollutants*, The Bulwark, Aug. 9, 2019 (describing experience with U.S. English and discovery of racist Tanton memorandum).

[73] *See* Gutierrez v. Municipal Ct. of Southeast Jud. Dist., Los Angeles County, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

[74] *See id.* at 1041-44.

[75] *Id.* at 1044.

[76] *See* Arizona Sec'y of State, *State of Arizona Official Canvass – General Election – November 8, 1988*, at 12, https://azsos.gov/sites/default/files/canvass1988ge.pdf.

[77] *See* Yniguez v, Mofford, 730 F.Supp. 309 (D. Ariz. 1990), *aff'd,* 69 F.3d 920 (9th Cir. 1995) (en banc), *vacated as moot,* 520 U.S. 43 (1997).

[78] *See id.* at 313-16.

[79] *See* Ruiz v. Hull, 191 Ariz. 441 (1998).

In both Arizona and California, this experience with "official English" voter initiatives, and the Latino community's efforts to litigate and block or limit these laws, forms an important backdrop to what was to come, especially as such laws embody discomfort with increased immigrant presence and concern about how that presence might change society. In effect, these laws mark early Latino community confrontation of demographic fear as a threat to Latino civil rights.

California's Notorious Nineties

The early 1990s were an era of extreme anti-immigrant sentiment in California. The unprecedented growth of the Latino community -- which had reached 26 percent of California's total population according to the 1990 Census and would increase through the 1990s to 32 percent in 2000[80] -- almost certainly played some role in this backlash against immigration to the Golden State. The state legislature took up many bills that seemed to target undocumented immigrants.[81] The political tenor of the times even led Latino Democratic legislators to hop on the anti-immigrant bandwagon, which they justified as necessary to avoid the enactment of even more extreme laws. Local policymaking was also infected by the prevailing political ethos; numerous localities, even those with Democratic majorities, adopted ordinances targeting day laborers, with testimony focused on the presumed immigration status of the day laborers, and following efforts by the right-wing FAIR (Federation for American Immigration Reform) to promote such ordinances nationwide.[82]

In this context, an extreme anti-immigrant voter proposal called by its proponents the "Save Our State" initiative, qualified for the ballot of November 8, 1994. Much has been written about Proposition 187, especially following commemorations a few years ago of its 25th anniversary.[83] Not only have many recognized the initiative's impact on California politics – catalyzing greater Latino civic participation and seeding a dramatic change in prevailing politics of the state overall -- but much has also been written about how racially divisive the campaign for Proposition 187, which was seized upon by the previously moderate Governor Pete Wilson to secure his reelection, ended up being.[84] For purposes here, given how widely renowned Proposition 187 is, there are a few elements of this oft-recounted story that are important to emphasize.

First, in the end, the final vote on the proposition demonstrated the racial division of the campaign. According to the L.A. Times exit poll, over three quarters of Latino voters opposed Proposition 187, and a bare majority of Black voters and of Asian American voters joined them in voting

[80] *See* Census Bureau, *1990 Census of Population General Population Characteristics California Section 1 of 3*, at 25 (Table 3) (1992); Census Bureau, *California: 2000 Summary Population and Housing Characteristics,* at 73 (Table 3) (2002).
[81] *See* Eric Bailey & Dan Morain, *Anti-Immigration Bills Flood Legislature*, L.A. Times, May 3, 1993.
[82] *See* Thomas A. Saenz, *Recollections of the Legal Battle Against Proposition 187*, 53 U.C. Davis L. Rev. 2021, 2025 (2020); Thomas A. Saenz, *One Advocate's Road Map to a Civil Rights Law for the Next Half Century: Lesson from the Latino Civil Rights Experience*, 38 N.Y.U. Rev. L. & Social Change 607, 608 & n.5 (2014).
[83] *See, e.g.,* California Secretary of State, *25 Years After the Passage of Prop 187, Secretary of State Alex Padilla Launches Digital Exhibit on Impact of Prop 187*, available at https://www.sos.ca.gov/administration/news-releases-and-advisories/2019-news-releases-and-advisories/25-years-after-passage-prop-187-secretary-state-alex-padilla-launches-digital-exhibit-impact-prop-187..
[84] *See, e.g.,* Thomas A. Saenz*, A New Nullification: Arizona's S.B. 1070 Triggers a National Constitutional Crisis,* 21 Berkeley La Raza L.J. 5, 9 (2011).

against the initiative.[85] Nonetheless, the initiative passed with 59 percent of the vote,[86] meaning that the much larger white vote alone secured passage of the law. On its face, this presented a clear challenge in the form of a California white community uncomfortable with demographic change -- overwhelmingly emanating from the Latino community, but also including other racial minorities – and demonstrating that discomfort through votes.

Second, the provisions of the initiative were sweeping in scope. They applied, through different sections, to law enforcement, public social services, health care, elementary and secondary education, and higher education, and the law would have required public servants to follow a drill of attempting to verify status, determining reasonable suspicion of undocumented status, denying services to those suspected, notifying those suspected to leave the state, and reporting those suspected to state and federal authorities.[87]

Third, the initiative itself, with the sole exception of two minor penal code provisions, never took effect. Latinos and others successfully challenged the provisions of the law in federal and state court. The federal court relied on the Supremacy Clause and federal preemption as the sole ground for striking most of the law.[88] State courts relied on other claims to strike the education provisions of the initiative.[89] Despite success on plaintiffs' part from the very day after enactment, Governor Wilson fought tenaciously in court to salvage Proposition 187, including initiating litigation against some of the federal plaintiffs in state court to try to secure declaratory relief to interpret the law to allow implementation of the initiative despite a federal court order barring it.[90] His tenacious misuse of the courts spun off into other cases. For example, following the enactment of Proposition 187, Wilson had the state of California sue the federal government for failing to adequately stop undocumented immigration; the claims included violation of the Constitution's Invasion Clause, which addresses protection against military invasion, and violation of the Guarantee Clause, ensuring the state a republican form of government.[91]

Fourth, even despite the losses in court, Proposition 187 had a negative effect far beyond the state itself. Though the proponents had ambitions of replicating the initiative in other states, that really did not occur.[92] Indeed, it was largely unnecessary because significant elements of the initiative were

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[85] *See* Daniel M. Weintraub, Crime, *Immigration Issues Helped Wilson, Poll Finds*, L.A. Times, Nov. 9, 1994 ("Proposition 187 . . . failed 78% to 22% among Latinos, 54% to 46% among Asian Americans and 56% to 44% among blacks.).

[86] *See* California Sec'y of State, *Statement of Vote -- General Election, November 8, 1994*, at xxv, 111, https://elections.cdn.sos.ca.gov/sov/1994-general/sov-complete.pdf.

[87] *See* League of United Latin American Citizens v. Wilson, 908 F.Supp. 755, 764-65 (C.D. Cal. 1995) (describing types of provisions in law); Saenz, *A New Nullification*, *supra* note 84, 21 Berkeley La Raza L.J. at 9-10.

[88] *See* League of United Latin American Citizens v. Wilson, 997 F.Supp. 1244 (C.D. Cal. 1997). The federal district court initially concluded that preemption also applied to the section barring undocumented immigrants' attendance at public elementary and secondary school because it was inconsistent with *Plyler v. Doe*, an equal protection decision. *See* 908 F. Supp. at 774 ("section 7 in its entirety conflicts with and is therefore preempted by federal law").

[89] *See* Saenz, *Recollections*, *supra* note 82, 53 U.C. Davis L. Rev. at 2030 (noting state and federal-court cases).

[90] *See* Wilson v. City of San Jose, 111 F.3d 688, 690 (9th Cir. 1997) (recounting case history).

[91] *See* State of California v. United States, 104 F.3d 1086 (9th Cir. 1997).

[92] In some ways, Proposition 200 in Arizona, enacted in 2004, is a replication of Proposition 187. *See* discussion below.

enacted through federal law, with nationwide application. Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, also known as the welfare reform act, established clear prohibitions on undocumented immigrants' receipt of federally-funded benefits and established a presumption against eligibility for state-funded benefits as well.[93] Indeed, the passage of the law secured the ultimate legal victory against Proposition 187 because the new federal law bolstered the federal preemption of California's law.[94]

Finally, the enactment of bad federal law was not the only legacy or export from Proposition 187. The demographic fear – fear of the growth of the Latino community and how it might change California society in unknown ways – that supported Proposition 187 among many white voters has plainly spread to other parts of the country and to the nation as a whole. Just as Pete Wilson exploited that demographic fear to his own political advantage, others have attempted to do the same. Most recently, of course, Donald Trump launched his presidential campaign in June 2015 with a slanderous and unsupported attack on Mexican immigrants, doubled down on that attack a year later by accusing a federal judge of bias simply because he is Mexican American (reinforcing the threat from Latinos becoming integrated and successful in U.S. society), and really built much of his campaign around unspoken fears of the growth of the Latino community.

In current national politics, there is now much discussion of the so-called "replacement theory" and its role in the rhetoric of some political leaders. Although the theory itself comes from Europe, a clear precursor of the theory lies in the campaign around Proposition 187, and particularly the proponents' frequent assertion that the existence of a "reconquista conspiracy" was an important reason to enact Proposition 187 as a message to the federal government to counter the conspiracy. The "reconquista conspiracy" was a theorized attempt by Mexico and its descendants to take over the portions of the United States ceded at the end of the nineteenth century United States-Mexico War and to return the territory ultimately to Mexico. While hearing this theory in open debate espoused by some of the less sophisticated leaders of the initiative campaign was perhaps unsurprising, even Governor Wilson adopted a somewhat sanitized version of the conspiracy in his lawsuit against the United States, likening undocumented immigration to a military invasion of California.

Had the proponents of Proposition 187 been aware of "replacement theory" at the time, they might well have embraced it over "reconquista conspiracy" because the former takes agency from the Latino community and places it in the hands of traitorous whites, reinforcing Mexican American inferiority while demonizing whites viewed as undesirable.[95] In any event, the exploitation of demographic fear of the growth of the Latino community stands as perhaps the clearest and most impactful of the exported legacies of California's Proposition 187. The state and its Latino population would continue to see related challenges as the notorious nineties proceeded.

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[93] *See* Pub. L. No. 104-193, Ti. IV, 110 Stat. 2105, 2260 *et seq.* (1996).

[94] *See* League of United Latin American Citizens, 997 F.Supp. 1244 (C.D. Cal. 1997) (discussing effects of welfare reform act on conclusions re preemption of initiative); *see also* Saenz, *Recollections*, *supra* note 82, 53 U.C. Davis L. Rev. at 2039-40.

[95] *See* Jean Guerrero*, Column: Here's How Fox News' White Supremacist Propaganda Can Be Stopped*, L.A. Times, Aug. 12, 2021 ("[t]he "reconquista" fiction has now morphed into the "replacement" hysteria— but this time, it also wraps in virulent antisemitism").

Only two years after the troubling Proposition 187 election, California's voters faced another racially divisive initiative and campaign surrounding Proposition 209 on the November 1996 general election ballot. Proposition 209 was a precedent-setting ban on affirmative action in public education, employment, and contracting. Deceptively named the California Civil Rights Initiative, the ballot measure would add a short paragraph to the state constitution that misleadingly and redundantly banned discrimination -- already clearly prohibited by the constitution -- and "preferential treatment" on the basis of race, sex, color, ethnicity or national origin.[96] Although the initiative originated with two disgruntled academics, Glynn Custred and Thomas Wood, the campaign was actually led by gubernatorial appointee Ward Connerly, with overweening support from Governor Pete Wilson.[97]

While the mainstream media have consistently portrayed efforts to eliminate affirmative action, especially in university admissions, as targeted at the Black community, in the context of California in the mid-1990s, Proposition 209 is more accurately seen as an anti-Latino measure. As noted above, as far back as the *Bakke* case, university affirmative action in California benefitted more Latinos than Blacks, and population changes by 1996 made that likelihood even more stark. During the school year when Proposition 209 was passed, Latinos comprised 36.4 percent of all public high school students in California, while Blacks made up only 8.5 percent of public high school students.[98] Wilson's strong support for Proposition 209 only two years after his demonization of Latinos and his exploitation of demographic growth of Latinos also suggest a Latino focus for the 1996 initiative. Moreover, Connerly has sometimes betrayed a specific concern about California Latinos,[99] and more recently articulated some troubling views about whether Latinos warrant recognition as racial minorities at all.[100]

Connerly effectively launched the debate around Proposition 209 and the elimination of affirmative action by proposing and leading a campaign for two resolutions to eliminate affirmative action in admissions, contracting and employment at the University of California.[101] Wilson had

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[96] Cal Const. art. I, § 31.

[97] *See* Lydia Chavez, The Color Bind: California's Battle to End Affirmative Action 2 ("Wilson's use of Proposition 187 became a blueprint for those looking to attract these voters. Immigration and Proposition 187 had worked in 1994. What issue and initiative would work in 1996? Enter Glynn Custred and Thomas E. Wood, two San Francisco Bay Area academics."); *see generally id.* (detailing Wilson-led use of Prop. 209 for partisan purposes).

[98] Calculated from data in Calif. Dept. of Education, *1996-97 Statewide Enrollment by Ethnicity and Grade*, at https://dq.cde.ca.gov/dataquest/StEnrAll.asp?cChoice=StEnrAll&cYear=1996-.97&cLevel=State&cTopic=Enrollment&myTimeFrame=S.

[99] *See, e.g.,* Generation Progress, *Ward Connerly – Quotes*, https://genprogress.org/ward-connerly/ (quote from July 8, 2003: "In California, this is no longer about race … It's about ethnicity, and those of Mexican descent will soon be a majority … They don't want to see those categories go … They want to see affirmative action policies remain so they can take advantage of them. They want to claim minority status when, in fact, they will soon be a majority in California. They want to hide behind the term 'Latino' and 'people of color,' but most of them check the 'white' box [on the census form] anyway."); Barry Bearak, *Questions of Race Run Deep for Foe of Preferences*, N.Y.Times, Jul. 27, 1997 ("Racism does ''not justify our government giving a preference to Jose over Chang because Susan's father discriminated against Willie's father 50 years ago,' Mr. Connerly said, summing up his thoughts.").

[100] *See* Thomas Peele, Ward Connerly: Anti-Affirmative Action Leader Calls Proposition 16 Effort to 'Reshape' Power in California, EdSource, Oct. 28, 2020 (Connerly: "When we say Latino, I can find any number of Latinos who are as white as anyone on the planet. They may have more vowels in their last name than others. If there are a lot of those, do they count as white or Latino?"); *see also* Genoa Barrow, *Ward Connerly Talks Affirmative Action, Contracting and Black Lives Matter*, Sacramento Observer, Sept. 11, 2020 (Connerly: "There are Latinos that are White guys, but are Latino.").

[101] *See* Lydia Chavez, The Color Bind 57-67.

appointed Connerly to the U.C. Board of Regents, and the media attention paid to the U.C. resolutions sparked public debate leading up to the November 1996 election, and placed the focus on U.C. admissions, where Latinos comprised the group with the greatest numbers at stake in the potential elimination of affirmative action.

In the end, the vote on Proposition 209 demonstrated opposition from the three numerically significant racial minority groups in the state, but, as with Proposition 187, white voters in their higher numbers effectively enacted the proposition, which drew a total statewide vote of 55 percent in favor.[102] Perhaps reflecting recognition of the main target of the initiative, Latinos had the highest "No" vote at 74 percent, according to the L.A. Times exit poll, followed closely by Black voters at 72 percent and by Asian American voters at 61 percent in opposition.[103] In percentages even more significant than with Proposition 187, California's voters of color overwhelmingly rejected Proposition 209, but saw it enacted and implemented nonetheless.

Further establishing Wilson's strong commitment to Proposition 209, perhaps to bolster his short-lived presidential campaign in 1996,[104] and reinforcing the through line from his advocacy of the plainly anti-Latino Proposition 187 to the anti-affirmative action initiative, Wilson again aggressively used the courts to secure implementation and to establish his leadership on the issue.[105] In litigation even more surreal than when he had the state sue the federal government for a violation of the Invasion Clause, Wilson effectively sued himself to implement Proposition 209. In his capacity as governor, even before Proposition 209 was enacted, Wilson filed a lawsuit against a number of subordinate state agencies to force them to stop implementing state laws that he deemed unconstitutional. When he continued his case after the initiative's enactment, Wilson asserted that the challenged statutes violated the ban on race-based "preferential treatment."[106] Connerly later intervened as a taxpayer plaintiff to continue the litigation after Wilson left office.[107]

Unlike Proposition 187 and its embrace by Congress, the California precedent in Proposition 209 was not incorporated into federal law; instead, Connerly endeavored to replicate the initiative in other states. Initially, he found success in another western state, Washington, which enacted its affirmative-

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[102] *See* California Sec'y of State, *Statement of Vote, November 5, 1996*, at xiii, 36, available at https://elections.cdn.sos.ca.gov/sov/1996-general/sov-complete.pdf.

[103] *See* Los Angeles Times Poll, Study #389, Exit Poll: The General Election, November 5, 1996 at 6, available at https://ca-times.brightspotcdn.com/08/c3/82a8919e4b098f2301898b647ed1/43120439.pdf. The Latino number was a dramatic reversal from early indications of high support for the confusing proposition. *See* Lydia Chavez, The Color Bind 152 (citing June 1996 L.A. Times poll of Los Angeles city voters showing 68 percent support among Latinos).

[104] *See* Robert Pear, *In California, Foes of Affirmative Action See a New Day*, N.Y. Times, Nov. 7, 1996 ("Bob Dole had endorsed the California measure, and Mr. Wilson had hoped to use it to mobilize support for Republicans in the election."); Lydia Chavez, The Color Bind 56 ("when the governor decided to make it an issue, it became a central part of his [presidential] campaign"); 69 ("Alas, for Wilson, all of this excitement about CCRI and affirmative action as a powerful presidential issue was short-lived" as his campaign ended in Sept. 1995).

[105] *See* Dave Lesher, *Wilson Urges Legislature to Act on Prop. 209*, L.A. Times, Sept. 10, 1997 (recounting Wilson lawsuit against five state statutes and his identification of 25 additional statutes he believed to violate Proposition 209).

[106] *See* Connerly v. State Pers. Bd., 37 Cal.4th 1149, 1173-74 (2006) (reciting background of case in ruling on attorney's fees); Connerly v. State Pers. Bd., 92 Cal. App. 4th 16, 27 (3rd Dist. 2001) (litigation "commenced by Governor Pete Wilson in his official capacity as Governor").

[107] *See id.*

action ban in 1998.[108] Replication also succeeded in Michigan and other states, but Connerly met a narrow electoral defeat in Colorado, a state with a significant Latino population, in 2008.[109] Notably, the most recent voter enactment replicating Proposition 209 came in 2010 in the western state of Arizona with its large and growing Latino populace.[110] Consistent with other regressive and anti-Latino measures enacted in Arizona in 2020, Proposition 107 was not an initiative by voters, as California's Proposition 209 was, but was a state constitutional amendment placed on the ballot by the Arizona legislature.[111] Connerly, as well as the legislators who authored the anti-immigrant S.B. 1070 and the ethnic studies ban, submitted arguments in favor of Proposition 107 for the official ballot pamphlet.[112]

The later follow-up in California was also disappointing. With a changed electorate and politics in California, there were frequent discussions in progressive circles about placing a measure on the ballot to repeal Proposition 209. Indeed, a Latino state senator put forward a proposal in 2013, but the effort was derailed by perceptions that the Asian American community would strongly oppose.[113] Late in the legislative session in 2020, a measure was placed on the ballot to repeal Proposition 209 in its entirety. Proposition 16,[114] the repeal measure, faced numerous challenges, from late placement on the ballot to pandemic restrictions on traditional campaigning to a crowded ballot with several well-funded propositions buying up advertising time.[115] Thus, Proposition 16 failed to pass in the November 2020 election, with only 43 percent of voters supporting the repeal measure.[116]

There is a strong argument that, even at the national level, the backlash against race-conscious affirmative action has been particularly about the large and growing Latino community. The case for such a focus in California is particularly strong, making Proposition 209, after Proposition 187, the second voter initiative in just two years targeting the Latino community in particular, championed by conservative political leaders, and producing a strongly racially-polarized vote at the polls. But California Latinos still faced one more similar threat from voter measure in the 1990s.

In the primary election of 1998, California voters confronted yet another ballot initiative, Proposition 227, targeted primarily at the Latino community. This measure, dubbed the "English for the

[108] Notably, a Seattle Times poll suggested that Washington Initiative 200 was viewed as more of an attempt to reform, rather than eliminate, affirmative action. *See* Tom Brune, *Poll: I-200 Passage Was Call for Reform*, Seattle Times, Nov. 4, 1998.

[109] *See* Naomi Zeveloff*, BREAKING: Amendment 46 Shot Down*, Colorado Independent, Nov. 6, 2008 (50.6 percent vote against); *see also* Naomi Zeveloff, *After Colorado Loss, Ward Connerly May Pull the Plug on Affirmative-Action Bans*, Colorado Indep., Nov. 7, 2008 (noting successful past replications).

[110] *See* Scott Jaschik, *Arizona Bans Affirmative Action*, Inside Higher Ed., Nov. 3, 2010.

[111] *See* Peter Schmidt, *Arizona Lawmakers Agree to Put on Ballot a Proposed Ban on Affirmative-Action Preferences*, Chronicle of Higher Educ., June 22, 2009.

[112] *See* Arizona Sec'y of State, *General Election November 2,2010 Ballot Propositions and Judicial Performance Review Publicity Pamphlet* at 34-35, https://apps.azsos.gov/election/2010/Info/PubPamphlet/english/e-book.pdf (arguments in support of Proposition 107 by Connerly, Steve Montenegro, and Russell Pearce).

[113] *See* Katy Murphy, *California Asian-Americans Show Strength in Blocking Affirmative Action Revival*, Mercury News, Mar. 17, 2014; Laurel Rosenhall, *California Lawmakers Shelve Effort to Bring Back Affirmative Actio*n, Sacramento Bee, Mar. 17, 2014.

[114] In full disclosure, the author was a co-chair of the campaign to pass Proposition 16.

[115] *See* Phil Willon &Teresa Watanabe, *Why Affirmative Action Measure Failed in California*, L.A. Times, Nov. 4, 2020.

[116] *See* California Sec'y of State, *Statement of Vote, General Election, November 3, 2020*, at 14, 60, https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf.

Children" initiative by proponents, but popularly known as the Unz initiative after its chief proponent and financier, Silicon Valley entrepreneur Ron Unz, was even more explicit than Propositions 187 and 209 in focusing on Latinos in the policy being proposed. Indeed, the official ballot pamphlet argument and rebuttal in support of Proposition 227 expressly capitalized "SPANISH-ONLY" in describing the education purportedly provided in the public school bilingual education programs that the initiative sought to eliminate.[117] The proponents, however, portrayed their focus on Latinos as amiable, designed to benefit Latino families, even if their rhetoric struck many in the Latino community as patronizing and discriminatory,[118] and even as their tactics would plainly appeal to any anti-immigrant, anti-Latino sentiment among white voters,[119] who still formed a hefty majority of the California electorate.

In fact, Unz had opposed Proposition 187 fours years before,[120] and he recruited to the Proposition 227 effort Sister Alice Callaghan, longtime non-profit director with a long history of serving Latino families in the skid row area of Los Angeles.[121] They then secured the active support of Jaime Escalante, a famous Latino math teacher in East Los Angeles, who was lionized in the 1988 feature film "Stand and Deliver" and who joined in signing the argument in support of Proposition 227 in the official Ballot pamphlet.[122] Nonetheless, with few other exceptions, most Latino community leaders opposed and organized against the initiative,[123] mainly because it would impose, in almost all circumstances, an unproven English-learner approach called "sheltered English immersion" with instruction virtually entirely in English, and imposed a presumptive limit on enrollment in that program of one year before

[117] *See* California Sec'y of State, *California Voter Information Guide, Primary Election, June 2, 1998*, at 34, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2165&context=ca_ballot_props; Argument in Support of Proposition 227, available in California Secretary of States archives at https://vigarchive.sos.ca.gov/1998/primary/propositions/227yesarg.htm.

[118] According to the L.A. Times exit poll, 32 percent of those voting "No" did so because they found the initiative discriminatory against non-English-speaking students. Mark Z. Barabak, *Fierce Governor's Race Draws Voters to Polls*, L.A. Times, June 3, 1998.

[119] The L.A Times exit poll found that 64 percent of Yes voters "did so because they believe that it is important to speak English if you live in the United States." *Id.* This suggests the significant voting effect of antipathy toward non-English speakers, most prominently Latinos, in California.

[120] "Most Californians view illegal immigrants as unwanted house guests. One very effective means of getting rid of such guests is to set your house on fire and burn it to the ground. This is Proposition 187's solution to illegal immigration." Ron Unz, L.A. Times, Oct. 3, 1994, republished at The Unz Review, https://www.unz.com/runz/against-prop-187/.

[121] *See* Patt Morrison, *Column: Alice Callaghan: Pushing Out the Homeless Isn't a Solution*, L.A. Times, July 15, 2015.

[122] Escalante was the sole signatory of the rebuttal argument in the ballot pamphlet, where he is identified as "East LA Calculus teacher portrayed in 'Stand and Deliver'". *See* Rebuttal to Argument against Proposition 227, available in California Sec'y of State archives at https://vigarchive.sos.ca.gov/1998/primary/propositions/227norbt.htm.

[123] "Latino community leaders, who were almost unanimous in their opposition to the initiative, said they had expected Latino voters to reject it." Nancy Cleeland, *O.C.'s Latino Precincts Voted Strongly Against Proposition 227*, L.A. Times, Jun. 5, 1998. *See also* Sharon Pinkerton, *Poll Analysis: Bilingual Education Initiative Attracts Broad-Based Support*, L.A. Times, Apr. 13, 1998 (noting contrast between pre-election poll support from half of Latino voters and leadership: "virtually all Latino leaders up and down the state oppose Prop. 227.").

mainstreaming.[124] Some have characterized Proposition 227 as essentially an "English-only" rule for public education.[125]

In the end, Latino voters did not support the purportedly Latino-friendly Proposition 227, with 63 percent voting against Proposition 227, according to the L.A. Times/CNN exit poll.[126] Despite such significant opposition from Latino voters, Proposition 227 passed with 61 percent of the statewide vote.[127] Because the state constitution then required the initiative to be implemented the day after the election and because the fall school term was rapidly approaching, civil rights groups filed an immediate legal challenge.[128] The challenge raised constitutional and statutory claims, including a claim under the EEOA. In mid-July, with oral argument having just concluded moments before, Judge Charles Legge read in open court his decision denying a preliminary injunction.[129] Initially, the court concluded that it could not "discern from the face of Proposition 227 any hidden agenda of racial or national origin discrimination against any group."[130] In addition, plaintiffs had to rely on a weakly-interpreted EEOA, the most direct federal statute protecting the rights of English learners, and the judge concluded that plaintiffs could not show that the initiative would violate the EEOA in all circumstances.[131]

Following a bench trial with a ruling against plaintiffs, the challenge went up on appeal. The only issue presented was a constitutional equal protection claim.[132] In something of a reversal of the pattern described above in the pre-*Brown* era, in the case against Proposition 227 case, the California-based federal courts anticipated a future regression in civil rights protections. The Ninth Circuit rejected the "political structure equal protection" doctrine several years before the Supreme Court did the same. That doctrine, derived from two Supreme Court decisions addressing housing discrimination and busing to desegregate schools,[133] subjected to strict scrutiny any restructuring of the policymaking process, such as requiring a popular vote, targeted at an issue of a "racial nature" – an issue that "at bottom inures primarily to the benefit of the minority, and is designed for that purpose."[134]

Yet, while the issue of bilingual education and the Latino community would seem squarely to fit this definition, the Ninth Circuit upheld Proposition 227 by holding that "reallocation of political decision

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[124] Cal. Prop. 227, § 1 ("Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year.").
[125] In full disclosure, as MALDEF regional counsel in Los Angeles at the time, the author was involved in the campaign against Proposition 227, and has generally characterized it in this way since that time.
[126] *See* Keating Holland, *Union Voters Contributed to Davis' Victory,* CNN, June 2, 1998.
[127] *See* California Sec'y of State, *Statement of Vote, Primary Election, June 2, 1998*, at viii, 86, https://elections.cdn.sos.ca.gov//sov/1998-primary/1998-sov-primary.pdf.
[128] In full disclosure, the author was one of the lead counsel in this challenge, and presented the oral argument (together with a co-counsel) in district court in support of the motion for a preliminary injunction.
[129] *See* Valeria G. v. Wilson, 12 F.Supp.2d 1007 (N.D. Cal. 1998) (order denying preliminary injunction).
[130] *Id.* at 1014. *Cf.* Kevin R. Johnson & George A. Martinez, Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education, 33 U.C. Davis L. Rev. 1227 (2000) (arguing that Proposition 227 violates racial discrimination ban in equal protection clause).
[131] *See id.* at 1016-17 (noting that "[t]he EEOA does not define what is 'appropriate action,' or provide criteria to evaluate whether a particular educational system constitutes 'appropriate action.').
[132] Valeria G. v. Davis, 307 F.3d 1036 (9th Cir. 2002). The author argued the case in the Ninth Circuit.
[133] *See* Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982) (striking down statewide initiative banning mandatory busing for desegregation); Hunter v. Erickson, 393 U.S. 385 (1969) (striking down city charter amendment requiring fair housing ordinances to be approved by voters).
[134] *See* Washington, 458 U.S. at 470, 472; *see generally id.* at 467-73.

making violates equal protection only when there is evidence of purposeful racial discrimination."[135] Even though it did not explicitly indicate it was doing so, the circuit opinion effectively ended "political structure equal protection" doctrine because purposeful racial discrimination already triggers strict scrutiny under conventional equal protection analysis.[136] The court's tacit elimination of the doctrine presaged what the Supreme Court would do a dozen years later in the case of *Schuette v. BAMN*.[137] Coincidentally, this effective nationwide ending of the "political structure equal protection" doctrine came in a case upholding a Michigan ban on affirmative action modelled directly on California's Proposition 209.[138]

Like its predecessor initiatives, Proposition 227 also had impact outside of California through the introduction and enactment of copycat versions of the law.[139] Specifically of import here, the state of Arizona enacted Proposition 203, derived from California's Proposition 227, almost two and a half years later in November 2000. In Arizona, the voter initiative passed with 63 percent of the vote, the same as in California.[140] In Arizona, however, the effort was led by Latinos who had been active in education reform efforts, and their explicit focus on "Hispanic children" in the ballot pamphlet argument may have been received differently than it was from the leaders of the effort in California.[141]

Neither of the English-only education initiatives in the west fared well in the long run. California voters repealed Proposition 227 through the enactment of Proposition 58 in November 2016.[142] The measure passed with 73.5 percent of the statewide vote.[143] The measure was placed on the ballot by the California Legislature, through a bill championed by a Latino state senator.[144] In Arizona, despite widespread acknowledgement of the failure of Proposition 203 and broad support to repeal, the initiative has not yet been revoked.[145]

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[135] Valeria G., 307 F.3d at 1040.

[136] In addition, political restructuring often occurs through voter enactments, and proving purposeful racial discrimination with respect to voter enactments is extraordinarily difficult.

[137] Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), 572 U.S. 291, 306-07 (plurality op.) (2014) (rejecting "new and far-reaching rationale" in case establishing political structure equal protection); *id.* at 316-332 (Scalia, J., concurring) (arguing that *Hunter* and *Seattle* cases should be overruled).

[138] *See id.* at 299 (excerpting Michigan Proposal 2 at issue).

[139] In addition to Arizona, Massachusetts passed a version of California's Proposition 227, known as Question 2, in November 2002. *See* Massachusetts Sec'y of the Commonwealth, *The Official Massachusetts Information for Voters: The 2002 Ballot Questions* 6-8, 11-13, https://www.sec.state.ma.us/ele/elepdf/ifv02.pdf. That law was repealed in November 2017. *See* Katie Lannan, *Baker Signs English Learning Overhaul into Law*, WBUR, Nov. 22, 2017, https://www.wbur.org/news/2017/11/22/bilingual-education-law.

[140] Arizona Sec'y of State, *State of Arizona Official Canvass, General Election – November 7, 2000*, at 16, https://apps.azsos.gov/election/2000/General/Canvass2000GE.pdf.

[141] *See* Arguments for Proposition 203, at https://web.archive.org/web/20101119091831/http://www.azsos.gov/election/2000/info/PubPamphlet/english/prop203.htm.

[142] Claudio Sanchez, *Bilingual Education Returns to California. Now What?*, NPR, Nov. 25, 2016, https://www.npr.org/sections/ed/2016/11/25/502904113/bilingual-education-returns-to-california-now-what.

[143] *See* California Sec'y of State, *Statement of Vote, General Election, November 8, 2016,* at 70, available at https://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf.

[144] *See* Jazmine Ulloa, *Bilingual Education Has Been Absent from California Public Schools for Almost 20 Years. But That May Soon Change*, L.A. Times, Oct. 12, 2016 (Proposition 58 from 2014 legislation by Ricardo Lara).

[145] *See* Laura Gomez, *Push to Repeal English-Only Education Appears Abandoned in 2022*, Jan. 28, 2022.

The 1990s in California was not a good decade for Latino civil rights. With three initiatives in quick succession that targeted Latinos as a clear political tactic, with potentially devastating policy consequences for the Latino population, as well as the subsequent incorporation of policy elements into the laws of other states or into federal law, the Latino community experienced serious challenges. Demographic change catalyzed by the growth of the Latino community, which reached a point viewed consciously or subconsciously as a trigger of fear, was irresponsibly exploited by unscrupulous political leaders. That such demographic fear, epitomized in its most crass form by the "reconquista conspiracy," drove so many of these developments led to very real concerns that similar demographic change in other states or nationally could trigger anti-Latino politicking and policymaking of a like kind and at a similar scale.

Arizona's Distressing Year, 2010

For those looking, actions in the western state of Arizona a little over a decade later confirmed the legitimacy of those worries. By 2010, according to the decennial U.S. Census, Latinos in Arizona had reached 29.6 percent of the state's total population.[146] Paralleling the California experience from two decades before, Arizona experienced a flurry of anti-Latino lawmaking in the areas of immigrants' rights, affirmative action, and education. In at least two of these areas, Arizona's actions, like California's before, led to incorporation of policy elements into laws elsewhere in the United States.

Arizona did not embark upon its 2010 lawmaking without a significant precedent of anti-immigrant and anti-Latino lawmaking in its past. As noted above, Arizona had enacted an "official English" law in 1988. Also noted above, the state also enacted a replication of California's Proposition 227, the English-only education law, in 2000. There were other precursors to the 2010 Arizona lawmaking. For example, in 2006, Arizona voters passed a new, modified "official English" law, placed on the ballot by the state legislature.[147]

Yet, perhaps most significant in anticipation of 2010 was an Arizona initiative enacted in November 2004 called the ""Arizona Taxpayer and Citizen Protection Act". On the ballot as Proposition 200, Arizona voters enacted the measure with close to 56 percent of the vote.[148] Findings in the proposition assert that "illegal immigration is causing economic hardship to this state and that illegal immigration is encouraged by public agencies . . . that provide public benefits without verifying immigration status."[149] The law had two major sections. First, it enacted a new requirement that newly-registering voters must provide documentary proof of their citizenship, and it imposed a voter identification provision.[150] Second, it conditioned provision of state public benefits on verification of immigration status, and required the reporting to federal authorities of any applicant determined to be in violation of federal immigration law.[151] The latter provision parallels those in California's Proposition

[146] *See* Census Bureau, *2010 Census: Arizona Profile*, https://www2.census.gov/geo/pdfs/reference/guidestloc/04_Arizona.pdf.
[147] *See, e.g., Arizona Makes English Official*, Wash. Times, Nov. 8, 2006.
[148] *See* Arizona Sec'y of State, *State of Arizona Official Canvass, General Election -- November 2, 2004*, at 16, available athttps://apps.azsos.gov/election/2004/General/Canvass2004General.pdf.
[149] Ariz. Prop. 200 (Nov. 2, 2004), § 2.
[150] Ariz. Prop. 200 (Nov. 2, 2004), §§ 3-5 (amending Ariz. Rev. Stat. §§ 16-152, 16-166, and 16-579)
[151] Ariz. Prop. 200 (Nov. 2, 2004), § 6 (adding Ariz. Rev. Stat. § 46-140.01).

187, by requiring proof of acceptable immigration status, verification of status, and mandatory reporting of those believed to lack acceptable status.

Latino individuals and organizations, as well as others, challenged the voter provisions, and the United States Supreme Court ultimately held that the National Voter Registration Act (NVRA) preempted the voter registration provision with respect to federal elections.[152] A previously-filed challenge to the entirety of Proposition 200, also brought by the Latino community, was dismissed by the Ninth Circuit on appeal of a denied preliminary injunction; the court held that the plaintiffs lacked standing for a pre-enforcement challenge to the law.[153]

A final precursor of note was the Legal Arizona Workers Act of 2007. The law, which seems to be the first of several similar state laws, set up an elaborate process of state involvement in policing the employment of immigrants, leading to the potential revocation of business licenses in Arizona.[154] The law thus set a disturbing precedent, rendered even more so when the Supreme Court held that the Arizona law was not preempted by the federal government's extensive regulation of immigrant employment established in 1986 through the Immigration Reform and Control Act (IRCA).[155]

Thus, the Arizona legislation of 2010 was not inconsistent with the state's recent history with respect to the civil rights of Latinos residing in Arizona, but the 2010 legislation sparked a greater degree of national attention and triggered similar policymaking and debates nationwide. Moreover, the range and breadth of anti-Latino legislation in 2010 appeared to be almost a concentrated version of the infamous 1990s initiatives in neighboring California. First, as noted and discussed above, one piece of 2010 legislation of note was the placement on the ballot and enactment of a copycat version of California's Proposition 209, with its effective ban of affirmative action. Of course, this Arizona legislation sparked no broader movement elsewhere; indeed, it is better seen as one of the final state replications of California's original from a decade and a half earlier.

The most well-known of the 2010 Arizona legislation, in part because it did catalyze almost immediate replications around the country, was Senate Bill (S.B.) 1070, an anti-immigrant law to rival California's Proposition 187 in its potential application and implication.[156] The law established an official Arizona policy of "attrition through enforcement" with respect to undocumented immigration and stated a purpose to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[157] It included several different provisions, including some restricting immigrant employment, but the law mainly sought to require state and local law enforcement officers to enforce federal immigration law as they went about their daily duties.[158]

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[152] Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1 (2013).
[153] Friendly House v. Napolitano, 419 F.3d 930 (2005).
[154] *See* Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582, 591-93 (2011) (describing statutory scheme).
[155] *See id.* at 594-600 (holding that law falls within savings clause of express preemption provision of IRCA); 500-07 (plurality op.) (rejecting conflict preemption as to regulatory scheme); 607-09 (rejecting conflict preemption as to E-verify mandate).
[156] *See* Ariz. Laws 2010, ch. 113 (S.B. 1070), amended by Ariz. Laws 2010, ch. 211 (H.B. 2162).
[157] *See* Arizona v. United States, 567 U.S. 387, 393 (2012).
[158] *See id.* at 393-94 (describing challenged provisions); *see also* United States v. Arizona, 703 F. Supp. 2d 980, 988-90 (D. Ariz. 2010) (detailing sections of S.B. 1070); Saenz, *A New Nullification*, supra note 84, 21 Berkeley La Raza L.J. at 11-12 (describing provisions).

In some ways, S.B. 1070 plainly drew from California's Proposition 187, but in others, including its focus on law enforcement, S.B. 1070 was more heavily influenced by the contemporary activities of Maricopa County Sheriff Joe Arpaio, who pursued a very public campaign of enforcing immigration law despite having no authority to do so.[159] Latino groups and others, followed by the federal government six weeks later, challenged the constitutionality of S.B. 1070.[160] The Supreme Court ultimately concluded that several provisions of the law were preempted by federal immigration regulation, but the Court left undisturbed the key provision requiring local and state police to participate in the enforcement of federal immigration law.[161]

While S.B. 1070 attracted great attention, it had mixed results for its chief proponents. Governor Jan Brewer tied her electoral campaign in large part to the law, and she did achieve election in her own right after ascending to the post following the resignation of Janet Napolitano to become Secretary of Homeland Security in 2009.[162] Yet, chief legislative author and proponent, Senator Russell Pearce, soon faced a successful recall from office, attributable in part to the notoriety he gained from his activity around S.B. 1070.[163]

The chief legacy of S.B. 1070 and the basis of its lasting importance is that it catalyzed the enactment of anti-immigrant bills in five other states in different regions of the country: Alabama, Georgia, Indiana, South Carolina, and Utah.[164] While, perhaps unsurprisingly, three of the states are in the deep south, the fact that the Mountain West and Midwest also had enactments demonstrates the extent to which Arizona catalyzed a nationwide movement among conservative lawmakers. While each of the replications included unique provisions, all had the common theme of seeking to involve local and state police in immigration enforcement. Thus, while it did not result in modification of federal law as Proposition 187 did, S.B. 1070 had an oversized impact, again placing the western region and its Latino population's struggle for equity at the forefront of national civil rights development.

As with Proposition 187 in California, S.B. 1070 involved politicians' exploitation of demographic fear, specifically concerns about the growth of the Latino population, which had reached over a quarter of the state population. While the law was replicated in states with substantially smaller Latino populations, it is still impossible not to see this demographic fear and its exploitation as part of what came with the export of the law itself.

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[159] Arpaio's tactics were ultimately very costly for Arizona taxpayers. *See*, Associated Press, *With the Latest Payout, Former Sheriff Joe Arpaio Has Cost Arizona Taxpayers $100M*, NPR, Oct. 29, 2021.

[160] Civil rights organizations, including MALDEF, filed their challenge on May 17, 2010; the United States filed on July 6, but that case immediately became the lead case of several challenging S.B. 1070.

[161] Arizona v. United States, 567 U.S. at 400-10 (holding three provisions preempted), 411-15 (rejecting facial challenge to provision requiring officers to attempt to verify immigration status of those reasonably suspected of being undocumented).

[162] *See* Sean Sullivan, *Meet Arizona Gov. Jan Brewer, No Stranger to National Controversy*, Wash. Post, Feb. 27, 2014 (for Brewer's 2010 campaign "the turning point came in April when Brewer signed SB 1070, the nation's most restrictive immigration law"); Rodolfo Espino, *AZ Gov Brewer Faces Massive Latino Opposition in 2010 – but Dems Face Opposition Too*, Latino Decisions, May 14, 2010, https://latinodecisions.com/blog/az-gov-brewer-faces-opposition/.

[163] *See* Rachel Weiner, *Arizona Recall: Why Russell Pearce Lost*, Wash. Post, Nov. 9, 2011.

[164] *See* Alabama H.B. 56, Act. No. 2011-535, 2011 Ala. Acts 888; Georgia H.B. 87, No. 252, 2011 Ga. Laws 794; Indiana S.B. 590, P.L. 171, 2011 Ind. Acts 1926; South Carolina S.B. 20, No. 69, 2011 S.C. Acts 325; Utah H.B. 497, ch. 21, 2011 Utah Laws 261.

The third piece of 2010 Arizona anti-Latino legislation attracted substantial attention in Arizona and some national attention, but its full effect on national policy debate may only now be coming forward. House Bill (H.B.) 2281, enacted in 2010, sought to block ethnic studies courses in Arizona public schools.[165] The particular focus of the legislation seemed to be the Tucson Unified School District (TUSD)'s Mexican American studies program, which was implemented in part to comply with a federal desegregation decree.[166] Indeed, following passage of H.B. 2281, two state superintendents of public instruction sought to block the TUSD program through a threat to state funding envisioned in the legislation.[167] Initially, the ban on ethnic studies in TUSD was undermined by the longstanding desegregation decree when the court monitor ordered that Mexican American studies be continued,[168] and ultimately, a federal court struck down H.B. 2281 as intentionally racially discriminatory in violation of the Fourteenth Amendment and also as a violation of the First Amendment.[169]

Of course, the developing possible legacy of H.B. 2281 lies in the current wave of legislative efforts to ban the teaching of critical race theory in public schools. Central to that debate is whether ethnic studies curricula violate such bans. The battle following implementation of H.B. 2281 anticipated this now-national debate. Arizona itself has adopted restrictions on critical race theory,[170] even as others in the state advocate to follow California in requiring ethnic studies to graduate college and high school.[171] Like S.B. 1070, albeit in more delayed fashion, Arizona's H.B. 2281 reinforces the central position of the west and Latino civil rights in national civil rights policy debate.

Latino Rights Today in California: A Troubling Dichotomy

This rendition of the development of Latino civil rights in the west reveals numerous themes, including the importance of the region and its Latino population to the national civil rights struggle, as well as the centrality of Latino activism and agency in the long-term development of civil rights. But, the prominence of demographic fear in driving civil rights setbacks for Latinos in the last quarter century suggests a theme of particular concern for the national future.

The contemporary California context for Latino civil rights presents a potential cautionary tale in this regard. From the policy perspective, California has progressed enormously from the notorious nineties. As noted above, many have identified Proposition 187, certainly abetted by the initiative

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[165] *See* Ariz. Laws 2010, ch. 311 (H.B. 2281), § 1 (adding Ariz. Rev. Stat. §§ 15-111 and 15-112).

[166] *See* Fisher v. United States, 549 F. Supp. 2d 1132, 1161 & n.31 (D. Ariz. 2008), *rev'd*, Fisher v. Tucson Unified Sch. Dist., 652 F.3d 1131 (9th Cir. 2011).

[167] *See* Acosta v. Huppenthal, No. CV 10-623, 2013 WL 871892, at *1 (D. Ariz. Mar. 8, 2013) (describing history of H.B. 2281); Ariz. Rev. Stat. 15-112(B) (enforcement through withholding 10 percent of monthly apportionment).

[168] *See* Hank Stephenson, *What Arizona's 2010 Ban on Ethnic Studies Could Mean for the Fight Over Critical Race Theory*, Politico, Jul. 11, 2021 (TUSD program continues "thanks to a court-appointed monitor overseeing TUSD'S longstanding federal desegregation order, a dark reminder of the district's own discriminatory past").

[169] Gonzalez v. Douglas, 269 F. Supp. 3d 948 (D. Ariz. 2017).

[170] *See* Stephenson, *supra* note 167 (in 2021 "[l]awmakers slipped a provision into a state budget package, which the governor signed, barring the teaching of "any form of blame or judgment on the basis of race" or teaching that anyone "should feel discomfort, guilt, anguish or any other form of psychological distress because of the individual's race.").

[171] *See, e.g.,* Elvia Diaz, *Arizona Once Killed Ethnic Studies. Now it Should Require Them in College and High School*, Arizona Republic, Jul. 30, 2020 ("Arizona must change its anti-Latino penchant that killed bilingual education, ended Mexican American studies in Tucson and censored literature by acclaimed Hispanic authors.").

campaigns that followed, as catalyzing broad political change in the state.[172] Indeed, Proposition 227 was repealed, as explained above, and the bulk of Proposition 187 was repealed by the legislature many years after the federal court enjoined those provisions.[173]

California has also made driver's licenses available regardless of immigration status,[174] and is the first state to explicitly prohibit discrimination on the basis of immigration status by businesses.[175] The state has also opened up Medi-Cal, its means-tested health care program, to the undocumented, and made COVID economic relief available to workers and families without status.[176] Moreover, California has implemented a form of weighted funding for its public schools, including added funding for English learners.[177] Finally, the state was the first to enact a state voting rights act, which has led to the conversion of scores of local bodies to district elections, enabling the election of many Latino officials.[178]

Other examples abound, demonstrating collectively that California has become a continually improving model of progressive policy, benefitting Latinos and other racial minority groups, in the state. But that is not the full story of the state in 2022.

At the same time that California Latinos participate in the ongoing improvement of state policy, the Latino community is badly underrepresented in key areas of leadership. As noted above, Latinos are now 40 percent of the state population, and Latinos have been the largest racial group in California since 2014. Yet, the California Supreme Court currently has only one Latina justice, recently elevated to chief justice. Historically, there has never been more than one Latino justice on the Court at a time. All three of the smaller, numerically significant racial groups in California have not faced this ceiling of one. Throughout most of state history, all seven justices have been white at the same time. Very recently, there were four Asian American justices serving simultaneously. After the governor's most recent appointment, there will soon be three Black justices serving at the same time.[179]

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[172] *See, e.g.,* Libby Denkmann, *After Prop 187 Came the Fall of California's Once-Mighty GOP and the Rise of Latino Political Power,* LAist, Nov. 11, 2019; Pilar Marrero, *Proposition 187 Shook Latino Voters and Changed California Politics,* KCET, Nov. 8, 2019; Alex Nowrasteh, *Proposition 187 Turned California Blue,* Cato Inst., July 20, 2016.

[173] *See* Patrick McGreevy & Phil Willon, *Gov. Brown Repeals Unenforced Sections of Prop. 187,* L.A. Times, Sept.15, 2014.

[174] *See, e.g.,* Andrea Castillo, *California Driver's License Program for Those Here Illegally Surpasses 1 Million Drivers,* L.A. Times, April 5, 2018.

[175] *See* Cal. Civil Code § 51(b)(inclusion of "citizenship, primary language, or immigration status" as prohibited bases of discrimination in Unruh Act).

[176] *See* Melody Gutierrez, *California Expands Medi-Cal Offering Relief to Older Immigrants Without Legal Status,* L.A. Times, July 27, 2021; Miriam Jordan, *California Offers $500 in COVID-19 Aid to Undocumented Immigrants,* N.Y. Times, May 18, 2020.

[177] California's Local Control Funding Formula provides increased funding to school districts based on numbers of foster youth, English learners, and students eligible for free or reduced-price meals. *See* Calif. Dep't of Educ., *-LCFF Funding,* available at https://www.cde.ca.gov/fg/laa/lc/lcfffaq.asp#FC.

[178] The California Voting Rights Act (CVRA) has already increased Latino representation in some local bodies, and should lead to additional increases over time. *See* Phil Willon, *A Voting Law Meant to Increase Minority Representation Has Generated Many More Lawsuits than Seats for People of Color,* L.A. Times, April 9, 2017 (reflecting progress as well as overblown expectations of immediate change).

[179] *See* MALDEF, *MALDEF Statement on the Elevation of Justice Guerrero to Chief Justice of the California Supreme Court,* Aug. 10, 2022.

This paradoxical phenomenon of comparative significant Latino underrepresentation occurs in other areas as well. Among the eight state constitutional officers, there are currently three Asian Americans, two Blacks, two whites, and two Latinos.[180] The Latino Policy and Politics Institute recently documented significant Latino underrepresentation in state gubernatorial leadership appointments.[181] Finally, until it was struck down in court, recent progressive state legislation requiring California publicly-traded companies to have women on their boards resulted in fewer appointments for Latinas than for white, Asian American, and Black women, according to a study by the Latino Corporate Directors Association.[182]

There are numerous other examples to support the pattern: Latinos experiencing the most severe underrepresentation among racial groups in non-elected leadership positions. This is California's odd dichotomy of progressive policy for Latinos, but severe Latino underrepresentation in leadership. The reasons for the paradoxical dichotomy are many, and worthy of deep study. But one partial explanation may lie in the lingering effects of demographic fear. Progressive white leaders are manifesting their own reaction to demographic fear in a significant portion of the electorate. Some right-wing politicians, like Trump and Wilson, exploited demographic fear through wedge issues, in hopes of increasing turnout among their supporters gripped by demographic fear. Conversely, politicians who do not enjoy support from that same group of voters seek to avoid provoking increased interest and turnout in that opposition base. One way to do that is to avoid calling significant attention to the group that most triggers demographic fear, Latinos. With the concomitant conclusion that Latino leadership commensurate with population proportion would attract significant attention, this then leads to severe underrepresentation in appointed positions. The consequent underrepresentation in government leadership then gets replicated in non-governmental leadership appointments.

If correct, this hypothesis demonstrates the long, toxic life of demographic fear; it also pinpoints a particular phenomenon to be prevented as the rest of the nation begins to experience the population change experienced decades ago in California. In any event, the influence of the western region on national civil rights development promises to continue long into the future.

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[180] To be clear, Latino underrepresentation here stems from gubernatorial appointment, not elections. After the 2018 statewide elections, four of the eight posts were held by Latinos (attorney general, secretary of state, insurance commissioner, superintendent of public instruction). After two of them resigned to become U.S. Senator and U.S. Secretary of Health and Human Services, the governor appointed two non-Latinos to succeed them.

[181] According to the study, Latinos are only 18.4 percent of executive appointees, yielding the highest level of underrepresentation in comparison to population proportion of the state. *See* Gabriella Noemi Carmona & Paul Barragan-Monge, *From Disparity to Parity: Latino Representation in Appointed Positions Within California's Gubernatorial Cabinet and State Boards and Commissions,* at 1, Aug. 11, 2022.

[182] Latinas received 3.3 percent of appointments, Blacks 5.3 percent, Asian Americans 11.5 percent, and white women 77.9 percent. *See* Latino Corporate Directors Association, *Latinas on CA Boards Since SB 826 Enacted,* available at https://latinocorporatedirectors.org/Latinas_on_ca_public_boards_si.php.