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### California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education Symposium: Race and the Law at the Turn of the Century

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# CALIFORNIA'S RACIAL HISTORY AND CONSTITUTIONAL RATIONALES FOR RACE-CONSCIOUS DECISION MAKING IN HIGHER EDUCATION

Richard Delgado\*  
Jean Stefancic\*\*

*Richard Delgado and Jean Stefancic examine the history of racial mistreatment of citizens of color in California. Beginning with incidents of racial brutality during the early Spanish colonial period and proceeding into the present, Delgado and Stefancic reveal that California has not been the egalitarian paradise many suppose. The authors write against a background of recent attacks on affirmative action in higher education which raise the prospect that the diversity rationale that universities had relied on to justify race-conscious admissions policies may no longer be constitutional. Recognizing this possibility, the authors offer remediation—making amends for past misbehavior—as an alternative basis for maintaining race-conscious programs in higher education. In particular, the authors argue that historical and recent racial discrimination in states such as California provides sufficient justification for adjusting admissions and hiring practices so that affected minority groups are placed in the status quo ante, that is, the position they would have been in had the discrimination not taken place.*

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## INTRODUCTION

On January 24, 1848, only a short time before Mexico signed the Treaty of Guadalupe Hidalgo, two Anglo settlers found gold at Coloma on the south fork of the American River. The two men attempted to suppress word of their discovery, but it soon spread to a world anxious to hear news about the rich western territory of California. Over the next few years, a trickle of miners became a flood. The newcomers encountered, however, a native and Mexican population, some of whom had the effrontery to be occupying the most coveted lands. The anarchy and vigilantism that followed included the infamous case of Juanita, a young Mexican woman who killed an Anglo miner attempting to break into her cabin in Downieville, a small mining town. She pleaded self-defense; the state charged murder. Tried before an impromptu court consisting of the dead man's friends, Juanita was pronounced guilty and

hanged, the first woman lynched in California. Other Mexicans who got in the way of miners or their appetites met similar fates. To ensure that Mexican and Chinese prospectors received the message, the California legislature passed the Foreign Miners' License Tax,<sup>1</sup> imposing a fee of twenty dollars per month on Mexicans and Asians who wanted to mine gold—a penalty never enforced against Europeans.<sup>2</sup> Despite this and many other incidents of raw racism, California's current population of nearly thirty-three million includes almost one-half people of color, including over nine million Latinos, more than two million blacks, and almost four million Asians.<sup>3</sup>

This Article documents California's ambivalent treatment of citizens of color beginning in its early days and continuing into the present, focusing particularly on events that limit minorities' ability to obtain an education. As we wrote on another occasion, diversity and affirmative action in higher education today are under sharp attack.<sup>4</sup> The diversity rationale for race-conscious decision making in higher education that was articulated by the Court in *Regents of the University of California v. Bakke*<sup>5</sup> may well be repudiated, either through judicial decision<sup>6</sup> or, as in California<sup>7</sup> and Washington,<sup>8</sup> by popular referendum. If this happens, remediation—making amends for past sins—may be the only basis remaining for institutions of higher learning to operate race-conscious programs.<sup>9</sup> Although diversity's status as a compelling

1. Act of Apr. 13, 1850, ch. 97, §§ 1, 5, 1850 Cal. Stat. 221, 221–22. The constitutionality of the act was upheld by *People v. Naglee*, 1 Cal. 232 (1850). The act was repealed by the Act of Mar. 14, 1851, ch. 108, 1851 Cal. Stat. 424.

2. See MANUEL G. GONZALES, *MEXICANOS: A HISTORY OF MEXICANS IN THE UNITED STATES* 85–86 (1999). A year later, in 1851, when the act was repealed, over two-thirds of the fifteen thousand Mexican miners in Calaveras, Tuolumne, and Mariposa counties—the “southern mines” which they had dominated—were driven away, most returning to their homes south of the border. Among [them] were many Californios, whose rights were denied in violation of the Treaty of Guadalupe Hidalgo.

*Id.*

3. See U.S. DEP'T. OF COMMERCE, U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES* 34 (1999). Of a total population of 32,667,000 as of July 1, 1998, Hispanics comprise 9,454,000; blacks, 2,456,000; Asian or Pacific Islanders, 3,938,000; and American Indians, Eskimos, and Aleuts, 309,000. See *id.*

4. See Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703, 705 (1999).

5. 438 U.S. 265 (1978). For a discussion of affirmative action in higher education, see *infra* Part I.

6. See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996).

7. See CAL. CONST. art. 1, § 31; see also Amy Wallace, *Prop. 209 to Have Immediate Effect on UC Applicants Education*, L.A. TIMES, Nov. 9, 1996, at A1.

8. See WASH. REV. CODE § 49.60.400 (1998); Tom Brune, *Now That I-200 Is Law, What's Next? UW Alters Admission Policy*, SEATTLE TIMES, Nov. 5, 1998, at A1.

9. Delgado & Stefancic, *supra* note 4, at 705. On the likelihood that this will happen, see *Race-Sensitive Admissions in Higher Education: Commentary on How the Supreme Court Is Likely to Rule*, 26 J. BLACKS HIGHER EDUC. 97 (1999–2000) [hereinafter *Commentary*] (noting how five

state interest is in question, our premise is that the Fourteenth Amendment will always permit, if not require, remediation.<sup>10</sup> If so, institutions that have demonstrably discriminated against minority groups will be able to maintain admissions and hiring policies designed to place these groups in status quo ante—the position they would have been in had the discrimination not taken place—into the foreseeable future.<sup>11</sup>

The scope of our inquiry is broad. We include, of course, discrimination that California has visited on minorities in schools and the state's universities.<sup>12</sup> We are also interested in a broader range of mistreatment that logic and everyday experience suggest would impair the educational prospects of families and children of color and dampen their aspirations in this vital area.<sup>13</sup>

Why California? First, on a personal level, the two of us hail from that state. Before assuming our current positions, both of us spent lengthy periods in the Golden State. One of us went to law school there; the other obtained a master's degree. We both worked for universities in California and still have children and friends in that state. More than any other state, California is home to us.

A second reason is that California, for complex reasons, has turned its face against minorities in recent years.<sup>14</sup> Its universities, once hospitable to students and faculty of color, have turned cold.<sup>15</sup> Its public schools, once the envy of the nation, have deteriorated alarmingly.<sup>16</sup> A recent measure,

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legal commentators, interviewed independently, each predicted that the Court would narrow or jettison the diversity rationale when next presented with the opportunity to do so). On its desirability, see Randall Kennedy, *Is Affirmative Action on the Way Out?* COMMENTARY, Mar. 1998, at 35 (“[R]eparative justice is the best rationale for affirmative action.”).

10. See Delgado & Stefancic, *supra* note 4, at 705.

11. Otherwise, the Fourteenth Amendment would seem to have little in the way of practical enforcement. See *infra* Part I.

12. See *infra* Part V.

13. See *infra* Parts II, IV. This is so because a host of factors, such as access to housing, fair treatment by the police, and occupational mobility, affect a family's ability to send their children to college. See, e.g., JONATHAN KOZOL, *SAVAGE INEQUALITIES* (1991) (pointing out how a host of conditions, such as having a parent in jail or out of work, hunger, and crowded living conditions, diminish the academic performance of young children). Accordingly, the scope of causation should be broad. The level of educational aspiration is fragile; dampen it and the effects on a family are apt to last a long time. In a corporation, by contrast, the consequences of a policy of discrimination are not as long lasting; a company that stops discriminating—and announces it—may return to normalcy in short order. See Kenneth Labich, *No More Crude at Texaco*, FORTUNE, Sept. 6, 1999, at 206 (noting that a company once seen as a “chamber of horrors for minorities” is now well on its way toward being a “bastion of equal opportunity”).

14. See *infra* Part IV.

15. See *infra* Part V.B.

16. See generally RUBÉN DONATO, *THE OTHER STRUGGLE FOR EQUAL SCHOOLS: MEXICAN AMERICANS DURING THE CIVIL RIGHTS ERA* (1997); PETER SCHRAG, *PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE* (1998).

enacted by the people, would eliminate access to K–12 schools for children of undocumented aliens.<sup>17</sup>

Finally, as California goes, so goes the nation. Other states have copied California's disavowal of race-conscious decision making in higher education, as once they tried to emulate its enviable schools and its open embrace of newcomers.<sup>18</sup>

We are not the only ones working in this vein. As we write, researchers at other institutions have been investigating the histories of their own schools and regions for evidence of lingering discrimination.<sup>19</sup> One researcher at the University of Texas School of Law teaches an annual seminar about his own school's history, in connection with which he has compiled a website containing thousands of pages of documents that has received over 8000 hits.<sup>20</sup> On a governmental level, the U.S. Department of Education has been investigating vestiges of discrimination in the Fifth Circuit,<sup>21</sup> while the U.S. Department of Justice<sup>22</sup> and a commission established by former Colorado governor Roy Romer have been documenting discrimination in various industries, with a view toward meeting the standards the U.S. Supreme Court seemingly requires for remedial affirmative action.<sup>23</sup> The rationale of remediation seems to be emerging, then, simultaneously with the increasingly ferocious, broad attack on affirmative action led by conservative think tanks and litigation centers.

This Article begins with a brief review of the case law of affirmative action in higher education, paying particular attention to its various rationales and standards of proof. It then turns to California's historic treatment

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17. See *infra* notes 245–253 and accompanying text.

18. See *supra* note 8 and accompanying text.

19. See, e.g., Thomas D. Russell, *History of Racial Discrimination at the University of Texas* (visited Mar. 28, 2000) <<http://www.ccwf.cc.utexas.edu/~russell/seminar/smnr.html>>; Letter from a University of California at Davis professor to Richard Delgado and Jean Stefancic (Oct. 15, 1997) (on file with authors); see also David J. Garrow, *Mississippi's Spy Secrets*, NEWSWEEK, Mar. 30, 1998, at 15 (explaining how investigators revealed that Mississippi had maintained a secret state agency aimed at discrediting the civil rights movement).

20. See Russell, *supra* note 19.

21. See Patrick Healy, *A Lightning Rod on Civil Rights: Norma Cantú Changes the Debate on Affirmative Action, Desegregation, and Athletics*, CHRON. HIGHER EDUC., Sept. 17, 1999, at A42; Telephone Interview with Tom Russell, Professor of Law, University of Texas, (Nov. 13, 1999).

22. See Michael Higgins, *Plan of Action*, A.B.A. J., Apr. 1998, at 68.

23. See Colorado Governor Roy Romer, Exec. Order No. D00798, Apr. 7, 1998 (creating the 13-member Disparity Resolution Task Force to respond to the Disparity Study Final Report); COLORADO DEP'T OF TRANSP., STATE OF COLO., DISPARITY STUDY: FINAL REPORT (1998) (unveiling a two year independent study on state spending, ordered by the Colorado legislature in response to legal challenges to affirmative action, that addresses the disparity between the number of Minority/Women/Disadvantaged Business Enterprise firms that are qualified to perform contracts with the State of Colorado and the Colorado Department of Transportation (CDOT) and the utilization by the state and CDOT of these firms in contracting and purchasing).

of Asians, Mexicans, African Americans, and Indians, focusing on actions that the average reader would conclude were likely to impair upward social mobility and educational opportunity. As we mentioned, the actions of schools and universities are of prime interest to us. But racism and prejudice weave a complex web, with many forms and manifestations converging to deny educational opportunity. The scope of the Article, accordingly, is relatively broad. It includes terrorism and official brutality, of course, as well as job and housing discrimination. It examines discrimination in social attitudes, media, and popular culture. Our approach is both chronological and concentric. The Article begins in the earliest times and radiates outward from an educational core, analyzing each group in turn.

This broad treatment seems advisable for a number of reasons. First, it is difficult to predict what the Supreme Court will do in deciding the next higher education affirmative action case. As mentioned, it may curtail the diversity rationale sharply or eliminate it altogether. But the remedial rationale is apt to remain in some form. Finally, legalities aside, we believe that fair-minded readers in California and elsewhere will want to know what events brought California to its current situation. Does California have much or little for which to atone? Understanding the social setting in which a problem arises is often a necessary precondition for treating it sensibly and humanely.

How did California's main ethnic minority groups first encounter whites, and what has their experience been like with their white neighbors and government? For our purposes, this history begins with the era shortly before the Gold Rush and continues to World War I. The second era begins with World War I and continues through the early Cold War competition with the Soviet Union. The third era begins with the Cold War and ends with the present. Each era has a characteristic quality; each shades off, of course, into the next.

Beginning around 1960, a significant development took place. The University of California system, for the first time, reorganized its admission policies to emphasize standardized testing scores.<sup>24</sup> This development coincided with the increasing bureaucratization of California higher education under former president Clark Kerr and the state's strategic initiative known as the Master Plan, which divided higher education in California into three tracks, corresponding roughly to upper-class, high-achieving whites, who went to campuses of the University of California; less-privileged whites and a few minorities, who went to the California State Universities; and everyone else,

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24. See *infra* notes 479–485 and accompanying text.

mainly some whites, minorities, and immigrants who attended the community colleges.<sup>25</sup>

We cover these developments in some detail, because they expose a direct link among higher education, governmental action, and the fates of minorities. In that same vein, we devote special coverage to the role of particular university professors in California and individual campuses, such as Davis, in maintaining a race-stratified society.

Because our main purpose is legal, namely documenting racial discrimination and its effects, we focus on the victimization, rather than the struggle, side of the equation. We are more interested, in other words, in the barriers minorities have had to surmount than in the gallant, often inspiring, efforts they took to survive and advance themselves in a frequently hostile environment. Finally, the reader should note that we are not historians. Our purpose is not to develop a novel historical thesis or interpretation, rather it is to bring to light events that bear on a vital legal and social question. What follows, then, is more like a "Brandeis brief" than a work of historiography.<sup>26</sup> We collect and display incidents and patterns because of their connection with the current debate about affirmative action. Policymakers and judges are our intended audience, as well as sympathetic members of the lay public—not historians. Finally, we cannot claim to be comprehensive. The history of one state, especially one as vast as California, exceeds the reach of any two researchers, no matter how diligent. We offer, at best, a beginning, in the hope that others will fill in the many gaps and untold stories that we leave unaddressed.

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25. See *infra* note 483 and accompanying text.

26. See *Muller v. Oregon*, 208 U.S. 412, 419 n.1 (1908) (employing social science data, long excluded by most higher courts); see also John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 477–82 (1986).

Studies of this sort usually attract two separate and invalid objections which we might as well address now. The first objection is, are we not overlooking all the good things California, and individual California citizens, have done for minorities over the years? The answer is, of course, that California has done good things for minorities over the years, but this is completely irrelevant. The appropriate level of discrimination is zero; a private firm that discriminates against a minority group (say, for example, blacks) does not offset kind treatment of another minority group, or of that group on another occasion. This is best illustrated in the case of crimes. A murderer may not plead that on other occasions he behaved in socially useful ways in order to escape liability. See FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* (Constance Garnett trans., Bantam Books 1962) (1866) (describing the character Raskolnikov, who murdered his landlady and then sought to escape punishment by listing the good things he planned to do in life).

The second objection is that California is no worse than other states. But if "everyone is doing it," the conclusion ought to be that those other states similarly owe remediation to the minorities they treated badly, not that all should escape responsibility. Also, one should not prejudge California's record in comparison with other states. Scholars in other states are researching their states' records now, and California might turn out to be worse, or better, than these other states when the full record becomes clear.



## I. RACE-CONSCIOUS DECISION MAKING IN HIGHER EDUCATION

The Supreme Court has set out what governmental actors, including institutions of higher education, may do in the way of race-conscious decision making. Among the issues it has addressed are the standard of review for affirmative action programs,<sup>27</sup> the amount of weight race may be afforded in relation to other factors,<sup>28</sup> and whether admissions and hiring committees must compare each applicant to all the rest, rather than considering minorities and whites separately.<sup>29</sup> In general, the scope for race-conscious decision making has narrowed with each successive decision. Nevertheless, until recently, most authorities believed that universities that avoided strict quotas, overt two-track procedures, or decisive weight to race stood on solid ground.<sup>30</sup>

The Fifth Circuit's decision in *Hopwood v. Texas*<sup>31</sup> cast doubt on many of these assumptions. Giving short shrift to *Bakke*, but patterning itself expressly after *Adarand Constructors, Inc. v. Peña*,<sup>32</sup> the Fifth Circuit applied strict scrutiny to strike down race-based admissions at the University of

27. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287–89, 320 (1978); see also *id.* at 361–62 (Brennan, J., concurring in the judgment and dissenting in part) (arguing, in an opinion joined by three other justices, for intermediate scrutiny). But see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that even benign racial classifications—those intended to help minorities—trigger strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (O'Connor, J., plurality opinion) (same); *id.* at 519 (Kennedy, J., concurring).

28. See *Bakke*, 438 U.S. at 315 (holding that the use of race is permissible, if not determinative or decisive). But see *infra* notes 35–39 and accompanying text (noting that the use of race is impermissible, even if not decisive, being merely one factor among many, under the Fifth Circuit's approach in *Hopwood v. Texas* 78 F.3d 932 (5th Cir. 1996)).

29. See *Bakke*, 438 U.S. at 317 (holding that the use of race is permissible if all applicants are compared). But see *infra* notes 35–39 and accompanying text (noting that the use of race is impermissible under *Hopwood*).

30. See, e.g., WILLIAM G. BOWEN & DEREK CURTIS BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); NEIL L. RUDENSTINE, *HARVARD UNIV., THE PRESIDENT'S REPORT 1993–1995* (1996); Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 *UCLA L. REV.* 1745, 1772–79 (1996); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 *DUKE L.J.* 705, 712–15; Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 *HARV. C.R.-C.L. L. REV.* 381, 429–41 (1998); Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 1995 *ANN. SURV. AM. L.* 515, 539–50; Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 *CAL. L. REV.* 953, 1014–15, 1022–29 (1996); Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 *HARV. L. REV.* 1357, 1360–66 (1996). But see *Wessmann v. Gittens*, 160 F.3d 790, 797–98 (1st Cir. 1998) (holding that *Bakke* may still be good law, but that “abstract” and “generalized” evidence of diversity's value will likely not suffice); *Tracy v. Board of Regents of the Univ. Sys. of Ga.*, 59 F. Supp. 2d 1314, 1321–23 (S.D. Ga. 1999) (implying that diversity does not, in itself, confer educational benefits and may not constitute a compelling interest).

31. 78 F.3d 932 (5th Cir. 1996).

32. 515 U.S. 200 (1995).

Texas School of Law, thus raising concerns in the minds of many other universities outside the Fifth Circuit over whether their own procedures would withstand scrutiny. Earlier, the district court in *Hopwood*, following Justice Lewis Powell's opinion in *Bakke*, held that Texas's purpose—"[t]o achieve the diversity of background and experience in its student population essential to prepare students for the real world functioning of the law in our diverse nation"<sup>33</sup>—met the compelling interest standard required for such cases, but that Texas's approach had not been narrowly tailored to advance that interest.<sup>34</sup>

On appeal, however, the Fifth Circuit found Texas's program deficient on even more basic grounds. Writing that "Justice Powell's view in *Bakke* is not binding . . . on this issue," it declared that any consideration of race, even for the purpose of achieving a diverse student body and intellectual climate, offended the Constitution.<sup>35</sup> A racial criterion for admission, it wrote, is "no more rational . . . than . . . choices based upon the physical size or blood type of applicants."<sup>36</sup> Even worse, using race "replicates the very harm that the Fourteenth Amendment was designed to eliminate."<sup>37</sup> For the *Hopwood* court, Supreme Court case law tolerates "only one compelling state interest [that could justify affirmative action in higher education]: remedying past wrongs."<sup>38</sup> Whether later courts, particularly the Supreme Court, will rule in a similar fashion remains, of course, an open question. Many commentators have warned—or urged—that when the Supreme Court finally decides a case like *Hopwood*, it may relegate the diversity rationale to the waste heap.<sup>39</sup> In California, of course, it appears that the voters who enacted Proposition 209 intended to do just that.<sup>40</sup>

If, after a few years, the remedial rationale is the only one left standing, how will it play out in higher education settings? Extrapolating from such cases as *Wygant v. Jackson Board of Education*<sup>41</sup> and *City of Richmond v. J.A.*

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33. *Hopwood v. Texas*, 861 F. Supp. 551, 570 (1994).

34. *See id.* at 569–74.

35. *Hopwood*, 78 F.3d at 944.

36. *Id.* at 945.

37. *Id.* at 946.

38. *Id.* at 944.

39. *See Commentary, supra* note 9 (discussing this possibility); Liu, *supra* note 30, at 381–82; Ethan Bronner, *Group Suing U. of Michigan Over Diversity*, N.Y. TIMES, Oct. 14, 1997, at A24 (describing impending lawsuit); *see also* Rice v. Cayetano, 528 U.S. 1, 20 (2000) (deeming racial classifications "corruptive of the whole legal order" and holding that a voting restriction aimed at ensuring a Hawaiian-only vote for the Office of Hawaiian Affairs Trustee position to be unconstitutional).

40. *See infra* notes 254–261 and accompanying text. Proposition 209's original title, the "California Civil Rights Initiative," may have misled some voters into thinking the measure would advance the cause of minorities.

41. 476 U.S. 267 (1986).

*Croson Co.*,<sup>42</sup> one may hazard some informed speculations. Certainly, evidence of past discrimination must be specific and particularized, not merely societal or general.<sup>43</sup> The findings must pertain to the specific region or institution in question—a showing that society in general or all universities maintained barriers against minorities will have, as one Court put it, “extremely limited” probative value.<sup>44</sup> Proof of past discrimination must emanate from a fact finder with high credibility.<sup>45</sup> Presumably, a university’s confession of guilt, standing alone, will not be enough.<sup>46</sup> Finally, remedial measures must be no broader and last no longer than necessary to correct the violations shown.<sup>47</sup>

Beyond these generalizations, it is difficult to hazard much more than a guess about the extent of remediation permissible, or required, under the Fourteenth Amendment. A few lower court cases imply that a university may afford race-based treatment in admissions and hiring “if [it can] show . . . it had essentially become a ‘passive participant’ in a system of racial exclusion”<sup>48</sup> established by other entities operating in the region—or, better yet, allied with it.

Of course, the Supreme Court may end up promulgating absurdly narrow guidelines for the remedial rationale so that, for example, a university could not engage in remedial affirmative action unless a specific subunit, such as a department, or even a particular professorship, had acted discriminatorily toward applicants precisely like the ones requesting consideration.<sup>49</sup> The Court might shrink the time permitted for proof of causation, so that discrimination that occurred a short time in the past would be deemed to have lost its efficacy. It could also hold that universities that had undertaken

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42. 488 U.S. 469 (1989).

43. See Liu, *supra* note 30, at 400–01.

44. *Croson*, 488 U.S. at 504.

45. See Liu, *supra* note 30, at 400–01.

46. See *id.*

47. See Lackland H. Bloom, Jr., Hopwood, Bakke, and the Future of the Diversity Justification, 29 TEX. TECH L. REV. 1, 50–54 (1998).

48. *Croson*, 488 U.S. at 492; see also *Coral Constr. Co. v. King County*, 941 F.2d 910, 916 (9th Cir. 1991).

49. See Richard Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 WIS. L. REV. 579, 583 (discussing the doctrine’s mirage-like retreat in face of ever more insistent proof). The absurdity of such an approach should be obvious. Consider that a university has a finite number of professorships, just as a town has a finite number of homes. Once these professorships are given out, no more remain to be disbursed. A professor of a minority race cannot “buy in” easily, at least not without turnover and some other professor’s departure, which is a slow and tedious process. And note how two considerations discourage: (1) The minority professor considering waiting out access knows he or she would, at the end of the line, have few other minority professors to talk with, and (2) The professors who will judge his or her application will be white and likely to examine the applicant’s credentials and accomplishments by traditional, white standards so that articles, books, and syllabi dealing with poverty or race may end up devalued.

even feeble measures to redress racial imbalances had done enough. We write in the hope that a commonsensical, middle-ground approach will prevail so that educational institutions will be able to offer race-conscious programs when clear-cut discrimination, which anyone would regard as impeding upward educational mobility, is shown by a credible authority. The remainder of this Article suggests that this standard is amply met in California.

Recently, we visited a renowned institution of higher education located in California, where one of us had been invited to present a paper. During a break in the proceedings, we were walking around the attractive tree-lined campus when we spotted an impressive building with a sign above the door that read "Heritage Hall." It was locked, but we later learned that the building is devoted to displays of trophies and other mementos memorializing the achievements of the school's athletic teams and of its scientists and other academic figures. Upon inquiring, we learned that most universities in California and elsewhere maintain comparable collections.<sup>50</sup> School pride and tradition evidently are themes that university administrators, fundraisers, and athletic departments feel perfectly free to exploit in fundraising and public relations efforts. The past plainly makes a difference; common sense and ordinary experience tell us that. But if universities may point with pride to past accomplishments, even ones lying in the rosy penumbra of distant history, to build solidarity and loyalty, then it should follow that those same universities may not deny the reality and lingering effect of past racial exclusion and misbehavior. If the past makes a difference, one cannot pick the good and ignore the bad. It is because we believe that the past does indeed make a difference—that understanding our history will enable us to grasp what it is that we are now called upon to do—that we offer this Article and our research into the history of a complex and rich state.

## II. CALIFORNIA HISTORY: THE EARLY PERIOD

The racial history of California, like that of Washington and Oregon, presents a unique twist in that the Pacific was the last frontier of America's westward expansion. Minority groups who had previously been pushed west were finally forced to assimilate into Anglo American culture or return home. Mexican Americans, for example, were offered a harsh choice under

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50. See, e.g., Steve Bisheff, *Nostalgia Is All that USC Fans Have Left*, ORANGE COUNTY REG., Oct. 19, 1999, at D1; Silvia Pettem, *Boulder County History: Wander Historical Treasures at CU*, BOULDER DAILY CAMERA, Jan. 26, 1999, at B8 (describing the University of Colorado Athletics Gallery, the University of Colorado In Space Gallery, and the Distinguished Alumni Gallery, among other displays of past achievements); Scott M. Reid, *Minorities Not Priority at USC*, UCLA Colleges, ORANGE COUNTY REG., Dec. 19, 1999, at D17.

the Treaty of Guadalupe Hidalgo: Mexicans residing in the newly conquered land had one year to decide whether to stay or to return to the interior of Mexico.<sup>51</sup>

In addition to the theory mentioned above—that California's minorities received harsh treatment because westward expansion had simply run out of land—other historians hypothesize that additional factors played a part in California's brutal, and sometimes bloody, treatment of minority groups. Tomás Almaguer points out that Manifest Destiny inflated Euro-Americans' sense of entitlement to California's land and riches, so that Mexican miners or Asian American farmers, for example, provoked suspicion—"Why are they in our way?"<sup>52</sup> He also points out that free labor ideology increased tensions between white laborers, on the one hand, and minorities on the other, who were seen as threatening capitalism by their willingness to work long hours for substandard wages.<sup>53</sup>

Although race seems to have been the prime factor in early California conflict, over time labor relations and class began to play an overarching role as well.<sup>54</sup> Authorities disagree slightly on the mixture of motives. One holds that most of the mistreatment stemmed from simple racism.<sup>55</sup> Kevin Starr, a preeminent California historian, offers disappointment as an additional reason for California's mistreatment of foreigners and minorities.<sup>56</sup> He points out that California is the only state that has made a dream part of its identity—the dream of a better life, beaches, sunshine, wealth.<sup>57</sup> That sense of destiny could turn cruel, as when, for example, Indians stood in the way,<sup>58</sup> or when Mexico inconveniently turned out to own lands coveted by Euro-Americans.<sup>59</sup> A final theory holds that the presence of several minority

51. See, e.g., RODOLFO ACUÑA, OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION 29 (1972).

52. TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA 12, 32–33 (1994).

53. See *id.* at 12–14, 33–37.

54. See *infra* Part III.

55. See Daniel Cornford, "We All Live More Like Brutes Than Humans": Labor and Capital in the Gold Rush, in A GOLDEN STATE: MINING AND ECONOMIC DEVELOPMENT IN GOLD RUSH CALIFORNIA 78, 86 (James J. Rawls & Richard J. Orsi eds., 1999).

56. See James J. Rawls, *California: A Place, A People, A Dream*, in CALIFORNIA: A PLACE, A PEOPLE, A DREAM 140, 142, 144 (Claudia K. Jurmain & James J. Rawls eds., 1986); Kevin Starr, *California: A Dream*, in CALIFORNIA: A PLACE, A PEOPLE, A DREAM, *supra*, at 13, 14.

57. See Starr, *supra* note 56, at 6.

58. See JAMES J. RAWLS & WALTON BEAN, CALIFORNIA: AN INTERPRETIVE HISTORY (7th ed. 1998).

59. See *id.* at 130–34.

groups within California afforded Anglo settlers the opportunity to manipulate one group against another as social attitudes or labor needs shifted.<sup>60</sup> The following parts show all of these forces in operation.

#### A. The Settlement Period

California was originally inhabited by more than one hundred Native American tribes. In 1533, Cortes arrived in lower California, and by 1769, the first significant Spanish settlement was in place. Unlike the English colonists, the Spaniards considered Indians subjects of the Spanish monarch in need of Christianization and training in European ways, language, and the domestic arts. Carried out by a string of missions, the central purpose of this training was to civilize the Indians and make them "Spanish," as well as to make use of their labor. Unsurprisingly, the Indians did not thrive in the regime of corporal punishment, unsanitary conditions, altered diet, hard labor, and terrifying sermons about hell and the afterlife. At the end of the mission era, 75 percent of the native population had been eliminated.<sup>61</sup>

After a long and bloody revolution that lasted from 1810–1822, Mexico gained independence from Spain. Mexico's new constitution, unlike the American version, provided for complete political and racial equality. It also granted Indians the right to vote and to hold office and property. By 1845, the last missions were privatized and replaced by ranchos, large private land grants, and cattle raising. Despite the noble aspirations of the Mexican Constitution, the California ranchos each employed thousands of Indians who did all of the work.<sup>62</sup>

American settlers began arriving in California around 1818, during the height of the Mexican Revolution.<sup>63</sup> Larger numbers, including families, arrived by covered wagon starting in 1841. A few years later, the United States concocted a pretext to declare war against the fledgling Republic. After two years, the United States decisively defeated Mexico and forced it to cede California and other territories in what is now the Southwest to the United States.<sup>64</sup>

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60. See ALMAGUER, *supra* note 52, at 4–7.

61. See RAWLS & BEAN, *supra* note 58, at 13, 15, 20, 26, 44, 46–47. On the Indians' fate, see generally ALBERT L. HURTADO, *INDIAN SURVIVAL ON THE CALIFORNIA FRONTIER* (1988).

62. See RAWLS & BEAN, *supra* note 58, at 51, 54, 60–62, 63.

63. See *id.* at 71. Many of the early arrivals were Yankee traders. See *id.* For other states of origin, see *infra* note 67 and accompanying text.

64. See *id.* at 74–76, 85–89.

## B. The Gold Rush

Americans discovered gold in the foothills of the Sierra Nevada in early 1848, a few days before signing the Treaty of Guadalupe Hidalgo with Mexico that ended the war with that nation.<sup>65</sup> The treaty signers appear to have been aware of this discovery, rumors of gold having circulated as early as 1843.<sup>66</sup> During the summer, the lure of gold drew prospectors from Hawaii, Oregon, Utah, and the rest of the United States, as well as from Mexico, Peru, and Chile.<sup>67</sup>

In the early period, over half of the miners were Indians; many worked for the white miners just as they had worked for the missionaries and rancheros, while others worked for themselves. In 1848, about six thousand miners had found gold, a figure that rose to forty thousand by 1849. By the peak year of the rush, 1852, California fields swarmed with more than one hundred thousand miners who raked in about eighty million dollars worth of gold. The lure of sudden wealth attracted adventurers from all economic classes, but most of the miners were young, footloose, and male. Needless to say, white miners did not want foreign or nonwhite competition. Many local mining codes forbade mining by Mexicans, Asians, or foreigners. The codes, whether formal or merely implicit, were enforced by rough and sudden action, including lynching and vigilantism.<sup>68</sup>

In addition to mining codes that excluded Mexicans entirely, an 1850 Foreign Miners' License Tax required noncitizen miners to pay the hefty fee of twenty dollars per month.<sup>69</sup> Anglo American miners enthusiastically enforced the new tax, many of them making the rounds of mines and mining camps, dressed in their old Mexican American war uniforms, in search of Mexicans. The visits struck terror in the hearts of many Mexican American miners, including some Californios who had become American citizens under the Treaty of Guadalupe Hidalgo and whose family histories in California considerably predated those of their enforcers. Many returned to Mexico fearing for their lives. Mexico protested this treatment, but California turned a deaf ear until enough local merchants complained that they were losing business. The tax was repealed in 1851, only to be reenacted in a somewhat more moderate form against the Chinese a short time later.<sup>70</sup>

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65. See *id.* at 91; see also GRAY BRECHIN, *IMPERIAL SAN FRANCISCO: URBAN POWER, EARTHLY RUIN* 29 (1999).

66. See BRECHIN, *supra* note 65, at 30 (noting that the *California Star* in 1847 "predicted, '[T]he town of Yerba Buena [San Francisco] is no doubt destined to be the Liverpool or New York of the Pacific Ocean,' since 'all the products of the gold . . . mines, with which the country abounds, must be concentrated here.'").

67. See RAWLS & BEAN, *supra* note 58, at 94.

68. See *id.* at 94, 101–02.

69. See *id.* at 129; see also ACUÑA, *supra* note 51, at 106–09, 118.

70. See RAWLS & BEAN, *supra* note 58, at 130, 135.

By 1852, following the departure of many Mexicans, the Chinese were the largest foreign group in California mining. Before then, few Chinese had come to the state; however, in 1851, China erupted in civil war and the ensuing economic disorder, coupled with news of easy wealth in the golden mountains of California, attracted many would-be miners. Unlike the Mexican miners, many Chinese planned to return home after making their fortunes.<sup>71</sup>

Californians visited many forms of mistreatment on the Chinese miners. Many Chinese were also oppressed by their own countrymen, who established a system of indentured servitude reminiscent of that which the English installed in the original thirteen colonies. California even attempted to legalize these labor contracts, presumably to increase the flow of Chinese, but mass meetings and opposition in the mining camps against the "coolie bill" defeated the measure.<sup>72</sup> During the same session, California legislators voted for the Foreign Miners' License Tax with the understanding that it would be enforced mainly against the Chinese.<sup>73</sup> Unlike the Mexican miners, however, the Chinese were not daunted by the tax and paid it uncomplainingly until 1862 when the California Supreme Court declared it unconstitutional.<sup>74</sup>

The early Chinese contended with other indignities, as well. The California Supreme Court in *People v. Hall*<sup>75</sup> ruled that the Chinese were legally included in the category "Indian" and thus fell under the scope of an 1850 law prohibiting blacks and Indians from testifying either for or against white men.<sup>76</sup> This ruling was not reversed until later in the century.

Early consideration of African Americans under California law began in June 1849, in the middle of the gold rush when the California Constitutional Convention opened. The majority of the delegates had lived in California for three or more years and were miners, not ranchers.<sup>77</sup> About half were under the age of thirty-five.<sup>78</sup> A major issue the delegates had to address was whether the state would allow slavery. Some of the early miners had brought slaves with them, but the convention voted unanimously to prohibit slavery.<sup>79</sup> It did so not for any humanitarian reasons, however. As Tomás Almaguer explains,

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71. See *id.* at 135.

72. See *id.*

73. See RAWLS & BEAN, *supra* note 58, at 135; *supra* note 70 and accompanying text.

74. See *Lin Sing v. Washburn*, 20 Cal. 535 (1862); RAWLS & BEAN, *supra* note 58, at 135.

75. 4 Cal. 399 (1854).

76. The inability to testify against whites, of course, deprived Chinese of redress for mistreatment at the hands of members of this group.

77. See RAWLS & BEAN, *supra* note 58, at 107.

78. See *id.*

79. See ALMAGUER, *supra* note 52, at 35–36 ("Neither slavery nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this state." (citing J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849, at 44 (1850))).



opposition to slavery “was not a sign of an enlightened social attitude toward black people.”<sup>80</sup> Quite the contrary, it reflected fears that blacks or any nonwhite group posed a threat to free white labor. As one delegate put it:

If there is just reason why slavery should not exist . . . there is [nevertheless] reason why that part of the family of man, who are so well adapted for servitude [for example blacks], should be excluded from amongst us. . . . I wish to cast my vote against the admission of blacks into this country, in order that I may thereby protect the citizens of California in . . . the right to labor. . . . I would make [the laboring man] worthy of his high prerogative, and not degrade him by placing him upon a level with the lowest in the scale of the family of man.<sup>81</sup>

Around the time the delegates were considering the “Negro question,” a mass meeting of mine owners passed a resolution “that no slave or Negro should own claims or even work in the mines.”<sup>82</sup> They served notice that the slaves who were then working in the mines had to leave the district by sunrise.<sup>83</sup>

The delegates also considered excluding free blacks from the state. Some voiced the fear that if freed slaves were permitted, slave owners would bring slaves, then free them, in accord with local law, only upon the condition that they perform indentured servitude.<sup>84</sup> One delegate supported the proposal to exclude free blacks on the ground that all blacks, free or not, were so “idle in their habits, difficult to . . . govern[] . . . , thriftless, and uneducated”<sup>85</sup> that their presence in California would be even worse for the state than the institution of slavery itself. The exclusion clause attracted considerable support, but was eventually voted down because the delegates feared that Congress would never admit California to the Union with it on the books.<sup>86</sup>

California’s agonizing over what to do about blacks was largely hypothetical because relatively few blacks resided in the state before World War II and the postwar boom. Some of the earliest Spanish conquerors were mulattos, but the Gold Rush, as mentioned above, brought blacks to the state in relatively small numbers. By the 1850s, African Americans in California were holding meetings to demand the right to vote, to testify in court, and to hold political office. They also protested the Fugitive Slave Act. Despite this early activism, blacks suffered severe discrimination in housing, jobs,

80. *Id.* at 36.

81. *Id.* at 36–37 (citing BROWNE, *supra* note 79, at 49).

82. RAWLS & BEAN, *supra* note 58, at 108.

83. *See id.*

84. *See id.*

85. *Id.*

86. *See id.* Blacks were also seemingly denied homestead rights. *See* DELILAH L. BEASLEY, THE NEGRO TRAIL-BLAZERS OF CALIFORNIA 60–61 (1919). On slave auctions in California, *see id.* at 72.

schools, and unions. According to one leading authority, blacks, although oppressed, enjoyed a significant advantage over other groups: They came to California with centuries of experience of living with whites. Although this experience was often brutal, it nevertheless familiarized them with Euro-American culture. All spoke English; many attended Protestant churches. After emancipation, they were not excluded from legal citizenship, unlike Asians who could not naturalize because they did not satisfy a congressional statute's definition of whiteness as a prerequisite for citizenship.<sup>87</sup>

Of all the early minority groups of color in California, the Indians probably suffered "the most unique and devastating experience."<sup>88</sup> As the original inhabitants, they had to be tamed, pacified, and colonized. Their hunting-gathering ways and spiritual approach to life and nature placed them radically at odds with Anglo settlers and made their adjustment to western ways extraordinarily difficult. Early Franciscan missionaries tried to train the Indians as agricultural workers, but without much success.<sup>89</sup> Diseases took a terrible toll; "whole cultures were destroyed or drastically altered."<sup>90</sup> In 1833, the Mexican government stripped the friars of much of their power over the Indians by making the latter free citizens of the new nation of Mexico. Some Indians went to work for the newly secular rancheros; others returned to pre-European life. Still others intermarried or became vaqueros, spoke Spanish, and wore European clothes.<sup>91</sup>

The Indians' improved condition did not last long; the American conquest and Gold Rush precipitated a sharp turn for the worse. After an initial period, the gold seekers not only had little use for Indian labor, they brought prejudices ingrained from contact with Indians on the Western frontier. When the federal government made only feeble efforts to protect them or to set aside land for reservations,<sup>92</sup> there ensued "one of the last human hunts of civilization, and the basest and most brutal of them all."<sup>93</sup> Marauding Californian settlers quickly cut the Indian population to one-tenth.<sup>94</sup>

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87. See Charles Wollenberg, *Ethnic Experiences in California History* [hereinafter *Ethnic Experiences*], in *NEITHER SEPARATE NOR EQUAL: RACE AND RACISM IN CALIFORNIA* 3, 8 (Roger Olmsted & Charles Wollenberg eds., 1971). On the white-prerequisite cases, see IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

88. Wollenberg, *Ethnic Experiences*, *supra* note 87, at 3.

89. See *id.* at 4.

90. *Id.*

91. See *id.*

92. See *id.*

93. *Id.* (quoting Hubert Howe Bancroft).

94. See *id.*

The settlers widely agreed that Indian extermination was a necessary and sensible policy.<sup>95</sup> In a vain effort to enlist federal support for it, Governor John McDougal sent a letter to President Millard Fillmore, warning that “100,000 Indian warriors were in a state of armed rebellion.”<sup>96</sup> The following year, Senator John B. Weller claimed that the tribes were ready to launch a “bloody and devastating war.”<sup>97</sup> The federal government apparently refused to believe the lies; it declined to fund a campaign against the California Indians.<sup>98</sup> Instead, it sent three agents to negotiate treaties to provide a system of segregation that would remove the Indians from the white mining districts and settlements.<sup>99</sup> An early attempt to create very large reservations failed because the Indians refused to move.<sup>100</sup> Then, the federal government changed its policy to promote small reservations. Although almost equally unsuccessful, this program became the model for much of the West.<sup>101</sup>

The initial strategy of extermination took the form of endless and unforgiving war on the Indians, including women and children, and featured some of the most shocking massacres in United States history. Because of the relentless press of westward migration by whites, many Indians were forced from their traditional areas and sources of food and forced to survive by seizing the white settlers’ horses and livestock, prompting instant violent retaliation.<sup>102</sup>

Whipped up by local newspapers such as the *Chico Courant*,<sup>103</sup> the extermination policy proved highly successful. By 1845, the Indian population had dropped from over three hundred thousand to about half that figure. By 1870, the number had dropped to thirty thousand, and by 1900, fewer than sixteen thousand Indians were left in California. Indians who were not killed were required to perform work. An 1847 military order, later incorporated into law by the state legislature, declared that any unemployed Indian was a vagrant

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95. See WALTON BEAN & JAMES J. RAWLS, CALIFORNIA: AN INTERPRETIVE HISTORY 137 (4th ed. 1968).

96. RAWLS & BEAN, *supra* note 58, at 139.

97. *Id.*

98. See BEAN & RAWLS, *supra* note 95, at 137.

99. See *id.* at 137–38.

100. See RAWLS & BEAN, *supra* note 58, at 137.

101. See *id.*

102. See *id.* at 138, 139.

103. See *id.* at 139. In 1866, *The Chico Courant* proclaimed that [i]t has become a question of extermination now. . . . The man who takes a prisoner should himself be shot. It is a mercy to the red devils to exterminate them, and a saving of many white lives. Treaties are played out. There is only one kind of treaty that is effective—cold lead.

*Id.*

who could be forced into working for the public or auctioned off as an indentured servant.<sup>104</sup>

Because most early Anglo settlers were Christian, they had to demonize the Indians before treating them so cruelly. Thus, "throughout recorded history the California Indians have suffered from . . . a negative stereotype."<sup>105</sup> Early settlers quickly deemed them "primitive," "repulsive," and "expendable."<sup>106</sup> Early trappers coined the pejorative term "digger" and applied it to Indians even before the era of intense competition and extermination began.<sup>107</sup> Indians were said to be dirty, to eat a "filthy" diet, and to be "exceedingly ugly."<sup>108</sup> Their complexion was black; their faces radiated no intelligence.<sup>109</sup> Settlers compared them to pigs and monkeys.<sup>110</sup> California was the only state to recognize formal, de jure Indian slavery.<sup>111</sup> An 1850s era California law "for the government and protection of Indians" paralleled the black codes, punishing vagrancy and other unremunerative activities not favored by the white overlords.<sup>112</sup> Indians were widely regarded as "obstacles to progress"<sup>113</sup> and at cross purposes with advancing white civilization. When the Indians fought-back, whites' fury increased. Bret Harte and a few others protested, but to little avail.<sup>114</sup>

When the Indians did not react quickly enough to satisfy the land lust of whites, bands of miners and ranchers armed with rifles simply shot and killed them. Entire frontier communities supported volunteer militia into the 1870s, as a sort of patriotic duty. Some localities paid bounties for Indian scalps.<sup>115</sup>

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104. See *id.* at 140.

105. JAMES J. RAWLS, *INDIANS OF CALIFORNIA: THE CHANGING IMAGE*, at xiii (1984).

106. See *id.* at xiv.

107. See *id.* at 49.

108. *Id.* at 195.

109. See *id.* at 196.

110. See *id.* at 195, 198. John Woodhouse Audubon wrote that he saw an Indian eating a nut, looking exactly like a monkey. See *id.* at 199. Oddly, the plight of the Indians as an exploited people later provided a template to oust the Mexicanos, who were likewise deemed to be an undeveloped and long-suffering people whose removal was required by Manifest Destiny. See HURTADO, *supra* note 61, at 30, 72; RAWLS, *supra* note 105, at 64.

111. See RAWLS, *supra* note 105, at 108.

112. See *id.* For a description of the black codes which punished African Americans for loitering or being out of work, see DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 111-12 (3d ed. 1992).

113. RAWLS, *supra* note 105, at 173.

114. See *id.* at 183-87.

115. See *id.* at 171.

### C. From the End of the Gold Rush to the Post-World War I Period

#### 1. Discrimination in the Labor Market

After about 1870, Anglo Americans had the upper hand; California's ethnic minority groups had either been defeated or firmly shown their places. The interval between then and about 1920 was one of consolidation. Its story—indeed the story of much of the twentieth century—centers around the history of labor relations, which sets the stage for many of the shifts of fortune for groups of color.

Early settlers, including John Sutter, held great hopes for the Indians as sources of labor. Indeed, Sutter established a permanent colony on the Sacramento River to which he tried to entice Indians by promises of beads, blankets, clothing, and sugar.<sup>116</sup> By controlling wages, prices, and credit, Sutter was able to set up substantial Indian trade and a primitive cash economy.<sup>117</sup> Although his colony was based primarily on Indian labor, employing up to six hundred Indians during the wheat harvest,<sup>118</sup> the Indians seem not to have been ideal laborers, for Sutter found it necessary to employ an army of one hundred fifty Indian infantrymen and fifty Indian cavalry, overseen by white officers, to guard their fellow Indians and maintain discipline. Sutter's success in domesticating the Indians by sheer force provided a model for later white settlers.<sup>119</sup> But just as Sutter recognized that his Indians were "not only potential laborers but a threat to white life and property,"<sup>120</sup> later white settlers remained wary about them, as well. As mentioned earlier, the settlers soon adopted a different, more final, approach to the treatment of Indians.

Mexican Americans, too, encountered both acceptance and resistance in California's labor force. Early California Anglos found them an "idle, indolent, sleepy set" and "illiterate, wasteful people."<sup>121</sup> Nevertheless, they played key roles in supporting California's mining and agricultural industries as

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116. See HURTADO, *supra* note 61, at 49 (citing WILLIAM HEATH DAVIS, SIXTY YEARS IN CALIFORNIA (1889); JOHANN AUGUST SUTTER, THE DIARY OF JOHANN AUGUST SUTTER (1932)).

117. See HURTADO, *supra* note 61, at 49 (citing A PIONEER AT SUTTER'S FORT, 1846-1850: THE ADVENTURES OF HEINRICH LIENHARD (M. Wilbur ed. & trans., 1941); JOHN SUTTER ET AL., NEW HELVETIA DIARY: A RECORD KEPT BY JOHN A. SUTTER AND HIS CLERKS AT NEW HELVETIA, CALIFORNIA, FROM SEPTEMBER 9, 1845, TO MAY 25, 1848 (1939); John Sutter, Personal Reminiscences of General John Augustus Sutter, MS, Bancroft Library).

118. See HURTADO, *supra* 61, at 49.

119. See *id.* at 50, 55.

120. *Id.*

121. Mario T. García, *Americanization and the Mexican Immigrant, 1880-1930*, in FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 69 (Ronald Takaki ed., 1987) [hereinafter FROM DIFFERENT SHORES] (internal quotation marks omitted).

migrant workers.<sup>122</sup> California's first major industry, mining, imposed a dual wage system in which Mexican workers received lower pay than Anglo workers for carrying out the same work.<sup>123</sup>

Mexican laborers also dominated the agricultural industry, comprising 90 percent of the field workers in the Imperial Valley by 1928. Although about three-fourths were undocumented immigrants, many growers winked at their status and benefited from it, secure in the knowledge that the workers would not complain for fear of deportation. For their part, Mexican workers benefited from a labor vacuum that resulted from the anti-Chinese hysteria that swept California and culminated in the Chinese Exclusion Act of 1882. Many of the Chinese had come to work on the railroads; when they were sent packing, Mexicans moved right in.<sup>124</sup> When Mexicans finally moved into urban industrial jobs during the 1920s, they continued to encounter negative stereotypes.<sup>125</sup> Economist Paul S. Taylor found that close to one-third of employers in Los Angeles during the 1920s considered the Mexican woman to be a poor worker—"undependable, irregular, slow, and unintelligent."<sup>126</sup>

The Chinese, in addition to work on the railroads, also found employment in other industries in California. In 1870, they constituted 8.6 percent of the California population, but 25 percent of the work force. In San Francisco, they represented 46 percent of the labor force in four key industries: shoes, woolens, tobacco, and sewing. At times, employers used their industriousness against them, deploying Chinese workers against white ones as strike breakers. For example, when Irish workers earned three dollars a day in the factories of San Francisco, they went on strike and were immediately replaced by Chinese workers at one dollar a day.<sup>127</sup> When they were finally forced out of mining, railroads, factories, and agriculture by virulent racist sentiment, some Chinese opened laundries in which they constituted 72 percent of all laborers by the mid-1870s.<sup>128</sup>

Both Mexican and Chinese laborers were considered migrant workers by the majority culture, which viewed the possibility of permanent settlement

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122. See *supra* note 70 and accompanying text; *infra* note 124 and accompanying text.

123. See RONALD TAKAKI, *IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA* 163 (1979). In the silver mines in the 1870s, Mexican workers received between twelve dollars and thirty dollars a month plus a ration of flour, while Euro-American workers were paid thirty to seventy dollars a month plus free board. See *id.*

124. See ACUÑA, *supra* note 51, at 125, 157–58.

125. See García, *supra* note 121, at 72.

126. *Id.*

127. See TAKAKI, *supra* note 123, at 216, 232, 239.

128. On society's resistance to these laundries, see JUAN F. PEREA ET AL., *RACE AND RACES* 377 (2000) ("[B]y 1870 they were dominant in the laundry industry."); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (rev. ed. 1998).

as odious and threatening.<sup>129</sup> The threat of permanence fueled intense resentment, which jingoists seized on to justify antiminority campaigns and exclusionary legislation.<sup>130</sup> Judicial decisions holding that Chinese, Japanese, and Asian Indians (even if Aryans) were nonwhite fed this sentiment.<sup>131</sup>

Although California's state constitution provided that Mexicans were white and thus eligible for citizenship, other minority groups such as Indians did not receive this protection.<sup>132</sup> Businessman Charles Crocker, superintendent of the Central Pacific Railroad, reported to a legislative committee that the Chinese were not "going to remain here long enough to become good citizens."<sup>133</sup> The Alien Land Laws of 1913 and 1920 prohibited the ownership and lease of California land by "aliens ineligible for citizenship," a prohibition that fell especially harshly on the Japanese, many of whom earned their livelihood by farming.<sup>134</sup>

Mexican migrant farmers fared little better. Although they were essential to the agribusiness industry that grew up in the early years of the twentieth century, social attitudes toward them rarely rose above those we described in early California history.<sup>135</sup> The *Santa Barbara Gazette*, in 1856, wrote that the native Mexicans "are habitually and universally opposed to all progress whatsoever."<sup>136</sup> In 1920, *The Survey* wrote: "[I]t is not surprising that the poor Mexican immigrant is content . . . with one toilet and one hydrant for fifteen families, four and five of these families living in one or two rooms."<sup>137</sup> Social workers found Mexicans a fascinating object of study. In *Americanization Through Homemaking*,<sup>138</sup> Pearl I. Ellis wrote that "the daily bath was important in prevention of skin diseases, but Mexicans seemed . . . lax in this respect, giving rise to the term 'dirty Mexicans.'"<sup>139</sup> New England aristocrat Richard

129. See *supra* notes 69–71 and accompanying text.

130. See *supra* notes 68–70, 72–73, 75–76 and accompanying text.

131. The Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790), had specified that only free white males were eligible for citizenship; later Supreme Court cases determined further that the prerequisite for citizenship was whiteness. See *United States v. Thind*, 261 U.S. 204 (1923) (holding that though Thind was racially classified as Caucasian, that did not make him a white person); *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that Japanese were Mongolians and therefore not white); *In re Saito*, 62 F. 126 (C.C.D. Mass. 1894) (same); *People v. Hall*, 4 Cal. 399 (1854) (holding that the Chinese were either generically Negroes or Indians).

132. See Ronald Takaki, *Reflections on Racial Patterns in America*, in FROM DIFFERENT SHORES, *supra* note 121; ALMAGUER, *supra* note 52, at 9.

133. Takaki, *supra* note 132, at 28 (internal quotation marks omitted).

134. Alien Land Law, Stats. 1921, § 10, 1921 Cal. Stat. lxxxiii, lxxxv, repealed by Stats. 1956, ch. 316, 1956 Cal. Stat. 767; see also ALMAGUER, *supra* note 52, at 10; Takaki, *supra* note 132, at 28.

135. See *supra* notes 68–70 and accompanying text.

136. García, *supra* note 121, at 69.

137. *Id.* at 73.

138. PEARL I. ELLIS, AMERICANIZATION THROUGH HOMEMAKING (1929).

139. *Id.* at 74.

Henry Dana, author of *Two Years Before the Mast*, found California Mexicans lacking “the enterprise and . . . mentality which characterized Yankees . . . inefficient in enterprise, they spent themselves in pleasure-giving activities.”<sup>140</sup> Not to be outdone, University of Southern California sociologist Emory Bogardus lamented, “Mexican adults do not change their food habits easily, and hence progress is slow in improving the Mexican immigrant’s diet.”<sup>141</sup> Moreover, Mexicans have little sense of time, the social scientist wrote, and so require constant supervision in order to achieve regular work.<sup>142</sup>

## 2. Discrimination in Other Areas

Other forms of social and economic discrimination visited on urban Mexicans mirrored that experienced by their countrymen in the fields. Mexican Americans were segregated into barrios, with their own schools and institutions.<sup>143</sup> Within those settlements, late nineteenth century Mexicans formed political organizations and organized Spanish language newspapers, which provided news of Mexico and the struggles of the Mexican American community.<sup>144</sup> In the early 1900s, many Mexicans migrated to California, fleeing the regime of the dictator Porfirio Diaz and the fighting accompanying the Mexican Revolution of 1910.<sup>145</sup> Migration from Mexico continued in the 1920s, making the Mexican presence more noticeable. Social workers and educators attempted to “Americanize” the Mexicans. But as the number of Mexican children in California schools rose, a new strategy—segregation—was put into place. School authorities created separate schools for them.<sup>146</sup>

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140. TAKAKI, *supra* note 123, at 157.

141. García, *supra* note 121, at 74; see also EMORY S. BOGARDUS, *ESSENTIALS OF AMERICANIZATION* 29 (3d ed. 1923) (noting that Mexican immigration “has developed a sinister aspect”); *id.* at 30 (noting that Mexicans lack understanding of American values); *id.* at 268 (noting Mexicans’ love of art and music); *id.* at 269 (noting how the United States needs to give Mexicans “a democratic industrial program” of education); *id.* at 318 (“[W]ithin limits, race does tell.”); *id.* at 322 (deploring “race prejudice [as] the subtlest enemy of Americanization”).

142. See García, *supra* note 121, at 74. Some California academics seem to have been equal opportunity stereotypes, issuing broad generalizations about which groups were desirable and which were not. See, e.g., ELLWOOD P. CUBBERLEY, *CHANGING CONCEPTIONS OF EDUCATION* 14–15 (1909) (decrying that while early immigrants, before about 1882, came from thrifty Northern Europe and blended in easily, newer immigrants—Slovenians, Rutherians, Italians, “Poles,” and Greeks were “[i]lliterate, docile, lacking in self-reliance . . . [and devoid of] the Anglo-Teutonic conceptions of law, order, and government”).

143. See ALBERT CAMARILLO, *CHICANOS IN CALIFORNIA: A HISTORY OF MEXICAN AMERICANS IN CALIFORNIA* 14, 16 (1984); RAWLS & BEAN, *supra* note 58, at 420–21.

144. See CAMARILLO, *supra* note 143, at 27; see, e.g., ACUÑA, *supra* note 51, at 213.

145. See CAMARILLO, *supra* note 143, at 32–33; ACUÑA, *supra* note 51, at 126–27.

146. See CAMARILLO, *supra* note 143, at 43, 44.



Signs on house porches and government agencies warned them that they were not welcome.<sup>147</sup> When written signals were missing, “the silent language of the doorman, the foreman, the school principal” said the same.<sup>148</sup>

The Depression brought greater public outcry against the Mexicans, who were thought to be consuming welfare resources and depleting an already scarce job market. American authorities instituted “a policy of mass deportation,” under which more than four hundred thousand Mexicans and U.S. citizens of Mexican descent were rounded up and sent back to Mexico. Between seventy-five thousand and one hundred thousand of these deportations originated in California. Whole barrios and families were devastated.<sup>149</sup>

Indians in California fared little better during this period. Even after being violently conquered, Indians continued tenaciously to oppose their own oppression, burning government schools in 1883, 1912, and 1914. By 1917, Indians used the courts to gain the vote, and by 1924, obtained the right to attend public school.<sup>150</sup>

California experienced no significant Japanese immigration until the 1890s.<sup>151</sup> While California had been violently anti-Chinese during this period,<sup>152</sup> Japanese immigrants were received, for a time, with favor.<sup>153</sup> The honeymoon period did not last long. As the Chinese had been earlier, Japanese workers came to be viewed as threats to white workers because they were willing to work twelve to fourteen hours per day and on weekends.<sup>154</sup> In 1905, the *San Francisco Chronicle* editorialized against them, and the next year four Japanese scientists were targeted for violence, while the Asiatic Exclusion League led a boycott of Japanese restaurants.<sup>155</sup> White laborers joined the fervor against “Mongolian” and cheap coolie labor.<sup>156</sup> By March

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147. See Wollenberg, *Ethnic Experiences*, *supra* note 87, at 111.

148. *Id.* On society's treatment of this minority group, see THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998).

149. See CAMARILLO, *supra* 143, note at 44, 48–50.

150. Jack D. Forbes, *The Native American Experience in California History*, in NEITHER SEPARATE NOR EQUAL: RACE AND RACISM IN CALIFORNIA, *supra* note 87, at 21.

151. See ROGER DANIELS, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION 6–8 (1962).

152. Earlier, intense opposition to the Chinese and new treaties with China in 1882 and the Chinese Exclusion Act put an end to Chinese immigration. See *id.* at 16–19.

153. See *id.* at 3.

154. See Edna Bonacich, *A Theory of Ethnic Antagonism: The Split Labor Market*, in FROM DIFFERENT SHORES, *supra* note 121, at 142. Moreover, unlike the Chinese, many Japanese men brought their families and showed signs of intending to settle in California permanently. See Wollenberg, *Ethnic Experiences*, *supra* note 87, at 5.

155. See DANIELS, *supra* note 151, at 33.

156. See *id.* at 19, 22–25.

of 1905, the *Chronicle's* campaign led to the passage of an anti-Japanese resolution by the California legislature that limited Japanese immigration.<sup>157</sup>

When Japanese children suffered discriminatory treatment in the San Francisco schools, the Japanese community, unlike the Chinese, did not accept their treatment passively. They organized demonstrations, published books and pamphlets, and sought intervention from President Theodore Roosevelt and the Japanese government, which led to the Gentlemen's Agreement of 1907–1908.<sup>158</sup> Although the two governments caused California to temper some of its most extreme forms of mistreatment of Japanese, resentment continued to simmer.<sup>159</sup>

The Japanese experience in California, then, was unique in a number of respects. First, "they rapidly began to challenge whites in many businesses and professions."<sup>160</sup> Second, many Californians, like Americans elsewhere, were suspicious of Japan as a growing world power.<sup>161</sup> Finally, most Japanese settled in California, a state that "had a lower boiling point than did the country at large."<sup>162</sup>

### III. FROM THE DEPRESSION TO THE COLD WAR

If the immediately preceding era was marked by labor concerns, as new markets in California decided what kind of workers they wanted and on what terms, the years between the Depression and the Cold War featured the early awakenings of minority activism and discontent. All of the minority groups had rebelled against their oppression, even from the early days, particularly the Japanese and Indians.<sup>163</sup> Now rebellion began breaking out more overtly, and repression took even more forceful forms.

During World War I, a number of Indians served in the army. In 1924, partly in recognition of their service, Congress awarded American Indians citizenship in both the United States and in their states of residence. Congress also accepted fault for failing to ratify the reservation treaties of the early 1850s, which had promised California Indians more than seven million acres of land. In 1928, Congress directed California's attorney general to sue the United States on behalf of California Indians to determine

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157. See *id.* at 24–25, 27 (reporting that a headline on February 23, 1905 read "The Japanese Invasion, The Problem of the Hour" with the article charging that "at least 100,000 of 'the little brown men' were 'no more assimilable than the Chinese' and 'undercut white labor'").

158. See *id.* at 9, 23, 33.

159. See *infra* notes 180–192 and accompanying text.

160. DANIELS, *supra* note 151, at 106.

161. See *id.*

162. *Id.*

163. See *supra* notes 150–158 and accompanying text.

the amount of damages. The case dragged on until 1944, when the Federal Court of Claims awarded Indians a mere two hundred dollars per person.<sup>164</sup> Other Indian litigation produced better results. The survivors of the Palm Springs Indians sued for rental income from individually allotted tribal land in that booming resort town.<sup>165</sup> Aided by John W. Preston, former justice of the California Supreme Court, the Indians won a substantial judgment.<sup>166</sup> The Palm Springs litigation persuaded Congress to pass the Indian Claims Commission Act of 1946. California Indians voted to accept an award of 29 million dollars under the act, about forty-five cents an acre for the lands their ancestors had originally occupied.<sup>167</sup>

By midcentury, increased births and migrations of Indians to California had reversed the "long and tragic decline" in Indian population.<sup>168</sup> At the same time, society's conscience was awakening over the earlier mistreatment of the Indian people. California abolished all legal distinction between Indian persons and other citizens and made Indians eligible to attend public schools and receive other public services. Median income and well-being of California Indians, especially on reservations, however, remained abysmal. During the 1960s, California Indians increased their political activism and organized several intertribal organizations. They also occupied Alcatraz Island, staged sit-ins, and took legal action to regain lands owned by Pacific Gas and Electric Company in northern California.<sup>169</sup>

African Americans, too, began airing grievances during this period. By 1940, blacks constituted about 11 percent of the U.S. population, but their representation in California was much smaller, only about 1 percent. With the war and increased demand for labor in the shipyards and other industries, the percentage rose rapidly; many blacks became concentrated in

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164. See RAWLS & BEAN, *supra* note 58, at 388.

165. The litigants, survivors of the Cahuilla tribe (also known as the Palm Springs Indians), received even-numbered sections of desert land in the Palm Springs area. The Southern Pacific Railroad owned the odd-numbered sections. In the 1920s, when Palm Springs became a thriving resort community, the Cahuilla petitioned the federal government to let them lease part of their lands to hotel operators. The government refused. *See id.*

166. "In 1944 the Court ruled that each of the Cahuilla should receive the rental from \$350,000 worth of individually allotted tribal land, as well as a share of the income from 30,000 acres of communal tribal land." *Id.*

167. See Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 959, 60 Stat. 1049 (1947) (omitted from 25 U.S.C. 70 upon termination of Commission on Sept. 30, 1978).

168. As two historians put it:

In 1965 the number of Indians living in California had risen to 75,000, less than 10 percent of whom were living on the 82 federal reservations. . . . During the 1970s the Indian population . . . more than doubled, and in 1981 . . . California, with more than 198,000 Indians, had the largest Indian population of any state in the nation.

RAWLS & BEAN, *supra* note 58, at 412.

169. *See id.*

all-black neighborhoods in Los Angeles, San Francisco, Oakland, Berkeley, and Richmond.<sup>170</sup> Their presence was immediately noted: servicemen on leave, with time on their hands, rioted protesting their presence.<sup>171</sup> Restrictive covenants enforced residential segregation with the enthusiastic support of California realtors, who launched a campaign to reverse the Supreme Court's decision in *Shelley v. Kraemer*,<sup>172</sup> which had declared racially restrictive covenants unconstitutional. Blacks won another significant court victory when the California Supreme Court, in *Perez v. Sharp*,<sup>173</sup> declared a California law against miscegenation unconstitutional—nearly twenty years before the Supreme Court did so nationally in *Loving v. Virginia*.<sup>174</sup> Nevertheless, the plight of black Americans in California was acute. In 1960, more than 40 percent had not completed more than the eighth grade and only 58 percent of black teenagers were functionally literate by the late 1970s.<sup>175</sup> To make matters worse, soon after passage of the Rumford “fair housing” law, the California Real Estate Association launched an energetic campaign against “forced housing.”<sup>176</sup> Its effort culminated in the November 1964 approval by California voters of Proposition 14 by more than a two-to-one margin.<sup>177</sup> Until struck down, it gave property owners the right to exclude anyone for any reason.<sup>178</sup> The passage of Proposition 14 was among the many grievances that contributed to the Watts riot and other disturbances in California in the mid-1960s.<sup>179</sup>

California Japanese, after vigorously opposing their mistreatment, suffered another blow when the threat of Japanese labor led to Japanese exclusion in the Immigration Act of 1924.<sup>180</sup> They were to be punished yet again with the advent of World War II. In January 1942, John B. Hughes

170. See *id.* at 416.

171. See Charles Wollenberg, *California: The People*, in CALIFORNIA: A PLACE, A PEOPLE, A DREAM, *supra* note 56, at 79, 86.

172. 334 U.S. 1 (1948).

173. 32 Cal. 2d 711 (1948).

174. 388 U.S. 1 (1967).

175. See BEAN & RAWLS, *supra* note 95, at 394.

176. RAWLS & BEAN, *supra* note 58, at 394, see also Fair Housing Law, CAL. HEALTH & SAFETY CODE §§ 35700–35745 (West 1963).

177. See CAL. CONST. art. I, § 26 (1964) (incorporating into the California Constitution, Proposition 14: Anti-Fair Housing Initiative (1964)) (repealed 1974); see also RAWLS & BEAN, *supra* note 58, at 394.

178. See RAWLS & BEAN, *supra* note 58, at 394. The proposition invalidated every state law or local ordinance that limited a person's right to refuse “to sell, lease, or rent any part or all of his real property . . . to such person or persons as he in his absolute discretion chooses.” BEAN & RAWLS, *supra* note 95, at 417.

179. See RAWLS & BEAN, *supra* note 58, at 394.

180. See Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (codified at 8 U.S.C. §§ 201–204 (repealed 1952)); see also DANIELS, *supra* note 151, at 1; ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882–1943 at vii–viii (Sucheng Chan ed., 1991).

of the Mutual Broadcasting Company launched a month-long campaign against the Japanese in California, arguing that they represented a threat to the war effort and might engage in espionage.<sup>181</sup> The *San Diego Union* followed suit, urging that “every Japanese . . . should be moved out of the coastal area . . . far enough to nullify any inclination they may have to tamper with our safety here.”<sup>182</sup> The *Los Angeles Times* did likewise, declaring that “a Japanese American born of Japanese parents—grows up to be a Japanese, not an American.”<sup>183</sup> Soon the California branch of the American Legion, the Native Sons and Daughters of the Golden West, the Grower-Shipper Vegetable Association, the Western Growers Protective Association, and the California Farm Bureau Federation were all campaigning for Japanese removal.<sup>184</sup>

California politicians were not far behind. The boards of supervisors of sixteen California counties urged internment, while California Attorney General Earl Warren pressed federal authorities to remove Japanese from the West Coast.<sup>185</sup> Against Attorney General Francis Biddle’s recommendation, President Roosevelt signed Executive Order 9066 shortly thereafter.<sup>186</sup> Within a relatively short time, one hundred twenty thousand Japanese, two-thirds of them U.S. citizens by birth, were interned.<sup>187</sup> Most of them were from California.<sup>188</sup> One hundred fifty seniors from the University of California at Berkeley were ordered to the camps and not allowed to attend their graduation ceremony.<sup>189</sup> Some who had completed their course work received their diplomas while in internment camps, while others never finished their degrees.<sup>190</sup> Decades after the war, it came to light that much of the evidence for Japanese disloyalty and threat of espionage had been fabricated,<sup>191</sup> yet reparations were long and slow in coming. By the time Congress voted financial reparations for the internees, it was too late for many of the Issei (first generation), because many had died.<sup>192</sup>

181. See TAKAKI, *supra* note 128, at 388.

182. *Id.*

183. *Id.*

184. See *id.* at 388–89.

185. See *id.* at 389.

186. See Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942), *reprinted in* 18 U.S.C. § 97a (Supp. 1943).

187. See TAKAKI, *supra* note 128, at 379.

188. See *id.* Over 95,000 came from California; about 25,000 had been living in Washington and Oregon.

189. See Chizu Iiyama & Lisa S. Hirai Tsuchitani, *Speaking Out: Memories of a Nisei Activist*, in *MAKING MORE WAVES: NEW WRITING BY ASIAN AMERICAN WOMEN* 229, 229 (Elaine H. Kim et al. eds., 1997).

190. See *id.*

191. See PETER H. IRONS, *JUSTICE AT WAR* at viii–ix (1983).

192. See *Reparations Are Tardy, ‘Sulu’ Says*, *OMAHA WORLD-HERALD*, Nov. 14, 1991, at 32. “Issei” refers to first-generation Japanese Americans—those born in Japan.

Koreans also experienced widespread discrimination in California. When realtors and boards of education were enforcing segregation policies for Japanese, they included Koreans in those measures as well.<sup>193</sup> Just as labor competition sparked violent attacks from whites angered by Japanese competition, Koreans hired to pick oranges in 1910 were violently attacked by white farm workers and told to leave or be killed.<sup>194</sup> The Asiatic Exclusion League condemned Koreans and Japanese alike; when the Japanese were interned during the war years, Koreans who moved to take advantage of the abandoned land were confronted by whites shouting "Japs, go home."<sup>195</sup> After the declaration of war against Japan, Koreans, remarkably, were classified in the United States as enemy aliens, despite Korean interest in a United States victory.<sup>196</sup>

Mexicans and Filipinos fared little better than blacks or Asian Americans during the period between the world wars. In a form of what one author calls "farm fascism," California capitalized much of its farm land on the basis of cheap, unorganized, migratory labor—first Chinese, then Japanese, then Mexican and Filipino.<sup>197</sup> The state's historic labor surplus, which helped keep land prices high and farm mortgages heavy, also disadvantaged small farmers at the expense of their larger competitors.<sup>198</sup> In the mid-1930s, leftist forces made determined efforts to unionize migratory farm labor, prompting agribusiness to launch an all-out countercampaign, funded by the Southern Pacific Railroad, Holly Sugar Corporation, Spreckles Investment Company, Pacific Gas and Electric, and the California Packing Corporation.<sup>199</sup> An umbrella organization called Associated Farmers of California worked in close cooperation with local law enforcement officials to harass agitators and dangerous radicals.<sup>200</sup> The Associated Farmers aided in state prosecutions of communists, unionists, and ordinary strike leaders under the state criminal syndicalism law.<sup>201</sup>

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193. See TAKAKI, *supra* note 128, at 271.

194. See *id.*

195. *Id.* at 272.

196. See *id.* at 364. Korea had long been warring with Japan. "Korean nationalists welcomed the war, hopeful that it would lead to the military destruction of Japan and the restoration of Korean independence." *Id.*

197. RAWLS & BEAN, *supra* note 58, at 376.

198. See *id.*

199. See *id.* at 376–77.

200. See *id.* at 377.

201. See *id.* Social workers and city housing officials in Los Angeles also took sides against them. In 1924, Los Angeles destroyed 2500 homes "housing Mexican wage earners and rats," William Deverell, *Plague in Los Angeles, 1924: Ethnicity and Typicality*, in OVER THE EDGE: REMAPPING THE AMERICAN WEST 172, 184 (Valerie L. Matsumoto & Blake Allmendinger eds., 1999), when an outbreak of plague was discovered in a poor Mexican district near downtown. The epidemic was seen as a failure to Americanize, one of the prime tenets of which was cleanliness. The fire department

In the middle and late 1930s, unemployed whites from the dust bowl region of Oklahoma swarmed into California, many seeking work as migrant farm laborers. Most were of Anglo American stock, and as a result, the public interest in the plight of farm laborers heightened.<sup>202</sup> Carey McWilliams's *Factories in the Field*<sup>203</sup> and John Steinbeck's *The Grapes of Wrath*,<sup>204</sup> both published in 1939, awakened many readers' sympathies. McWilliams, appointed by Governor Culbert L. Olson as chief of the state division of immigration and housing, sided decisively with the farm workers, inspecting farm labor camps and denouncing the conditions he found there. For his pains, the Associated Farmers passed a resolution describing McWilliams as California's worst agricultural pest, outranking the boll weevil. Agribusiness also succeeded in getting the state legislature to pass a bill abolishing McWilliams's position, but Governor Olson vetoed it. With the advent of World War II, the "Okies" left farm work for the shipyards, leaving Mexicans and Mexican Americans virtually the sole groups in the farm labor force. The public promptly lost interest in their plight.<sup>205</sup>

California growers, however, became quite interested in Mexicans when the shortage of farm labor became acute with the onset of World War II.<sup>206</sup> Thus, in 1942, Congress entered into an agreement with Mexico under which the U.S. Department of Agriculture assumed responsibility for the contracting, recruiting, transporting, housing, and feeding of temporary immigrant farm workers, or *braceros*.<sup>207</sup> Twenty-five years earlier, private labor contractors set up an informal *bracero* program during World War I, when thousands of peons, anxious to escape the Mexican Revolution, came to California to work in the fields.<sup>208</sup> The Depression years slowed Mexican immigration; indeed, California cooperated in rounding up and deporting tens of thousands of Mexicans during this period to minimize welfare costs. In 1942, the Mexi-

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cordoned off the entire area, and trolley drivers would not let passengers on or off. Guards shot cats, dogs, chickens, and "a donkey or two." Workers sprayed houses with petroleum and sulfur, and scattered rat poison everywhere. City health authorities destroyed buildings, but only after declaring them nuisances so that the city would not need to pay compensation. The Biltmore Hotel fired its entire Mexican staff. Rhetoric blended Mexicans and rats, with most of the blame going to Mexican-ness for hosting and introducing the disease into sunny California. See *id.* at 179, 180-182, 184-185, 188-190.

202. RAWLS & BEAN, *supra* note 58, at 377.

203. CAREY MCWILLIAMS, *FACTORIES IN THE FIELDS: THE STORY OF MIGRATORY FARM LABOR IN CALIFORNIA* (1939).

204. JOHN STEINBECK, *THE GRAPES OF WRATH* (1939).

205. See RAWLS & BEAN, *supra* note 58, at 378.

206. See *id.*; see also ERNESTO GALARZA, *BARRIO BOY* (1971); ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* (1964); ERNESTO GALARZA, *SPIDERS IN THE HOUSE AND WORKERS IN THE FIELD* (1970).

207. See ACUÑA, *supra* note 51, at 168-72.

208. See RAWLS & BEAN, *supra* note 58, at 378.

can government was concerned that California might do the same thing when World War II ended and, therefore, demanded that the U.S. government, rather than private contractors, take responsibility for the program. Congress granted periodic extensions of the bracero program until 1964. The end of that program ushered in a second period of intense labor activism over the right to unionize.<sup>209</sup>

Meanwhile, Mexican Americans living in California cities contended with difficulties of their own. On an evening in August 1942, two juvenile gangs clashed in East Los Angeles.<sup>210</sup> The next morning, a young Mexican American boy was discovered dead next to an old reservoir known as Sleepy Lagoon. Police suspected that he had been murdered by gang members. Immediately afterward, over three hundred Mexican American youths were rounded up and jailed, where they were brutally treated. In a trial riddled with racial bias, seventeen were convicted. In response to allegations of racial stereotyping, the Second District Court of Appeals, aided by the Sleepy Lagoon Defense Committee that was headed by Carey McWilliams, reversed the convictions.<sup>211</sup> Unfortunately, public opinion was not so easily changed. In June 1943, American servicemen from nearby bases, along with civilians, attacked young Mexican Americans in what came to be known as the “zoot suit” riots, acting on a rumor that Chicanos had attacked sailors who insulted a Mexican woman.<sup>212</sup> The resulting Los Angeles riots lasted for six days until the Navy declared downtown Los Angeles off limits.<sup>213</sup>

Conditions for Mexicans improved slightly during the later war and the postwar years. Mexican American servicemen and women were not segregated, at least not overtly, in the armed forces, and many rose in the ranks.<sup>214</sup> Proportionately, more Mexican Americans earned medals of valor

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209. See ACUÑA, *supra* note 51, at 190–92. This chapter is covered in more detail later in this Article. See *infra* notes 635–636 and accompanying text.

210. See RAWLS & BEAN, *supra* note 58, at 397; ACUÑA, *supra* note 51, at 202–08.

211. See BEAN & RAWLS, *supra* note 95, at 397–98.

212. See ACUÑA, *supra* note 51, at 204. Zoot suits were a dandified, exaggerated costume, with tight, cuffed trousers and a long coat with padded shoulders, popular with young Mexican Americans, or “pachucos.”

213. See RAWLS & BEAN, *supra* note 58, at 398; see also EDWARD ESCOBAR, RACE, POLICE AND THE MAKING OF A POLITICAL IDENTITY: MEXICAN AMERICANS AND THE LOS ANGELES POLICE DEPARTMENT, 1900–1945, at 284 (1999) (arguing that the Los Angeles Police Department’s view of Mexicans as biologically predisposed to commit crime and the concerted violence it legitimated moved the Mexican American community to organize and become aware of itself as no other previous issue had done).

214. See RAWLS & BEAN, *supra* note 58, at 390. But see ROBERTO RODRIGUEZ & PATRISIA GONZALES, REBEL ARTIST’S CANVAS: MARGINALIZED BARRIO STREET YOUTH (Universal Press Syndicate, n.d.) (noting how during World War II, state legislators schemed to open concentration camps for “pachuco” youths, who were considered un-American).



than any other group, including whites.<sup>215</sup> After the war, many attended California colleges and universities under the G.I. Bill.<sup>216</sup> Rising expectations collided with repressive reality, however. As often happens during times of enhanced expectations, postwar activism broke out. Mexican American leaders and organizers began calling themselves "Chicano" and referred to the Mexican American people as "La Raza,"<sup>217</sup> demanding better schools, bilingual and bicultural classes, and greater political representation.<sup>218</sup>

#### IV. CALIFORNIA NEOPOPULISM: A REACTION TO CIVIL RIGHTS GAINS

By 1960, California was the envy of the country, its highways, schools, universities, and other institutions the best in the United States if not the world.<sup>219</sup> Until then, its formal values and self-image were of a polyglot, a multicultural melting pot that welcomed immigrants and domestic minorities alike. Although, as we have seen, this self-image did not always correspond to reality,<sup>220</sup> immigrants, minorities, and the foreign-born could generally find housing, jobs, and schooling for their children, as well as obtain welfare services and medical aid at a standard unavailable elsewhere. This was made possible by a booming postwar economy and by growth in such sectors as agribusiness, aircraft construction, the entertainment industry, and later, the computer industry.<sup>221</sup>

As Peter Schrag, the author of *Paradise Lost*, observed, California's golden age did not last much longer.<sup>222</sup> Proposition 14, enacted by popular referendum in 1964, effectively nullified all of California's fair housing laws and allowed California property owners the right to refuse to rent, sell, or lease on the basis of race, religion, or ethnic background.<sup>223</sup> Proposition 14 came

215. See BEAN & RAWLS, *supra* note 95, at 421.

216. See ACUÑA, *supra* note 51, at 199.

217. See RAWLS & BEAN, *supra* note 58, at 398 (noting that these terms connote racial pride and militancy).

218. See ACUÑA, *supra* 51, at 222-63.

219. See SCHRAG, *supra* note 16, at 7.

220. See *supra* Parts II.B., II.C, III.

221. See SCHRAG, *supra* note 16, at 7, 28-34. "The postwar public works boom had begun under [Governor Pat] Brown's progressive Republican predecessors, Earl Warren and Goodwin Knight, well before Brown was elected governor in 1958, and in considerable measure even before that, and it would continue for some years afterward." *Id.* at 35.

222. See *id.* at 43-52.

223. See CAL. CONST. art. I, § 26 (1964) (incorporating into the California Constitution, Proposition 14: Anti-Fair Housing Initiative (1964)) (repealed 1974); JOHN H. DENTON, APARTHEID AMERICAN STYLE, Introduction (1967). The next summer, riots broke out in Watts; a year later, Black Panthers burst onto the scene. CHARLES WOLLENBERG, ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS, 1855-1975, at 148 (1996).

on the heels of the Rumford Act, which created and authorized a state commission to enforce fair housing legislation.<sup>224</sup> The act angered realtors who campaigned for homeowners' "sacred property rights" and against the evils of "forced housing."<sup>225</sup> Proposition 14 was the first indication that Euro-Americans in California regarded the number of minorities as having reached a saturation point, making further increases in their numbers intolerable.<sup>226</sup> After the proposition was enacted, seven different cases challenging its validity were consolidated and argued together.<sup>227</sup> On May 10, 1966, the California Supreme Court ruled in *Mulkey v. Reitman*<sup>228</sup> that Proposition 14 violated the Equal Protection Clause of the United States Constitution. The California Real Estate Association appealed the decision to the Supreme Court, which affirmed, reasoning that the proposition established a legal right to discriminate privately on grounds that would be unavailable should state action be present.<sup>229</sup> Because the proposition required state government engagement for its enforcement, it did indeed impermissibly include state action.<sup>230</sup>

Proposition 14 was only the first salvo in California's fusillade of neo-nativist measures. A few years later, Assemblyman Floyd Wakefield sponsored a state constitutional amendment on the 1972 ballot voiding all state integration guidelines and outlawing any use of race for school assignments or busing. Although it passed by a two-to-one margin, the antibusing provision was soon struck down by the state supreme court.<sup>231</sup>

In November 1986, three-fourths of the California voters enacted Proposition 63, an official English-only statute requiring the legislature to take affirmative measures to "preserve and enhance the use of English."<sup>232</sup> Unlike

224. See Fair Housing Law, CAL. HEALTH & SAFETY CODE §§ 35700–35745 (West 1963); DENTON, *supra* note 223, at 2.

225. See DENTON, *supra* note 223, at 19. Immediately after the act was passed, opponents began collecting signatures for a referendum to reject it. See *id.*

226. See *id.* On white consciousness, see CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997).

227. See DENTON, *supra* note 223, at 6.

228. 64 Cal. 2d 529 (1966).

229. See *Reitman v. Mulkey*, 387 U.S. 369 (1967).

230. See *id.* at 374. Like the more recent campaigns against homosexual civil rights, such as Amendment 2 in Colorado, the California Real Estate Association argued that the act provided "preferred" or "special rights" for minorities rather than simply providing them with equal rights.

231. See WOLLENBERG, *supra* note 223, at 163–64 (discussing *Santa Barbara Sch. Dist. v. Superior Court of Santa Barbara County*, 13 Cal. 3d 315 (1975)).

232. CAL. CONST. art. III, § 6; see also SCHRAG, *supra* note 16, at 231; John Wildermuth, *What AIDS, English-Only Votes Will Mean*, S.F. CHRON., Nov. 5, 1986, at 9 (noting that Proposition 63 passed by a three-to-one margin). Earlier, when *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974), required California public schools to offer bilingual classes, some Anglo parents withdrew their children from school to avoid any association with that form of instruction. See *infra* note 423 and accompanying text.

similar laws in other states, California's statute allows citizens to file suit if they feel that official use of the English language is threatened or diminished.<sup>233</sup> For example, the mayor of Monterey Park tried to prevent the public library from accepting a gift of ten thousand books written in Chinese on the grounds that "English is the law of the land."<sup>234</sup> Requirements of English in the workplace became an issue at the University of California at San Francisco's Medical Center.<sup>235</sup> In Los Angeles, court employees had to win the right to use languages other than English in the workplace.<sup>236</sup> Chicano activists called for recognition that the Treaty of Guadalupe Hidalgo guaranteed language rights, but to no avail.<sup>237</sup>

Another early measure, Proposition 13, sounded a similar theme, but with an economic cast.<sup>238</sup> To equalize what was perceived as an unfair tax on property, Howard Jarvis and Harvey Gann campaigned to limit real estate taxes to 1 percent of a residential property's assessed value upon sale of the property and annual increases during nonsale years to a maximum of 2 percent.<sup>239</sup> The Jarvis-Gann measure tapped a deep vein of discontent among California homeowners who believed they were staggering under an unfair tax burden of educating immigrants, feeding the unemployed, and building shelters for the homeless.<sup>240</sup> The measure devastated California's infrastructure, particularly its schools, and came just two years after a California Supreme Court ruling that the California scheme of school finance, based largely on property taxes, was unconstitutional because of disparities between the resources available to property-rich districts in contrast to property-poor ones.<sup>241</sup>

Howard Jarvis expressed thinly disguised scorn toward California's concern over the imminent destruction of the state's schools, remarking that the twenty thousand school teachers of the Superintendent of Public Instruction, Wilson Riles, were less important for homeowners than taxes.<sup>242</sup>

233. See CAL. CONST. art. III, § 6.

234. DENNIS BARON, *THE ENGLISH ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS?* 20 (1990).

235. See *id.* (noting when the University of California at San Francisco Medical Center allowed "its departments to require that English be spoken as a legitimate 'business necessity'").

236. See *Gutierrez v. Municipal Court of S.E. Judicial Dist., L.A. County*, 838 F.2d 1031, 1044-45 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989); BARON, *supra* note 234, at 23.

237. See BARON, *supra* note 234, at 17-18.

238. See CAL. CONST. art. XIII.A.

239. See Hanif S.P. Hirji, *Inequalities in California's Public School System: The Undermining of Serrano v. Priest and the Need for a Minimum Standards System of Education*, 32 *LOY. L.A. L. REV.* 583, 600 (1999).

240. See SCHRAG, *supra* note 16, at 139.

241. See *Serrano v. Priest*, 18 Cal. 3d 728, 775-77 (1976); SCHRAG, *supra* note 16, at 151-57; see also Hirji, *supra* note 239, at 600, 604.

242. See SCHRAG, *supra* note 16, at 146.

Proposition 13 set in motion a series of populist reforms that Schrag and others considered no mere coincidence, as they came on the heels of the rapid growth of the state's minority population.<sup>243</sup> Some of the rhetoric used by the proposition backers was explicitly racist. For example, flyers prepared for Proposition 187 urged California to "wake up and smell the refried beans."<sup>244</sup>

Proposition 187, overwhelmingly enacted by the voters in 1994, excluded undocumented persons from many public services including schools and health care.<sup>245</sup> Originally billed as the S.O.S. (Save Our State) measure, it would even have denied schooling to American children if their parents were illegals. Nurses, school administrators, doctors, and public agencies were required to report all individuals seeking social services if they believed them to be undocumented aliens.<sup>246</sup> Echoing themes from California history, including denying the Japanese the right to own land,<sup>247</sup> the Chinese in San Francisco license laundries,<sup>248</sup> and the Mexicans the right to speak their language,<sup>249</sup> the campaign for Proposition 187 bore unmistakable overtones of xenophobia and exclusionism.<sup>250</sup> It featured television commercials showing a flood of foreign-looking people with a narrator's voice intoning, "They keep coming."<sup>251</sup> Governor Pete Wilson even lobbied President Bill Clinton to have *legal* aliens declared ineligible for federal welfare benefits.<sup>252</sup> Proposition

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243. See *id.* at 10–11.

244. *Id.* at 231.

245. Relevant parts of Proposition 187 are codified at CAL. EDUC. CODE § 48215 (West 1994); CAL. EDUC. CODE § 66010.8 (West 1994); CAL. HEALTH & SAFETY CODE § 130 (West 1994); CAL. WELF. & INST. § 10001.5 (West 1994). See Paul Feldman & Patrick J. McDonnell, *Prop. 187 Backers Elated—Challenges Imminent*, L.A. TIMES, Nov. 9, 1994, at 1. The initiative was largely drafted by Alan C. Nelson, former head of the U.S. Immigration and Naturalization Service, who at the time was the California lobbyist for the Federation for American Immigration Reform. Other sponsors included Harold Ezell, Western Regional Director for the Immigration and Naturalization Services, accountant Ronald Prince, and Assemblyman Richard Mountjoy, as well as a number of grassroots anti-immigration groups. See JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 20–32* (1996).

246. See SCHRAG, *supra* note 16, at 229–30.

247. See *supra* note 134 and accompanying text; *infra* note 350 and accompanying text.

248. See *supra* note 128 and accompanying text.

249. See *infra* notes 421–423 and accompanying text.

250. See Otto Santa Ana, *Awash Under Brown Tide: Immigration Metaphors in California Public and Print Media Discourse*, 23 AZTLÁN 137 (1998).

251. See SCHRAG, *supra* note 16, at 233. The commercials, used in Pete Wilson's bid for reelection as governor, divided Democrats and helped defeat Kathleen Brown, sister of former Governor Jerry Brown. See *id.*

252. See *id.* at 233–34. President Bill Clinton signed the bill. See Jeff Lustig, *California Studies and California Politics*, 77 CAL. HIST. 131, 136 (1998) (describing the incumbent governor's support for the measure).

187 remained in place for two years until litigation finally resulted in a settlement that eliminated its most draconian measures.<sup>253</sup>

A few years later, two academicians, Glynn Custred, an anthropologist at California State University at Hayward, and Tom Wood, director of the California Association of Scholars, drafted the California Civil Rights Initiative, or Proposition 209.<sup>254</sup> Aimed at reversing race-conscious decision making in state employment and university admissions, the proposition first appeared destined for defeat.<sup>255</sup> Lacking adequate resources, Custred and Wood appeared unlikely to muster the sufficient number of signatures, but were rescued when Governor Wilson and the Republican Party saw the proposition as a wedge issue that could siphon away blue collar voters from the Democratic Party.<sup>256</sup> Until then, Governor Wilson had been a determined proponent of affirmative action.<sup>257</sup> The Republicans even linked Proposition 209, whose implicit “majoritarian bias corrupted the decision-making process,”<sup>258</sup> with the earlier racist Proposition 187, which embarrassed even Ward Connerly, one of its staunchest supporters.<sup>259</sup>

Proposition 209 had an immediate and devastating effect on minority admissions throughout the University of California system, especially in elite programs such as law and medicine, and at the more selective campuses such as Berkeley, UCLA, and San Diego.<sup>260</sup> Even Connerly conceded that a gradual approach might have been better and that Proposition 209 might make it harder to end old boy networks in state contracting. And as the University of California struggled for minority numbers, he acknowledged

253. See *United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1300–01 (9th Cir. 1997). Five lawsuits filed in state and federal courts challenging the constitutionality of Proposition 187 were consolidated. The district court enjoined sections 4, 5, 6, 7, and 9 of the proposition holding that these sections were preempted by federal law. The sections that the district court enjoined denied immigrants social, health, and educational benefits. The remaining sections addressed such issues as the manufacturing of false documentation of resident alien citizenship. See *id.* During these two years, hate crimes against Latinos increased. See *Report Says Latinos Are Being Targeted in More Hate Crimes*, NEW MEXICAN, July 27, 1999, at A6.

254. See CAL. CONST. art. I, § 31; LYDIA CHAVEZ, *THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION 1–38* (1998); SCHRAG, *supra* note 16, at 234; Edward W. Lempinen & Pamela Burdman, *Measure to Cut Back Affirmative Action Wins*, S.F. CHRON., Nov. 6, 1996, at A1; Amy Wallace, *Prop. 209 to Have Immediate Effect on UC Applicants*, L.A. TIMES, Nov. 9, 1996, at A1.

255. See SCHRAG, *supra* note 16, at 234–35.

256. See *id.* at 235; CHAVEZ, *supra* note 254, at 245.

257. Governor Wilson supported goals and targets in contracting and employment as a U.S. senator, previously serving as a state legislator, and later as mayor of San Diego. See SCHRAG, *supra* note 16, at 235.

258. Benjamin A. Doherty, *Creative Advocacy in Defense of Affirmative Action: A Comparative Institutional Analysis of Proposition 209*, 1999 WIS. L. REV. 91, 95.

259. See SCHRAG, *supra* note 16, at 236–37.

260. See *infra* notes 491–495 and accompanying text.

that it might be necessary to amend or to construe Proposition 209 to allow race-targeted outreach measures in minority communities.<sup>261</sup>

Another measure, Proposition 140, which limited the number of terms that politicians could serve, possibly aimed at long-serving African American speaker of the house Willie Brown, proved to be one of the most obstructive of all.<sup>262</sup> Political partisanship and mean-spirited behavior immediately increased because politicians now realized that they need not worry about reelection. One commentator deemed California's legislative situation as desperate because term limits mandate a continual turnover of legislators, depriving the government of needed experience. In the power vacuum that ensued, spasmodic efforts of direct democracy took over. The same commentator attributed the entire wave of propositions, including the recent Proposition 227 eliminating bilingual education, to a neopopulist revolt fueled by white fears about loss of control. Paradoxically, the revolt injured whites as well because of the ensuing reduction in public services. Without drastic intervention, California may become like Hong Kong, with a thin tier of high-income oligarchs at the top, living behind gated walls, and the rest of the population doomed to a fate of long hours, subsistence wages, free market schools, and no social safety net.<sup>263</sup> Twenty years ago, California was the best positioned of all the states to close the immigrant gap. It invested in schools, roads, and social services. Today it leads the nation in the opposite direction—in showing a cold shoulder toward the unpropertied, foreign-born, or nonwhite.<sup>264</sup>

## V. THE EDUCATIONAL SYSTEM

Among the arenas in which race has played a decisive role in California's history is public education. And, if diversity should fall by the wayside, discrimination in public education is central to an assessment of whether

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261. See SCHRAG, *supra* note 16, at 239. Ward Connerly's concession should not be mistaken for contrition. He has been considering backing measures patterned after Proposition 209 in several other states, patterned after Proposition 209. See CHAVEZ, *supra* note 254, at 253.

262. See CAL. CONST. art. IV, § 1.5. The proposition, enacting term limits for all elected officials—three two-year terms for assembly members, two four-year terms for senators and all other elected officials—also reduced legislative staff and perks. See SCHRAG, *supra* note 16, at 241–43; Robert Presley, *Taking California Back to Amateur Status Term Limits: In a Time When Voters Demand Efficient and Responsible Government, They Paradoxically Have Voted for Inexperience and Incompetence*, L.A. TIMES, Nov. 8, 1990, at B7.

263. See SCHRAG, *supra* note 16, at 245, 264, 279–80; see also Lustig, *supra* note 252, at 136.

264. See SCHRAG, *supra* note 16, at 280, 282. On the antidemocratic potential of referendums, see Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 520–21 (1999). On the recent Proposition 227, which banned bilingual education after an election "inflected" by race, see Nirej Sekhon, *A Birthright Rearticulated: The Politics of Bilingual Education*, 74 N.Y.U. L. REV. 1407, 1407 (1999).

California universities may engage in affirmative action. This part examines racism in kindergarten through twelfth grade. It then considers the relationship of California's universities to minorities. Finally, it explores the way that intellectuals and academics contributed to a structure of knowledge that implicitly stratified society and, in turn, rendered California's recent backlash inevitable.

#### A. K-12

In 1874, in *Ward v. Flood*,<sup>265</sup> a black family from Oakland sued in a California court to be permitted to send their child to a largely white neighborhood school. Unfortunately, they lost; the California Supreme Court ruled that separate but equal schools were all that African Americans were entitled to.<sup>266</sup> California, which sometimes prides itself on being ahead of the rest of the nation, thus anticipated *Plessy v. Ferguson*<sup>267</sup> by nearly twenty years. As early as 1852, California only contained 2206 blacks, but already forbade mixed marriages and voting by anyone with more than one-sixth African blood.<sup>268</sup> Blacks were also prohibited from holding office or testifying against a white person. As mentioned earlier, the legislature had passed a tough fugitive slave law, and Governor Peter Burnett was calling for a ban on black immigration and settlement in California.<sup>269</sup> Only a disagreement between the state assembly and the senate over the precise wording of the proposal prevented the governor's ban on black immigration from taking effect.<sup>270</sup>

Thus, when black parents in San Francisco appealed for public schooling for their children in 1854, the state's response was predictable. The San Francisco Board of Education established a "colored school"—the state's first—in the basement of a church.<sup>271</sup> Other California communities followed suit so that by 1873 the state contained twenty-one such segregated schools.<sup>272</sup> This led to the development of a corps of influential black teachers,

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265. 48 Cal. 42 (1874).

266. "[T]here is certainly to be found no violation of the constitutional rights of the one race more than of the other . . . for each, though separated from the other, is to be educated upon equal terms with that other . . ." *Id.* at 52.

267. 163 U.S. 537 (1896).

268. See WOLLENBERG, *supra* note 223, at 9. Blacks comprised about 1 percent of the population of the state. See *id.*

269. See *id.*; see also *supra* notes 84–86 and accompanying text.

270. See WOLLENBERG, *supra* note 223, at 9.

271. The church, St. Cyprian, was located near the corner of Jackson and Virginia Streets. The following year, Sacramento gave money to a private black school, later providing it with a new building. See *id.* at 10–11.

272. See *id.* at 11.

including a colleague of Frederick Douglass and a white teacher who was a daughter of abolitionist John Brown.<sup>273</sup> One black teacher, Jeremiah Sanderson, acquired such a legendary reputation that black parents from all over the state sent their children to his school in Stockton.<sup>274</sup> He was paid sixty dollars a month; white teachers, seventy-five dollars.<sup>275</sup>

In 1855, one year after the establishment of the first colored school, the California legislature passed a law effectively denying state funds for schooling for black children.<sup>276</sup> Some school districts defied the law, establishing separate schools anyway. San Francisco even allowed a light-skinned daughter of a prominent citizen to enroll in a public school for whites.<sup>277</sup> Parents protested so vociferously, however, that the board of education rescinded her assignment.<sup>278</sup>

In 1859, Andrew Jackson Moulder, a native of Virginia, became state superintendent of instruction.<sup>279</sup> Adamantly opposed to racial mixing and insistent that whites not associate with "inferior races," he successfully reversed the slight softening of racial attitudes ushered in by his predecessors.<sup>280</sup> His view soon prevailed: The legislature enacted a measure providing that no money was to be spent on integrated education.<sup>281</sup>

By 1863, oppression had lifted somewhat. Blacks in California could testify against whites. Lincoln issued his Emancipation Proclamation. John Swett, a New Englander and an associate of Thomas Starr King, was now the state superintendent of public instruction.<sup>282</sup> During his election campaign,

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273. Sara Brown, one of the few white teachers employed, taught at a school in Red Bluff. Jeremiah Sanderson, born in Rhode Island, had Scottish and Negro parents. *See id.*

274. Sanderson arrived in California in 1854, serving first as a teacher in the Sacramento black school, and then in San Francisco. His checkered career there included a two-year assignment as principal. Then, when his black assistant was replaced by a white woman, he was transferred to the evening division to avoid the impropriety of a black supervising a white person. In 1868, he finally arrived in Stockton. *See id.* at 12.

275. *See id.*

276. The law, the first in the state to mention race, provided funding for schools according to the proportion of white children attending them. *See id.*

277. *See id.* at 12–13.

278. In other California communities, some black students attended regular (white) schools. *See id.*

279. In his annual report of 1859, Andrew Jackson Moulder wrote, "in several counties attempts have been made to introduce Negroes into our public schools on an equality basis with the whites." *Id.* (citing CALIFORNIA DEP'T OF PUB. INSTRUCTION, ANNUAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION 14–15 (1859)).

280. *See id.*; *see also* IRVING G. HENDRICK, CALIFORNIA EDUCATION: A BRIEF HISTORY 10 (1980) (noting that this "bright proceduralist" proposed laws to prohibit California schools from admitting "inferior races" and ridiculed "mock philanthropists" who urged the cause of Negroes and others).

281. *See* WOLLENBERG, *supra* note 223, at 13–14.

282. *See id.* at 14–15.



Swett's opponents circulated a rumor that he was an abolitionist who would allow Negroes to be taught on "terms of equality."<sup>283</sup> He denied these scandalous charges and won anyway. Although he never publicly supported mixed schools, he did staunchly support separate education for blacks.<sup>284</sup>

A few years later, in 1867, black parents in San Francisco were outraged when the city's board of education relocated the colored school so that a new white one would not share a city block with it. The city's superintendent, James Denman, told them to expect no better. After the city closed the black school, allegedly for low numbers, a group of black parents and educators called for an end to such shenanigans. Soon thereafter, a bill that would have opened schools to all was defeated when it appeared that 90 percent of whites opposed racial mixing. Black parents then raised money for a court case and engaged John D. Dwinelle, a prominent white attorney from San Francisco, to argue on their behalf. In court, the San Francisco school board denied that education was a basic right of citizenship and argued that Mary Ward's case was moot because she lacked the skills necessary to succeed at Broadway School.<sup>285</sup> Writing for the California Supreme Court, Justice C.J. Wallace agreed with the parents that education is a fundamental interest, but held that San Francisco had not denied the plaintiff an education; she was only deprived of schooling with whites.<sup>286</sup>

After further efforts to achieve legislative reform failed, the black community barely survived a movement in 1874 to close all colored schools in San Francisco when a measure to do so failed by only one vote. Then, astonishingly, in 1875 the full board abolished separate schools and ruled that colored people could attend any school at all. Within a year, Oakland, Sacramento, and Vallejo followed suit. By 1880, the state legislature removed all mention of race from its statutes and required schools to be open to everyone. A black newspaper editorialized that the white establishment was not doing this out of the kindness of its heart, but as a cost-cutting device: An economic depression had settled on California and thus maintaining a system of dual schools was costly.<sup>287</sup> What the editor failed to mention was that California was now inflamed with a massive campaign against Chinese immigration; moreover, the state school law was soon amended to establish

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283. *Id.* at 15.

284. *See id.*

285. *See id.* at 16–22.

286. *See Ward v. Flood*, 48 Cal. 36, 50–52 (1874).

287. *See WOLLENBERG, supra* note 223, at 22–26.; *see also BOGARDUS, supra* note 141, at 145–65 (proposing, astonishingly, a campaign for educators to Americanize the *Negro*, because Africa's climate favors indolence and suppresses ambition).

separate Indian schools.<sup>288</sup> Eventually, residential segregation led to de facto school segregation, reversing black gains.

In 1885, 722 Chinese children lived in San Francisco's Chinatown, among such "immorality and debauchery," according to a report by that city's board of supervisors, that their mere presence in white schools would be a disaster.<sup>289</sup> The report ended with the exhortation: "Guard well the doors of our public schools that they do not enter . . . [I]t is but the enforcement of the law of self-preservation . . . and an integral part of the iron rule of right . . . to defend ourselves from this invasion of Mongolian barbarianism."<sup>290</sup> The outburst was prompted by an attempt by Joseph and Mary Tape to enroll their eight-year-old daughter, Mamie, in Spring Valley School.<sup>291</sup> When rejected, they complained to the Chinese consulate to no avail.<sup>292</sup> Since 1880, the legislature had formally denied school districts the right to practice segregation. But San Francisco ignored the law, fearing Mongolian barbarism, and so denied public education altogether to Chinese children.<sup>293</sup>

By the early 1880s, more than seventy-five thousand Chinese lived in California, constituting the largest foreign-born group and the second largest minority.<sup>294</sup> Initially, they came to work in the mines, then railroads and farms, and later still, urban shops, factories, and laundries. Industrious and quiet, they were initially well received, but within a few decades began to be considered economic rivals.<sup>295</sup> As was mentioned earlier, the legislature

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288. See WOLLENBERG, *supra* note 223, at 26.

289. *Id.* at 28 (citing SAN FRANCISCO BD. OF SUPERVISORS, REPORT OF THE SPECIAL COMMITTEE ON THE CONDITION OF THE CHINESE QUARTER AND THE CHINESE IN SAN FRANCISCO 59–62 (1885)). Though the supervisors acknowledged that the children were American citizens by birth, they believed them to be as Chinese "as if they had been born in the province of Canton, speaking little or no English and rarely having contact with white people" and pointed out that the children lived side by side with "the painted harlots of the slums and alleys, the women who are bought and sold to the slavery of prostitution." *Id.*

290. *Id.* at 28–29.

291. Though the Tapes were self-described "Christian, Americanized" Chinese, and their daughter, Mamie, had been born in the United States and spoke English better than she did Chinese, the principal of the school explained that the San Francisco Board of Education's policy barred the Chinese from the public schools. *See id.* at 29.

292. At this time Andrew Moulder, formerly state superintendent of Public Instruction, had become superintendent of the San Francisco public schools. He applied the same policy he had used 25 years earlier when he had recommended that "Negroes, Mongolians and Indians" not be allowed to attend public schools with white children. *See id.* at 29–30.

293. *See id.* at 30.

294. Most of the immigrants came from the region of Canton, which was experiencing economic hardship. *See id.*

295. *See id.* During the 1850s, the Chinese population in California increased from 800 to about 35,000. San Francisco, an outpost of Chinese culture, had a Chinese-language newspaper by 1854, Cantonese opera performances, Chinese merchant and labor contractors, and social and economic associations. *See id.* at 30–31.

levied a foreign miners tax,<sup>296</sup> state and national law deemed them nonwhite and thus ineligible for various incidents of citizenship;<sup>297</sup> in 1854, the state supreme court ruled that they, like blacks and Indians, could not testify against whites.<sup>298</sup> And, in a flight of unscientific fantasy, the court reasoned that Indians, like Chinese, were “Mongolians” and thus excluded from naturalization.<sup>299</sup>

Because most early Chinese settlers were single men hoping to strike it rich and return to their country of origin, the issue of schooling did not arise. Then, a few wealthy Chinese families settled in San Francisco. Within a few years, they were clamoring for the board of education to provide schooling for their children. In 1859, the board agreed and established the first Chinese school at Stockton and Sacramento Streets. But superintendent of schools James Denman visited the school and did not like what he saw. Declaring it a waste of taxpayers’ money because the children he saw were stamped glaringly with caste, idolatry, and bad character, he closed it down. The school did not reopen until the Tape family’s case, fifteen years later.<sup>300</sup> The Chinese community went without public schools in the interim, making do with Chinese language schools organized by Chinese scholars.<sup>301</sup>

By 1877, the campaign to end Chinese immigration was at its height.<sup>302</sup> Railroad construction and mining were declining, forcing the Chinese to move into urban jobs, which brought them into even more sharp competition with whites. A national depression was settling in; conditions were ripe for conflict.<sup>303</sup> In 1876, nativist clubs and labor organizations merged to form the Workingman’s Party, one of whose slogans was “[T]he Chinese Must Go.”<sup>304</sup>

296. See *supra* notes 69, 73–74 and accompanying text.

297. See *supra* note 131 and accompanying text.

298. See *supra* notes 75–76 and accompanying text.

299. See WOLLENBERG, *supra* note 223; see also *A HISTORY OF THE CHINESE IN CALIFORNIA: A SYLLABUS* 19–21 (Thomas W. Chinn ed., 1969); WILLIAM HOY, *THE CHINESE SIX COMPANIES* 1 (1941).

300. See WOLLENBERG, *supra* note 223, at 31–32, 34.

301. The most famous of these schools was one organized by the “Six Companies,” separate groups of merchant and labor contractors officially known as the Chinese Consolidated Benevolent Association. The school, based on traditional Chinese values and staffed by teachers with degrees from schools in China, prepared students for examinations required to enter professions in China. See *id.* at 36–37.

302. See *supra* notes 71, 127–128 and accompanying text.

303. See WOLLENBERG, *supra* note 223, at 38.

304. See *id.* at 38–39. “Republican and Democratic politicians adopted similar stands, and the new state constitution of 1879 reflected the anti-Chinese crusade.” *Id.* A short time afterward, in 1882, Congress passed the Chinese Exclusion Act, ch. 126, § 1, 14. 22 Stat. 58, 59, 61 (1882), repealed by Recision of Chinese Exclusion Act, Pub. L. No. 51-90, 57 Stat. 600 (1943). The slogan, then, was 100 percent successful. See Russell M. Posner, *The Lord and the Drayman*, in *NEITHER SEPARATE NOR EQUAL: RACE AND RACISM IN CALIFORNIA*, *supra* note 87, at 57, 65.

Anglo sympathizers were pilloried and hung in effigy.<sup>305</sup> Chinese parents considered the streets too dangerous for their children and kept them home even from private school.<sup>306</sup>

This was the setting in which *Tape v. Hurley*<sup>307</sup> was decided. The case arose when Consul-General Bee protested to San Francisco school superintendent Moulder who, after obtaining advice from Sacramento, correctly replied that the state's new constitution on its terms declared the Chinese to be "dangerous to the well-being of the state."<sup>308</sup> Judge James G. Maguire ordered the San Francisco school board to appear and show cause for the exclusion because the state education law also provided that California schools be open to all children. Moreover, because Mamie Tape was an American citizen, denial of public schooling seemingly violated the Fourteenth Amendment. When San Francisco failed to make an adequate case, he ordered the child admitted. State superintendent Welcher described the decision as a terrible disaster and urged the school board to appeal the decision to the California Supreme Court.<sup>309</sup> That court affirmed the trial court decision, agreeing that state law did allow the exclusion of the "filthy . . . those having contagious and infectious diseases," but exclusion on those bases required individual, not group, determination.<sup>310</sup> Reading the decision carefully, Moulder concluded that it only required that the Chinese be given access to schools, so he raced to establish a separate school before Mamie had time to enroll in Spring Valley.<sup>311</sup> Sacramento supported him, passing a bill establishing a separate school for Mongolians.<sup>312</sup> Before this could happen, Mamie showed up at Spring Valley, but was sent away for vaccinations and a medical exam. By the time she returned, the new Chinese school had opened and she was forced to go there.<sup>313</sup>

In 1902, San Francisco's separate but equal policy was challenged a second time in *Wong Him v. Callahan*<sup>314</sup> and again upheld by the federal court

305. See WOLLENBERG, *supra* note 223, at 39. For example, Methodist minister Otis Gibson, who had defended the Chinese, was twice hanged by the Ninth Ward Club, and later by the Tailor's Protective Union. See *id.*

306. See *id.*

307. 66 Cal. 473 (1885); see also WOLLENBERG, *supra* note 223, at 40–42.

308. WOLLENBERG, *supra* note 223, at 40 (quoting Consul General Frederick A. Bee). The school board concurred, one member stating that he "would rather go to jail than allow a Chinese child to be admitted to the schools." *Id.* (quoting the school board member).

309. See *id.* at 40–41.

310. *Id.*

311. See *id.* at 41–42.

312. See *id.* at 42. The bill passed by a vote of 63 to 1. See *id.*

313. See *id.* at 42–43. Anti-Chinese virulence seems to have been strongest in San Francisco. However, Sacramento established a segregated Chinese school in 1893 and three small communities in the Sacramento River delta region had "Asiatic schools" for Chinese and Japanese. See *id.*

314. 119 F. 381 (C.C.N.D. Cal. 1902).

relying on *Plessy v. Ferguson*.<sup>315</sup> Gradually, San Francisco schools relaxed their policy and began to admit individual Chinese children, especially after a threatened economic boycott by the Chinese community in 1905. To justify this admission, some school officials adopted the pretext that the children were really Japanese.<sup>316</sup>

After World War II, overt discrimination declined as the Chinese moved out of Chinatown and into other areas.<sup>317</sup> Indeed, the Chinese community concerns reversed. By 1971, Chinatown protested federally mandated busing<sup>318</sup> and in the 1974 *Lau v. Nichols*<sup>319</sup> case, the community succeeded in securing special programs for Chinese-speaking students. The Tapes were said to have visited their daughter's separate Chinese school and were never happy with it.<sup>320</sup>

Unlike the Chinese, Japanese numbers in California had been small until the 1900s; the Japanese government had limited emigration. By the late nineteenth century, however, Japan had relaxed its policy, while United States employers began to complain of a lack of workers because of Chinese exclusion. The Japanese were seen as the solution. In the early twentieth century, their numbers grew rapidly.<sup>321</sup> Predictably, they inherited the anti-Chinese sentiment, bigots and unions finding a new yellow peril.<sup>322</sup> Nativism found an ally in the courts, which ruled that the Japanese, like the Chinese, were non-white and therefore not entitled to naturalize.<sup>323</sup>

In 1900, San Francisco mayor James D. Phelan and Stanford professor Edward A. Ross spoke at a rally, urging exclusion of the Japanese. Labor groups fell into line, while a community group formed the Japanese Association of America to fight back. When Japan turned the tables on the favored Russia in 1905 and emerged as a world power, matters worsened. The *San Francisco Chronicle* launched a torrid war of words on the Japanese, encouraging trade unions and mass meetings to counter this new threat to American values.<sup>324</sup>

315. 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

316. See WOLLENBERG, *supra* note 223, at 44.

317. See *id.* at 46. Though middle-class Chinese moved to the Richmond and Sunset areas as well as some neighborhoods on Russian and Telegraph hills, Chinatown continued to contain poor Chinese, many of whom arrived after the Immigration Reform Act of 1965. See *id.*

318. See *id.* (reporting that many Chinese preferred to keep their children in Chinatown schools).

319. 414 U.S. 563 (1974).

320. See WOLLENBERG, *supra* note 223, at 47.

321. See *id.* at 49. Only 148 Japanese lived in the United States in 1880. By 1890, they numbered 2000, growing to 25,000 by the turn of the century. By 1910, the Japanese population exceeded 72,000. See *id.*

322. See *id.* at 49-50.

323. See *In re Saito*, 62 F. 126, 128 (C.C.D. Mass. 1894).

324. See WOLLENBERG, *supra* note 223, at 50. On February 23, 1905, the *San Francisco Chronicle* bore the banner headline "Japanese Invasion the Problem of the Hour," and stated that "[o]nce

Among the leaders of the Anti-Japanese League were immigrants from Sweden, Ireland, and Norway.<sup>325</sup> The *San Francisco Chronicle* editorialized that Japan was “sending her worst to California.”<sup>326</sup> But unlike the Chinese, who viewed themselves as temporary visitors, many of the Japanese planned to stay and raise families here; moreover, unlike the Chinese, they came from a rapidly modernizing society, were well educated, and prepared to assert their rights.<sup>327</sup> When the San Francisco Board of Education responded to civic sentiments by confirming its policy of separate schools for the Japanese—repeating essentially the same arguments made earlier with respect to the Chinese concerning the need to protect impressionable youth from association with wicked Mongols—the Japanese community protested. When a 1906 earthquake and fire forced Japanese to move to white areas, sentiment against them hardened. Japanese-looking people were harassed and assaulted, and Japanese businesses were vandalized. When Japan sent monetary relief and scientists to assist with the aftermath of the earthquake, they were stoned.<sup>328</sup>

When lack of funding precluded building separate schools for the Japanese, California cities merely dispatched Japanese and Koreans to existing Chinese schools.<sup>329</sup> (One can imagine the linguistic bedlam that must have ensued.) When Japan’s Consul K. Uyeno learned of San Francisco’s practice, he complained that “this action of your honorable board constitutes a species of discrimination which is offensive to the Japanese national spirit.”<sup>330</sup> Local Japanese leaders wired Japanese newspapers with stories describing how they had been humiliated and treated like demons.<sup>331</sup> The American ambassador in Tokyo informed Washington that a crisis was brewing; later the Japanese ambassador visited the U.S. State Department for a meeting with Elihu Root to assert the right to fair treatment for Japanese living in the United States under the Treaty of 1894.<sup>332</sup> San Francisco’s Japanese took heart,

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the war with Russia is over . . . the brown stream of Japanese immigration is likely to become an inundating torrent.” *Id.* (quoting *Japanese Invasion the Problem of the Hour*, S.F. CHRON., Feb. 23, 1905, at 1).

325. *See id.* at 51.

326. *Japanese Invasion the Problem of the Hour*, *supra* note 324. Most of the immigrants, however, had been hard-working farmers from the Hiroshima region. *See WOLLENBERG, supra* note 223, at 50.

327. *See WOLLENBERG, supra* note 223, at 50. Many of the Japanese had worked in Hawaii before coming to the mainland and were partly accustomed to American ways. *See id.*

328. *See id.* at 52–54.

329. *See id.* at 54. Though most Korean children appeared at the school, all but two of the Japanese children did not. The secretary of the Japanese Association and two Methodist ministers asked the board to rescind its decision. *See id.*

330. *Id.* at 55.

331. *See id.* The incident was to have profound effects on future relations between Japan and the United States. *See id.* at 56.

332. Treaty of Commerce and Navigation, Nov. 22, 1894, U.S.-Japan, 29 Stat. 848. The ambassador asserted that the treaty gave Japanese children the right to attend school with everyone

redoubled their efforts, and displayed some of the vigor their countrymen had shown in the war with Russia.<sup>333</sup> On one occasion, more than 1200 Japanese attended a protest and heard speeches by clergy and business leaders.<sup>334</sup>

Undaunted, the *San Francisco Chronicle* editor insisted that the only way to reduce the building tension was “to keep the two races apart.”<sup>335</sup> The paper also wrote that while very young Japanese may be uncontaminated, “as they grow older they acquire the distinctive character, habits and moral standards of their race, which are abhorrent to our people.”<sup>336</sup> Two university presidents, Benjamin Ide Wheeler of the University of California and David Starr Jordan of Stanford, criticized San Francisco’s hard-line stand,<sup>337</sup> and President Theodore Roosevelt sent a personal emissary to intercede with the San Francisco school board, in hopes of salvaging relations with a militarily strong ally.<sup>338</sup> Local leaders resisted, considering it a betrayal to change their position; if the United States had a treaty with Japan, that treaty was wrong and the fault of the national government.<sup>339</sup> Roosevelt continued to pressure San Francisco and California, condemning their position on the Japanese and ordering U.S. Attorney General Robert Devilen to assist in *Aoki v. Dean*.<sup>340</sup> Many Californians saw the issue as one of states’ rights, coining a strategy that would be of intense interest to the South fifty years later.

*Aoki* arose when a Japanese child applied to the Redding School by prearrangement, so as to set up a test case.<sup>341</sup> Predictably denied, he sued in

else, stating that “[a]fter all the years of friendship between the two nations[,] . . . it seems too bad that the poor innocent Japanese school children should be subjected to such indignities.” WOLLENBERG, *supra* note 223, at 56 (quoting CALL, Oct. 26, 1906).

333. See WOLLENBERG, *supra* note 223, at 56.

334. Misuji Miyakawa, the only Japanese lawyer in San Francisco licensed to appear in federal court, announced that he and a well-known San Francisco attorney, Charles Fickert, had sued the school board. See *id.* at 57.

335. *Id.* at 57 (quoting S.F. CHRON., Oct. 27, 1906).

336. *Id.* (quoting S.F. CHRON., Nov. 6, 1906).

337. See *id.* at 58.

338. Though President Theodore Roosevelt took a strong stand, he seemed less interested in racial justice than in preserving friendly relations with a world ally, as he had not taken any action for Negroes in the South or for the Chinese. See *id.* at 58–59.

339. See *id.* at 59 (“I could not betray the State of California and its citizens, even at the request of the President of the United States.”) (quoting PROCEEDINGS OF THE FIRST INTERNATIONAL CONVENTION OF THE ASIATIC EXCLUSION LEAGUE OF NORTH AMERICA 67 (1908) (quoting Olaf Tveitmoe)); *id.* at 60 (“If there is a violation of treaty rights between two governments, the fault is not ours; it is with the legislature which passed the law.”) (quoting S.F. CHRON., Nov. 2, 1906 (quoting school board president Aaron Altmann))).

340. *Id.* at 60 (discussing this unreported decision).

341. See *id.* at 62. California law during this period required separate schools for Indian, Chinese, or children of “Mongolian descent.” See David Brudnoy, *Race and the San Francisco School Board Incident*, in NEITHER SEPARATE NOR EQUAL: RACE AND RACISM IN CALIFORNIA, *supra* note 87, at 75.

state and federal district court.<sup>342</sup> His family's argument was not constitutional, but rather statutory—the California Code only provided for the segregation of Chinese and Mongolians, whereas the Japanese were neither.<sup>343</sup> They also pointed out that the Treaty of 1894 guaranteed Japanese descendents living in the United States the same privileges as Native Americans.<sup>344</sup> California argued that the Japanese, according to popular usage, were Mongolians, that segregation in a separate school did not constitute a deprivation of constitutional liberty, and that the Treaty of 1894 did not specifically mention education.<sup>345</sup> A *Harvard Law Review* note argued that U.S. courts had allowed segregation of nonwhites, so that denying California the ability to segregate the Japanese would, in effect, grant the Japanese “a greater right . . . than citizens of this country possess.”<sup>346</sup>

Roosevelt next invited school board president Roncoveier to Washington to discuss the situation. He refused, insisting that the President invite the entire board. Fearing an international crisis, Roosevelt agreed. On February 15, 1907, the San Francisco delegation agreed to rescind their segregation policy in return for a “gentlemen’s agreement” that Japan stop sending laborers to this country.<sup>347</sup> Theodore Roosevelt acquiesced and issued an executive order prohibiting further entry of Japanese laborers and exercised his influence to have the *Aoki* case dismissed. The *San Francisco Chronicle* was furious over the appeasement.<sup>348</sup>

President Roosevelt had to intervene when California proposed other measures that would have provoked the Japanese nation.<sup>349</sup> Later in 1913, California Governor Hiram Johnson did nothing to oppose the enactment

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342. See WOLLENBERG, *supra* note 223, at 62.

343. See CAL. EDUC. CODE § 8003 (West 1921) (repealed 1947); WOLLENBERG, *supra* note 223, at 62.

344. See WOLLENBERG, *supra* note 223, at 63. “[T]he citizens or subject of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties and rights, and shall be subject to no higher imposts or charges in those respects than native citizens or subjects of the most favored nation.” *Id.*

345. See *id.* at 63–64.

346. Note, *The Rights of the Japanese in California Schools*, 20 HARV. L. REV. 337, 338 (1907).

347. See WOLLENBERG, *supra* note 223, at 66, 67. For this “Gentleman’s Agreement,” see *Memorandum by the Division of Far Eastern Affairs*, in 2 U.S. DEP’T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1924, at 339 (1939) (attaching portions of the Gentlemen’s Agreement as an appendix), reprinted in part in BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850–1990*, at 207–12 (1993).

348. See WOLLENBERG, *supra* note 223, at 67 (stating that “the Mayor had surrendered on the ‘great fundamental principle whose establishment is of far more consequence than the presence or absence of a few Japanese children in our schools . . . the right of the Federal Government to interfere in the management of our schools’” (quoting S.F. CHRON., Mar. 15, 1907)).

349. See *id.* (noting how President Roosevelt prevented the California legislature from passing anti-Japanese bills).



of the Alien Land Law, which prohibited Japanese from buying farms.<sup>350</sup> Despite all this, wives and other family members of Japanese already in California continued to immigrate, because they were not covered by the antilabor agreement.<sup>351</sup> As numbers rose, so did strident opposition by such groups as the American Legion and the Native Sons and Daughters of the Golden West.<sup>352</sup> Even Saturday schools, conducted in the Japanese language, attracted criticism as un-American, though many of them taught such harmless subjects as sewing and emphasized assimilation into American culture.<sup>353</sup> In 1921, the California legislature established qualifications for language teachers and textbooks to ensure that American values were taught.<sup>354</sup> That same year, the California legislature finally amended its education statute to name Japanese as eligible for segregation; until then the statute had named only Mongols, leaving the Japanese's classification ambiguous.<sup>355</sup> Many school boards seized on the opportunity and established segregated schools for the Japanese.<sup>356</sup> When asked why, one parent replied simply, "prejudice."<sup>357</sup> The same parent explained that the Japanese beat us at baseball and received too many academic awards.<sup>358</sup>

During internment, even though over 70 percent of the Japanese sent to camps were from California, Governor Earl Warren refused to spend state money to operate schools for children in the camps at Manzanar and Tule Lake. Underfunded camp schools taught progressive ideas and included a class yearbook showing cheerleaders and young people wearing cardigan sweaters. Some of the Japanese politely pointed out that this imagery clashed with the reality of life behind barbed wire.<sup>359</sup> At one point, the United

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350. See Alien Land Law, Stats. 1921, § 10, 1921 Cal. Stat. 1xxxiii, 1xxxv (1920), *repealed* by Stats. 1956, ch. 316, 1956 Cal. Stat. 767.

351. See WOLLENBERG, *supra* note 223, at 68. The Japanese population increased; the Issei (first generation) and Nissei (second generation) populations combined grew from 41,000 in 1910 to over 71,000 in 1920. See WOLLENBERG, *supra* note 223, at 68.

352. See WOLLENBERG, *supra* note 223, at 69. These groups and organized labor supported a new Japanese Exclusion League. With the passage of the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 154 (1924), Japanese immigration came to an end. See WOLLENBERG, *supra* note 223, at 68.

353. See WOLLENBERG, *supra* note 223, at 69-72. The Japanese, unlike the Chinese, tried to prepare students and adults alike to assimilate into American culture. See *id.*

354. See *id.* at 72.

355. See *id.* at 72; CAL. EDUC. CODE §§ 8003-8004 (West 1921) (repealed 1947). This law is discussed in *Westminster School District of Orange County v. Mendez*, 161 F.2d 774, 780 (9th Cir. 1947).

356. See WOLLENBERG, *supra* note 223, at 72. In all of these school districts, the Japanese were a majority of the school population. See *id.*

357. *Id.*

358. See *id.* at 73.

359. See *id.* at 75-76, 78. In the fall of 1942, when school opened at the camp at Rohner, Arkansas, the words "Jap Prison" appeared on the tarpaper wall. See *id.*

States distributed questionnaires asking whether the internees were loyal; “renunciants,” persons who refused to sign, suffered the ultimate indignity.<sup>360</sup> Already segregated from society, they were sent to the Tule Lake camp for troublemakers.<sup>361</sup> Some militant parents pulled their children out of the official cardigan-sweater schools and operated Japanese language schools to prepare students to relocate to Japan after the war ended. When it did, 2000 Japanese internees repatriated to Japan even though that nation was in shambles. The Manzanar high school yearbook in 1945 showed a photograph of a hand squeezing pliers around barbed wire. One internee, Harry Kitano, now a UCLA professor, believes camp schools did the children a favor, allowing them to grow up free of Anglo prejudice.<sup>362</sup>

Indian schools, by contrast, seem to have done the Indian children sent there very little favor. As mentioned earlier,<sup>363</sup> Spanish missions and Mexican ranchos made Indians into a colonial work force. Stone Age hunters were Christianized, forcibly settled in villages, and taught to farm and to herd livestock.<sup>364</sup> Indian numbers decreased rapidly because of the ravages of European diseases.<sup>365</sup> When Anglos swarmed into California during the gold rush, they did not need the Indians for labor as the earlier Spaniards and Mexicans had, so they displaced and destroyed them with great energy.<sup>366</sup> As mentioned earlier, Hubert Howe Bancroft described the period as “one of the last human hunts in history, and the basest and most brutal of them all.”<sup>367</sup> Under federal treaties, most California Indian tribes agreed to move from the foothills into the Central Valley in return for social services, including education.<sup>368</sup> California, however, was of a different mind; the state legislature vehemently opposed even this shred of kindness, enacting laws depriving Indians of the right to vote, hold office, testify against whites, and attend white schools.<sup>369</sup> After *Ward v. Flood*<sup>370</sup> in 1874, Indian children could attend

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360. See *id.*

361. The flux of people moving in and out of Tule Lake disrupted the school program. See *id.*

362. See *id.* at 78–79, 80.

363. See *supra* notes 61–62 and accompanying text.

364. See WOLLENBERG, *supra* note 223, at 83.

365. See *id.* “In 1769 the Indian population of California was between 200,000 and 300,000; by 1880, not more than 20,000 Indians were left.” *Id.*

366. See *id.*

367. *Id.* (citing 7 HUBERT HOWE BANCROFT, HISTORY OF CALIFORNIA 474–75 (1890)).

368. See WOLLENBERG, *supra* note 223, at 84. The 18 treaties provided for 22 teachers, 45 assistants, and 54 school buildings.

369. See *id.* at 84–85. The treaties were not ratified by the U.S. Senate in 1853, therefore state action held sway. See *id.*

370. 48 Cal. 42 (1874).

white schools only if their school district did not maintain one for colored children. Only sixty-three children in the entire state opted to do this.<sup>371</sup>

Faced with such intransigence, the federal government considered opening schools at Hoopa Valley and Tule River, but Indian agent George Hoffman spoke against the idea, writing that the “California Digger” is a degenerate, cruel, cowardly, thieving, vagabond—“without one redeeming trait”<sup>372</sup>—and in any event was bound for extinction. When Indian extinction did not materialize, federal authorities went ahead and opened schools at Hoopa and Tule River.<sup>373</sup> Stanford University president David Starr Jordan opposed the Indian school movement and urged the government to open public schools to Indian children.<sup>374</sup>

In *Piper v. Big Pine School District*,<sup>375</sup> the Indians won a narrow victory. An Indian girl, not a member of a tribe, was a California citizen and resided away from the reservation.<sup>376</sup> As such, she had voluntarily adopted “the habits of civilized life,” and as a U.S. citizen, asserted that she was entitled to public schooling.<sup>377</sup> The court agreed, although it noted that schooling could be separate but equal.<sup>378</sup> By 1926, San Francisco’s Commonwealth Club, in a study of Indians in public schools, reported a depressing array of statistics including early dropout and high truancy.<sup>379</sup> One northern California town, forced to accept Indians in school, walled them off with a partition in special rooms, fenced off a part of the playground, and provided them with a separate teacher.<sup>380</sup>

In another town, parents objected that the Indian children might be diseased. The Indian parents produced medical certificates showing that their children were in perfect health. Grumblingly, the school admitted them.<sup>381</sup> Special government boarding schools for Indians were little better. According to another report, even the best of them subscribed to an implicit mission of destroying Indian culture and viewed Indian girls as potential

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371. See WOLLENBERG, *supra* note 223, at 85.

372. *Id.* at 86.

373. *See id.* By 1872 the schools had an enrollment of 127 students. *See id.*

374. *See id.* at 92. Jordan was a member of the San Francisco-based Indian Board of Cooperation, a group of leading citizens, whose aim was “to promote the general welfare with regard to public school privileges.” *Id.*

375. 193 Cal. 664 (1924).

376. See WOLLENBERG, *supra* note 223, at 96–97.

377. *Id.* at 97.

378. *See id.* at 98.

379. *See id.* at 98–99.

380. *See id.* at 99.

381. *See id.*

house servants and boys as farmhands.<sup>382</sup> By 1960, 43 percent of Indian children dropped out by the eighth grade, and less than 2 percent completed four years of college.<sup>383</sup> California Indians had the highest unemployment rate and lowest per capita income of all groups in the state.<sup>384</sup>

If the story of Chinese, Japanese, black, and Indian schoolchildren in California is dismal, that of Mexican Americans is possibly even worse. Mexican schoolchildren, in many cases, were sons and daughters of migrants and so could not complete an entire school year in the same school.<sup>385</sup> Moreover, many of them spoke English haltingly at best. California educational authorities seized on these characteristics to argue for segregated schools for Mexican American children. Segregating them was in their own best interest, the argument went, because their educational disadvantages and language difficulties required a special curriculum. At the same time, it would be unfair for Anglo children to attend school with children who were so far behind and who did not share Anglo traits of independence and high educational aspiration. Educational psychologists added that separation was necessary to protect Mexican American schoolchildren from the laughter and derision they might suffer if sent to school with more able Euro-American children.<sup>386</sup>

Large numbers of Mexicans arrived between 1910 and 1930, shortly after the wave of European immigrants had subsided.<sup>387</sup> Social workers and settlement house operators who had spent decades studying, teaching, and lecturing to Irish, Polish, Slovakian, and Italian immigrants in America's large cities now transferred their attention to the "Mexican problem."<sup>388</sup> Books and master's theses described Mexicans as dirty, diseased, and in need of training in personal hygiene.<sup>389</sup> Their culture and family structure supposedly emphasized

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382. A report by the progressive Institute of Government Research in Washington in 1928 criticized the assimilationist thrust of government schools and advocated preserving Indian culture. *See id.* at 99–100.

383. Whites had a 25 percent dropout rate, with 11 percent completing four years of college. *See id.* at 102.

384. *See id.* at 102–03.

385. *See id.* at 114. Cesar Chavez, son of migrants during the 1930s, remembered attending at least 31 different schools, but never getting past the sixth grade. *See id.*; *see also* RAWLS & BEAN, *supra* note 58, at 405 (noting that Chavez attended nearly 40 different California public schools).

386. *See* WOLLENBERG, *supra* note 223, at 112–15. Educator Grace Stanley described an "all-Mexican school, where the children's faces 'radiated joy, they had thrown off the repression that held them down when they were in school with the other [white] children.'" Grace Stanley, *Special School for Mexicans*, SURVEY, Sept. 15, 1920, at 715.

387. *See supra* notes 145–146 and accompanying text.

388. *See* CAREY MCWILLIAMS, NORTH FROM MEXICO 188–89 (updated by Matt S. Meier, new ed. 1990).

389. *See id.*

passivity and fatalism; they were at best a source of manual labor.<sup>390</sup> California schools tracked Mexican schoolchildren into vocational training out of the belief that they had a natural capacity for the manual arts.<sup>391</sup> In rural areas, farmers sat on school boards, many of which saw schools as extensions of the packing shed and Mexican schoolchildren as future pickers and processors of produce.<sup>392</sup> In educational theory, the vocational movement embraced a philosophy with democratic rhetoric, but managerial overtones.<sup>393</sup> The idea was to educate everyone for their natural places. These ideas had an impact. A 1914 commission on national aid to vocational education<sup>394</sup> led to a federal statute that stratified schoolchildren into separate tracks under the guise of democratic education.<sup>395</sup>

The movement had drastic repercussions for Mexican schoolchildren in California. Authorities already believed their natural lot in life was to serve Anglo farmers or factory owners, and high school counselors were already advising Mexican girls to prepare for careers as domestics, boys to major in manual arts.<sup>396</sup> The post-World War I intelligence testing movement served as a handmaid to school tracking.<sup>397</sup> Mexican children were widely tested in California, Colorado, New Mexico, Texas, and Arizona, where authorities found remarkably similar results: Most Mexican children fell into the 81–85 I.Q. range.<sup>398</sup> One psychologist tested migrant children in California with the Stanford Achievement Test after which he pronounced that “87.6 percent [of the children] were retarded.”<sup>399</sup> Foreshadowing the University of

390. See DONATO, *supra* note 16, at 20–21.

391. See SAMUEL BOWLES & HERBERT GINTIS, *SCHOOLING IN CAPITALIST AMERICA* 191–95 (1976); DONATO, *supra* note 16, at 20–21.

392. See DONATO, *supra* note 16, at 16–17.

393. See *id.* at 19 (“[T]his literature . . . demonstrates that the vocational education movement became ‘a response to the specific job training needs of the rapidly expanding corporate sector than an accommodation of a previously elite educational institution—the high school—to the changing needs of reproducing the class structure.’” (quoting BOWLES & GINTIS, *supra* note 391, at 194)).

394. See *id.* at 20.

395. See Smith-Hughes Vocational Education Act of 1917, Pub. L. No. 64-347, 39 Stat. 929 (codified at 20 U.S.C. §§ 11–28 (1994)); DONATO, *supra* note 16, at 20–21; William E. McGorray, *The Needs of a Mexican Community*, 18 CAL. J. SECONDARY EDUC. 349, 349 (1943) (urging schools to adjust curriculum and pedagogy to suit the needs of Mexican boys, who have good manual ability, noting that the “[t]he curriculum is industrial arts in nature . . . and many of the boys spend four hours in school and four hours in industry daily”).

396. See DONATO, *supra* note 16, at 21. Merton Hill, a prominent Americanization specialist in California, also maintained that since Mexican children demonstrated a “considerable aptitude for hand work . . . courses should be developed that will aid them in becoming skilled workers with their hands.” *Id.*

397. See *id.* at 23. Intelligence testing legitimated the tracking that industry had needed all along.

398. See *id.* at 26.

399. *Id.* at 28 (citing Wilbur K. Cobb, *Retardation in Elementary Schools of Children of Migratory Laborers in Ventura County, California* 1 (1932) (unpublished Master’s thesis, University of Southern California)). Stanford was also the academic home of Lewis Terman, developer of the

California system's Master Plan, which was to come a few decades later, California's public schools were thoroughly tracked by 1930 with Mexican American children either in segregated schools or in the bottom tracks of integrated ones.<sup>400</sup> Progressive educator George Sanchez criticized the use of tests for Chicano schoolchildren, but with little success.<sup>401</sup> Some California school districts simply segregated Mexican schoolchildren to avoid any sort of mixing.<sup>402</sup>

During the Depression years, the virulence of California's rhetoric increased. Writing in a book published by the University of Southern California press, sociologist Emory Bogardus warned of the perils of continued Mexican immigration<sup>403</sup> that resulted in many Mexican families permanently relocating to the United States.<sup>404</sup> Governor C.C. Young's Mexican Fact Finding Committee warned that Mexican Americans were supplanting other immigrant races and native-born Americans.<sup>405</sup> Even as late as 1966–1967, a California study showed that the vast majority of school districts lacked programs for the English deficient.<sup>406</sup> Seventy percent failed to conduct conferences with the parents and families of Mexican children. Schools conveyed the impression that educating Mexican schoolchildren was an exercise in futility because of their low aspiration level, poor home environment, and lack of parental

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early intelligence quotient (IQ) test. Terman believed that southern Europeans, Blacks, and Jews were intellectually subpar. See *Father to 1,000 Geniuses*, L.A. TIMES, July 30, 1995 (Magazine), at 20; *Planned Parenthood Carries on the Eugenics Tradition*, WASH. TIMES, Sept. 13, 1997, at A12.

400. See DONATO, *supra* note 16, at 28–30; *infra* note 483 and accompanying text.

401. See DONATO, *supra* note 16, at 29 (noting George Sanchez's objection to testing children in a language and culture they did not understand).

402. See WOLLENBERG, *supra* note 223, at 113–18. Not all Mexican parents passively accepted segregated schools. See PEREA ET AL., *supra* note 128, at 670–75 (describing *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946) (striking down the local practice of segregating Mexican American schoolchildren because California law did not expressly provide for it), *aff'd*, 161 F.2d 774 (9th Cir. 1947)). The defendant school districts introduced expert academic witnesses from the state universities to prove that segregation was in the Mexican children's best interest and done to help them. Moreover, California followed, both formally and informally, the *Plessy* rule of separate but equal. Judge Paul O. McCormick ruled that the California Education Code did not provide specifically for segregation in the case of Mexican children; that Mexicans were not Indians, who were subject to legal segregation in school; and that segregation did not help the children because their counterparts who did attend Anglo schools performed demonstrably better. See WOLLENBERG, *supra* note 223, at 126–28. For a discussion of another earlier chapter of Mexican-American resistance to school segregation in California (the "Lemon Grove incident"), see Kevin Johnson & George Martínez, *Crossover Dreams*, 53 U. MIAMI L. REV. 1143, 1154 (1999).

403. See BOGARDUS, *supra* note 141, at 270; DONATO, *supra* note 16, at 38–39.

404. See DONATO, *supra* note 16, at 39.

405. See *id.* The Depression exacerbated relations between Mexicans and whites. Unemployed white workers from other parts of the country migrated to California, saturated the labor market, and made jobs more competitive.

406. See *id.* at 62; cf. JOHN PLAKOS, CALIFORNIA STATE DEP'T OF EDUC., ERIC No. ED018281, MEXICAN-AMERICAN RESEARCH PROJECT, PROGRESS REPORT 1 (July 13, 1967).

support.<sup>407</sup> A California State Advisory Committee to the U.S. Commission on Civil Rights (the Civil Rights Commission) found that many California schoolteachers subscribed to negative stereotypes and attitudes toward Mexican children, that school boards assigned the worst teachers to schools with a high percentage of such pupils, and that teachers resented and resisted assignment to those schools.<sup>408</sup>

Although many teachers did not personally know any Mexican parents, they developed stereotypes of the uncaring Mexican parent and, as a result, made no efforts to meet or to enlist them in support of their children's education.<sup>409</sup> Oscar Lewis's "deficit theory" of Mexican home life received a wide and sympathetic reception among California schoolteachers.<sup>410</sup> His 1965 book, *Five Families*,<sup>411</sup> captured and reinforced ideas that California farmers, school boards, and testing psychologists already embraced.<sup>412</sup> In one northern California city, 42 percent of Mexican children dropped out before completing the eighth grade.<sup>413</sup> Even those who persisted in school struggled against marginalization and exclusion from clubs, academic organizations, and extra-curricular activities. Few ate in the school cafeteria. Others were steered into work study programs, ostensibly for their own good, because they "needed the money" and were not expected to be interested in school.<sup>414</sup>

One educational study showed that teachers devoted more time and energy to Anglo children and "systematically ignored" Mexican Americans in the same classrooms because the Euro-Americans were regarded as society's future leaders, while the Mexican kids "might as well accept being led by Anglos."<sup>415</sup> "[H]igh ability classes were almost entirely filled with white children."<sup>416</sup> Some districts used federal money intended for minorities for

407. DONATO, *supra* note 16, at 62.

408. *See id.* at 63; CALIFORNIA STATE ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, ERIC No. ED025355, EDUCATION AND THE MEXICAN AMERICAN COMMUNITY IN LOS ANGELES COUNTY: A REPORT OF AN OPEN MEETING 7 (Apr. 1968).

409. *See* DONATO, *supra* note 16, at 62.

410. *See id.* at 66-67.

411. OSCAR LEWIS, FIVE FAMILIES: MEXICAN CASE STUDIES IN THE CULTURE OF POVERTY (1959); *see also* Oscar Lewis, *The Culture of Poverty*, SOCIETY, Jan.-Feb. 1998, at 7. Lewis still adheres to his culture of poverty thesis.

412. *See* DONATO, *supra* note 16, at 21-22 (noting the high number of books and masters' theses written during this period that emphasized the uneducability of Mexican schoolchildren and urging that they receive training for simple manual labor).

413. *See id.* at 67. Mexican children made up 22 percent of high school enrollments, but only 13 percent of them graduated. *See id.*

414. *See id.* at 67-69.

415. *Id.* at 70; *see also* Theodore Parsons, *Ethnic Cleavage in a California School* 296-97 (1965) (unpublished Ph.D. dissertation, Stanford University) (on file with authors).

416. DONATO, *supra* note 16, at 71.

“tuxedos for high school proms and band uniforms.”<sup>417</sup> Mexican American schoolteachers were few. By 1968, Mexicans comprised 21 percent of California’s schoolchildren, but only 2.2 percent of its teachers.<sup>418</sup> By the mid-sixties, tracking was so obvious that Anglos virtually “had to be retarded” to be placed in the practical sections.<sup>419</sup> In the relatively few schools that were ethnically integrated, “the social, cultural, and academic climates were organized around an ideology so obvious that it became an insult to white students to be placed in classes with Mexican American[s].”<sup>420</sup>

In the 1960s, when Mexican parents did begin to assert their rights, to bilingual schools for example, white parents became incensed and replied that the Mexicans should either fit in or go back to Mexico. Some educational professionals resisted structural reform on the ground that the dissatisfied Mexicans were foreigners, even though many had resided in the area longer than their white counterparts. They claimed that, as foreigners, the Mexicans should be grateful because the schooling opportunities in California were superior to those they enjoyed in Mexico.<sup>421</sup> When *Lau v. Nichols*<sup>422</sup> compelled California schools to offer bilingual education, some white parents resented the new programs, even though their own children were not in them, and withdrew their children from the schools.<sup>423</sup> By 1974, Mexican children in California schools were even more isolated than blacks.<sup>424</sup> Schools with a high proportion of Mexican children suffered from “[i]nadequate resources, poor equipment, and unfit building construction.”<sup>425</sup> Some wealthy communities pursued deunification so that white children would not have to go to school with children with last names like Ramirez and Gomez.<sup>426</sup> Proposition 1, passed in 1979, amended the California Constitution to limit the use of mandatory busing.<sup>427</sup> The Civil Rights Commission found a high degree of segregation

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417. *Id.* at 72 (citing D.B. Reed & D.E. Mitchell, *The Structure of Citizen Participation: Public Decisions for Public Schools*, in PUBLIC TESTIMONY ON PUBLIC SCHOOLS: NATIONAL COMMITTEE FOR CITIZENS IN EDUCATION 190 (Commission on Educ. Governance, 1975)).

418. *See id.* at 74.

419. *Id.* at 76 (citing DOUGLAS FOLEY, *LEARNING CAPITALIST CULTURE: DEEP DOWN IN THE HEART OF TEJAS* 102 (1990)).

420. *Id.*

421. *See id.* at 80–81.

422. 414 U.S. 563 (1974).

423. *See DONATO, supra* note 16, at 117–18.

424. *See id.* at 126.

425. *Id.* at 126 (citing GILBERT GONZALEZ, *CHICANO EDUCATION IN THE ERA OF SEGREGATION* 21–22 (1990)).

426. *See id.* at 137–39.

427. *See id.* at 140; *see also* CAL. CONST. art., I, § 7 (1979) (codifying Proposition 1).



in California, with one of the state's school districts being named as one of the nation's most segregated.<sup>428</sup>

The Civil Rights Commission also found a high degree of isolation of blacks in California schools. In a survey of enrollment during the 1965–1966 school year, nearly 40 percent of Los Angeles blacks attended schools that were 99–100 percent black; in San Francisco, 21.1 percent of black students did. It also found that racial isolation was increasing. In Oakland, almost half of the black elementary schoolchildren were attending 90–100 percent black schools in 1965, but five years earlier only 10 percent were doing so. The Civil Rights Commission found that the causes of racial isolation were complex, but all had their roots in racial discrimination sanctioned and even encouraged by the government. As an example, it cited the way California funded its schools, noting that suburban areas had at their disposition more resources than city ones, a gap that government funding did not completely close.<sup>429</sup> The funding gap, the commission found, directly disadvantaged minority students.<sup>430</sup>

The report also pointed to site selection decisions as contributing to California's racial segregation. For example, officials in Oakland opened Skyline High School creating a "new senior high attendance district that removed white high school students from a racially mixed to an all-white school. Skyline High was situated in a white residential area . . . and it withdrew white students from four other senior highs."<sup>431</sup> In San Francisco during the 1950s, "capacity for approximately 2,400 elementary children was added to the predominantly Negro schools in the Hunter's Point area. As a result, three of the Hunter's Point schools were enlarged . . . At the same time a new elementary school . . . was constructed within an adjacent white area."<sup>432</sup> The new school opened with a nearly all-white student body. In another case, San Francisco opened an elementary school in a white area eight blocks from a predominantly black, overcrowded school in a black neighborhood. This new school was planned to accommodate only 540 students and opened with a nearly all-white enrollment, while overflow students from the black school were bused fifteen blocks away to another school.<sup>433</sup>

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428. See *id.* at 151.

429. See U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 4, 8, 17, 27–29 (1967). Revenues per pupil from state sources increased 33.6 percent in the city and 63.1 percent in the suburbs. See *id.* at 29.

430. "When children are assigned to schools on the basis of residential proximity, rigid residential segregation intensifies racial isolation in the schools." *Id.* at 31.

431. *Id.* at 45.

432. *Id.* at 46.

433. See *id.* at 46–47.

In Oakland, school officials addressed increases in black enrollment at the elementary level through the use of portable classrooms instead of by new construction.<sup>434</sup> More probationary teachers were found in minority schools than in wealthier white ones.<sup>435</sup> Some districts allowed children living in an “optional” zone to choose between the school located in their area and one in a nearby attendance area. School authorities manipulated these zones to allow white parents to avoid sending their children to schools with too many minorities.<sup>436</sup> The Civil Rights Commission warned that racial isolation had serious consequences for school performance: “[T]he educational attainment of an individual student is related both to his own social class and [that] of his classmates.”<sup>437</sup> The commission cited a study of Richmond, California, in which a professor from the University of California at Berkeley found that “social class was the single factor most closely related to the academic achievement of children in the early grades”<sup>438</sup> and that the quality of teachers was “the most important element in the quality of education schools offer.”<sup>439</sup>

#### B. The Role of California's Universities

Both public and private universities in California have played roles in the state's unfolding racial history. In 1874, the state legislature adopted compulsory education in “an act to enforce the educational rights of children,” despite parents' objections that it interfered with their rights.<sup>440</sup> At first, free public schooling applied only to public elementary schools. In 1884, by constitutional amendment, California became the first state to distribute textbooks, produced by the state printing office, for free. During this halcyon period, California opened the first campus of the University of California system in Berkeley.<sup>441</sup>

Stanford University was conceived about the same time when the only child of Leland and Jane L. Stanford died at a young age.<sup>442</sup> These wealthy parents decided to dedicate a university in their child's name for “the children of California [who] would become the foster children of their love.”<sup>443</sup> The

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434. See *id.* at 50.

435. See *id.*; Jennifer Kerr, *ACLU Sues California Over Schools*, *BOULDER DAILY CAMERA* (Colo.), May 19, 2000, at 7A (noting a lawsuit alleging “appalling” conditions at schools attended by minority and poor students).

436. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 429, at 52–54.

437. *Id.* at 77.

438. *Id.* at 81.

439. *Id.* at 93.

440. RAWLS & BEAN, *supra* note 58, at 239.

441. See *id.* at 240–42.

442. See *id.* at 241.

443. *Id.*

Stanfords dedicated their large farm in Palo Alto and a substantial portion of their fortune, which would have become their son's inheritance. Stanford University opened in 1891 with 559 students, nearly twice the enrollment of Berkeley.<sup>444</sup>

A semiofficial history of the University of California, by Verne A. Stadtman, details the early years, the role of the Morrill Act of 1862, which offered land grant endowments to the states for agricultural colleges, and the role of six ex officio regents in setting up the fledgling university system.<sup>445</sup> It describes the formation of the academic senate in the 1870s,<sup>446</sup> the political turbulence of the early period,<sup>447</sup> and the era of relatively powerless presidents.<sup>448</sup> It details the university's slow expansion to include a college of pharmacy and one of law in San Francisco<sup>449</sup> and later one of veterinary science located in that city as well.<sup>450</sup> It reports the role of farmers' institutes,<sup>451</sup> establishment of the university farm in Berkeley,<sup>452</sup> later moved to Davis, and the growth of fraternities, sororities, and student government.<sup>453</sup> It describes noodle-eating contests and water fights between student groups.<sup>454</sup> It discusses the university's steady growth between the world wars,<sup>455</sup> the university's emergence as a research powerhouse during the Cold War,<sup>456</sup> and the loyalty oath controversy.<sup>457</sup> It describes the Clark Kerr era as one of "planning,"<sup>458</sup> and the advent of the liberated students and "the Berkeley rebellion" in the sixties and the seventies.<sup>459</sup> It ends with the university today in a period of "change and . . . evolving purpose."<sup>460</sup>

What the book is conspicuously devoid of is any serious discussion of race, class, or life and death struggles over affirmative action. Although California colleges and universities have had a long and complicated relationship with these issues, one could hardly tell by looking at official sources and documents. Berkeley's world class history department in recent times has only

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444. See *id.*

445. See VERNE A. STADTMAN, *THE UNIVERSITY OF CALIFORNIA: 1868-1968* (1970).

446. See *id.* at 52-54.

447. See *id.* at 54-59, 68-70.

448. See *id.* at 88-106.

449. See *id.* at 130-33.

450. See *id.* at 135-36.

451. See *id.* at 148-49.

452. See *id.* at 141-54.

453. See *id.* at 161-66, 171-73, 185-86.

454. See *id.* at 163-66, 168-70.

455. See *id.* at 193-238.

456. See *id.* at 301-61.

457. See *id.* at 319-39.

458. See *id.* at 376-400.

459. See *id.* at 425-74.

460. *Id.* at 497-510.

included one historian, Walton Bean, whose primary intellectual interest was the history of California; after his retirement, his courses in California history often have been covered by part-time or visiting professors.<sup>461</sup> If one goes, as we did, to the world-famous Bancroft Library and asks for histories of the university emphasizing minority rights and political struggle, one is apt to be told that such books do not exist, or at any rate will not be found in the collection.<sup>462</sup> In short, the University of California system, on an institutional level, appears to pay little attention to the history of its own interaction with California's minority communities.

But that interaction, though largely unwritten, has indeed taken place. By piecing together accounts from many different sources, including archival materials, the following story emerges.

### 1. The University's Early Years

For the first seventy years of its existence, the University of California seems to have been nearly all white.<sup>463</sup> In a memoir of his period in Berkeley during the 1930s, sociologist Robert Nisbet describes the campus as "99.99 percent white"<sup>464</sup> and says, "I didn't know or know of a single American-born black student at Berkeley in the thirties."<sup>465</sup> Moreover, Nisbet writes, Berkeley was satisfied with that situation. If anyone had proposed affirmative measures to improve minority enrollment, the idea "would have been rejected at just about every hand, student and faculty irrespective of political or social ideology, or anything else."<sup>466</sup>

Thirty years later in 1964, a decade after *Brown v. Board of Education*,<sup>467</sup> nine years after the civil disobedience of Rosa Parks, and a year after Dr. Martin Luther King, Jr. delivered his "I Have a Dream" speech, Berkeley's Boalt

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461. See Interview with James J. Rawls, professor of history and author of a leading text on California history, in Sonoma, Cal. (Aug. 3, 1999).

462. See Telephone Interview with Archivist, Bancroft Library, University of California at Berkeley (July 26, 1999). Similarly, we were told the Bancroft collection contains nothing on Arthur Jensen or the controversy over race-I.Q. research. See *id.*

463. See Jerome Karabel, *The Rise and Fall of Affirmative Action at the University of California*, 1-2, 9 n.23 (Sept. 1999) (unpublished manuscript, on file with authors) [hereinafter *Rise and Fall of Affirmative Action*]. For a shortened version without all of the tables, see Jerome Karabel, *The Rise and Fall of Affirmative Action at the University of California*, 25 J. BLACKS IN HIGHER EDUC. 109 (1999).

464. ROBERT NISBET, *TEACHERS AND SCHOLARS: A MEMOIR OF BERKELEY IN DEPRESSION AND WAR* 61 (1992).

465. *Id.*

466. *Id.* at 64; see also Anthony M. Platt, *Confessions of a Model Meritocrat*, 25 SOC. J. 129, 134 (1999) (pointing out that this situation prevailed well into the middle years of the century).

467. 347 U.S. 483 (1954).

Hall School of Law did not graduate a single black student.<sup>468</sup> For its part, UCLA's school of medicine, founded in 1951, graduated its first class in 1955. Between then and 1968, 764 students graduated as physicians;<sup>469</sup> of these, not a single one was black or Hispanic.<sup>470</sup> Two of the state's premier schools of law and medicine thus remained effectively segregated as late as 1964, when a short-lived era of affirmative action began.

Earlier, the University of California at Berkeley's (Cal's) admissions process appears to have been based almost entirely on grades, recommendations, and family connections.<sup>471</sup> Our review of admissions committee minutes going back to the 1940s and 1950s shows that the admissions office kept close track of the performance of graduates of vast numbers of California high schools, public and private.<sup>472</sup> It did the same with transfer applicants from other universities such as Stanford or St. Mary's College. These schools were assigned a correction factor based on the performance of their students once enrolled at Cal. A positive factor meant that the sending school was rigorous and that its graduates performed better at Cal than they had done at the previous school.<sup>473</sup> A negative factor meant that the grades from the sending school were "soft"—a student with a 3.7 grade point average might only earn on average 3.0 at Cal. This system greatly disadvantaged Catholic and inner city schools, whose graduates were predicted to do poorly at Cal, even if they had near perfect averages at their previous schools.

## 2. The Advent of Standardized Testing

By the mid-1930s, testing by the College Entrance Examination Board (College Board) played a large part in determining scholarship recipients at Ivy League schools.<sup>474</sup> In the late nineteenth century, an oral subject exam, as well as the high school principal's recommendation, had loomed large in a student's

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468. See Karabel, *Rise and Fall of Affirmative Action*, *supra* note 463, at 1 ("Table 1: Racial Composition of Boalt Hall Entrants Who Subsequently Graduated (1960-1969)").

469. *See id.*

470. *See id.* ("Table 2: Graduates of UCLA School of Medicine by Race (1955-1968)"). Karabel's figures do not include Asian Americans or Native Americans.

471. See NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 171-72 (1999). Until 1963, the University of California operated an accreditation system for California high schools. A student graduating with a B average from a school which met the standards and requirements of the University of California plan would gain automatic admission to the university. *See id.*

472. See 3-10 University of Cal. (Sys.), Academic Senate, Board of Admissions and Relations with Schools, Minutes 1920 May-1966 March (covering the period Apr. 1939-May 1961) (University Archives, The Bancroft Library, Collection Number CU-9.01) [hereinafter Minutes].

473. *See id.*

474. See LEMANN, *supra* note 471, at 39-41.

chances for acceptance to the University of California.<sup>475</sup> Shortly thereafter, written exams prepared and graded by the faculty were added.<sup>476</sup> By the early twentieth century, tests administered by the College Board began to be used. By 1927, only College Board exams were used to determine a student's eligibility for admission.<sup>477</sup> By 1933, the principal's recommendation counted for nearly nothing—only 1 percent of students were admitted on that basis.<sup>478</sup>

Standardized test scores, however, were apparently not required of all applicants. According to Nicholas Lemann, they became mandatory only in 1967.<sup>479</sup> The University of California, with its tens of thousand of freshman admitted every year, was a much coveted plum for the Educational Testing Services, because it would be the first large public university to use the test.<sup>480</sup> *Brown* had been decided only a decade earlier,<sup>481</sup> so that the University of California must have had in mind the flood of black and Hispanic high school graduates that would be coming. Standardized testing, of course, resonated well with Clark Kerr and the era of managerialism,<sup>482</sup> as well as with the Master Plan,<sup>483</sup> under which California sought to provide

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475. See, e.g., 6 Minutes 1951 December, § 4: Subject Requirements and Admissions to the University of California (noting how freshman admitted from accredited high schools to the university with a recommendation from the principal of the high school).

476. See *id.* The principal was to verify that the student has passed subject requirements. See *id.*

477. See *id.* The principal's power began to wane, having at this time only the right but not the requirement to recommend a student. See *id.*

478. See *id.*

479. See LEMANN, *supra* note 471, at 171. Ironically, this decision coincided with the firing of Clark Kerr, a strong proponent of testing and elitism in higher education, after failing, his conservative accusers charged, to control unruly student demonstrations. See *id.* at 168–71.

480. See *id.* at 104–05. Though the University of California became the first public university member of the College Board in 1947, the Board bent the rules for the University so that it would not have to require the Scholastic Aptitude Test (SAT), but could only use it experimentally. Henry Chauncey, however, had set his sights on the day, were the University of California ever to require all its applicants to take the SAT, which would make the University of California the Educational Testing Service's (ETS) biggest single customer and establish ETS as the prime organization in the fledging testing industry. See *id.*

On University of California's first discussions of whether to make testing mandatory for all applicants, see Minutes, *supra* note 472, May 12, 1955, at 15, 19.

481. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

482. See LEMANN, *supra* note 471, at 131–36. In the decade prior to Kerr's installation as president of the University of California, standardized tests had been used primarily for out of state applicants. But with mandatory testing, the wealthy gained a huge edge, as parents learned to pay for test and essay writing coaches and crash courses. See *id.*; see also *id.* at 27 (noting that SAT scores correlate about as well with family income as with scholastic performance); Kenneth R. Weiss, *More Rich Kids Get to Take Extra Time on SAT*, DENVER POST, Jan. 9, 2000, at 2A (noting how wealthy, suburban test takers documented reading disorders to gain extra time on standardized tests).

483. One of Clark Kerr's greatest achievements, the Master Plan, divided California higher education into three tiers. See LEMANN, *supra* note 471, at 121–39; STADTMAN, *supra* note 445, at 392–95. The University of California campuses would educate the top eighth of California's high school graduates; the Cal State system, the top third; and the community college system

educational opportunities, in a highly stratified system, for every qualified applicant. Might it be that the University of California's embrace of mandatory standardized testing, after years of resistance, was partially designed as a bulwark against too many minorities<sup>484</sup>—or that, even earlier, the Master Plan was designed to provide a safe haven of elite, state-sponsored schools for California's white leaders and their children?<sup>485</sup>

### 3. Affirmative Action Arrives on the Scene

If so, it did not last for long. Increasing public pressure and internal recognition of the need to educate minority leaders quickly led to two periods of affirmative action. Beginning in the mid-1960s, the University of California engaged in "soft" affirmative action, primarily through outreach and recruit-

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everybody else. In fact, the system ended up distinctively color- and class-coded, with upper-income whites attending University of California campuses, ethnic whites and some minorities in the Cal State system, and a few blue collar whites and many minorities at the community colleges. See COMMISSION FOR THE REVIEW OF THE MASTER PLAN FOR HIGHER EDUC., *THE MASTER PLAN RENEWED: UNITY, EQUITY, QUALITY, AND EFFICIENCY IN CALIFORNIA POSTSECONDARY EDUCATION* 12–17 (1987) [hereinafter *MASTER PLAN RENEWED*]; LEMANN, *supra* note 471, at 135–37; STADTMAN, *supra* note 445, at 395; see also HENDRICK, *supra* note 280, at 65 (noting how the Master Plan, which featured differentiation of mission, also differentiated people. In 1968, Mexicans made up only 1.6 percent of the student body at the University of California campuses, by 1972 only 4.8 percent. Blacks went from 2.1 to only 5.2 percent; Asians, 5.2 to 8.3 percent; then, the percentage even declined for blacks, as a result of the *Bakke* decision); Patrick M. Callan, *California's Master Plan for Higher Education*, in *THE OECD, THE MASTER PLAN AND THE CALIFORNIA DREAM* 79–83 (Sheldon Rothblatt ed., 1992) (pointing out that the Cal State system's leadership proved unimaginative so that even those less elite campuses produced few minorities as late as 1970–1980); William Zumeta & Priscilla Wohlstetter, *Higher Education at the Crossroads*, in *NEW DIRECTIONS IN CALIFORNIA HISTORY: A BOOK OF READINGS* 366, 367–69, 372–74 (James J. Rawls ed., 1988) (noting how minorities fared poorly under the Master Plan and the programs designed to implement it). Relatively few community college students succeeded in transferring to University of California campuses, see *MASTER PLAN RENEWED*, *supra*, at 12, and the community colleges currently serve minorities more than they serve any other population. See *id.* at 12–13 (noting that about 80 percent of California blacks who attend college in California attend a community college); see also BOWLES & GINTIS, *supra* note 391, at 211 (noting that the community colleges' purpose is to "cool out" students' expectations); Jack Citrin, *The Legacy of the Tax Revolt*, in *NEW DIRECTIONS IN CALIFORNIA HISTORY: A BOOK OF READINGS*, *supra*, at 358, 359–73 (noting how under the Master Plan, few minorities succeeded in transferring from community colleges to University of California campuses, and how their "college admissions and graduation rates . . . have remained scandalously low").

484. See Letter from H.Y. McCown, Registrar and Dean of Admissions, University of Texas, to Logan Wilson, President, University of Texas (May 26, 1954) (on file with authors) ("In view of the recent Supreme Court decision, I think we should take a new look at our admission policy with reference to Negro students. . . . If we want to exclude as many Negro undergraduates as possible, we could require . . . [and going on to list some onerous requirements]").

485. See *MASTER PLAN RENEWED*, *supra* note 483, at 17 (pointing out, delicately, that the Master Plan seemingly did not contemplate a place for California's growing ethnic population). On the very slight predictive value of standardized tests and their devastating impact on minority admissions, see Michael A. Olivas, *Higher Education Admissions and the Search for One Important Thing*, 21 U. ARK. LITTLE ROCK L.J. 993, 993 (1999).

ment. When this did not produce high enough numbers, “hard” affirmative action, which included the use of race as a plus factor in admissions, began in 1968. Within a year, blacks and Latinos constituted 15 percent of entrants to the UCLA law school and 8 percent to Boalt Hall law school and the UCLA medical school.<sup>486</sup> According to sociologist Jerome Karabel, the “sharp rise was a direct product of the adoption—under the pressure of the riots that shook America’s cities in 1967 and 1968—of strong affirmative action policies.”<sup>487</sup> Pointing out that these changes took place well over a decade after the Montgomery bus boycott, but shortly after the 1967 riots in Newark and Detroit and the 1968 riots that swept many American cities in the wake of Martin Luther King, Jr.’s assassination, Karabel hypothesized that it was not so much the civil rights movement’s moral claims as the palpable threat to existing order that produced the softening of official attitudes at the University of California.<sup>488</sup>

The university’s era of affirmative action was to last a scant twenty-seven years—barely one generation. On July 20, 1995, the University of California Regents enacted SP-1, banning any consideration of race or ethnicity in admissions.<sup>489</sup> Sixteen months later, in a vote sharply divided along racial lines, Californians approved Proposition 209, codifying the Regents’ directive and extending it to all public employers in California.<sup>490</sup>

#### 4. Affirmative Action Ends and Minority Numbers Plummet

Enrollment of blacks and Latinos at Boalt Hall dropped dramatically from 21 percent in 1995 to 5.6 percent in 1997, the year immediately after the passage of SP-1 and Proposition 209.<sup>491</sup> Not since 1967 had the number of minority matriculants been so low.<sup>492</sup> Proposition 209 and the Regent’s directive succeeded in turning the clock back thirty years. At UCLA School of Law, the impact was almost as dramatic. Blacks and Latinos had comprised

486. See Karabel, *Rise and Fall of Affirmative Action*, *supra* note 463, at 1–3 (“Table 1: Racial Composition of Boalt Hall Entrants Who Subsequently Graduated (1960–1969);” “Table 3: Entrants to UCLA School of Medicine by Race (1965–1980);” “Table 4: Entrants to UCLA Law by Race (1967–1980)”).

487. *Id.* at 3 (citations omitted).

488. See *id.* at 4.

489. See *id.*

490. See *supra* notes 254–261 and accompanying text.

491. See Karabel, *Rise and Fall of Affirmative Action*, *supra* note 463, at 5 (“Table 5: Entrants to Boalt Hall School of Law (1970–1999)”) (again, Karabel’s figures do not include other groups). Just a few years earlier, the Republicans led a successful movement to raise tuition at University of California schools, a measure that dropped minority enrollment almost as sharply, if not quite so publicly. See also *The 1990’s: How Racial Conservatives Are Closing the Door on Black Opportunities in Higher Education*, 24 J. BLACKS HIGHER EDUC. 10, 10–11 (1999) [hereinafter *The 1990’s*].

492. See Karabel, *Rise and Fall of Affirmative Action*, *supra* note 463, at 1 (“Table 1: Racial Composition of Boalt Hall Entrants Who Subsequently Graduated (1960–1969)”).



over 18 percent of the entering class in 1995; two years later, their numbers dropped to slightly over 12 percent, the lowest point since 1968.<sup>493</sup> The impact on blacks and Latinos at the University of California's five medical schools was similar to that sustained by the law schools.<sup>494</sup>

At the undergraduate level, the impact of Proposition 209 registered most dramatically at the system's most selective campuses, Berkeley and UCLA, where numbers plummeted about 50 percent in a one-year period.<sup>495</sup> The less prestigious campuses either remained about the same or showed increases in black and Latino enrollment.<sup>496</sup> As Karabel sums up, "Taken together, the declines in black and Chicano enrollment at UC's law, medical, and undergraduate schools in the wake of Proposition 209, while not uniform, in the aggregate constitute perhaps the sharpest reversal in opportunities for under-represented minorities in the history of American higher education."<sup>497</sup>

Did the University of California's embrace of testing in the early 1960s, which in turn required an open and public embrace of affirmative action a few years later to preserve any sort of minority presence, set the stage for this rapid decline? Before answering this question, it is first necessary to understand the parts played by Clark Kerr, managerialism, and the California Master Plan—matters covered later. First, however, it is worth taking a brief look at some of the conditions that prevailed on California campuses during the relatively short period when affirmative action was in effect.

## 5. Campus Unrest

During the period when affirmative action prevailed, California's universities for the first time included significant numbers of students of

493. See *id.* at 5 ("Table 4: Entrants to UCLA Law by Race (1967–1980);" "Table 6: Entrants to UCLA Law by Race (1981–1998)").

494. See *id.* at 6 ("Table 7: Entrants to UC Medical Schools Systemwide by Race (1993–1997)"). Indeed, low minority numbers at UC Davis Medical School prompted the school to establish a quota-based affirmative action plan that was struck down in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

495. See *id.* at 7–8 ("At Berkeley . . . the number of African-American admits plummeted from 545 to 236 between 1997 and 1998; for Chicanos, the comparable figures were 1033 and 455."). Earlier, in September, 1990, the Republicans voted for increases in tuition, which dropped black enrollment sharply. See *The 1990's*, *supra* note 491, at 10–11. And even earlier, in 1973, Boalt Hall had scaled back minority enrollment from 34 to 25 percent. See ANDREA GUERRERO, *THE SILENCE AT BOALT HALL* (forthcoming 2000) (on file with authors).

496. See Karabel, *Rise and Fall of Affirmative Action*, *supra* note 463, at 8.

497. *Id.* at 9. On the meaning of this displacement downward ("cascading"), see Adam Cohen, *When the Field is Level*, *TIME*, July 5, 1999, at 30; Carlos Muñoz, *The Nonstop Attack on UC's Ethnic Studies*, *S.F. EXAMINER*, Feb. 11, 2000, at A21; Harry Pachon, *The Real Numbers Offer Nothing to Cheer About*, *L.A. TIMES*, Jan. 31, 2000, at B5; Jeffrey Selingo, *U. of California Sees Increase in Minority Applicants Admitted*, *CHRON. HIGHER EDUC.* (Apr. 14, 2000) <<http://www.chronicle.com/report/weekly>>.

color.<sup>498</sup> Their arrival coincided with a sharp increase in the number of hate crimes and other incidents of racial discrimination that made life difficult for many minority students and faculty on campus. These incidents included derogatory theme parties sponsored by Greek organizations, defacement of property belonging to ethnic student organizations or individuals, racially biased coverage or content in campus newspapers and radio shows, threats directed at faculty members and students of color, and discriminatory treatment of ethnic minorities by faculty members and administrators.<sup>499</sup>

Racial and ethnic tension in the University of California system became so palpable that in 1989, California Senator Art Torres, chairman of the California Senate Special Committee on University of California Admissions (the Committee), convened a hearing on the subject.<sup>500</sup> The *San Francisco Chronicle* summarized the proceedings in the following terms: "Minority students . . . portrayed the University of California as a minefield of racist slights, attacks and indifference that leaves them humiliated, frustrated and never quite sure of their place in the system."<sup>501</sup> Student leaders also charged that university administrators were aware of these conditions and did little to counter them or to make minorities feel welcome,<sup>502</sup> charges that few university officials admitted.<sup>503</sup>

The Committee asked each campus to submit reports detailing each racial or ethnic incident that it knew about during 1985 to 1988, as well as what

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498. See *supra* notes 486–488 and accompanying text.

499. See Craig Anderson, *600 Students at UC Rally Protest Racism*, S.F. CHRON., Nov. 7, 1987, at A2 (noting the negative and hostile environment); Bill Billiter, *University President Accused of Evading Meeting on Metzger*, L.A. TIMES, May 1, 1986, at 1 (noting the racially biased coverage or content in campus newspapers and radio shows); Larry Gordon, *UC Libraries Quit NASA Databank in Rules Dispute*, L.A. TIMES, July 3, 1988, at 3 (noting the inappropriate treatment of ethnic minorities by faculty members and administrators); Debra Levi, *Housing Office Occupied—Blacks Sit In at UC Berkeley*, S.F. CHRON., Apr. 7, 1988, at A2 (noting the defacement of property belonging to ethnic student organizations or individuals); Gary Robbins, *Charges of Racism at UCI: Use of Blackface in Skits Draws Criticism*, ORANGE COUNTY REG., Feb. 5, 1988, at B1 (noting derogatory theme parties by Greek houses); *Student Editor Sues*, ORANGE COUNTY REG., May 11, 1988, at A3 (noting racially biased coverage or content in campus newspapers and radio shows); Letta Taylor, *Racial Woes Reportedly Rife on Campus*, ORANGE COUNTY REG., Mar. 28, 1987, at A3 (noting threats directed at faculty and students of color); Elaine Woo, *UCLA to Probe Racial Melee Over Campus Election*, L.A. TIMES, May 28, 1988, at 1 (noting inappropriate treatment of ethnic minorities by faculty members and administrators).

500. See *Racial/Ethnic Tensions and Hate Violence on Univ. of Cal. Campuses: Hearings Before the Senate Special Comm. on Univ. of Cal. Admissions*, S. REP. (Cal. 1989) [hereinafter *Hearings*].

501. Diane Curtis, *UC is a Minefield of Racism, Minorities Tell Senate Panel*, S.F. CHRON., Oct. 5, 1988, at A11.

502. See Larry Gordon, *Panel Told of Race, Sex Bias at UC Campuses*, L.A. TIMES, Oct. 5, 1988, at I13.

503. See Shana Chandler & Tina Anima, *Hearing Examines Racism*, UCLA DAILY BRUIN, Oct. 5, 1988, at 12.

was done and what procedures were put in place to deal with future incidents.<sup>504</sup> The Committee's summary spanned forty pages and listed hundreds of incidents at the nine University of California campuses, including insensitive fraternity theme parties, rampant homophobia, and mock slave auctions. Dorm residents proudly hung Confederate flags on walls, and campus areas sprouted graffiti bearing swastikas and Ku Klux Klan emblems. Derogatory flyers appeared at campus libraries, halls, and eating areas.<sup>505</sup> The Committee heard testimony about sexist teaching, jokes about Mexicans in the university shuttle bus, the beating of a Chicano in a parking lot, a racist letter to a black food service manager, racial epithets written on dorm windows or message pads, and refusal to fund an Asian American dance, when other groups received funding, because a student committee saw it as exclusionary. An anti-Semitic poster advertised a campus concert, and some whites made a conspicuous show of leaving campus bathrooms when a minority entered. Twenty-five members of an Aryan youth union inserted a racist letter in the campus newspaper, while other campus papers printed racially insensitive cartoons.<sup>506</sup>

Minority professors with good records were denied tenure, and departments resisted hiring more.<sup>507</sup> A kiosk containing copies of *Ha'am*, a Jewish student publication, was burned.<sup>508</sup> An instructor turned away a black student who showed up the first day of class, alleging that she was unqualified.<sup>509</sup> Minorities were significantly underrepresented on key student affairs committees, while at the provost and vice chancellor levels, many campuses had no Asians or Chicanos.<sup>510</sup>

In the wake of the Committee's report, the University of California took few remedial measures; indeed, California's legislature in 1989 greatly increased university tuition, which sharply reduced minority numbers.<sup>511</sup> In the summer of 1990, the California Advisory Committee to the Civil Rights Commission held a second set of hearings on bigotry and violence on college campuses in California. Their report, which included campuses other than just those

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504. See *Hearings*, *supra* note 500, at 53.

505. See Letter from Art Torres, Chairman Special Committee on University of California Admissions, to Interested Party (May 15, 1989), *cited in Hearings*, *supra* note 500, at 2.

506. See *Hearings*, *supra* note 500, at 14, 25, 31-33.

507. See *id.* at 12; see also Professor Roberto P. Haro, Campus Climate: Perceptions and Reality, in University of California, Berkeley Commission on Responses to a Changing Student Body: Records of the Commission, 1987-1990, Box 2, Folder 38 (University Archives, The Bancroft Library, Collection Number CU-156) (pointing out revolving-door syndrome in which the University of California recruited minority professors and then let them wither for lack of support).

508. See *Hearings*, *supra* note 500, at 17.

509. See *id.* at 4. The instructor later apologized. See *id.*

510. See *id.* at 58.

511. See *The 1990's*, *supra* note 491, at 10.

of the University of California system, drew attention to many of the same patterns of racism and indifference that the Torres committee found, including that the year 1988 alone witnessed a 60 percent increase in ethnoviolence on California campuses. The regional director of the U.S. Department of Justice attributed the rise to the increase in numbers of Hispanics and Asians, generalized insensitivity on the part of universities to minority concerns, and low numbers of minority faculty. A rabbi reported increasing numbers of anti-Semitic incidents, including that of a student leader who had won election to the student governing council but was not allowed to take his seat because of his pro-Zionist activities.<sup>512</sup> A Berkeley African American representative testified that students and faculty complained openly about blacks appearing in curricular materials and also stated that blacks were frequently beaten by whites after parties ended. When whites and blacks got into fights, only the blacks were arrested, never the whites.<sup>513</sup> Another African American student officer testified that the administration was unresponsive and regarded racism as tolerable. Insulting minority professors was viewed as no big deal.<sup>514</sup>

An attorney for the Mexican American Legal Defense and Educational Fund reported that bulletin boards at Hastings College of the Law featured white supremacist literature and caricatures<sup>515</sup> and that Boalt Hall School of Law had justified its inability to hire minority or female professors on the ground that it could not find any who “think like lawyers.”<sup>516</sup> In a bizarre incident, Berkeley staff, who supposedly had undergone sensitivity training, placed decorations on cafeteria food during Mardi Gras showing a black mule driver pulling a white couple. When black students complained, cafeteria managers replied they could see nothing wrong with the decorations and warned the students to leave them alone.

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512. See CALIFORNIA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, FAIR AND OPEN ENVIRONMENT? BIGOTRY AND VIOLENCE ON COLLEGE CAMPUSES IN CALIFORNIA, SUMMARY REPORT 5-7 (1991) [hereinafter BIGOTRY AND VIOLENCE] (noting that other incidents included desecration of religious symbols, graffiti, hate literature, and harassment).

513. See *id.* at 8 (reporting “many cases of fights breaking out at other fraternity parties that are held mainly by Caucasian individuals and [that] the response by the police has never been this way. I think this is directly reflective of how people feel about black students.” (statement by Lance Johnson, African Students Association, University of California at Berkeley)).

514. See *id.* at 8-9.

515. See *id.*

516. *Id.* Other departments cited the “small pool” of minority candidates as an excuse for inaction—yet ads generated a long list of potential hires on short notice. Still others excused their poor hiring records by saying that minorities would find the quality of life low in Berkeley, and so efforts to recruit them would be futile. See *The Challenge of Increasing Faculty Diversity at Berkeley* 3-5 (1989), in University of California, Berkeley Commission on Responses to a Changing Student Body: Records of the Commission, 1987-1990, Box 2, Folder 39 (University Archives, The Bancroft Library, Collection Number CU-156) (a report of a departmental survey conducted by the Provost's Academic Affirmative Council).

The American Indian Student Association representative reported that alienation and a torrent of negative remarks from professors and students caused a high proportion of his group to drop out before graduation. He described a "brilliant Indian doctoral student" who failed an exam for an M.A.; later, when she compared her answers to those of others who had passed, she noticed that they were the same. When she pointed this out to the professor who graded the exam, he told her that he needed to toughen her to prepare her for the hard times she would face in mainstream society. Other Indians complained of bogus "box checking" by individuals who exaggerated or fabricated their Indian heritage.<sup>517</sup>

Other groups experienced similar problems. When the University of California added a rural preference program, Asians complained that their population was 98 percent urban and thus likely to be almost entirely excluded.<sup>518</sup> The executive director of the Latino Issues Forum, a coalition of Latino and Mexican American groups, said that the top governance positions within the University of California were not awarded to Latinos and blacks<sup>519</sup> and that in 1987, Chicano-Latino faculty represented only 2.3 percent of the university professoriate and 3 percent of the management and professional program, a career development track at the University of California.<sup>520</sup>

## 6. Campus Responses—Two Examples

In the late 1980s, the Berkeley campus was concerned about women and minority professors, hired in the heyday of affirmative action, who were coming up for tenure. Many were being turned down, predictably causing heartache for the faculty members and unrest among the students. Accordingly, a faculty committee addressed this subject, publishing a booklet of advice for women and minority faculty.<sup>521</sup> The advice included publishing only in

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517. See BIGOTRY AND VIOLENCE, *supra* note 512, at 9–10, 12. For a discussion of overinclusiveness in admissions, see generally John Martinez, *Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs*, 12 HARV. BLACKLETTER J. 49 (1995).

518. See BIGOTRY AND VIOLENCE, *supra* note 512, at 12.

519. See LATINO REPORT CARD ON THE UNIVERSITY OF CALIFORNIA 6 (prepared by Latino Issues Forum, American G.I. Forum, Mexican American Political Association, League of United Latin American Citizens, 1988) [hereinafter LATINO REPORT CARD] ("The University rates an F- for having no Hispanics among its top 100 administrators, who earn an average salary of well over \$100,000 a year. . . . The Report Card also notes that none of the University's leaders (Vice Presidents, Vice Chancellors and higher) is Hispanic."); see also *infra* notes 529–538 and accompanying text (discussing this report).

520. See *id.* at 7.

521. Advancement and Promotion at UC Berkeley, Committee on the Status of Women and Ethnic Minorities (Fall 1987), in University of California, Berkeley Commission on Responses

the most prestigious journals in one's field, never in activist or community-oriented publications,<sup>522</sup> shutting the door to one's office, so that students would not be tempted to disturb one's work,<sup>523</sup> and strategic schmoozing, in which the untenured minority or woman would get to know influential white male figures in the department, flatter them, and seek their advice.<sup>524</sup> The booklet urged women and faculty of color to avoid the trap of community service or agreeing to serve on too many university committees.<sup>525</sup> It also warned against coauthoring publications<sup>526</sup> and urged that aspiring professors document every single favorable remark or mention about their work and send a note to their department chairs. "If someone who is influential gives you some oral praise, try to get a letter in your file. . . . If you receive a 'feeler' about a job, keep a complete record."<sup>527</sup> Young professors were urged to check their own citation count from time to time.<sup>528</sup> The booklet, in short, advised women and minorities how to behave like self-centered, alienated, calculating upward climbers.

Published a short time later, the *Latino Report Card on the University of California*<sup>529</sup> (*Report Card*), prepared by the Latino Issues Forum, rated the university "based upon data secured exclusively from University records."<sup>530</sup> The *Report Card* relied on the grading standards set forth by University of California president David Pierpont Gardner in his National Commission on Excellence in Education report, *A Nation at Risk*.<sup>531</sup> The *Report Card* concluded that "the University of California has flunked its own test and has failed

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to a Changing Student Body: Records of the Commission, 1987–1990, Box 2, Folder 29 (University Archives, The Bancroft Library, Collection Number CU-156).

522. See *id.*

523. See *id.*

524. See *id.*

525. See *id.*

526. See *id.*

527. *Id.*

528. See *id.*

529. See LATINO REPORT CARD, *supra* note 519, at 6. The Latino Issues Forum was an "activist California-based think tank whose Board of Directors include[d] the largest Hispanic membership organizations in California and four of the state's leading Latino scholars." *Id.* at 4.

530. *Id.* at 3.

531. See *id.* This 1983 report stated:

We do not believe that a public commitment to excellence and educational reform must be made at the expense of a strong public commitment to the *equitable treatment of our diverse population*. The twin goals of equity and high-quality schooling have profound and practical meaning for our economy and society, and we cannot permit one to yield to the other, either in principle or in practice. To do so would deny young people their chance to learn to live according to their aspiration and ability. It also would lead to a generalized accommodation to mediocrity in our society on the one hand or the *creation of an undemocratic elitism on the other*.

*Id.* at 3–4.

to meet both its general educational obligation as required by the state legislature, and the legitimate needs and aspirations of California's six million Hispanics, a population larger than that of many Central American nations."<sup>532</sup> After evaluating the university's hiring record, the *Report Card* gave the regents a grade of F minus for including zero Hispanics in a total of 122 staff members hired over the period reviewed. It also gave the university a grade of F minus for employment of top administrators—a perfect zero out of one hundred. The faculty received a somewhat better grade of F for including 202 Hispanics out of a total of 8581 teachers.<sup>533</sup> Undergraduate and graduate enrollment rated a C minus and a D, respectively.<sup>534</sup> The report also flagged the University of California's failure to do business with Hispanics, noting that for a recent fiscal year, while it awarded almost three quarters of a billion dollars in private purchasing contracts, less than five million dollars went to Hispanic-owned businesses.<sup>535</sup>

The report recommended a freeze on the salaries of all persons occupying positions at or above the level of vice president or vice chancellor "based upon the well-accepted [maxim] that poor performance should not be rewarded,"<sup>536</sup> and also recommended that the University be required to set five year goals in all the areas found deficient in the report.<sup>537</sup> It also urged enactment of a "Latino Master Plan for the Twenty-First Century" to ensure that "California's six million Hispanics receive at least as much support as a few dozen giant agribusinesses received from the university's agricultural mechanization research, including its 'Super Tomato' effort."<sup>538</sup>

## 7. Recent Developments

Beginning in the year 2001, the University of California will guarantee a place for the top 4 percent of graduating students from each of the state's

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532. *Id.* at 4.

533. *See id.* at 6–7.

534. Undergraduate Hispanic enrollment was 10,244 out of a total number of 117,216 for a percentage of 8.7; the 2076 Hispanic graduate students made up 5.2 percent of the total number of 40,115. *See id.*

535. *Id.* at 8, 15 ("Between July 1, 1986 and July 1, 1987, the University awarded \$747,681,906 in purchasing contracts to all suppliers. But Hispanic businesses received only \$4,993,861, or .67 percent, of these University contracts."); *see also id.* at 20 app. B ("Results of Affirmative Action in Purchasing Universitywide (excluding DOE Laboratories)").

536. *See id.* at 10. The recommended freeze would apply to about 65 administrators earning over \$100,000. *See id.*

537. The recommendations were that the student body and the top 336 administrators reflect the diversity of the state, and that the faculty achieve 40 percent of parity. *See id.*

538. *Id.* at 11. On the "super (square) tomato" *see infra* notes 615, 636 and accompanying text.

863 public high schools.<sup>539</sup> Patterned after a similar measure adopted by the Texas legislature in the wake of *Hopwood*, the plan hopes to increase the number of minority students admitted, although Berkeley, UCLA, and San Diego, the three most prestigious campuses in the system, will probably see little change.<sup>540</sup>

Jesus Rios, a student who was in the top 4 percent of his class when he graduated from high school but was refused admission to Berkeley, filed an action on behalf of himself and more than 750 Latino, black, and Filipino students.<sup>541</sup> The complaint pointed out that more than half of the applicants admitted to Berkeley come from only 5 percent of California's high schools.<sup>542</sup> These top high schools have primarily white enrollments and offer a number of advanced placement courses for which Berkeley gives extra credit. Consequently, an applicant who took many such courses could end up with a grade point average considerably higher than 4.0.<sup>543</sup> In contrast, over 50 percent of California's public high schools offer no advanced placement courses, which are very costly.<sup>544</sup> Recent information showed that Berkeley rejected 800 African American and Hispanic students with perfect 4.0 grade point averages.<sup>545</sup>

A literature search disclosed that in the last few years numerous female and minority employees of the University of California, or applicants for such positions, settled or won substantial awards for various types of discriminatory treatment.<sup>546</sup> A campaign to end the Department of Ethnic Studies

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539. See *Why the "4 Percent Solution" Won't Restore Racial Diversity at Selective California Campuses*, 24 J. BLACKS HIGHER EDUC. 25 (1999).

540. See *id.*

541. See *Rios v. Regents of the Univ. of Cal.*, No. CV99-0525 SI (N.D. Cal. Feb. 2, 1999); see also Nat Hentoff, *Discrimination by Parental Income*, SAN DIEGO UNION-TRIB., Apr. 13, 1999, at B-6:1,7,8; B-8:2,3.

542. See *Rios*, No. CV99-0525 #SI.

543. See Hentoff, *supra* note 541; Dan Carnevale, *ACLU Sues California over Unequal Access to Advanced Placement Courses*, CHRON. HIGHER EDUC. ¶ 3 (Aug. 8, 1999) <<http://chronicle.com/weekly/v45/i48/48a03802.html>>. The University of California system adds one grade point for an Advanced Placement (AP) course, so that a high school student who took a large number of AP courses could earn a grade point average of well above 4.0.

544. See generally Sara Hebel, *A.P. Courses are New Target in Struggle Over Access to College in California*, CHRON. HIGHER EDUC., Nov. 26, 1999, at A32.

545. See Ronald Takaki, Letter to the Editor, *On Admissions, More Inequality*, N.Y. TIMES, Aug. 10, 1999, at A16.

546. Numerous suits were filed: *Taylor v. Regents of the Univ. of Cal.*, 993 F.2d 710 (9th Cir. 1993) (describing how a plaintiff brought a civil rights action under 42 U.S.C. § 1983, but that the complaint was filed beyond the statute of limitations); *Vaughn v. Regents of the Univ. of Cal.*, 504 F. Supp. 1349 (E.D. Cal. 1981) (describing how eleven present and former employees brought sex and race discrimination actions under the Civil Rights Act of 1964); *Acuña v. Regents of the Univ. of Cal.*, 56 Cal. App. 4th 639 (1997) (describing how an unsuccessful applicant for tenured position sued for alleged violations based on race, ethnicity, and age); *Carrillo v. Regents of the Univ. of Cal.*, No. B105848, 1997 WL 913107 (Cal. Ct. App. Dec. 4, 1997) (describing how a former



at the Berkeley campus stalled when students went on a hunger strike and forced the administration to provide that department with a guarantee of its continuation and several new faculty positions.<sup>547</sup> But faculty opposition continues, and Regent Ward Connerly has declared his adamant opposition to ethnic studies, which he considers an inferior area of academic inquiry and a refuge for student radicals.<sup>548</sup>

### C. Official Elitism: The University of California System's Role in the Creation of a Caste-Based Structure of Knowledge

In addition to displaying indifference or outright hostility to minorities at various points in its history, the University of California and state intellectuals generally contributed to the development of a paradigm, or architecture, of knowledge.<sup>549</sup> This paradigm—virtually an intellectual Master Plan—firmly excluded minorities as agents and interpreters of official knowledge. It rationalized and justified a caste-based society. It also excused and apologized for mistreatment of minorities by the white establishment. Development of this paradigm included at least the following components: (1) inattention to California history, especially vis-à-vis minorities and the University of California's role in advancing or impeding their educational

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employee filed several FEHA claims); *Ibarbia v. Regents of the Univ. of Cal.*, 191 Cal. App. 3d 1318 (1987) (describing how an unsuccessful applicant brought an employment discrimination action based on national origin); Roberto Rodriguez, *Clash of '95: After Three Year Delay, UC and Chicano Professor Finally Get Trial Date*, BLACK ISSUES HIGHER EDUC., July 27, 1995, at 27 (noting how a Chicana professor filed charges of employment discrimination alleging that she was not reappointed as chair of the Chicano studies department because of her outspoken support of another Chicano professor's lawsuit against the university); Michelle Jeffers, *Man Claims Discrimination at Lab*, VALLEY TIMES, Nov. 10, 1995, at A4 (noting how a former employee sued for alleged race discrimination); Daniel Yi, *Regents Sued Over Race-Bias Claims*, L.A. TIMES, Sept. 19, 1998, at B2 (noting how a white professor sued for breach of contract and wrongful termination alleging he was fired for reporting an administrator's racially discriminatory remarks); see also RODOLFO F. ACUÑA, SOMETIMES THERE IS NO OTHER SIDE: CHICANOS AND THE MYTH OF EQUALITY 211–12 (1998); Roberto Rodriguez, *UC Professor Wins Gender Discrimination Suit*, BLACK ISSUES HIGHER EDUC., June 12, 1997, at 7; *Clash of '95: After Three-Year Delay, UC and Chicano Professor Finally Get Trial Date*, 12 BLACK ISSUES HIGHER EDUC., July 26, 1995, at 11.

547. See Elizabeth Martinez, *Who's Cleansing Ethnic Studies?* Z MAG., June 1999, at 31, 32–34.

548. See *id.* at 32; see also Carl C. Jorgensen, *Ward Connerly: Guilty as Charged*, 15 BLACK ISSUES HIGHER EDUC., Aug. 20, 1998, at 50.

549. See *supra* notes 461–462 and accompanying text; see also ACUÑA, *supra* note 51, at 71, 79–80, 90, 100–01, 121; Ralph Guzman, *The Function of Anglo American Racism in the Political Development of Chicanos*, in NEITHER SEPARATE NOR EQUAL: RACE AND RACISM IN CALIFORNIA, *supra* note 87, at 101, 104–08 (noting the role of University of California professors in stereotyping Chicanos as lazy); Wollenberg, *Ethnic Experiences*, *supra* note 87, at 5 (noting how a professor supported segregation of Japanese and dismissed the treaty rights argument).

aspirations;<sup>550</sup> (2) testimony by academics and educators on the capabilities of minority school children, the necessity of tracking, and the permissibility of school segregation;<sup>551</sup> (3) exoneration of elite whites for moral missteps affecting minorities; (4) an assault on ethnic studies as a legitimate academic discipline;<sup>552</sup> (5) a program of agricultural research that favored large farms at the expense of small farm owners and Mexican migrant workers and that emphasized heavy use of energy-consuming machinery, pesticides, and genetically engineered plants and livestock;<sup>553</sup> (6) an all-out attack on farm unionization;<sup>554</sup> (7) toleration, if not encouragement, of race-I.Q. research;<sup>555</sup> and (8) development of a language and vocabulary for discourse about minorities that predisposed California society to see them as problem groups rather than potential contributors to California culture and wealth.<sup>556</sup>

At the same time, California universities forfeited minority social interests in various tangible ways that contributed to the same paradigm of knowledge: (1) by building campuses, especially elite ones, in white communities rather than in areas with large minority populations;<sup>557</sup> (2) by contributing as drafters or supporters of various antiminority propositions and referenda;<sup>558</sup> (3) by emphasizing liaisons with corporations and industry in ways that distorted the research and teaching functions of the University of California, so as to favor technology and the hard sciences over human and social development;<sup>559</sup> and (4) by acting in concert with towns earmarked for a new University

550. See *supra* notes 455–457 and accompanying text; see also Lustig, *supra* note 252, at 134 (“Professors do not get hired or promoted for knowing about California . . .”).

551. See *supra* notes 409–428 and accompanying text; see also GUERRERO, *supra* note 495, at 77 (noting how several Boalt Hall professors submitted a brief urging affirmance of Proposition 209 and that none wrote in opposition to the proposition).

552. See, e.g., *supra* notes 546–548 and accompanying text; see also ACUÑA, *supra* note 51, at 49–70. In earlier periods, California textbook writers ignored problems of minorities, especially discrimination by the majority culture, see HENDRICK, *supra* note 280, at 75.

553. See *infra* notes 636–645 and accompanying text.

554. See *infra* notes 624–625 and accompanying text.

555. See *infra* notes 576–594 and accompanying text.

556. See *supra* notes 387–428 and accompanying text; see also HENDRICK, *supra* note 280, at 30 (describing the initiative, backed by two University of California law professors, that would have put California education on a voucher plan that would have decimated public education); LEMANN, *supra* note 471, at 208–09 (noting that Clark Kerr, in *Bakke*, arranged for the Carnegie Foundation to supply a paper defending standardized testing, a key means by which the University of California enforced class and color lines).

557. See *infra* notes 564–565 and accompanying text.

558. See *supra* notes 254–256 and accompanying text.

559. See, e.g., DEAN C. JOHNSON, *THE UNIVERSITY OF CALIFORNIA: HISTORY AND ACHIEVEMENTS* 1–2 (1996) (touting the University’s partnership with industry); Sheila Slaughter, *Federal Policy and Supply-Side Institutional Resource Allocation at Public Research Universities*, 21 REV. HIGHER EDUC. 209 (1998) (describing this movement in general); Robert Berring, *Is Berkeley Off Course?* CAL. MONTHLY, Feb. 1999, at 18–20.

of California campus to clear out low-income minorities and pave the way for the development of the surrounding community.<sup>560</sup>

A number of these themes have been already covered in this Article. For example, Part V describes how educators and education researchers depicted Mexican Americans as a problem group, slow to learn, passive, and uninterested in education, economic advance, higher culture, or vigorous participation in American life.<sup>561</sup> Part V also describes how a university regent, abetted by his staff and hostile to university professors, launched a vitriolic attack on ethnic studies, a discipline that both attracts many minorities and seeks to understand and improve the condition of their communities.<sup>562</sup> Part IV describes the role of California academics in drafting and campaigning for Proposition 209, which portrayed students and workers as undeserving individuals clamoring for special treatment.<sup>563</sup>

Finally, both the University of California and the California State University systems seem instinctively to grace attractive upper-class communities with new campuses when they decide to expand. University of California at Berkeley, for example, is located in an attractive town, perched on a hill overlooking San Francisco Bay,<sup>564</sup> not the flats of that city, much less downtown Oakland. The University of California campuses located at Santa Barbara, Santa Cruz, San Diego, Los Angeles, and Davis are also located in idyllic settings with very small minority populations. The simple location of a campus sends a message to the world about whom the campus values and sees itself as serving. California State University, Los Angeles is located on a hill on one side of a freeway in a white middle-class neighborhood. If it had been located on just the other side of the highway, it would have been in the middle of a Chicano and mixed minority neighborhood.<sup>565</sup>

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560. See *supra* Part V.D.3.c.

561. See *supra* Part V.A.

562. See *supra* notes 546–548 and accompanying text.

563. See *supra* notes 254–261 and accompanying text.

564. An early piece of Berkeley boosterism, A DESCRIPTION OF THE TOWN OF BERKELEY: WITH A HISTORY OF THE UNIVERSITY PRESENTING THE NATURAL AND ACQUIRED ADVANTAGES OF A MOST ATTRACTIVE PLACE OF RESIDENCE 5 (Albert Sutcliffe comp., 1881), praises that campus town in extravagant terms. The university had come to the town just a few years earlier, yet: “The population . . . is select and homogeneous, characteristics which it will hereafter always maintain . . . The learned professor lives in a trellised cottage . . . The air of refinement and good keeping . . . evinces a local pride that animates the entire population.” *Id.* The prediction was right: Berkeley was characterized by residential and school segregation well into the mid-twentieth century. See GABRIELLE S. MORRIS, HEAD OF THE CLASS: AN ORAL HISTORY OF AFRICAN-AMERICAN ACHIEVEMENT IN HIGHER EDUCATION AND BEYOND 166 (1995). The campus hired its first black professor in 1954. See *id.* Early in its history, UCLA was located on blue-collar Vermont Avenue; it soon moved to more upscale Westwood when a Regent visited the region and admired the “ocean view.” See STADTMAN, *supra* note 445, at 228.

565. See Telephone Interview with R.A. (Nov. 17, 1999).

Most of this has been treated in earlier parts of this Article. But it seemed advisable to summarize all these strands in one place to enable the reader to get a sense of the panoply of means by which California's paid intelligentsia contributed to a paradigm of knowledge in which minority misery and exclusion came to seem natural and inevitable. The following paragraphs, and the final section about University of California at Davis, fill in a few more pieces of the puzzle.

### 1. Exoneration of White Elites for Serious Moral Missteps

Although state actors in California have often played despicable—or at least seriously compromised—roles in the state's unfolding racial drama, the state's professoriate and intelligentsia have been slow to condemn them. Regarding them as their own, and perhaps reasoning, “there but for the grace of God go I,” opinion makers grant members of their group “moral passes” in a way that conceals official wrongdoing, assures that moral insight does not generalize, and makes the next mistakes just as easy.

Consider the case of the civil rights–civil liberties icon Earl Warren, who as U.S. Supreme Court justice presided over decisions outlawing segregation in public schools, invalidating Jim Crow laws that prevented blacks from voting, and declaring miscegenation laws unconstitutional.<sup>566</sup> Despite this brilliant judicial record, one aspect of Warren's career looms large in California history, a chapter that predates his tenure on the Supreme Court. As Attorney General of California and, later, candidate for Governor in the 1942 elections, Warren made common cause with California's “native sons and daughters” in a campaign against Asians, culminating in the 1942 internment of over 120,000 persons of Japanese ancestry, two-thirds of them American citizens.<sup>567</sup>

As Professor Sumi Cho has shown, Warren's official biographers constituted a “fraternity of admirers,” who downplayed his role in the Japanese internment.<sup>568</sup> Warren's admirers included a committee of University of California scholars led by historian Jacobus tenBroek, which concluded that Warren should not be held accountable because the Supreme Court could have stopped internment but did not.<sup>569</sup> Others acknowledged Warren's leadership in whipping up hysteria against Japanese Americans, conceding

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566. See Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 73–75 (1998).

567. See *id.* at 75, 86–104. For a discussion of Warren's close identification with the Native Sons of the Golden West, a virulently anti-Asian organization, see CAREY MCWILLIAMS, *THE EDUCATION OF CAREY MCWILLIAMS* 107 (1978).

568. Cho, *supra* note 566, at 77–86.

569. See *id.* at 84.

that Warren “engineered one of the most conspicuously racist and repressive governmental acts in American history,”<sup>570</sup> but nevertheless suggested that the exigencies of wartime excused what he did. Even Carey McWilliams defended his long-time friend, reminding his readers that before his exposure to the civil rights movement, Warren, like many Americans, held bigoted and prejudiced views against people of color. Yet, through the crucible of his early experiences, including participation in the internment of the Japanese, Warren grew as a person and surmounted his early prejudices.<sup>571</sup>

One university interview is illustrative. In the archives of the Bancroft Library we came across a transcript of an interview conducted by a university biographer of California’s illustrious son.<sup>572</sup> After a period, the interview turned to the issues surrounding the internment of the Japanese. At one point, Warren volunteered that a key issue in justifying internment, namely Japanese ownership of much land near strategic installations, might have remained unproved. This was a quite damaging admission, because Warren had based much of his campaign on a dramatic map of California with red pins marking Japanese-owned property. Instead of pursuing the matter, the interviewer laughed and changed the subject.<sup>573</sup> Although Cho does not mention this episode, it exemplifies the mechanism (ready exoneration) that she highlights.

Another example is the retrospective canonization of Clark Kerr as a visionary leader, although close analysis reveals that his main virtues were pragmatic, and included logrolling and appearing to offer something for everyone.<sup>574</sup> President Kerr, as we pointed out earlier, was a prime force in establishing the California Master Plan and standardized testing, two measures that had severe consequences for social equity in the state.<sup>575</sup>

Other examples include solicitous treatment of race-I.Q. researchers such as Arthur Jensen, William Shockley, and Vincent Sarich.<sup>576</sup> These three researchers played major roles in winning social acceptance for the idea that intelligence is genetic, an idea that rendered palatable cutbacks in funds for Head Start, welfare, aid to schools, and a host of other measures

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570. *Id.* at 79.

571. *See id.* at 78–82, 83.

572. *See* Regional Oral History Project, Staff Interview of Earl Warren, in Bancroft Library, University of California at Berkeley; *see also* James J. Rawls, *The Earl Warren Oral History Project: An Appraisal*, 67 PAC. HIST. REV. 87, 96 (1998).

573. *See supra* note 572.

574. *See* LEMANN, *supra* note 471, at 121, 136, 171–72, 208–09; *see also supra* note 458 and accompanying text.

575. *See supra* notes 482–485 and accompanying text.

576. *See generally* WILLIAM H. TUCKER, *THE SCIENCE AND POLITICS OF RACIAL RESEARCH* (1994); John Battelle, *The Gospel According to Sarich*, EXPRESS, Jan. 18, 1991, at 3.

necessary for the social advancement of minorities.<sup>577</sup> Jensen and Sarich taught at Berkeley; Shockley at Stanford. Although students and members of the public reacted to their pronouncements with outrage, only a few of their colleagues did. Some academics remained quiet, perhaps out of the belief that the three controversial speakers might be right. Others hid behind the guise of academic freedom. Prompted by Jensen's research, the University of California's academic freedom committee considered a measure that would have declared investigation into racial components of intelligence to be inappropriate.<sup>578</sup> A law school professor, who was also a psychiatrist, pointed out that such research could easily harm an entire community, such as blacks, and that human subjects research guidelines should be interpreted to prohibit it unless the entire African American community approved.<sup>579</sup> The measure was defeated,<sup>580</sup> and Jensen has been advocating his position until very recently. Indeed, his findings were prominently cited in Richard Herrnstein and Charles Murray's *The Bell Curve* and are an integral part of the current nativist revival.<sup>581</sup>

Early I.Q. researcher Lewis Terman, who taught at Stanford, believed several ethnic groups were dull and should not be encouraged to reproduce.<sup>582</sup> Race-I.Q. research played a significant role in this country even before the Bell Curve controversy broke out. In the mid-1950s, liberals across the United States had been aflame with the ideal of school desegregation championed by *Brown*.<sup>583</sup> Indeed, the Supreme Court had relied on a number of academic studies to conclude that segregation harmed black schoolchildren.<sup>584</sup> By the late 1960s, however, some academic social scientists were questioning the link between segregation and harm.<sup>585</sup> Conservative social scientists criticized

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577. See, e.g., WOLLENBERG, *supra* note 223, at 166–67; see also *supra* note 399 and accompanying text (describing the work of Stanford I.Q. researcher Lewis Terman).

578. See Battelle, *supra* note 576; Carl Irving, *Showdown on Human Studies Nears at UC*, S.F. EXAMINER, Aug. 19, 1973, at A1.

579. See Irving, *supra* note 578.

580. See *id.*

581. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 9–10, 13, 283–84, 302–04, 308 (1994); see also *Native Sons of the Golden West* (flyer, n.d.) (on file with authors) (featuring an endorsement by University of California History Professor Herbert E. Bolton of a virulently nativist and anti-Japanese organization devoted to “hold[ing] California for the white race”).

582. See *Father to 1,000 Geniuses*, *supra* note 399, at 20; *Planned Parenthood Carries on Eugenics Tradition*, *supra* note 399; see also *supra* note 399 and accompanying text.

583. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). For the argument that *Brown* played a legitimizing role, allowing social elites to continue business as usual, see Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, WM. & MARY L. REV. 547 (1995).

584. See *Brown*, 347 U.S. at 494 n.11, 494–95.

585. See JOHN P. JACKSON, *TRANSFORMING SOCIAL SCIENCE INTO MODERN AUTHORITY IN BROWN, 1945–1955* (forthcoming 2000) (on file with authors).

the empirical basis of *Brown*.<sup>586</sup> Arthur Jensen maintained that I.Q. was genetic, and therefore relatively fixed, and that the white and black races differed greatly in their average level of intellectual endowment.<sup>587</sup> Writing in 1972, Christopher Jencks and David J. Armour echoed his findings.<sup>588</sup> When federal courts ordered busing in California cities, many whites simply left for the suburbs or forced recall elections for school boards that enforced federal decrees;<sup>589</sup> other cities proposed open enrollment and voluntarism as strategies to defeat segregation.<sup>590</sup> Around that time, David J. Armour of the Rand Corporation in Santa Monica, published a study professing to show that integration did not close the racial gap in test scores and asked federal judge Manuel Real to suspend his order desegregating Pasadena schools.<sup>591</sup> The judge refused, and the U.S. Department of Health, Education, and Welfare fined the city \$1.68 million for violating Judge Real's order.<sup>592</sup> Eventually, the federal courts bowed to reality and either softened or ended desegregation decrees,<sup>593</sup> in some cases because not enough whites were left to promote any measurable degree of integration.<sup>594</sup>

D. Agribusiness and the University: The Case of the University of California at Davis

One final area requiring discussion concerns both types of impact mentioned earlier: The University's relation to farming, farm unionization, mechanization, and agricultural research has contributed both to direct oppression of segments of the California population and to an architecture of knowledge that deems certain issues valid and important and others not. University of California at Davis figures centrally into each of these areas.

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586. See *id.*

587. See WOLLENBERG, *supra* note 223, at 165.

588. See CHRISTOPHER JENCKS ET AL., *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972); WOLLENBERG, *supra* note 223, at 166, 172; David J. Armour, *The Evidence on Busing*, PUB. INTEREST, Summer 1972, at 115.

589. See WOLLENBERG, *supra* note 223, at 180-86.

590. See *supra* notes 431-439 and accompanying text.

591. See WOLLENBERG, *supra* note 223, at 172.

592. See *id.*

593. See, e.g., James B. Meadow, "I'll Probably Ride My Bike to School:" *End to Forced Busing Prompts Children on School Bus No. 2231 to Look Back and Ahead*, ROCKY MOUNTAIN NEWS (Colo.), June 6, 1996, at F6a.

594. See *Crawford v. Board of Educ.*, 458 U.S. 527 (1982); *Keyes v. Denver Sch. Dist.*, 413 U.S. 189 (1973); David J. Armour & Gary Orfield, *Should the Courts Reduce Their Role in School Desegregation?* 6 CQ RESEARCHER 929 (Oct. 18, 1996); Craig Horst, *U.S. Judge Ends Kansas City's School Desegregation Battle*, 145 CHI. DAILY L. BULL., Nov. 18, 1999, at 1.

## 1. California Agriculture

### a. Labor Supply and Demand

By the late nineteenth century, California agriculture already represented a major sector of the state's economy.<sup>595</sup> After the initial attraction of the gold rush wore off, Anglos needed to find another means of supporting themselves.<sup>596</sup> Many fraudulently or violently displaced the original landowners to gain land for farming.<sup>597</sup> By 1889, California was the second largest wheat producer in the country.<sup>598</sup> Unlike the Jeffersonian vision of a classless agricultural society, California "bonanza wheat farming" relied on class division.<sup>599</sup>

Since its inception, California's agriculture depended on cheap labor. Thus, early farmers pushed for the "establishment of a full-blown plantation economy . . . complete with a black slave labor force imported from the South."<sup>600</sup> This proposal failed when California decided not to become a slave state.<sup>601</sup> Still, Californians were convinced from the beginning that farm labor was "not suitable for whites."<sup>602</sup> At the same time, California growers saw farm labor as a factor of production, like water or hours of sunshine. As such, they were prepared to manipulate it in search of profit.<sup>603</sup> Indians were initially forced into farm labor through discriminatory vagrancy laws,<sup>604</sup> as were the Chinese, who were driven out of the mining camps by whites asserting their racial prerogative to sudden wealth.<sup>605</sup> The Chinese and succeeding groups of nonwhite farm workers were the "practical equivalent of slaves," much like post-Civil War freedmen, who were stuck in a single occupational status in which others controlled the structure of their lives.<sup>606</sup>

By 1890, the agricultural colleges of the University of California had established a strong relationship to large-scale farmers. Earlier, Edward Wickson of the College of Agriculture had advised farmers to abandon traditional ways and emulate commercial and manufacturing industries.<sup>607</sup> He argued

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595. See, e.g., CLITUS E. DANIEL, BITTER HARVEST: A HISTORY OF CALIFORNIA FARMWORKERS 1870-1941, at 21-22 (1981).

596. See *id.* at 20-21.

597. See *id.*

598. See *id.*

599. See *id.* at 23.

600. *Id.* at 24.

601. See *supra* notes 79-87 and accompanying text.

602. See DANIEL, *supra* note 595, at 26.

603. See *id.* at 25.

604. See *supra* note 104 and accompanying text; see also DANIEL, *supra* note 595, at 24.

605. See DANIEL, *supra* note 595, at 24.

606. *Id.* at 27-28.

607. See *id.* at 41.



that the success of California agriculture depended on eliminating the “historic distinction between the businessman and the farmer” and on “embracing scientific methods.”<sup>608</sup> The source and training ground for these scientific methods would, of course, be the faculty of the agricultural schools of the University of California. By the late 1800s, spurred by the university, large growers developed organizations and means dedicated to the continuation of a cheap labor force. Over time, the identity of this force shifted; with the exclusion of the Chinese in 1882, growers urgently needed a new source. Before the 1920s, California farmers had resisted hiring Mexicans, believing them to be less tractable than the Chinese, but these fears quickly subsided as farmers realized that the federal government’s liberalized immigration policy toward Mexico provided a ready source of peon labor. As they had with the Chinese, farm owners continued to see Mexican laborers as an element of production, rather than as equal human participants in a common venture. With farm mechanization, the laborers’ position only worsened.<sup>609</sup>

b. The University Enters the Scene

The modern land grant college rests on three major pieces of legislation: the Morrill Acts of 1862, 1883, and 1890, the Hatch Act of 1887, and the Smith-Lever Act of 1914. These acts provide the basis for federal support for agricultural colleges, agricultural experiment stations, and the agricultural extension system, which was an arm of all of these.<sup>610</sup> Although the original purpose of this cooperative system was to help the average farmer, California’s land grant college system quickly evolved as a research wing providing tax-free aid, machines, and consultation to large-scale farming and the wealthiest class of farmers.<sup>611</sup>

The University of California is an integral member of the land grant complex and research factory. Through its agricultural schools and experiment stations in Berkeley, Davis, and Riverside, it has provided pathfinding research

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608. *Id.*

609. *See id.* at 42, 46, 66–67, 69–71; *see also infra* Part V.D.2. (describing farm mechanization issues and litigation).

610. *See* Smith-Lever Act of 1914, ch. 79, § 1, 38 Stat. 372 (1914) (codified at 7 U. S. C. §§ 341–348 (1994)); Morrill Act of 1890, ch. 841, § 4, 26 Stat. 419 (1890) (codified at 7 U.S.C. §§ 321–326, 328 (1994)); Hatch Act of 1887, ch. 314, §§ 1, 2, 24 Stat. 440 (1887) (codified at 7 U.S.C. §§ 361a, 362, 363, 365, 368, 377–379 (1994)); Morrill Act of 1883, ch. 130, § 4, 12 Stat. 504 (1883) (codified at 7 U.S.C. § 304 (1994)); Morrill Act of 1862, ch. 130, §1, 12 Stat. 503 (1862) (codified at 7 U.S.C. §§ 301–305, 307, 308 (1994)); *see also* JIM HIGHTOWER, *HARD TOMATOES, HARD TIMES: A REPORT OF THE AGRIBUSINESS ACCOUNTABILITY PROJECT ON THE FAILURE OF AMERICA’S LAND GRANT COLLEGE COMPLEX* 8 (1973).

611. *See* HIGHTOWER, *supra* note 610, at 1–5.

into crops such as tomatoes, grapes, and prunes, and also into livestock.<sup>612</sup> It has provided laboratories for the chemical industry to research pesticides.<sup>613</sup> It has also served as a principal proving ground for farm mechanization research—the development of large, expensive machines capable of “planting, thinning, weeding, and harvesting” without any human workers other than a single driver.<sup>614</sup> The University of California has also sponsored research to create a tomato that is hard enough and shaped in such a manner as to be picked, handled, and sorted by a machine.<sup>615</sup>

(1) The Farm Bureau and the Extension System

Almost since its inception, the American Farm Bureau Federation (the Farm Bureau), the “largest, most powerful, most affluent farm organization”<sup>616</sup> in the country, has opposed social reforms related to small farms or farm labor. The self-proclaimed spokesman for the American farmer, its true interests lie in the improvement of farming as a business. Created by the U.S. Chamber of Commerce, the Farm Bureau was quickly adopted and supported by the government-sponsored Extension Service in the 1920s. The Farm Bureau maintains an extensive system of county agents and products for farmers, including insurance, oil and fertilizer, and a travel agency. Its politics are decidedly conservative; at conventions and youth gatherings, the Farm Bureau has been known to bring in individuals to give antiregulation, anti-Communist, and anti-civil rights speeches.<sup>617</sup> It also opposes federal legislation that targets poverty, including fair housing and minimum wage laws.<sup>618</sup>

The Farm Bureau also committed extensive resources to defeating Cesar Chavez and the national boycotts, originating in California, of table grapes and lettuce, by distributing tens of thousands of pamphlets promoting

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612. See *California Agrarian Action Project, Inc. v. Regents of the Univ. of Cal.*, 210 Cal. App. 3d 1245, 1249 (1989).

613. See HIGHTOWER, *supra* note 610, at 98. The contribution prompted a professor of the entomology department to comment in a confidential memorandum to the head of the department in 1971: “There seems to be a trend developing that I don’t think should continue. Men that retire from jobs with chemical corporations take jobs in universities if for no other reason than to give their ideas credence by using a university letterhead.” *Id.* (quoting D.L. Dalsten, Confidential Memorandum to Dr. R.F. Smith, Head of Entomology, University of California at Berkeley).

614. See *infra* notes 636, 639–640 and accompanying text; see also ANN FOLEY SCHEURING, TILLERS: AN ORAL HISTORY OF FAMILY FARMS IN CALIFORNIA 182 (1983).

615. See SCHEURING, *supra* note 614, at 182.

616. SAMUEL R. BERGER, DOLLAR HARVEST: THE STORY OF THE FARM BUREAU 2 (1971).

617. See *id.* at 3, 5. A large majority of the members of the American Farm Bureau Federation (the Farm Bureau) have nothing to do with farming; it sponsors events under the “banner of ‘American citizenship’ programs.” *Id.* at 4.

618. See *id.* at 3. The Farm Bureau also opposed “Medicare, federal aid to education, anti-poverty legislation, housing bills, [and] minimum wage laws.” *Id.*

nonunion table grapes and depicting the union as a den of malcontents and troublemakers. It coordinated the growers' resistance, distributing newsletters and sponsoring educational programs on how to cope with labor problems and unionization. Farm workers are barred from joining the organization except as nonvoting members.<sup>619</sup>

The Farm Bureau is related to the University of California through the Cooperative Extension System, which plays a major role in all land grant universities.<sup>620</sup> The Smith-Lever Act, which established the Extension System, specifically allowed "contributions from private sources" as part of state-matching funds.<sup>621</sup> Over time, the Farm Bureau gained influence by contributing to the extension offices to such an extent that some county bureaus considered the county extension agent an employee.<sup>622</sup> The Farm Bureau lobbied Congress to expand extension services and resisted efforts to separate the two.<sup>623</sup>

In California, university extension agents, sometimes called farm advisors, were hired by the university and the federal government. These agents traveled the farm circuit lecturing on such topics as how to handle crews; it appears they never addressed farm workers on how to handle their foremen. According to Anne and Hal Draper, in the 1930s, the Farm Bureau and its child, the Associated Farmers, organized vigilantism, cross burning, and espionage, breaking strike after strike. Farm Bureau secretaries, appointed by the University, served as the leadership of the Associated Farmers. When the University of California at Berkeley College of Agriculture organized a three-day conference in 1938 on how to oppose unionization, this proved too much even for the Alameda County Congress of Industrial Organizations, which charged that the University of California was emerging as an antiunion partisan. Carey McWilliams complained that the Associated Farmers were using the University's extension system to sabotage labor.<sup>624</sup> When he continued raising his voice, Earl Warren terminated him from his state position as watchdog for the migrant population.<sup>625</sup>

The Drapers report how university professor R.L. Adams, in a text entitled *Farm Management*, provided guidelines for California farm employers. Negroes,

619. See *id.* at 160, 162.

620. See WAYNE D. RASMUSSEN, *TAKING THE UNIVERSITY TO THE PEOPLE: SEVENTY-FIVE YEARS OF COOPERATIVE EXTENSION* 77 (1989).

621. Smith-Lever Act of 1914, ch. 79, § 3, 38 Stat. 373 (codified at 7 U.S.C. § 343 (1994)).

622. See RASMUSSEN, *supra* note 620, at 77-78.

623. See HIGHTOWER, *supra* note 610, at 132. In 1921, a memorandum of separation signed by the president of the Farm Bureau and the head of the State Relations Board revealed the longtime relationship between the organizations. See *id.*

624. See ANNE DRAPER & HAL DRAPER, *THE DIRT ON CALIFORNIA: AGRIBUSINESS AND THE UNIVERSITY* 2, 3 (1968).

625. See Telephone Interview with Jeffrey Lustig, Sacramento State University (Mar. 13, 2000); see also MCWILLIAMS, *supra* note 567, at 107.

he wrote, are “prevaricators and robbers;” Japanese, “tricky;” Mexicans “childish” and ungrateful.<sup>626</sup> The professor warned farmers that migrant workers are an unappreciative lot and cautioned them against allowing radical talk. The Drapers also highlight the way the University of California’s Division of Agricultural Science, Agricultural Extension, and the Experiment Stations have worked hand in glove and how, alone among other major industries, agribusiness has its research done for free.<sup>627</sup> Agricultural extension services helped the Chamber of Commerce publish a *San Francisco Business* feature favorable to farmers exactly at a time when supermarket grape boycotts were hitting the Bay Area.

The Drapers also point out how the University of California’s Division of Agricultural Sciences, working in cooperation with the State Agricultural Extension Service with hundreds of farm advisors, wields great influence in university politics and governance. Until recently, the Regents of the University of California included, *ex officio*, the president of the State Board of Agriculture. Appointments to the position of regent have included a heavy representation of agricultural interests such as a president of Hunt Foods and a president of the California Farm Bureau Federation, who was a leading opponent of Cesar Chavez, and who boasted that his workers came to the back door of his home on his two thousand acre ranch to talk over problems with him. He also told a church audience that he would consider that he had failed his Christian duty if his workers were to say that they wanted a union.<sup>628</sup>

University of California agricultural experts appeared at hearings on California farm labor problems, in which one testified that very small increases in farm worker wages were all that should be expected based on increases in productivity. This expert and his colleagues presented volumes of research showing that farm workers, then paid about one dollar per hour, were not mistreated; their thousands of words of testimony included no mention of widespread exploitation of women and children in the fields and orchards. The committee voted for no significant reforms: no state minimum wage for farm workers, no unemployment insurance, and no collective bargaining. Economists from the Agricultural Extension also defended the Bracero Program, then under attack nationally, explaining that the state had experienced no educational or family health problems with the Mexican workers.

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626. See DRAPER & DRAPER, *supra* note 624, at 4 (quoting R.L. Adams).

627. See *id.* at 5; see also DANIEL, *supra* note 595, at 4 (reporting a study showing that the state research apparatus devoted 6000 “man years” to projects benefiting agribusiness).

628. See DRAPER & DRAPER, *supra* note 624, at 9–11.

After Congress ended the official program, California agricultural experts urged the creation of an informal one to subsequent Congresses.<sup>629</sup>

University of California experts long opposed unionization and the institution of the minimum wage for farm workers, and when the tide seemed to turn against them, encouraged the development of harvesting machines for fruit, tomatoes, and lettuce. Growers had not been receptive to the idea until panicked by Congress's termination of the Bracero Program. When the university developed an artificial grape picker, it awarded the mayor of Berkeley a contract to manufacture it. When farm worker sympathizers questioned whether University of California chancellors should serve on the boards of large food companies, one replied "I don't see any conflict."<sup>630</sup>

When some liberal legislators charged the university-sponsored 4-H program with ignoring farm workers and catering to fresh-faced sons and daughters of large farm owners, the University of California buried the issue.<sup>631</sup> Later, when the Cooperative Extension Service faced widespread charges of discrimination and had made little progress in hiring blacks and Hispanics, President David Saxon appointed a task force in 1979 to inquire into the allegations. It recommended the appointment of a full-time officer and increased participation of minorities in all phases of program development.<sup>632</sup>

## 2. Matters Come to a Head: Chemical Poisoning and the Farm Mechanization Suit

In an intriguing story covered in greater detail in the final section of this Article,<sup>633</sup> the sleepy farm town of Davis was selected in 1906 as the site of a major University of California agricultural experiment station.<sup>634</sup> The station soon revealed its attitude toward labor. A 1918 report commented on the great distinctions among farm laborers and the "great variation . . . among Mexicans and Hindus" and stated that flimsy quarters for "peon, coolie, or oriental labor are generally not suited" for the more demanding American standard of living.<sup>635</sup>

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629. See *id.* at 11–14, 16.

630. See *id.* at 22–23, 26, 27–30.

631. See SCHEURING, *supra* note 614, at 225.

632. See *id.* at 226; see also Interview with Anonymous, in Davis, Cal. (Aug. 15, 1999) (reporting that growers successfully opposed the appointment of an eminent Mexican American professor because he was "inappropriate for Davis" because of his history of employment with California Rural Legal Assistance, an organization that works on behalf of farmworkers).

633. See *infra* Part V.3.c.

634. See SCHEURING, *supra* note 614, at 66–68.

635. *Id.* at 142.

Years later, after President Lyndon B. Johnson ended the Bracero Program and the United Farm Workers Organizing Committee threatened to increase the cost of tomato and grape harvesting, California agribusiness faced a disconcerting prospect: rumors that the entire processing industry might move to Mexico, where a plentiful supply of laborers awaited. Sacramento, however, saved the day, appropriating one hundred fifty million dollars to develop a mechanized picker and hybridization to produce a square tomato. Soon, eighty other mechanization projects joined these two.<sup>636</sup>

After Rachel Carson published *Silent Spring*,<sup>637</sup> the ensuing public outcry prompted University of California scientists to study pesticides in food and fertilizers in ground water. Until the early 1960s, Davis obligingly field-tested a veritable menu of new chemical compounds at the request of pesticide and insecticide producers. Reaction to chemical hazards by consumers and sympathy for farm workers displaced by the university's mechanization research prompted University of California's president Charles J. Hitch to call for a study of rural poverty.<sup>638</sup>

Against this background, California Rural Legal Assistance (CRLA) filed suit on behalf of the California Agrarian Action Project against six regents, three administrators, and unnamed faculty researchers and employees at Davis.<sup>639</sup> The suit alleged improprieties stemming from conflicts of interest and maintenance of mechanization research that had a harsh impact on small farming, including the undermining of collective bargaining, the destruction of small farming as a way of life, the production of inferior produce, and the charging of higher prices. The complaint charged that the defendants used public monies to confer a private benefit on large farmers and agribusiness in violation of the California Constitution, the Political Reform Act, and the very statutes setting up land grant colleges mentioned in the early paragraphs of this part.<sup>640</sup>

Plaintiffs called witnesses who testified about the improper influence of corporate money on research priorities and the great desirability of a remedy termed a "social impact statement."<sup>641</sup> After narrowing the scope of the case, the trial court ruled that the university was required to install procedures to monitor social impact and that this requirement did not infringe on academic liberty.<sup>642</sup> The university appealed and the Court of Appeals in San

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636. See *id.* at 182.

637. RACHEL CARSON, *SILENT SPRING* (1962); see also SCHEURING, *supra* note 614, at 186–87.

638. See SCHEURING, *supra* note 614, at 186–87, 192.

639. See *California Agrarian Action Project, Inc. v. Regents of the Univ. of Cal.*, 210 Cal. App. 3d 1245 (1989).

640. See SCHEURING, *supra* note 614, at 192.

641. See *id.*

642. See *California Agrarian Action Project*, 210 Cal. App. 3d at 1248–49.

Francisco reversed, finding that nothing in the Hatch Act or the mandate of the experiment station required evaluating, much less minimizing, the impact of the university's research on small family farming. When the California Supreme Court refused review, all issues appeared decided in the university's favor. Earlier, a 1979 Academic Senate report had advised the regents that social-impact review was undesirable. Because no one could foresee the results of their research, scientists were ill equipped to make social-impact predictions. They might err on the side of caution with the result that valuable research would remain undone.<sup>643</sup>

Although the plaintiffs lost, CRLA believed that the University of California's victory was pyrrhic. Publicity generated by the suit, coming on top of pressures from environmental and consumer groups, prompted both the university and the California legislature to modify Davis's practices, including studies of overgrazing, dairy waste management, and urban gardening.<sup>644</sup> Some of the reforms went beyond ecological issues to include affirmative action and attention to allegations of discrimination in the cooperative extension service.<sup>645</sup>

### 3. The Town of Davis

Early in its history, Davis was a sleepy agricultural town located in rural Yolo County, about twenty-five miles from Sacramento. Like the surrounding towns of Winters, Woodland, Dixon, and Sacramento, which contained, then as they do now, well-delineated Mexican barrios, Davis had a modest Mexican settlement that may have included a restaurant, a cantina, and a row or two of modest houses.<sup>646</sup> Today, Davis is a clean, upscale college town with shops, bookstores, community gardens, and environmentally conscious high-priced housing developments. Mexican people, much less a Mexican neighborhood, are nowhere to be found, and the number of African American families is also very low.

What happened in between? The prevailing culture of Davis today is liberal. The town boasts of its recycling programs, endless miles of bicycle

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643. See SCHEURING, *supra* note 614, at 192.

644. See *id.* at 216-18; see also *Court Won't Force UCD to Aid Farms*, SACRAMENTO BEE, Sept. 7, 1989, at F1 (noting that the company refocused its research away from mechanization and toward nonchemical alternatives to pesticides and fertilizers).

645. See SCHEURING, *supra* note 614, at 216-18. Evidently, pesticide exposure was not completely rectified. See Martha Mendoza, *Exposure to Pesticides Torments Farmworkers*, BOULDER DAILY CAMERA (Colo.), June 24, 1999, at 2C (noting how California's tough regulations often are not enforced and that farm counties reported hundreds of cases of poisoned workers with ailments ranging from rashes to blisters to cancer).

646. See Interview with Anonymous, former law student at Davis.

paths, and solar homes. Both it and the campus profess to wish that they could attract more minority students and residents, but believe that their location far from a large urban center, the relatively high price of housing, and the lack of a critical mass of people of color make doing so difficult. In short, impersonal forces such as location and the economics of the housing market account for the town's nearly exclusive white and Asian makeup.

Oral history, however, and a few tantalizing strands of physical evidence suggest a less benign explanation. Nearly fifty years ago, the University of California Regents and the California legislature gave the go-ahead for Davis to expand from a small, bucolic agricultural school to a broad-based general-purpose campus.<sup>647</sup> The town fathers immediately realized that Davis would be transformed and that a great deal of money stood to be made. Tens of thousands of new students and faculty would need housing, stores, and services. Like a host of California towns that abruptly removed minority settlements when they were inconvenient or in the way,<sup>648</sup> Davis may have undertaken a coordinated, but scarcely visible, effort to drive the Mexicans out of town. According to oral reports, longtime residents of Yolo County recall a time when, just before the university's expansion, the town of Davis turned even meaner than usual.<sup>649</sup> The police began hassling Mexican-looking people,<sup>650</sup> merchants stopped extending credit,<sup>651</sup> and local inspectors closed down the barrio's commercial establishments for zoning and health violations.<sup>652</sup> Earlier in its history, Davis had done the same to a tiny Chinatown during the time in which the Chinese were suffering one of their intermittent periods of unpopularity.<sup>653</sup> According to suggestive evidence, university authorities were aware of the town's anti-Mexican purge and either welcomed it or did nothing to stop it.<sup>654</sup>

Previous parts of this Article review the prominent role of Davis's agricultural research machine and the University of California's ties to agribusiness in declaring war on farm unionization, farm labor rights, consumer protection from unsafe pesticides, and small farming as a way of life.<sup>655</sup> We have also seen how geographic choice and decisions to locate new campuses in predominantly

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647. See UC Davis FACTS, *Historical Milestones* (visited June 21, 1999) <<http://facts.ucdavis.edu/timeline.html>> [hereinafter UC Davis FACTS].

648. See Letter from T.R., Professor of Law, to authors (July 15, 1999) (on file with authors).

649. See Interview with Anonymous, *supra* note 646.

650. See *id.*; see also *infra* notes 709–713 and accompanying text (regarding automobile “sticker” program).

651. See Interview with Anonymous, *supra* note 646.

652. See *id.*

653. See Telephone Interview with J.L., former professor, Davis, Cal. (July 21, 1999).

654. See Interview with Anonymous, *supra* note 646.

655. See *supra* notes 628–632, 636–645 and accompanying text.



white communities helped ensure that the University of California and the California State University system came to be regarded as serving those constituencies and a few highly selected minorities.<sup>656</sup> In the case of Davis, the University of California appears to have picked a site favorable for agriculture (because of its abundant sunlight, water, and inexpensive land) and turned it into an all-white community by means that anyone today would regard as despicable.

a. Early Davis History

In the early twentieth century, the tiny agricultural town of Davisville was extremely anxious to be selected as the site of a University of California state farm. It organized a chamber of commerce and a women's improvement club to boost the town's chances and to raise money for the purchase of farm land to be offered to the University of California if Davisville were selected. Aware that it was competing against its rival, the neighboring city of Woodland, the town set out energetically to demonstrate to university officials its own superiority and its wholehearted support of the planned experimental station.<sup>657</sup> It even took subscriptions for the purchase of land of dubious title.<sup>658</sup>

The Davis archives contain evidence of an impressive display of boosterism and town pride. The journal of one almond farmer named George W. Pierce contains entries showing how he raised contributions from eighty-four of his neighbors ranging from 25 to 500 dollars.<sup>659</sup> His neighbors appear to have been as good as their word; a later entry shows that all but seven paid up.<sup>660</sup> He also seems to have been something of a double agent, speaking at public events in Woodland.<sup>661</sup> One April day in 1906, his diary reports: "Had terrible accident today. Hand mangled in sorting machine. Went to doc who amputated part of my finger."<sup>662</sup> The next day's entry reads matter of factly: "Ran to Woodland and back. Heard of fearful earthquake this morning at 5 a.m. San Francisco reported to be in ruins."<sup>663</sup>

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656. See *supra* notes 564–565 and accompanying text.

657. See JOANN L. LARKEY & SHIPLEY WALTERS, *YOLO COUNTY: LAND OF CHANGING PATTERNS* 58–60 (1987).

658. See Journal of George W. Pierce, Letters and Other Documents Relating to George W. Pierce, at 1–2, Box 81, in Shields Library, Special Collections, University of California at Davis.

659. See *id.*

660. See *id.*

661. See *id.* at 2.

662. *Id.*

663. *Id.* at 2–3.

His finger presumably healed, he negotiated for the best possible price on Davis area farms and wrote to Governor George Pardee and the state attorney general, arguing Davis's case.<sup>664</sup> An August 10, 1906 entry reads: "Found lost deeds";<sup>665</sup> another describes Woodland's "competing fee,"<sup>666</sup> while still another records an imploring letter to the state governor to "put it here where the best people are."<sup>667</sup> Another entry describes an effort to acquire a certain Peña property and mentions "this cloud is more serious."<sup>668</sup>

A standard history of Yolo County likewise reports that Davisville was highly anxious to promote itself as a site for the state farm, and reports that the decisive purchase of a 778-acre site known as the Jerome C. Davis farm occurred in 1906, with the university farm opening two years later.<sup>669</sup> The town celebrated the day of decision by flying flags and shooting off firecrackers. On January 5, 1909, the university farm school opened with eighteen students. Enrollment remained under 350 until World War I; but by the 1920s, the farm had become a four-year agricultural school, and the town considered itself transformed.<sup>670</sup> It dropped the "ville" in its name in 1917 and adopted the slogan "We Are Growing."<sup>671</sup> In 1951, the university added a College of Letters and Science to the agricultural school; in 1959, the Regents designated Davis a comprehensive campus.<sup>672</sup> In short order, it added a college of engineering, a law school, a school of medicine, a division of biological sciences, and a graduate school of management.<sup>673</sup>

In 1932, seasonal workers from Mexico came to Yolo County in substantial numbers. Many more arrived during World War II, when they were actively recruited.<sup>674</sup> Others came during the Bracero Program that started during the war years and continued until 1964. By 1979, Yolo County was 11 percent Mexican American.<sup>675</sup> Despite the growth in numbers of Mexicans and blacks, for much of its early history the town appears to have been not at all hospitable to its small minority settlements. The first realtor who sold to blacks received death threats.<sup>676</sup> Many neighborhoods contained restrictive

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664. See *id.*

665. *Id.*

666. *Id.*

667. *Id.*

668. *Id.*

669. See *UC Davis FACTS*, *supra* note 647.

670. See LARKEY & WALTERS, *supra* note 657, at 58, 60.

671. See *id.*

672. See *id.* at 94; *UC Davis FACTS*, *supra* note 647.

673. See LARKEY & WALTERS, *supra* note 657, at 94–95; *UC Davis FACTS*, *supra* note 647.

674. See LARKEY & WALTERS, *supra* note 657, at 83, 86.

675. See *id.* at 90, 92.

676. See Interview with Anonymous, *supra* note 646.

covenants, and a local historian described the town newspaper as “racist.”<sup>677</sup> Until Woodland relaxed its attitude toward Mexicans in the 1940s and 1950s, Mexican people could not get a haircut anywhere in Yolo County, enter a bar or restaurant, and “had to go to Sacramento” for most services.<sup>678</sup> A walnut grower described Mexican labor as “a water spigot you turn it on when you need it and turn it off when you don’t . . . we don’t pay any social attention to them . . . that is almost slavery.”<sup>679</sup>

As they did elsewhere in California during this period, local educators wrote that Mexicans have low I.Q.s and are not capable of much improvement by schooling.<sup>680</sup> Anglo schoolchildren seem to have caught a whiff of these attitudes. One Mexican American girl from an influential family in Davis reported that “[t]hey would be invited to birthday parties and I was not, and I always felt it was because we did not have the money and I was Mexican.”<sup>681</sup> Another recalled “there were three girls Mexican all brilliant in grammar school . . . but not one of them ever won an award or a scholarship.”<sup>682</sup> Braceros avoided Davis because the city had a reputation as unfriendly toward Mexicans and because the police would harass them.<sup>683</sup> Davis police reportedly would even ticket Asians, believing them up to no good.<sup>684</sup> The town tolerated unspeakable conditions in migrant camps in the 1950s, and when, in the wake of Proposition 13, the town did not have enough money to operate school buses for all, it discontinued providing bus service for the sons and daughters of migrants living in a camp several miles outside of town. Liberals protested that without busing, the children would not be able to attend school at all because their parents needed the family car to get to and from their jobs in the fields. The school board replied that it could not play favorites, otherwise it would have to provide bus service for students living in the wealthy all-white suburb of El Macero, which was also located outside of town.<sup>685</sup>

A local resident remembers only one black man in town during the 1940s and 1950s, Mr. Powell the postman. She remembers him during World War II because he would deliver the telegrams informing people about the

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677. See *id.*

678. HENRY T. TRUEBA ET AL., *HEALING MULTICULTURAL AMERICA: MEXICAN IMMIGRANTS RISE TO POWER IN RURAL CALIFORNIA* 81 (1993).

679. *Id.*

680. See *id.* at 82.

681. *Id.* at 83.

682. Interview with D.M., in private Davis archives, compiled by a Davis professor (copy on file with authors).

683. See Interview with S.D.L.T., in private Davis archives, *supra* note 682.

684. See Telephone Interview with I.F. (Aug. 2, 1999).

685. See Telephone Interview with D.V. (Nov. 1, 1999).

deaths of soldiers. She does not remember whether he had a family or not.<sup>686</sup> In 1959, the first professor of color at Davis, an Asian American, was unable to buy a house anywhere in the town until Chancellor Emil Mrak intervened personally.<sup>687</sup> By then, two black families lived in Davis in “awful housing,” one at the dump.<sup>688</sup> Both would have liked to have moved into town, but no one would sell to them. Later, three university administrators helped one family, the Rogers, buy a home in central Davis. In 1960, a cross was placed in their yard. In 1963, one of the sympathetic administrators, Dean Minnis, sold his home to Steve Need, an African American. The next day, his neighbor put up a for sale sign and made nasty comments to Need. As late as 1963, the owner of a popular Davis restaurant refused to serve braceros.<sup>689</sup> When Latin American students at Davis declared that they were “ready to march” against this restaurant, two university officials, including Minnis, went to talk with the owner. He backed down.<sup>690</sup>

One builder was said literally to hide when minority homeseekers came to his office. The town treated braceros as “dirty” and refused to allow African Americans to swim in the public pool, so many learned how to swim in Minnis’s backyard.<sup>691</sup> An early African American professor at the campus committed the sin of driving a flashy sports car, for which he paid the price of frequent stops by the police.<sup>692</sup> Teachers would call students “dirty Mexicans” and favor professors’ children, most of whom were white.<sup>693</sup>

One Mexican American businessman, the descendent of braceros, told us that he was one of the “few brown faces” in Davis.<sup>694</sup> Nevertheless, he succeeded in joining the chamber of commerce—“how I survived was a miracle. I never felt at home here.”<sup>695</sup> His fellow Mexicans shopped elsewhere because Davis merchants were cold and would not cash checks.<sup>696</sup> They were not even welcome inside the Catholic church, which instead held a special mass for them in the basement.<sup>697</sup> Although the Mexican American businessman is a long-term resident and operator of a successful business, he describes Davis as “a miserable place,” whose<sup>698</sup> police chief was a “mean son

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686. See Telephone Interview with E.P. (Feb. 1, 2000).

687. See Interview with D.M., in Davis archives, *supra* note 682.

688. *Id.*

689. See *id.*

690. *Id.*

691. See *id.*

692. See Interview with D.M., *supra* note 682.

693. See Interview with R.N. (Nov. 2, 1999).

694. Telephone Interview with D.M. (Nov. 2, 1999).

695. *Id.*

696. See *id.*

697. See *id.*

698. *Id.*

of a bitch.” He considered himself nearly totally isolated.<sup>699</sup> Asked about the role of the university in racial politics, another respondent described it as “very conservative. It stayed out of most issues.”<sup>700</sup>

#### b. The Hunt Tomato Processing Plant Controversy

In the mid-1950s, the Hunt Corporation proposed to establish a processing plant and cannery in Davis.<sup>701</sup> The town exploded in controversy when citizens learned that the plant would employ large numbers of Mexican workers to handle and process the tomatoes. In blazing letters, a newspaper ad blared, “Wake Up! Before it’s too late” and warned that the cannery, if annexed to the city, would cause “large numbers of cannery workers to camp around Davis and pack our already over- . . . crowded schools!”<sup>702</sup> It described the proposed cannery as a threat causing higher taxes, lower property values, and “a public health menace and an all-around headache for all of us!”<sup>703</sup> The flyer urged citizens to “get the true facts about the Hunt cannery before it’s too late” and to write to the mayor and city councilmen.<sup>704</sup>

A sociologist, probably from the University of California at Davis, wrote a letter to the local newspaper describing migrants as “not necessarily riffraff,” but nonetheless a source of serious problems for the community, including nutritional deficiencies and communicable diseases such as tuberculosis, syphilis, gonorrhea, and malaria.<sup>705</sup> Many other letters fulminated to the same effect. According to one respondent, Davis resisted the tomato processing plant as long as possible, then bowed to the inevitable, moving the city’s boundary so that it would not owe services to the plant or its workers.<sup>706</sup>

#### c. Evidence of a Purge

In addition to maintaining a generally unfriendly attitude toward its resident minorities throughout the first half of the century—something it had in common with many California towns of the period—Davis may have carried

699. *Id.*

700. Telephone Interview with C.B. (Jan. 22, 2000); Interview with J.L., *supra* note 653.

701. See, e.g., Letter from Anonymous, to authors (July 17, 1999) (on file with authors).

702. DAVIS ENTERPRISE, Oct. 11, 1956, at 16 (on file with authors) (“(Otherwise, where is the large labor force for the cannery going to come from?)” . . . “It’s up to all of us . . . to safeguard our clean city and make Davis a BETTER place to live.”).

703. *Id.*

704. *Id.*

705. E.M.L., Letter to the Editor, DAVIS ENTERPRISE, Oct. 18, 1956, at 7.

706. See Telephone Interview with Anonymous, Professor of Law (July 20, 1999). Even university authorities opposed the processing plant because it would supply jobs for “the wrong sort of people.” Telephone Interview with J.L. (Aug. 6, 1999).

out, consciously or unconsciously, a concerted effort to remove Mexican residents from the small neighborhood in which they were concentrated to pave the way for development when the university expanded.<sup>707</sup> Mexican people recall an increase in racism during this period; a few recall harassment by civil authorities such as housing and restaurant inspectors.<sup>708</sup> Many recall a despised "sticker" program in which local police would stop any driver of a dilapidated vehicle lacking a U.C. Davis sticker, especially if he or she looked dark or foreign.<sup>709</sup> An Anglo activist reported that the chamber of commerce and the association of realtors maintained a blatant agenda of keeping Davis upwardly mobile.<sup>710</sup> Newspapers and civic announcements exhorted the town to stamp out "blight."<sup>711</sup> Aerial photographs of the town show inexpensive "flat top housing" disappearing from one year to the next.<sup>712</sup> Records of eighth grade graduation from Davis elementary schools show decreasing numbers of children with Mexican surnames between 1946 and 1952.<sup>713</sup>

If Davis did, indeed, expel and harass minority residents to render the town nearly all-white and suitable for university development, and especially if it did so with the tacit consent of even a portion of the university administration, this chapter would constitute a type of "original sin" tainting the subsequent history of that campus and adding to the overall moral claim of minority communities for recompense.

## CONCLUSION

In the words of the common refrain, those who do not learn the lessons of history are doomed to repeat them. Studying the history of a region or college system may bring to light evidence of serious mistreatment and inequities continuing into the present. On acquainting themselves with this history, fair-minded readers may conclude that their society owes a duty of redress to minority populations whose children have been denied the opportunity for upward educational mobility. Moreover, documented evidence may bolster both the beleaguered diversity rationale for race-conscious decision making in higher education, by showing how different from the mainstream are the stories that minorities have to tell, *and* the remedial rationale, which will be the

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707. See *supra* note 646 and accompanying text; see also Interview with S.D.L.T., *supra* note 683.

708. See Interview with S.D.L.T., *supra* note 683.

709. See Interview with P.G., in private Davis archives, *supra* note 682.

710. See Telephone Interview with S.S. (Dec. 3, 1999).

711. See Interview with P.G., in private Davis archives, *supra* note 682; Memorandum from D.A. (Mar. 18, 1998) (on file with authors).

712. Aerial photographs of town of Davis, California (on file with authors).

713. See Letter from P.D. and accompanying graduation lists (Feb. 1, 2000) (on file with authors).

only one left if the Supreme Court jettisons diversity, as it may in the months and years ahead.

For all of these reasons, the racial history of California commends itself to all who are concerned with a fair and just society. This Article is only a beginning.