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ETHNICITY AND THE CONSTITUTION: BEYOND THE BLACK AND WHITE BINARY CONSTITUTION

JUAN F. PEREA*

I used to stare at the Indian in the mirror. The wide nostrils, the thick lips Such a long face—such a long nose—sculpted by indifferent, blunt thumbs, and of such common clay. No one in my family had a face as dark or as Indian as mine. My face could not portray the ambition I brought to it. What could the United States of America say to me? I remember reading the ponderous conclusion of the Kerner Report in the sixties: two Americas, one white, one black—the prophecy of an eclipse too simple to account for the complexity of my face.¹

I. INTRODUCTION

Are there just two Americas, defined by blackness and whiteness, struggling to define some mutual accommodation in society? If we define our Americas by race, are there not other Americas, less frequently recognized, whose ethnic voices must inform our public discourse about race? For too long, the real ethnic complexity of American society has been submerged, hidden by a discussion that counts only race as important and only black or white as race. What of the rest of us, neither black nor white, not fitting neatly into either category? What of “other” Americans of color?

This Essay discusses “other” Americans, Latinos and Asian

* Copyright © Juan F. Perea (1995). Associate Professor of Law, University of Florida College of Law. The Author would like to thank Professors Mark Brodin, Toni Massaro, Martha Minow, Kenneth Nunn, and Michael Olivas for helpful and insightful comments on earlier drafts of this Essay. I would also like to thank Ms. Alise Johnson, Esq. and Ms. Lynette Eaddy for expert research assistance. I would like to dedicate this Essay to the memory of my friend Dr. George E. Pozzetta, late Professor of History at the University of Florida, whose untimely death deprived us of much collegiality, much humor, and much insight regarding ethnicity in the United States.

1. RICHARD RODRIGUEZ, *DAYS OF OBLIGATION* 1 (1993).

Americans among them, and their treatment under the Constitution.² The Essay explores the degree of constitutional protection for expressions of ethnicity. Ethnicity has most frequently been considered by the Supreme Court under its concept of "national origin."³ It has become a constitutional truism that the Constitution protects individuals against discrimination because of their national origin.⁴ The concept of discrimination because of national origin, however, may have outlived its usefulness for many Americans.

Most of the discrimination we currently label "national origin" discrimination is actually discrimination because of ethnic characteristics.⁵ Although the Court has recently referred to a constitutional prohibition against discrimination because of ethnicity or language,⁶ the Court seems to be using the term "ethnicity" as part of its unclear conception of "race."⁷ The Court's language reveals and creates confusion and obscures discrimination.⁸ To the extent that the current constitutional prohibition

2. I do not discuss the constitutional status of Native Americans in this Essay, as such a discussion would be beyond its limited scope. For excellent discussions of the treatment of Indians under American law, see ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

3. Cf., e.g., *Lau v. Nichols*, 414 U.S. 563 (1974) (interpreting "national origin" provision of Title VI of the Civil Rights Act of 1964 to require language assistance for children whose primary language was Chinese and who spoke no English). With respect to Title VII of the Civil Rights Act and the Constitution, the Court has done virtually nothing to protect ethnicity. See, e.g., *Hernandez v. New York*, 500 U.S. 352, 355 (1991) (finding the peremptory exclusion of bilingual jurors to be "race-neutral" under the Equal Protection Clause). See generally Juan F. Perea, *Ethnicity and Prejudice: Re-Evaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994).

4. See *Hernandez v. Texas*, 347 U.S. 475 (1954).

5. GORDON ALLPORT, *THE NATURE OF PREJUDICE* 89, 108-109, 113, 131-32 (2d ed. 1988); see Perea, *supra* note 3.

6. *Hernandez v. New York*, 500 U.S. at 355.

7. *Id.* at 371. For an excellent analysis of the Court's varied uses of the term "race" to perpetuate the racial subordination of nonwhite Americans, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

8. In the related context of Title VII of the Civil Rights Act of 1964, the Court has sometimes used the terms "national origin" and "ethnic origin" interchangeably. See, e.g., *International Bd. of Teamsters v. United States*, 431 U.S. 324, 328-29, 338 n.19 (1977) (referring to "racial and ethnic discrimination"); *East Tex. Motor Freight*

focuses on national origin, it misses the problem: discrimination because of the ethnic characteristics of certain Americans.

The Court has considered race to be the principal protected characteristic under the Constitution. The Court has, therefore, encouraged an underinclusive, binary discourse about race in which the primary views expressed are the white and the African American. This binary discourse is beginning to be augmented by commentaries regarding the presence and needs of other American ethnic communities.⁹ However, a binary black-white discourse continues to dominate in legal academic journals and in more popular media. We are a long way from an academic and legal discourse that includes all the voices that must be heard.

After defining several important terms, this Essay discusses problems with term "national origin." The next section of the Essay surveys the historical development of "national origin" as a protected characteristic under the Constitution. This section also discusses the treatment of an ethnic characteristic, language differences, under the doctrine of substantive due process. Section IV argues that the current Court's paradigms for evaluating problems of race discrimination under the Equal Protection Clause of the Fourteenth Amendment are inadequate for recognizing and redressing discrimination because of ethnicity. The penultimate section discusses some potential avenues for the constitutional protection of ethnicity. The Essay concludes by arguing that a broad conception of freedom from discrimination because of ethnic characteristics is essential for meaningful equal citizenship for all Americans.

Sys. v. Rodriguez, 431 U.S. 395, 398-99, 405 (1977) (referring to ethnic discrimination in a lawsuit alleging race or national origin discrimination).

9. See, e.g., Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1 (1994); Symposium, *Latinos and the Law: 20 Years of Legal Advocacy & Lessons for Future Advancement*, 14 CHICANO-LATINO L. REV. 1 (1994).

II. DEFINITIONS OF TERMS, THE NATURE OF PREJUDICE, AND THE PROBLEM WITH "NATIONAL ORIGIN"

A. *Definitions of Terms: National Origin, Ancestry, and Ethnicity*

The Court has stated that classifications based on race,¹⁰ ancestry,¹¹ national origin,¹² and, recently, ethnicity,¹³ are suspect classifications under the Equal Protection Clause. It is important to define what these terms mean at the outset. In particular, it is important to define national origin, ancestry, and ethnicity.

National origin is the most simply defined and the most easily understood. National origin means the nation of one's birth.¹⁴ National origin should be distinguished from ancestry.

Ancestry may be defined as "family descent or lineage."¹⁵ Ancestry, therefore, is a broader concept than national origin because it encompasses more than one ancestor and includes the

10. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967). Many commentators have described the complexity of defining race and racial identities. See generally JOE R. FEAGIN AND CLAIRECE B. FEAGIN, *RACIAL AND ETHNIC RELATIONS* 4-8 (4th ed. 1993); ASHLEY MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* (4th ed. 1964); PIERRE L. VAN DER BERGHE, *RACE AND RACISM* 1-11 (1967); Linda A. Lacewell & Paul A. Shelowitz, Comment, *Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts*, 41 U. MIAMI L. REV. 823 (1987).

11. See *Hirabayashi v. United States*, 320 U.S. 81, 100-01 (1943).

12. *Hernandez v. Texas*, 347 U.S. 475, 479 (1954).

13. *Hernandez v. New York*, 500 U.S. 352 (1991) (plurality opinion of Kennedy, J.).

14. National origin is also a protected characteristic under Title VII of the Civil Rights Act of 1964. In the meager legislative history of the term "national origin" in Title VII, legislators extended its meaning slightly to include the nations of birth of one's ancestors. Thus "national origin" under Title VII means both one's national origin and the national origin characteristic of one's ancestry. See *Espinoza v. Farah Mfg.*, 414 U.S. 86, 89 (1973) (deletion of word "ancestry" from early versions of Title VII not intended as a material change and suggests that terms "national origin" and "ancestry" were considered synonymous); H.R. REP. NO. 914, 88th Cong., 1st Sess. at 87 (describing Civil Rights Act of 1963, predecessor to enacted Title VII, which had included both the terms "national origin" and "ancestry" but deleted "ancestry"; in the paragraph describing the deletion, the authors of the report wrote that "[t]here [was] no material change in the substantive provisions").

15. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 50 (2d C. ed. 1982).

potentially multiple national origins of one's ancestors. Inter-marriage among persons of differing ancestries yields ever more complex ancestries. Although ancestry may overlap with national origin, one's ancestors may not have a single national origin. Acadians, for example, have a specific ancestry, but no national origin, because Acadia has never been a nation.¹⁶ Gypsies, too, have specific ancestry, but claim no particular national origin or affiliation.¹⁷

Of the three concepts, ethnicity is the most complex and the most difficult to define because it is a varying mix of different traits. Under a broad definition, ethnicity refers to physical and cultural characteristics that make a social group distinctive, either in group members' eyes or in the view of outsiders.¹⁸ Thus ethnicity consists of a set of ethnic traits that may include, but is not limited to, race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols—all of which contribute to a sense of distinctiveness among members of the group.¹⁹ These traits may also engender a perception of group distinctiveness in persons who are not members of that group.²⁰ This perception of difference, often based on ethnic

16. *Roach v. Dresser Ind. Valve & Instrument Div.*, 494 F. Supp. 215, 218 (W.D. La. 1980) (holding that persons of Acadian descent are protected under "national origin" term, despite the historical absence of any nation of Acadia).

17. *See Janko v. Illinois State Toll Highway Auth.*, 704 F. Supp. 1531, 1531-32 (N.D. Ill. 1989) (concluding that despite absence of particular national affiliation, gypsies are covered under "national origin" term of Title VII).

18. *FEAGIN & FEAGIN*, *supra* note 10, at 8-9.

19. *See HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS* (Stephen Thernstrom, ed. 1980).

Ethnicity is an immensely complex phenomenon. [Ethnic groups] are characterized by some of the following features, although in combinations that vary considerably: common geographic origin; migratory status; race; language or dialect; religious faith or faiths; ties that transcend kinship, neighborhood, and community boundaries; shared traditions, values, and symbols; literature, folklore, and music; food preferences; settlement and employment patterns; special interests in regard to politics in the homeland and in the United States; institutions that specifically serve and maintain the group; *an internal sense of distinctiveness; an external perception of distinctiveness.*

Id. at vi (emphasis added).

20. *Id.* *See generally* ANDREW M. GREELEY, *ETHNICITY IN THE UNITED STATES* 291-315 (1974). Greeley uses the term "ethnogenesis" to describe the dynamic development and adaptation of immigrant ethnic groups to the dominant host cultures of

traits, is what results in discrimination.²¹

Ethnic group membership is dependent upon a constellation of traits, some of which are more perceptible and immediately obvious than others. Discrimination is more likely to occur against persons because of the perceptible manifestations of ethnic distinction, ethnic traits, than because of the often imperceptible fact of national origin.²² As Professor Allport wrote, "perceptible differences are of basic importance in distinguishing between out-group and in-group members."²³ The perceptible differences that mark out-groups include, among others, skin color, cast of features, gestures, prevalent facial expression, speech or accent, dress, mannerisms, religious practices, food habits, names, place of residence, and insignia.²⁴

their new countries of residence. *Id.* at 297. Over time, "the ethnic group has a cultural system that is a combination of traits shared with other groups and traits that are distinctive to its own group." *Id.* at 308-09. Despite this gradual overlap, some distinctive traits, such as racial features, language, accent, and name, may remain perceptibly different from the dominant culture and still elicit discrimination.

21. Ethnic prejudice, in the negative sense in which it is usually applied to ethnic groups, has been defined by Professor Allport as:

an antipathy based upon a faulty and inflexible generalization. It may be felt or expressed. It may be directed toward a group as a whole, or toward an individual because he is a member of that group. The net effect of prejudice, thus defined, is to place the object of prejudice at some disadvantage not merited by his own misconduct.

GORDON ALLPORT, *THE NATURE OF PREJUDICE* 9 (25th Ann. ed. 1979); see also FEAGIN & FEAGIN, *supra* note 10, at 10-12. Discrimination may be understood as directed detrimental action, motivated by prejudice and not deserved by the victim. Professor Feagin defines discrimination as "actions or practices carried out by members of dominant groups, or their representatives, which have a differential and harmful impact on members of subordinate groups. The dominant and subordinate groups here are racial and ethnic groups." *Id.* at 14.

22. See ALLPORT, *supra* note 5, at 89.

Even a fragment of visibility, however, focuses people's minds on the possibility that everything may be related to this fragment. A person's character is thought to tie in with his slant eyes, or a menacing aggressiveness is thought to be linked to dark color. Here is an instance of our common tendency to sharpen and exaggerate a feature that captures attention and to assimilate as much as possible to the visual category thus created.

Id. at 108-09. "Most human characteristics ascribed to race are undoubtedly due to cultural diversity and should, therefore, be regarded as ethnic, not racial." *Id.* at 113.

23. *Id.* at 131-32.

24. *Id.*

B. The Problem with "National Origin" as a Protected Characteristic Under the Equal Protection Clause

There are several reasons for the inadequacy of "national origin" as a protected characteristic. First, to the extent that the Court uses "national origin" as a synonym for ethnic traits or ethnicity, the Court creates confusion because the two concepts are not the same. National origin means one's place of birth. Ethnicity consists of a varied set of traits including nationality, race, language, and cultural heritage and features, among other traits. Although the concepts are often related, attempts to collapse ethnicity into national origin or race obscure the nature of discrimination on the basis of ethnicity and make such discrimination claims very weak.²⁵

Second, the concept of "national origin," as it refers to place of birth, may not be as relevant as it used to be as a source of discrimination. Between 1924 and 1965, when the Federal government sanctioned discrimination based on country of origin in the immigration laws and employers were unrestrained in their discrimination, national origin had significant meaning as a reason for discrimination. The enactment of Title VII of the Civil Rights Act of 1964,²⁶ which prohibits discrimination because of national origin, and the subsequent repeal of the national origins quotas in the immigration laws,²⁷ have operated to limit the explicit national origin discrimination common during past generations. Some readers will recall the frequent signs in businesses stating that "No Irish Need Apply," or "No Japs Wanted." State actors know better than to discriminate this overtly. Rather, today's discrimination is much more likely to be based on ethnic traits such as nonconforming accent, language difference, surname, skin color, and manner of dress.²⁸

25. See *infra* notes 119-49 and accompanying text (discussing *Hernandez v. New York*, 500 U.S. 352 (1991)).

26. 42 U.S.C. § 2000e to 2000e-17 (1988 & Supp. V 1993).

27. See Immigration and Nationality Act, 8 U.S.C. §§ 1101-1525.

28. See, e.g., *Hernandez v. New York*, 500 U.S. 352 (arguable discrimination because of bilingualism); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (arguable discrimination because of language); see also *Fragante v. City of Honolulu*, 888 F.2d 591 (9th Cir. 1989) (finding no violation of Title VII in denial of employment to applicant with heavy accent), *cert. denied*, 494 U.S. 1081 (1990).

Lastly, the characterization of claims of discrimination because of ethnic traits as claims of "national origin" discrimination perpetuates stigmatizing and marginalizing social meanings for persons who are ethnically different from unstated norms of American identity. All persons born in the United States are citizens of American or United States national origin.²⁹ All persons born here constitute part of our collective American identity. Yet those who are discriminated against because of some ethnic difference must phrase their claims as claims of unconstitutional treatment because of "different" national origin. Such individuals must deny their actual national origin, the United States, and plead their ancestry, which is deemed to be their fictional "national origin" in order to be protected from discrimination.

In effect, ethnically different Americans must claim a treacherous fiction, that they belong to another country, in order to fit a constitutionally recognized category of claims. This fiction is treacherous because it subtly removes ethnically different Americans from their constitutive role in American identity by removing them to a periphery corresponding to different national origin. This exclusion from American identity operates to create and reinforce a kind of second-class citizenship for certain Americans. Furthermore, given this country's historic distrust of the foreign-born—or the foreign-seeming—forced identification with a different national origin carries with it a host of connotations of disloyalty that, in the past, have had disastrous constitutional consequences for ethnically different Americans.³⁰

There are perils and inaccuracy, therefore, in the concept of national origin as a protected characteristic under the Constitution. On the other hand, the Court has never recognized appropriately the constitutional significance of ethnicity and ethnic

29. U.S. CONST. amend XIV; *see also* 8 U.S.C. § 1401 (1988 & Supp. V 1993).

30. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the exclusion of Japanese Americans and aliens because of suspicion based on their ancestry). *See generally* JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (2d ed. 1988) (describing history of American nativism during the era of World War I); ROBERT K. MURRAY, *RED SCARE: A STUDY OF NATIONAL HYSTERIA 1919-1920*, at 266-67 (1955) (describing the anti-alien feeling that culminated in the trial and subsequent executions of Sacco and Vanzetti).

characteristics, as it has with race, as a prohibited basis for governmental regulation. The Court misses the significance of ethnicity because it focuses primarily on race when analyzing discrimination under the Constitution. The Court's existing paradigms for analyzing problems of race discrimination do not work for assessing the independent significance of ethnicity as a source of discrimination. The failure of the Court's race discrimination jurisprudence to redress ethnic discrimination became particularly evident in the Court's recent decision in *Hernandez v. New York*,³¹ the Court's first decision in many years to consider the significance of discrimination because of an ethnic characteristic, bilingualism, under the Constitution.

III. THE DEVELOPMENT OF PROTECTION FROM "NATIONAL ORIGIN" DISCRIMINATION

A. "National Origin" and the Equal Protection Clause

One can begin with a simple question: How is it that "national origin" became a protected characteristic under the Constitution? The principle that governmental classifications based on national origin will be analyzed using strict scrutiny is commonplace.³² However, where did this rule originate? And what is its current meaning? The principle is said to have originated in *Korematsu v. United States*,³³ but in fact, it was suggested much earlier.

In *The Slaughter-House Cases*,³⁴ the Supreme Court interpreted the Reconstruction Amendments for the first time.³⁵ The Court stated that the primary purpose underlying the Thirteenth, Fourteenth and Fifteenth Amendments was to secure the

31. 500 U.S. 352 (1991); see *infra* notes 119-49 and accompanying text.

32. See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 623 (4th ed. 1991) (noting that classifications based on race or national origin are "suspect" and are analyzed using strict scrutiny); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 572, 1712 (2d ed. 1991) (describing special scrutiny given to statutes directed toward racial or ethnic minorities; index describes nationality as a suspect classification).

33. 323 U.S. 214 (1944); see sources cited *supra* note 32.

34. 83 U.S. (16 Wall.) 36 (1873).

35. *Id.* at 67.

freedoms of newly freed African American citizens.³⁶ Construing the Equal Protection Clause, the Court "doubt[ed] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."³⁷ The Court also suggested, however, a broader reach for these amendments:

We do not say that no one else but the negro can share in this protection Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.³⁸

The Court acknowledged, therefore, that the amendments could apply to classifications based on ancestry or national origin.

In *Strauder v. West Virginia*,³⁹ the Court again stated that the purpose of the Fourteenth Amendment was to prohibit "discrimination because of race or color"⁴⁰ against the African American citizens of the nation.⁴¹ The Court concluded that the West Virginia law at issue, which limited eligibility for jury service to "white male persons," was just such a prohibited discrimination.⁴² Having found that the primary purpose underlying the Fourteenth Amendment was to protect blacks, the Court, in dicta, somewhat contradictorily stated that the Equal Protection Clause would be violated equally by a law excluding white men

36. *Id.* at 71-72.

37. *Id.* at 81.

38. *Id.* at 72.

39. 100 U.S. 303 (1879).

40. *Id.* at 310.

41. See Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 68-69 (1992) (concluding that the primary purpose of the 14th Amendment was to protect African Americans).

42. *Id.*

from jury service—an extremely unlikely hypothetical.⁴³

In *Strauder*, the Court suggested a broader reach for the Equal Protection Clause than its statement from the *Slaughter House Cases* quoted above. In dicta, the Court wrote: "Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the *spirit of the amendment*."⁴⁴ In the Court's view, a classification based on ethnicity and national origin excluding naturalized Celtic Irishmen would also violate the Equal Protection Clause. Perhaps acknowledging some departure from the primary purpose of the amendment, the Court characterized such a classification as inconsistent with the *spirit* of the amendment, not the amendment itself. The Court thus recognized early that the Equal Protection Clause prohibited discrimination based on national origin, but the prohibition was based only on some unstated analogy between race and national origin.

During the middle and late nineteenth century, discrimination against Asian immigrants was rampant, particularly in the Western United States.⁴⁵ Congress passed laws to exclude Chinese laborers from the United States. In the Chinese Exclusion case, *Chae Chan Ping v. United States*,⁴⁶ the Supreme Court upheld Congress's authority to enforce United States sovereignty by excluding foreigners.⁴⁷ In *Yick Wo v. Hopkins*,⁴⁸ decided in

43. *Id.* at 308. I am not aware of any instances in which white men were excluded from jury service because they were white. On the other hand, African Americans were excluded from juries routinely and almost exclusively, even in southern jurisdictions in which they vastly outnumbered whites. See GILBERT T. STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 247-72 (1910) (describing the tiny extent of African American jury service in the South around 1900). Mexican Americans were also routinely excluded from jury service in part of Texas and probably in other jurisdictions. See *Hernandez v. Texas*, 347 U.S. 475 (1954); see also *infra* notes 74-81 and accompanying text.

44. *Strauder*, 100 U.S. at 308 (emphasis added).

45. See RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 79-131, 180-83, 197-212 (1989).

46. 130 U.S. 581 (1889) (Chinese Exclusion case); see Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58 (10-year suspension of the immigration of Chinese laborers).

47. *Chae Chan Ping*, 130 U.S. at 604-09; see also *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892). See generally THOMAS A. ALENIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 3-14 (2d ed. 1991).

48. 118 U.S. 356 (1886).

1886, the Court found that the discriminatory application of a local ordinance enforced only to prohibit Chinese persons from operating laundries in wooden buildings violated the Equal Protection Clause. The Court wrote that the Fourteenth Amendment was "universal in [its] application . . . without regard to any differences of race, of color, or of nationality."⁴⁹ This decision was a rare legal victory for the Chinese in America.

The Japanese curfew and internment cases⁵⁰ tested the constitutionality of military orders commanding that persons of Japanese ancestry be subject to curfew and forcible exclusion from the Pacific coast. Several cases upheld the constitutionality of restrictions imposed on the liberty of American citizens solely because of their Japanese ancestry. The Court upheld, as applied to American citizens of unquestioned loyalty, curfew restrictions in *Hirabayashi v. United States*⁵¹ and forcible exclusion orders in *Korematsu v. United States*.⁵² These cases illustrate the Court's ambivalent treatment of persons of different ancestry, race, and ethnicity under the Constitution.

On the one hand, the Court stated clearly principles condemning classifications based on race or ancestry. In *Hirabayashi*, Justice Stone wrote that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."⁵³ In *Korematsu*, the Court fashioned its first version of strict scrutiny for racial classifications, insisting that

all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such

49. *Id.* at 369.

50. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). *But see Ex Parte Mitsuye Endo*, 323 U.S. 283 (1944) (holding that Endo, a loyal American citizen, could not be detained in a Relocation Center under the exclusion orders).

51. 320 U.S. 81 (1943).

52. 323 U.S. 214 (1944).

53. *Hirabayashi*, 320 U.S. at 100.

restrictions; racial antagonism never can.⁵⁴

The *Korematsu* decision is widely accepted to stand for the proposition that racial or national origin classifications warrant strict judicial scrutiny.⁵⁵

On the more troublesome hand, despite their odious nature and the application of the "most rigid scrutiny,"⁵⁶ the Court upheld the restrictions, largely on the grounds of perceived military necessity.⁵⁷ Emphasizing this aspect of the decision, the principle that emerges from *Korematsu* is that the equality rights of ethnic minorities, in this case defined by race and ancestry, will be sacrificed when a court decides that "pressing public necessity,"⁵⁸ as defined by elected and appointed representatives of the majority, demands it. Pressing public necessity often will not reflect the equality interests of minorities. Despite the Court's renunciation of racism, the Court had before it ample evidence that racism played a significant, if not dominant, role in the formulation of the exclusion orders.⁵⁹

54. *Korematsu*, 323 U.S. at 216.

55. See, e.g., NOWAK & ROTUNDA, *supra* note 32, at 623 (classifications based on race or national origin are "suspect" and are analyzed using strict scrutiny); STONE ET AL., *supra* note 32, at 572, 1712 (describing special scrutiny given to statutes directed toward racial or ethnic minorities; index describes nationality as a suspect classification). This understanding of *Korematsu* confuses ancestry (one's lineage, or the national origins of one's forefathers) with national origin (one's place of birth). Many of the interned Japanese Americans were citizens because of birth in the United States. Their national origin was, therefore, the United States.

56. *Korematsu*, 323 U.S. at 216.

57. *Id.* at 217-18.

58. *Id.* at 216.

59. For example, Americans of Japanese ancestry were singled out for far harsher treatment than persons of German and Italian ancestry. The Court upheld curfew restrictions against United States citizens of Japanese ancestry, while similar restrictions applied only to German and Italian *aliens*, not citizens. *Hirabayashi*, 320 U.S. at 88. Furthermore, persons of German and Italian ancestry were given individualized consideration of their loyalty through investigations and hearings, while persons of Japanese ancestry were simply excluded on the basis of their ancestry, with no consideration given to their individual circumstances. *Korematsu*, 323 U.S. at 241 (Murphy, J., dissenting). The different and more burdensome treatment imposed upon Japanese Americans suggests that the primary concerns motivating the curfew and exclusion orders were not loyalty or security risks. Such risks presumably would have been presented in equal measure by all persons sharing ancestry with nations against whom the United States waged war, including persons of German and Italian ancestry. Rather, the government's concern must have been with the degree of

The Court's use of "assimilation" to mean the disappearance or obliteration of ethnic differences in these decisions is also troubling. The Court failed to acknowledge the extent to which Japanese Americans were precluded from full community membership by majoritarian legislative action. The Court determined that the congressionally-authorized restrictions upon Japanese Americans were reasonable in large part due to the isolation and lack of assimilation of members of this community "as an integral part of the white population."⁶⁰ Yet the isolation and lack of assimilation were in large part due to the restrictions placed upon them by white legislative majorities of the time, due to their unchecked racism. These restrictions included the denial of citizenship through naturalization,⁶¹ inability to own land,⁶² prohibition of intermarriage with whites,⁶³ segregation into separate schools,⁶⁴ and discrimination in employment.⁶⁵

The "absence of assimilation" rationale for curfew and exclu-

perceived racial and cultural differences of Japanese Americans from the majority, which were thought to be greater with Japanese Americans than with persons of German or Italian ancestry. See Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1945-46 (1991) (discussing how the majority in *Korematsu* ignored Justice Murphy's powerful counter-narrative, which told a story of racism directed at Japanese Americans and aliens).

60. *Hirabayashi*, 320 U.S. at 96-98. One of the insights of contemporary sociology is that nonwhites can *never* become "an integral part of the white population" because the racism of the white community prevents a reciprocal acceptance of nonwhites by whites, regardless of the efforts of nonwhites to assimilate. See FEAGIN & FEAGIN, *supra* note 10, at 251-52. See generally MILTON M. GORDON, *ASSIMILATION IN AMERICAN LIFE* (1964).

61. 8 U.S.C. § 703 (1940) (not repealed until 1952); see *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that a Japanese person could not be naturalized because he was not Caucasian).

62. *Hirabayashi*, 320 U.S. at 96 n.4 (citing 1 CAL. GEN. LAWS (Deering 1931), Act 261; 5 ORE. COMP. LAWS ANN. § 61-102 (1940); 11 WASH. REV. STAT. ANN. §§ 10581-82 (Remington 1933)).

63. *Id.* (citing MONT. REV. CODES § 5702 (1935)).

64. See, e.g., *Guey Heung Lee v. Johnson*, 404 U.S. 1215, 1215-16 (1971) (describing a California statute that required separate schools for children of Asian descent until its repeal in 1947); *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (invalidating a California statute which had authorized the segregation of certain Indians and children of Chinese, Japanese, or Mongolian parentage; the statute had been used to justify the segregation of children of Mexican ancestry, which was widely practiced in California).

65. *Hirabayashi*, 320 U.S. at 96 n.4.

sion turns out to be tautological. Legislative majorities denied to the Japanese basic access to community membership, including the denial of citizenship through naturalization.⁶⁶ The Court then relied on this legislatively-created exclusion from community membership as proof of Japanese American isolation and lack of assimilation, which justified the further burdens of curfew and exclusion. Discrimination becomes the rationale justifying both further discrimination and constitutionality.

The Court also cited, as evidence of the reasonableness of the curfew, propaganda allegedly distributed by Japanese consuls and Buddhist priests,⁶⁷ attendance of children of Japanese ancestry at Japanese-language schools after public school hours, and association with other persons of Japanese ancestry.⁶⁸ Thus efforts by Japanese Americans to maintain the culture of their ancestral land, including religious practices, language, and affiliation with persons of like culture and ethnicity—efforts common to virtually all immigrant groups in the United States—are treated by the Court as further reasons for the suspicion directed at persons of Japanese ancestry. The Court's reliance on ethnic group affiliation as a justification for discriminatory treatment arguably violates well-established First Amendment freedoms, including rights of religious freedom and expression, rights of association and the substantive scope of liberty under the Due Process Clause.⁶⁹

The relatively unassimilated status of persons of Japanese

66. See 8 U.S.C. § 703 (1940) (extending eligibility of naturalization "only to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere").

67. *Hirabayashi*, 320 U.S. at 91.

68. *Id.* at 96 n.4. It is interesting to note that with respect to a presumably white sectarian school, the Court allowed the school to exist against state interference in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). See TONI M. MASSARO, CONSTITUTIONAL LITERACY 75 (1993). Yet with respect to Japanese American or Japanese sectarian schools, these were viewed as a threat and a justification for the interment of the Japanese. This differential treatment suggests differential treatment based on the race of the Japanese.

69. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that a state law forbidding the teaching of any language other than English to any student below the eighth grade invaded the liberty guaranteed by the Fourteenth Amendment); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that state law requiring mandatory public school education violated Fourteenth Amendment).

ancestry, as described and decided by the Court, is deemed to justify the results in these cases. The Court takes assimilation as the baseline for community membership. Yet with bruising irony and paradox, assimilation and citizenship were irrelevant in the Court's decisions. Neither Gordon Hirabayashi's nor Fred Korematsu's citizenship, unquestioned loyalty, and assimilation impeded the enforcement of these regulations.⁷⁰ Citizenship and assimilation made no difference in the outcomes. The Court, in deferring to perceived military necessity, ignored a substantial amount of evidence that this "military judgment" was actually based on racism and that the curfew and exclusion orders actually accomplished very little.⁷¹ Justice Murphy, in dissent, made a strong case for both propositions.⁷²

As Justice Murphy accurately noted, the Court's reasoning and conclusion in *Korematsu* "[opened] the door to discriminatory actions against other minority groups in the passions of tomorrow."⁷³ The sobering message of these cases is that perceived public necessity can, in the eyes of judges, justify discrimination against persons ethnically different from the majority.

70. As General DeWitt stated: "It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty . . . we must worry about the Japanese all the time until he is wiped off the map." *Korematsu*, 323 U.S. at 236 n.2 (Murphy, J., dissenting).

71. See Delgado & Stefancic, *supra* note 59, at 1945-46; see also *supra* note 59.

72. See *Korematsu*, 323 U.S. at 236 (Murphy, J., dissenting); see also Delgado & Stefancic, *supra* note 59, at 1946. Clear evidence of racial animus against persons of Japanese ancestry was on the record. We must hope that today such proof would be taken as proof of intent to discriminate. General DeWitt, author of the curfew and exclusion orders, testified that

I don't want any [persons of Japanese ancestry] here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese on this coast . . . The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. *It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty . . . But we must worry about the Japanese all the time until he is wiped off the map.*

Korematsu, 323 U.S. at 236 n.2 (Murphy, J., dissenting) (emphasis added). DeWitt also stated that "a Jap's a Jap." See PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 42 (1988). The fact that, despite such evidence, the Court still deferred to DeWitt's judgment is disturbing.

73. *Korematsu*, 323 U.S. at 240.

These cases thus present an ominous constitutional mixed message: racial and ethnic discrimination is prohibited in principle but upheld in practice when the Court deems it reasonable under the circumstances.

Hernandez v. Texas,⁷⁴ rather than *Korematsu*, stands directly for the proposition that classifications based on national origin violate the Equal Protection Clause. The evidence in *Hernandez* showed that fourteen percent of the population of Jackson County, Texas, had Mexican or Latin American surnames.⁷⁵ In addition, eleven percent of males over twenty-one years old had Latino surnames, and six or seven percent of freeholders on the county's tax rolls were persons of Mexican descent.⁷⁶ Despite these statistics, there was no record that any person with a Latino surname had ever been selected to serve on a jury commission, grand jury, or petit jury in Jackson County within the last twenty-five years, during which over six thousand jurors had served.⁷⁷

Finding that these statistics established a case of discrimination against persons of Mexican descent, the Court, relying in part on the dicta from *Strauder*,⁷⁸ wrote that "[t]he exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment."⁷⁹ This appears to be the first articulation since *Strauder* of the principle that a national origin classification could violate the Fourteenth Amendment. The Court, however, was dealing with a classification based upon ancestry, the systematic exclusion of persons of Mexican descent. For those persons who were United States citizens by birth, their national origin—their place of birth—was the United States. The *Hernandez v. Texas* opinion refers to the terms "an-

74. 347 U.S. 475 (1954). See generally Richard Delgado & Vicky Palacios, *Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME LAW. 393 (1975).

75. *Hernandez v. Texas*, 347 U.S. at 480-81.

76. *Id.*

77. *Id.* at 482.

78. *Strauder v. West Virginia*, 100 U.S. 303 (1879); see *supra* notes 34-38 and accompanying text.

79. *Hernandez v. Texas*, 347 U.S. at 479.

cestry" and "national origin" as though they meant the same thing when they do not.⁸⁰ Subsequent cases have condemned statistically significant underrepresentation of Mexican Americans on Texas grand juries as a violation of the Equal Protection Clause of the Fourteenth Amendment.⁸¹

B. Substantive Due Process and Protection of Language Differences

The Court has faced issues presented by ethnic differences in contexts other than equal protection. In *Meyer v. Nebraska*,⁸² the Court addressed state regulation of the teaching of the German language. *Meyer* has regularly been used to signal the beginning of the use of substantive due process with respect to individual liberties.⁸³ Indeed, it has been resurrected very recently as part of the doctrinal reformulation of abortion rights.⁸⁴ This case has also been interpreted to mean that there exists some fundamental right to language, one of the constituent aspects of ethnicity.⁸⁵ The case and its context merit consideration regarding the extent to which substantive due process has protected persons whose language may differ from the language of the majority.

Like the *Korematsu* decision, *Meyer v. Nebraska* was a decision rendered in the wake of wartime. *Meyer* was also decided at the height of the Americanization movement. The case provides, therefore, another opportunity to assess how well ethnically different people fare when the majority feels threatened. Interestingly, when persons of German birth or ancestry were perceived as the "enemy people," they were not forcibly interned. Reprisals against them were largely limited to restrictions on

80. See *id.* (referring to "ancestry or national origin"); *id.* at 482 (referring to "national origin or descent").

81. See, e.g., *Castaneda v. Partida*, 430 U.S. 482 (1977).

82. 262 U.S. 390 (1923).

83. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-53 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

84. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2801 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

85. See, e.g., BILL PIATT, *¿ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES* 40-42 (1990).

the teaching of the German language and its use in the press. The different treatment suffered by persons of German and Japanese ancestry supports the view that the harsher treatment inflicted on persons of Japanese descent was based on their racial differences compared to white Americans.

The law at issue in *Meyer* resulted from the Americanization movement of the time and the intense American hostility towards Germans unleashed by World War I.⁸⁶ The Americanization movement attempted to define English as the only proper language of American identity.⁸⁷ The nativists attempted, largely successfully, to eliminate other languages of citizens and immigrants. Many Americans either fled the country or gave up non-English languages to escape persecution by "superpatriots."⁸⁸ Nativists declared war on German-language instruction in the schools.⁸⁹ The National Education Association declared that "the practice of giving instruction in a foreign tongue [was] un-American and unpatriotic."⁹⁰ Such sentiments were eventually codified into state laws restricting the teaching of foreign languages.⁹¹ By 1919, fifteen states, including Nebraska, had banned the teaching of foreign languages and required English to be the exclusive language of instruction in both public and private schools.⁹²

Most courts were captivated by the Americanization fervor of the time. State courts typically upheld their state laws banning

86. HIGHAM, *supra* note 30, at 195 ("The struggle with Germany . . . called forth the most strenuous nationalism and the most pervasive nativism that the United States had ever known.").

87. See generally Frederick C. Luebke, *Legal Restrictions on Foreign Languages in the Great Plains States 1917-1923*, in *LANGUAGES IN CONFLICT; LINGUISTIC ACCULTURATION ON THE GREAT PLAINS* 1 (Paul Schach ed. 1980).

88. *Id.* at 1, 9.

89. *Id.* at 5.

90. *Id.* at 6 (quoting 87 J. EDUC. 514 (May 9, 1918)). One can only note with irony that the Continental Congress published the Articles of Confederation in Official German, French, and English editions. Juan F. Perea, *Demography and Distrust: American Languages, Cultural Pluralism and Official English*, 77 MINN. L. REV. 269, 286 (1992). This publication was one of many examples of federal and state official multilingualism in the United States during the late eighteenth and nineteenth centuries. See *id.* at 305-28.

91. Luebke, *supra* note 87, at 10-15.

92. HIGHAM, *supra* note 30, at 260.

the teaching of foreign languages. The Supreme Court of Nebraska, for example, upheld Nebraska's statute with the following reasoning:

The Legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. *The result of that condition was found to be inimical to our own safety.* To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. *It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country.* The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language.⁹³

According to this court, the mere use of a non-English language threatened public safety and undermined the best interests of our country. The court reiterated longstanding fears of language difference that still haunt us today.⁹⁴

The United States Supreme Court, in *Meyer v. Nebraska*,⁹⁵ struck down the Nebraska statute, which prohibited the teaching of any language other than English to students who had not passed the eighth grade.⁹⁶ The arguments before the Court in support of the statute, which were based largely on the need for Americanization, and the Court's apparent receptivity to such arguments,⁹⁷ make the opinion fascinating. The State argued that the law was justified for the protection of its citizens.⁹⁸

93. *Meyer v. State*, 187 N.W. 100, 102 (Neb. 1922) (emphasis added), *rev'd*, 262 U.S. 390 (1923).

94. Today, for example, the official English movement advocates the elimination of languages other than English out of some perceived threat to national unity. See Perea, *supra* note 90, at 346-47.

95. 262 U.S. 390 (1923).

96. *Id.* at 397.

97. *See id.* at 393-96.

98. The statute itself declared that "[w]hereas, an emergency exists, this act shall

The purpose of the legislation, according to the state, was "to create an enlightened American citizenship in sympathy with the principles and ideals of this country, and to prevent children reared in America from being trained and educated in foreign languages and foreign ideals before they have had an opportunity to learn the English language and observe American ideals."⁹⁹ Furthermore, the statute was meant to ensure that English would be the mother tongue of children raised in the United States.¹⁰⁰

The Supreme Court decided to strike down the statute based on a substantive due process rationale.¹⁰¹ Describing the scope of liberty protected by the Fourteenth Amendment, the Court wrote that the appellant, who taught stories from the Bible in German, "taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment."¹⁰² Furthermore, according to the Court, "the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."¹⁰³ The Court concluded that there was no emergency justifying the statute, and that mere knowledge of the German language was not harmful.¹⁰⁴ Accordingly, the statute, unsupported by a sufficient public interest, was arbitrary and violated the Due Process Clause of the Fourteenth Amendment.¹⁰⁵

In large part, the Court's reasoning in *Meyer* represents the classic substantive due process reasoning of the *Lochner*¹⁰⁶ era. With respect to the teacher, the Court protects his right to engage in his chosen profession, teaching.¹⁰⁷ The Court enforces

be in force from and after its passage and approval." *Id.*

99. *Id.* at 394.

100. *Id.*

101. *Id.* at 401.

102. *Id.*

103. *Id.*

104. *Id.* at 403.

105. *Id.*

106. *Lochner v. New York*, 198 U.S. 45 (1905).

107. *Meyer*, 262 U.S. at 400.

the teacher's and the parents' liberty of contract, following and citing the *Allgeyer*¹⁰⁸ and *Lochner* line of cases, which had not yet been discredited.¹⁰⁹

Interpreting *Meyer* as a case providing broad affirmative protection for linguistic difference or ethnic identity is difficult. For example, the Court wrote that "[t]he obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state."¹¹⁰ Interpreting the case as a decision protecting some affirmative right to retain a language other than English rests largely on the outcome of the case (the voiding of the statute) and two paragraphs in the Court's opinion. The Court wrote that "the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue."¹¹¹ Another paragraph of the Court's opinion describes the scope of liberty under the Due Process Clause broadly:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own

108. See *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (stating that liberty "is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties . . . to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper").

109. *Meyer*, 262 U.S. at 399-400. The doctrine of economic substantive due process, and judicial enforcement of the Court's conception of "liberty of contract" was subsequently discredited and overruled. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

110. *Meyer*, 262 U.S. at 398.

111. *Id.* at 401; see also *Farrington v. Tokushige*, 237 U.S. 284 (1927). In *Tokushige*, the Court relied on substantive due process and the *Meyer* decision to strike down an oppressive system of regulation of foreign-language schools in the then-territory of Hawaii. *Id.* at 298-99. The Court wrote that "[t]he Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue." *Id.* at 298.

conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹¹²

Many readers will recognize this passage as the typically broad conception of liberty that the Court used to invalidate state regulations that, as in *Lochner*, interfered with freedom of contract or with the pursuit of a profession.¹¹³ It is possible to find support for some language right in the liberty to "establish a home and bring up children" and in the assertion that "the protection of the Constitution extends to all," including those who speak other languages. The liberty to educate one's children as one sees fit could provide some basis for the transmission of cultural and historical components of ethnicity.¹¹⁴

In the context of the case and the times, however, I think that the *Meyer* opinion, like those on which it relies, is more properly read to protect liberties of contract and of property.¹¹⁵ Another case cited for the constitutional protection of language rights, *Yu Cong Eng v. Trinidad*,¹¹⁶ can also be understood as a decision protecting the liberty of contract and employment of Chinese merchants under similar principles of substantive due process.¹¹⁷

112. *Id.* at 399.

113. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); cf. *The Slaughterhouse Cases*, 83 U.S. 36 (1873) (describing a similarly broad scope of liberty under the privileges and immunities clause of the 5th Amendment).

114. See *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

115. For a fascinating interpretation of substantive due process as a doctrine used by the Court to mediate religious and ethnic group conflict, see Martha Minow, *We, the Family: Constitutional Rights and American Families*, in *THE CONSTITUTIONAL AMERICAN LIFE* 299-323 (D. Thelan ed., 1988).

116. 271 U.S. 500 (1926). In *Yu Cong Eng*, the Court struck down a Philippine law which prohibited Chinese merchants from keeping their account books in Chinese, the only language they knew. The Court recognized that the law interfered dramatically with the merchants' abilities to engage in their professions and therefore violated substantive due process and equal protection of the laws under the Fourteenth Amendment. *Id.* at 528.

117. In *Yu Cong Eng*, the Court relied on both substantive due process and equal protection as grounds for striking a statute which had the effect of prohibiting Chinese merchants from keeping their account books in Chinese. *Id.* at 524-25. Much of

IV. THE COURT'S CURRENT PARADIGMS FOR ANALYZING RACE AND ETHNIC DISCRIMINATION

[B]ut the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place. . . .¹¹⁸

The modern Court appears to have cast ethnicity and its characteristics into some dark, mysterious, and unknown place. The Court's current paradigms for analyzing equal protection problems involving race and ethnic discrimination are not adequate for dealing with discrimination because of ethnic characteristics. These paradigms appear in the Court's recent decision in *Hernandez v. New York*.¹¹⁹ In that case, the Court concluded that there was no equal protection violation when a prosecutor used peremptory challenges to exclude two bilingual Latino jurors from a jury that was expected consider Spanish-language testimony.¹²⁰ Because the discrimination in *Hernandez v. New York* was based on bilingualism,¹²¹ an ethnic characteristic of approximately two-thirds of American Latinos,¹²² *Hernandez* provides a good vehicle for assessing the current Court's ability to recognize and deal appropriately with discrimination because of ethnic characteristics.

the Court's reasoning, however, appears to be based on substantive due process, relying on *Meyer v. Nebraska* and related cases. *Id.* at 524-28.

118. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (quoting Plato's Republic); see also ERIC H. WARMINGTON & PHILIP G. ROUSE, GREAT DIALOGUES OF PLATO 258 (W.H.D. Rouse trans., 1956) ("The children of the good, then, they will take, I think, into the fold, and hand them over to certain nurses who will live in some place apart in the city; those of the inferior sort, and any one of the others who may be born defective, they will put away as is proper in some mysterious, unknown place.").

119. 500 U.S. 352 (1991).

120. *Id.* at 369-70.

121. The Court reasoned that the discrimination was race-neutral because it was based both on the jurors' bilingualism and their demeanor, which gave the prosecutor reason to doubt that these jurors could adhere faithfully to the official interpretation of testimony before the court. *Id.* at 371. As I have argued elsewhere, upon close analysis, the prosecutor's stated reason was probably not race-neutral, and the Court's conclusion was probably wrong. See Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1 (1992).

122. Leobardo F. Estrada, *The Extent of Spanish/English Bilingualism in the United States*, 15 AZTLAN 379, 389-90 (1984).

A. *Three Paradigms of Race and Ethnicity*

1. *Paradigm I: Ethnicity Submerged in Race*

The plurality opinion in *Hernandez v. New York*, authored by Justice Kennedy, uses the words "race" and "ethnicity" as though they were interchangeable. The opinion begins with the proposition that discrimination against two Latino jurors "by reason of their ethnicity" would violate the Equal Protection Clause.¹²³ In the next sentence, Kennedy writes that the Court must determine whether the prosecutor offered a "race-neutral" reason for excluding the two Latino jurors.¹²⁴ If the Court is considering potential discrimination because of ethnicity, as the plurality appears to recognize, then it should be determining whether the prosecutor's reason was "ethnicity-neutral," not "race-neutral." This distinction is more than a semantic difference because many reasons that can be deemed "race-neutral"—meaning "not race"—such as bilingualism, accent, or Latino surname, may not be "ethnicity-neutral."

The plurality acknowledged ambiguity in its conception of race:

[W]e do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes [I]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.¹²⁵

Similarly, the plurality suggested that excluding jurors because they are Spanish-speaking, an ethnic characteristic of many

123. *Hernandez*, 500 U.S. at 355.

124. The Justices joining the plurality opinion concluded that the prosecutor's reason for excluding the two bilingual jurors, their bilingualism and their demeanor—which made him feel uncertain that the jurors could accept the official translation of Spanish-language testimony—was "race-neutral." *Id.* at 359-61. I reject the "race-neutrality" of this explanation principally because the jurors' bilingualism is an inherent part of their ethnicity so, in my view, the prosecutor discriminated exactly "by reason of their ethnicity." The language of race-neutrality comes directly from the Court's important decision in *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

125. *Hernandez*, 500 U.S. at 371.

Latinos, would violate the Equal Protection Clause.¹²⁶

The plurality's reference to the breadth, possibly expanding, possibly contracting, of its "concept of race" demonstrates that the plurality conceives of race as the only relevant characteristic protected under the Equal Protection Clause. The problem with grouping ethnic characteristics under the label "race" is that the single concept makes it harder to identify and redress discrimination because of ethnic characteristics. The Court can only consider the languages of ethnic groups as part of its concept of race and not on their own terms as targets of unconstitutional discrimination. By submerging the distinctive traits of language difference and bilingualism into race, the Court confuses ethnicity with race.

Although the plurality acknowledges that language may be a "surrogate" for race, it ignores the many other perceptible ethnic traits that elicit discrimination and that should also be subjects of heightened judicial scrutiny when used as the basis for state classifications. Professor Allport has listed many of the traits that elicit prejudice and discrimination. These include, among others, skin color, physical features, gestures and mannerisms, speech and accent, dress, religious practices, food habits, names and surnames, places of residence, and ethnic insignia.¹²⁷ By collapsing all perceptible manifestations of ethnicity into its ambiguous "concept of race," the plurality makes it easy to ignore the discrimination that can occur because of any of these ethnic traits.

By creating a "concept of race" that it can expand or contract at will, the Court dilutes the meaning and proper analysis of race and ethnicity under the Constitution.¹²⁸ A pliable "concept of race" leads easily to non-recognition of discrimination based on ethnic characteristics whenever the Court decides that certain traits, such as bilingualism, language difference, or accent do not belong within the boundaries it defines for race. Recognizing the capricious nature of the Court's concept of race is one

126. *Id.*

127. ALLPORT, *supra* note 5, at 131-32.

128. *See* Nunn, *supra* note 41, at 68-69 (arguing that extending the protection of *Batson* to white defendants dilutes the force of the Equal Protection Clause as a constitutional protection for black defendants, which is closer to its original intent).

way to understand the result in *Hernandez*: a majority of the Court decided that bilingualism, despite constituting part of Latino ethnicity, was not the same as race. Because language difference is not the same as race, the argument goes, discrimination because of language difference does not violate the Equal Protection Clause.

The plurality's apparent willingness to allow certain ethnic characteristics to be treated as "surrogates for race" illustrates what I shall call the correlation problem. This problem is created for advocates and litigants who must persuade a court that an ethnic characteristic is sufficiently linked to race or national origin to function as a "surrogate" for the recognized protected categories of race or national origin. One correlation problem is that courts retain discretion to decide which ethnic traits can, as a threshold matter, properly function as proxies for the "real" protected category of race. This formulation seems inconsistent with the Court's recognition that discrimination because of ethnicity violates the Equal Protection Clause.¹²⁹ If the Court neither recognizes that language difference is an aspect of ethnicity nor that discrimination because of bilingualism raises an equal protection issue, then it has turned ethnicity into a meaningless abstraction.

In the absence of constitutional recognition that it is ethnicity itself, in its manifold aspects, that deserves constitutional protection, judges will make arbitrary and inconsistent decisions regarding which characteristics are "surrogates" for race. In applying the *Batson*¹³⁰ standard of "race neutrality," for example, courts have differed widely on whether identical ethnic traits can function as proxies for race. Bilingualism and Spanish surname have been found, by different courts, to be both "race-neutral," and not "race-neutral."¹³¹ Courts have also rejected

129. See *Hernandez v. New York*, 500 U.S. at 355.

130. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

131. Compare, e.g., *Hernandez v. New York*, 500 U.S. at 352 (jurors' bilingualism and demeanor, which caused prosecutor to doubt their adherence to official transcript found race neutral) with *Pemberthy v. Beyer*, 800 F. Supp. 144 (D.N.J. 1992) (under similar circumstances, prosecutor's exclusion of all spanish-speaking jurors not race neutral); compare, e.g., *Bueno-Hernandez v. State*, 724 P.2d 1132, 1133-35 (Wyo. 1986) (three jurors "apparently of Mexican-American heritage," excluded because of

class certification for Mexican Americans by rejecting the significance of ethnic traits such as self identification, Spanish surname, Mexican or Spanish ancestry, and Spanish language.¹³²

Another correlation problem is the uncertain degree of correlation one must prove. What level of correlation would establish that an ethnic characteristic is actually a proxy for prohibited race or national origin discrimination? Would the fact that two-thirds of American Latinos are bilingual establish Spanish/English bilingualism as a proxy for Latino ethnicity?¹³³ Is ninety percent required? Because there are no guidelines to establish the sufficiency of a correlation for legal purposes, judges will make arbitrary and inconsistent choices as to what degree of correlation is "sufficient" for the purposes of establishing discrimination. The correlation problem forces advocates to make the weak and potentially unpersuasive legal argument that some degree of correlation is sufficient for an ethnic trait to be considered a proxy for race or national origin.

By collapsing the traits of ethnicity into an ambiguous and pliable notion of "surrogacy for race," the plurality ignores the independent significance that ethnicity should have in equal protection analysis. Courts protecting solely against race or national origin discrimination do not protect enough. Discrimination because of ethnicity often will not be redressed because of correlations or surrogacy deemed insufficient.

2. *Paradigm II: Only Race Matters*

In a concurring opinion in *Hernandez v. New York*, Justice O'Connor, joined by Justice Scalia, took a narrower view of race that would not permit its extension to encompass any ethnic characteristics. To prevail, the Justice wrote, the defendant must prove that the prosecutor "intentionally discriminated against Hispanic jurors on the basis of their race."¹³⁴ O'Connor

their Spanish surnames, insufficient for prima facie case) with *People v. Cerrone*, 829 P.2d 468 (Colo. Ct. App. 1991) (finding *Batson* violation where all Spanish-surnamed persons excluded from group of prospective jurors brought up to voir dire), *rev'd and remanded*, 854 P.2d 178 (Colo. 1993).

132. See Delgado & Palacios, *supra* note 74, at 398-400.

133. See Estrada, *supra* note 122, at 389-90.

134. *Hernandez v. New York*, 500 U.S. at 372 (O'Connor, J., concurring). Again, this

also rejected the significance of the correlation between ethnic characteristics, race, and presumably national origin.¹³⁵

No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is.¹³⁶

The approach taken by O'Connor generates major problems for advocates attempting to argue that a classification based on "national origin" violates the Equal Protection Clause. O'Connor tells us that only discrimination because of race, and presumably national origin, matters; discrimination for any other reason does not violate equal protection.¹³⁷ If this approach gains popularity among the Justices, then invidious discrimination because of ethnic characteristics, like language, accent, surname, religion, and certain physical characteristics will always be "race-neutral" in the sense that these traits are not race.

The concurrence's approach grants prosecutors free license to discriminate for many reasons that have been found to be discriminatory in other, related contexts. Under the Equal Employment Opportunity Commission's Guidelines on National Origin Discrimination, for example, the Commission has recognized that ethnic traits such as surname, accent, language difference, and other characteristics may be reasons for discrimination.¹³⁸ Some courts, interpreting the prohibition against "national origin" discrimination in Title VII of the Civil Rights Act of 1964, have found that these ethnic traits can be the basis for prohibited discrimination.¹³⁹

description of Latino jurors confuses their ethnicity and ethnic characteristics with race.

135. I assume that Justice O'Connor would still find a classification explicitly based on national origin to be as presumptively invidious as a classification based on race.

136. *Hernandez v. New York*, 500 U.S. at 375.

137. *Id.* ("[I]f . . . the trial court believes the prosecutor's *nonracial* justification, . . . that is the end of the matter.") (emphasis added).

138. See 29 C.F.R. § 1606.1, .6 (1993).

139. See, e.g., *Carino v. University of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (discrimination because of accent and national origin); *United States*

Furthermore, prosecutors and other governmental actors have learned to avoid overt expressions of discrimination because of national origin or race. As Justice Thurgood Marshall recognized some time ago, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."¹⁴⁰ The narrow conception of race expressed in the concurrence facilitates an enormous amount of discrimination.

Furthermore, applying a narrow concept of race to Latinos makes no sense. Latinos constitute a heterogeneous group composed of people of many races and nationalities but with a high degree of commonality in culture, language, history, and tradition. For this group, equal protection defined narrowly by race really constitutes little or no protection because much discrimination suffered by Latinos does not depend on racial difference.

3. *Paradigm III: Disproportionate Impact and the Problem of "Facial Neutrality"*

In a dissenting opinion joined by Justice Marshall, Justice Stevens reiterated his view that a significant disproportionate impact is itself evidence of discriminatory purpose.¹⁴¹ Justice Stevens would have found a violation of equal protection in *Hernandez v. New York* for three reasons: (1) because of the inevitable disproportionate impact of the prosecutor's exclusion of bilinguals upon Spanish-speaking prospective jurors, (2) because "[a]n explanation that is 'race-neutral' on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice,"¹⁴² and (3) because less drastic means could have satisfied the prosecutor's interests.¹⁴³

While Justice Stevens' approach, if followed, holds more potential for redressing discrimination than the approaches de-

v. Lee Way Motor Freight, Inc., 625 F.2d 918, 941-42 (10th Cir. 1979) (minimum height requirements may have a disparate impact on Latinos).

140. *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

141. *Hernandez v. New York*, 500 U.S. at 375-76 (Stevens, Marshall, JJ., dissenting); see also *Washington v. Davis*, 426 U.S. 229, 252 (1976) (Stevens, J., concurring).

142. *Hernandez v. New York*, 500 U.S. at 375-76.

143. *Id.* at 379.

scribed in the other opinions, his approach is flawed because he concedes the facial neutrality of governmental action that is not neutral.¹⁴⁴ There is nothing neutral about a governmental peremptory challenge that, on its face, excludes mostly Latino people because of their bilingualism. The absence of neutrality is easily shown by considering the prosecutor's question at issue in *Hernandez v. New York*.

The prosecutor asked the jurors "whether or not they could accept the translation" of Spanish-language testimony.¹⁴⁵ Monolingual English-speaking jurors, who will understand only the English interpretation of testimony, have no choice but to accept the interpreter's translation. Their response to the question was an easy "yes." Bilingual jurors, who will understand both the Spanish-language source testimony as well as the interpreted version, will be aware of discrepancies between the testimony and its interpretation. Such discrepancies occur routinely in interpreted testimony. Suppose that the interpreter makes errors in the interpretation. Bilingual jurors will then be forced into the dilemma of accepting an inaccurate translation or relying on their understanding of what the testimony actually was, an intellectual dilemma not confronted by monolingual English speakers. Why should bilingual jurors promise under oath to accept a potentially erroneous interpretation? If a bilingual juror promises to accept an interpretation of unknown accuracy, is the juror possibly violating her duty to find the facts to the best of her ability? These are inevitable issues for bilingual jurors, which demonstrate that the prosecutor's question is not facially neutral.

In the United States, most persons become bilingual as a result of birth into a family whose primary language is not English and subsequently growing up in that family.¹⁴⁶ Many such

144. Justice Stevens' approach can also be criticized for its reliance on an unspecified "proxy" relationship between a "neutral" rule and discriminatory results. This approach presents the correlation problem in slightly different form: how much disproportionate impact is enough to warrant the inference of discriminatory purpose?

145. *Hernandez v. New York*, 500 U.S. at 356.

146. NANCY F. CONKLIN & MARGARET A. LOURIE, A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES 158-62 (1983); FRANÇOIS GROSJEAN, LIFE WITH

persons claim Spanish as their first language, and then learn English in order to adapt to the dominant English-speaking culture.¹⁴⁷

Justice Stevens' approach transforms an unstated norm of the dominant culture, English-speaking monolingualism, into a baseline for facial neutrality. Facial neutrality, thus constructed, becomes no more than the means for the enforcement of the norms of the dominant culture for assessing social deviance and constitutionality. The Court has erred as badly in the context of gender, with its holdings that discrimination on the basis of pregnancy did not constitute sex discrimination.¹⁴⁸ In both the bilingualism and pregnancy cases, the Court concluded that discrimination with an exclusive adverse impact upon a historically disadvantaged group was not discrimination, transforming dominant cultural norms of English-speaking monolingualism and male gender into "facially neutral" baselines against which social and constitutional deviance are measured. But there is no facial neutrality when a rule or practice will burden only historically disempowered groups. The lack of neutrality in other so-called facially neutral standards, such as objective tests like the LSAT, have come under increasing criticism.¹⁴⁹

Together, the plurality and concurring opinions demonstrate much about the current Court's flawed approach to questions of discrimination because of ethnicity. First, both opinions treat race as the only relevant prohibited basis for discrimination

TWO LANGUAGES 43, 103-05 (1982); Estrada, *supra* note 122, at 383.

147. According to the 1990 Census, approximately 31.8 million persons over the age of five spoke a language other than English in their homes. This number represents approximately 14% of the total census count. The number of persons speaking Spanish at home was 17.3 million, about 7.5% of the total census. Felicity Barringer, *For 32 Million Americans, English Is a 2d Language*, N.Y. TIMES, Apr. 28, 1993, at A18.

148. See *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that exclusion of pregnancy-related condition from disability insurance program did not discriminate because of gender); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that exclusion of pregnancy from a benefit plan does not discriminate because of sex under Title VII). *Gilbert* was subsequently overruled by Congress' enactment of the Pregnancy Discrimination Act of 1978, which defined sex discrimination to include discrimination based on pregnancy and its related conditions. See 42 U.S.C. § 2000k (1988).

149. See, e.g., Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J.L. & GENDER 121 (1993).

under the Equal Protection Clause. By focussing exclusively on race, the Court will not recognize, either by design or through error, many equally pernicious forms of discrimination because of ethnic traits. The Court's exclusive focus on race, either broadly or narrowly conceived, reinforces the tendency to consider all issues of discrimination and racism in the binary terms of only two communities, the African American and the white. The Court's use of only race oversimplifies grossly the complexity in our ethnically diverse country. The dissent's approach also oversimplifies by defining facial neutrality to correspond to unstated majoritarian norms when in fact such norms are inherently discriminatory in certain cases. *Hernandez* presents one such case—a norm of English monolingualism is inherently discriminatory against bilingual persons. Rather than oversimplification, our ethnic diversity requires much greater nuance in the analysis of problems of discrimination under the Constitution.

V. OTHER AVENUES FOR THE CONSTITUTIONAL PROTECTION OF ETHNICITY

The preceding Section demonstrates flaws in the Court's interpretation of the Equal Protection Clause as a source of constitutional protection for ethnicity. This Section will discuss other constitutional doctrines that could provide a basis for the protection of ethnic differences.

A. *Substantive Due Process*

The joint opinion of three Justices in *Planned Parenthood v. Casey*¹⁵⁰ resurrected substantive due process as a potentially viable basis for unenumerated individual rights. In sweeping language, the joint opinion described the substantive scope of liberty protected under the Due Process Clause of the Fourteenth Amendment:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education These mat-

150. 112 S. Ct. 2791 (1992).

ters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁵¹

Such a broad conception of liberty could encompass individual choices relating to ethnic identity, the cultural component of which largely defines one's concepts of existence and meaning. The joint opinion's emphasis on individual decisionmaking, while perhaps appropriate for the context of abortion rights, might not be as well suited for the protection of ethnicity—a concept that defines identity through group membership, some aspects of which may be chosen and many aspects of which are not. However, a broad conception of freedom of individual identity could encompass many aspects of ethnicity. The ultimate success of a substantive due process approach to the protection of ethnic characteristics depends entirely on the receptivity of judges in recognizing that ethnic characteristics are crucial aspects of individual identity properly encompassed within a broad conception of liberty.

B. Section 1981 and the Meaning of the Fourteenth Amendment

The current interpretation of section 1981¹⁵² provides another approach with the potential to protect ethnicity and ethnic traits under the Constitution. Current section 1981 and section 1982¹⁵³ were enacted originally as the Civil Rights Act of 1866¹⁵⁴ (the 1866 Act). A substantial amount of evidence and scholarly commentary establish that one of the principal purposes underlying the Fourteenth Amendment was to

151. *Id.* at 2807 (citations omitted).

152. 42 U.S.C. § 1981 (Supp. III 1991). The statute provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws . . . as is enjoyed by white citizens." *Id.*

153. 42 U.S.C. §§ 1981, 1982 (1988).

154. Ch. 31, § 1, 14 Stat. 27 (1866) (codified at 42 U.S.C. §§ 1981-1982 (1988)).

constitutionalize the rights protected under the 1866 Act and to place these rights beyond the reach of ordinary legislative action.¹⁵⁵

In *Saint Francis College v. Al-Khazraji*,¹⁵⁶ the Supreme Court described the scope of section 1981. According to the Court, "Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their *ancestry or ethnic characteristics*. Such discrimination is racial discrimination."¹⁵⁷

Interestingly, the Court based its interpretation of section 1981 on the Court's own reconstruction of the meaning of the term "race" as understood by the drafters of the Civil Rights Act of 1866. At that time, race meant "ancestry and ethnic characteristics," in addition to our contemporary understanding of race as distinctive physical features and skin color. Thus, the nineteenth-century understanding of "race" included many groups defined by ancestry and ethnicity, such as Europeans,¹⁵⁸ Finns,

155. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 20, 23 (1977) ("The 'privileges and immunities' clause was the central provision of the [Fourteenth] Amendment's § 1, and the key to its meaning is furnished by the immediately preceding Civil Rights Act of 1866, which, all are agreed, it was the purpose of the Amendment to embody and protect."); KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 51 (1989) ("[I]t is beyond dispute that the focus of congressional discussion of the proposed Fourteenth Amendment was the eradication of racial discrimination in the enjoyment of the rights of citizens spelled out in the 1866 act."); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 57 (1955) (stating that the final language of the Fourteenth Amendment was deemed to protect all the rights specifically enumerated in the Civil Rights Act of 1866); see also STONE ET AL., *supra* note 32, at 500.

156. 481 U.S. 604 (1987).

157. *Id.* at 613 (emphasis added). The Court also held that the statute was intended to prohibit discrimination against an individual "because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*." *Id.* Thus the statute was meant to prohibit discrimination because of ethnicity (belonging to an ethnically distinctive sub-group) and race (belonging to a genetically and physiognomically distinctive sub-group).

158. CONG. GLOBE, 39th Cong., 1st Sess. 251 (1866) (remarks of Sen. Davis) (describing European race and mixed races in Mexico); *id.* at 307 (remarks of Rep. Johnson) (commenting that "negro race is inferior to the white or European race"); *id.* at 523 (remarks of Sen. Davis) (observing that prior to the Constitution citizenship was available only to members of "the European nationalities, from the Caucasian race").

gypsies,¹⁵⁹ Basques, Castilians,¹⁶⁰ Jews,¹⁶¹ Hindus,¹⁶² Swedes, Norwegians, Germans,¹⁶³ Greeks, Italians, Spanish, Mongolians,¹⁶⁴ Russians, Arabs, and Hungarians.¹⁶⁵ All of these groups, at the time of the drafting of the Civil Rights Act of 1866, were deemed to be different "races." In addition, various Congressmen described groups such as the Chinese,¹⁶⁶ Latins,¹⁶⁷ Anglo-Saxons,¹⁶⁸ Mexicans,¹⁶⁹ and Blacks¹⁷⁰ as different "races." Because of the broad nineteenth-century meaning of "race," all of these groups were deemed to be protected under the 1866 Act.

The drafters of the 1866 Act were, however, concerned about the Act's validity as an exercise of congressional power under the Thirteenth Amendment.¹⁷¹ Accordingly, the Fourteenth

159. *Id.* at 249 (remarks of Sen. Davis) (reference to "the negro slaves, as separate and distinct and insoluble almost as Jew and Gypsy").

160. *Id.* at 542 (remarks of Rep. Dawson) (describing his view that a "disgusting and deteriorating admixture of races [exists in Latin America because of the] crossing of the Castellan with the Aztec and the negro").

161. *Id.* (racial homogeneity among Jews, preserved by intermarriage within the race, accounts for their "physical and mental excellence").

162. *Id.* at 523 (remarks of Sen. Davis) (observing that prior to the Constitution no member of the "Hindoo" race was ever made a citizen by a state).

163. *Id.* at 498 (remarks of Sen. Cowan and Sen. Trumbull) (discussing United States citizenship of children of German parents); *id.* at 1294 (remarks of Rep. Shellabarger) (making several references to the German race).

164. *Id.* at 498 (remarks of Sen. Cowan) (describing Mongolian and Chinese races, apparently as synonymous); *id.* at 523 (remarks of Sen. Davis) (observing that prior to the Constitution no member of the Mongolian race was ever made a citizen).

165. See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 612 (1987).

166. CONG. GLOBE, 39th Cong., 1st Sess. 237 (1866) (remarks of Rep. Kasson) (describing the exclusion of the Chinese, pagans, Indians, white males under twenty-one, and women from suffrage); *id.* at 498 (remarks of Sen. Cowan) (describing Chinese and Mongolian race, apparently as synonymous); *id.* at 523 (remarks of Sen. Davis) (stating that prior to the Constitution was no member of the Chinese race ever made a citizen).

167. *Id.* at 238 (remarks of Rep. Kasson) (referring to the Latin races in Mexico and South America).

168. *Id.* (referring to the Caucasian and Anglo-Saxon race); *id.* at 542 (remarks of Rep. Dawson) (describing the superiority of "Anglo-Saxon" race).

169. *Id.* at 238 (remarks of Rep. Kasson) (describing the Mexican population as a Latin race of "mixed bloods").

170. *Id.* (referring to the black race); *id.* at 246 (remarks of Sen. Morrill) (asserting his view of the black or negro races).

171. STATUTORY HISTORY OF THE UNITED STATES; CIVIL RIGHTS, PART 1 100-01 (Bernard Schwartz ed., 1970).

Amendment, including the congressional enforcement power under Section Five, was proposed and ratified and the 1866 Act subsequently was re-enacted as part of the Enforcement Act of 1870.¹⁷² It has often been argued that the substantive scope of the Fourteenth Amendment is, or should be, limited to rights protected under the 1866 Act.¹⁷³

The argument has rarely been made, however, that the Fourteenth Amendment should be interpreted to protect the groups intended to be protected by the drafters of the Civil Rights Act of 1866. The same logic that dictates defining the substantive scope of the Fourteenth Amendment according to the intentions of its framers (and those of the 1866 Act) supports the argument that the Amendment should be interpreted to protect the same groups—defined by race, “ancestry and ethnic characteristics”—that were protected under the 1866 Act. Although neither the Fourteenth Amendment nor current § 1981 need be interpreted solely according to nineteenth-century meanings, it is interesting that adopting the broad nineteenth-century conception of “race” could lead to *more* protection for ethnic characteristics than the current Court is willing to give under the Equal Protection Clause.

Adoption of the view that groups defined by “ancestry and ethnic characteristics” should be protected under the Equal Protection Clause could provide a broad basis for the protection of ethnicity and ethnic traits under the Constitution. Of course, the breadth of the protection of ethnicity depends on the Court’s understanding of ethnicity and upon its willingness to give the term a broad scope. Judging from the Court’s decision in *Hernandez v. New York*,¹⁷⁴ a majority of the current Court probably would not give “ancestry and ethnic characteristics” as broad an interpretation as would be necessary to provide meaningful protection for ethnicity.

172. *Id.* at 101.

173. See *supra* note 155 and accompanying text.

174. 500 U.S. 352 (1991).

CONCLUSION

Despite the well-accepted formulation that classifications will likely be struck down under the Constitution, the actual treatment under the Constitution of discrimination because of national origin, ancestry, and ethnicity has been problematic. In *Hernandez v. Texas*, the Court stated and enforced the principle that discrimination against Mexican Americans because of their national origin or ancestry violated the Equal Protection Clause, as foreshadowed nearly a century before by the Court in *Strauder*. More recently, the Court in *Hernandez v. New York* recognized, in words at least, that a classification because of ethnicity or an ethnic characteristic could violate the Equal Protection Clause.¹⁷⁵ However, the divided Court's opinions reveal confusing, multiple conceptions of race and ethnicity that make the possibility of meaningful protection remote. Such divisions regarding the constitutional recognition of ethnicity may suggest underlying ambivalence about heightened recognition of ethnic and racial differences and fears of Balkanization.¹⁷⁶

The treatment of ethnic identity, and its constituent traits, under the Constitution brings to the surface powerful contradictions in American culture. On one hand, assimilationism and the suppression or denial of ethnic differences has long been a profound and powerful principle in American culture.¹⁷⁷ Indeed, some writers, new and old, have defined the essence of American culture as the shedding of traces of perceptible ethnicity and the adoption of a new "American" identity.¹⁷⁸ Recent Court decisions implementing a norm of "colorblindness," in which race and ethnicity are presumed to have lost their relevance in Amer-

175. Adding the Justices who joined the plurality (4) to the Justices who dissented (3) yields seven Justices who could have recognized discrimination in *Hernandez v. New York*.

176. See Gotanda, *supra* note 7, at 7 (quoting Justice O'Connor's dissent in *Metro Broadcasting v. FCC*, 497 U.S. 547, 602-04 (1990)).

177. See MASSARO, *supra* note 68, at 72 (assimilationist instinct is profound and abiding within American culture).

178. J. HECTOR ST. JOHN DE CREVECOEUR, *LETTERS OF AN AMERICAN FARMER* 83 (1986) (first published 1782); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1991).

ican life, illustrate the power of assimilationist ideas in American legal culture.¹⁷⁹ The assimilationist perspective can be criticized for its underlying premise that true "American" identity is an identity without perceptible ethnicity. Such a construction of American identity operates to privilege the ethnicity of white Americans, whose features and traits are assumed to be the standards against which all deviance and ethnic variance are measured.¹⁸⁰

Such a construction, however, collides powerfully, and ultimately unpersuasively, with the reality that distinctive ethnic and racial groups have long existed in this nation. While the distinctiveness of American ethnic and racial groups has at times been driven underground by movements such as the Americanization movement of the early twentieth century, it has survived and it continues to exist. Some writers have found in this ethnic and racial pluralism a truer account of American identity than the account emphasizing assimilation. Horace Kallen, for example, wrote:

In manyness, variety, differentiation, lies the vitality of such oneness as they may compose. Cultural growth is founded upon Cultural Pluralism. Cultural Pluralism is possible only in a democratic society whose institutions encourage individuality in groups, in persons, in temperaments, whose program liberates these individualities and guides them into a fellowship of freedom and cooperation.¹⁸¹

The recognition and protection of ethnic identity as an important constitutional value, under either the Equal Protection or the Due Process Clause, represents a fuller protection of individual identity and of the group identity that both constitutes, and is constituted by, individuals. Reflection upon the nature of

179. See *Hernandez v. New York*, 500 U.S. 352 (1991) (on one view, not recognizing the significance of language and bilingualism as an aspect of ethnicity); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990). See generally Gotanda, *supra* note 7, at 53-56 ("The end of color-blind constitutionalism is a racially assimilated society in which race is irrelevant.")

180. Cf. Gotanda, *supra* note 7, at 2-3.

181. HORACE M. KALLEN, *CULTURE AND DEMOCRACY IN THE UNITED STATES* 42-43 (1970); see also IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

identity reveals that we belong, first, to groups.¹⁸² From birth, our individual identities are shaped by birth into groups defined by gender, race, ethnicity, language, religion, and wealth to name only some of the important group identifiers that begin to define the self. The usual liberal assumption is that the self somehow precedes the social group, but this is a false understanding.¹⁸³ As Professor Young has written, "[t]he self is a product of social processes, not their origin."¹⁸⁴

The prevailing current discourse of individual autonomy and individual rights is poorly suited to accommodate the fuller notion of individual identity that encompasses the significance and characteristics of group identity.¹⁸⁵ As currently conceived, the Constitution only offers a piecemeal and inadequate recognition of group identity as a constitutional value.¹⁸⁶ The First Amendment protects religious freedom, but this is only one, albeit important, aspect of group identity.¹⁸⁷ The First Amendment also protects a limited right of association, often described as limited to association for political purposes.¹⁸⁸ The Equal

182. YOUNG, *supra* note 181, at 45.

183. *Id.*

184. *Id.*

185. See Minow, *supra* note 115, at 319-25; see also Owen M. Fiss, *Groups and the Equal Protection Clause*, 88 PHIL. & PUB. AFF. 107 (1976).

186. For a leading discussion of the issue of group rights under the Equal Protection Clause, see Fiss, *supra* note 185, at 107; see also *id.* at 127 ("The Equal Protection Clause is primarily enforced through litigation, and it is especially difficult to fit the vindication of group rights into the mold of the lawsuit."). This difficulty need not be dispositive, however, since Congress has used its power under § 5 of the 14th Amendment to enforce group rights under the Voting Rights Act of 1965 and the 1972 Amendments to the Voting Rights Act. In the 1972 Amendments, Congress concluded that "voting discrimination against citizens of language minorities is pervasive and national in scope." 42 U.S.C. § 1973b(f)(4) (1982). Congress concluded that "[p]ersons of Spanish heritage are the group most severely affected by discriminatory practices, while the documentation of discriminatory practices concerning Asian Americans . . . was substantial." S. REP. NO. 295, 94th Cong., 1st Sess. 2 (1975; reprinted in 1975 U.S.C.A.N. 774, 794. Even if Courts perceive themselves as incapable of redressing group harms, Congress clearly has power to recognize and address group harms under the Constitution.

187. The Court recently interpreted the First Amendment's guarantee of religious freedom to protect the practices of a nonconforming religious minority in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993). But see *Employment Div. v. Smith*, 498 U.S. 913 (1990) (not protecting bona fide use of peyote in Native American religious practice from applicable Oregon criminal laws).

188. See generally William P. Marshall, *Discrimination and the Right of Association*.

Protection Clause has been held, somewhat ambivalently and inconsistently, to protect members of historically discriminated-against groups from burdensome classifications. This piecemeal array of constitutional protections, of varying force and import, does not do justice to the rich and infinitely more complex ethnic matrices of our people.

A more meaningful recognition of ethnicity and ethnic traits means a better fulfillment of the meaning of equality for all Americans. As Professor Karst has written regarding the principle of equal citizenship, "[u]nder that principle, every individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat people as members of an inferior or dependent caste, or as nonparticipants."¹⁸⁹ A similar conception of equality underlies Professor Tribe's anti-subjugation principle, "which aims to break down legally created or legally reenforced systems of subordination that treat some people as second-class citizens. The core value of this principle is that all people have equal worth."¹⁹⁰ Equality demands equal dignity and respect for the ethnic traits of all Americans whether these traits are shared by a majority or not. Indeed, the notion of ethnicity and ethnic group identity is entirely consistent with a full concept of American identity and nationality.¹⁹¹

It is time to expand our understanding of the Constitution's protections beyond its usual black and white racial referents. It is time to withdraw the traits of different ethnicity from their mysterious and mostly hidden places of submersion. It is time to restore them to their proper light, their proper role as constituting parts of the American identity.

81 NW. U. L. REV. 68 (1986); Kenneth H. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986).

189. Kenneth H. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1 (1988).

190. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1515 (2d. ed. 1988).

191. Philip Gleason, *American Identity and Americanization*, in CONCEPTS OF ETHNICITY 57, 141 (William Peterson et. al. eds., 1980).