

THE “OTHERIZED” LATINO: EDWARD SAID’S ORIENTALISM THEORY AND REFORMING SUSPECT CLASS ANALYSIS

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INTRODUCTION

Several months before the 2012 presidential election, a *Time* magazine cover featured the faces of twenty Latinos¹ and boldly proclaimed that Latinos would “pick the next President.”² In big white lettering, the cover read, “Yo Decido” (I Decide).³ After President Barack Obama’s reelection, discussion about the Latino vote remained at the center of a national dialogue. Headlines reported that Latinos had turned out in record numbers and had significantly increased their share of the total voters.⁴ Commentators warned that the losing Republican Party could no longer afford to ignore or alienate Hispanics in national races and must instead pay greater attention to the interests of Latino communities.⁵ An official at the National Council of La Raza, a Hispanic organization involved in registration campaigns, powerfully said, “Latino voters confirmed un-

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1 This Comment uses the terms “Latino” and “Hispanic” interchangeably.

2 TIME, Mar. 5, 2012.

3 *Id.*

4 See, e.g., Julia Preston & Fernanda Santos, *A Record Latino Turnout, Solidly Backing Obama*, N.Y. TIMES, Nov. 8, 2012, at P13; Donna St. George & Brady Dennis, *Growing Share of Hispanic Voters Helped Push Obama to Victory*, WASH. POST, Nov. 7, 2012, available at http://articles.washingtonpost.com/2012-11-07/politics/35505702_1_hispanic-voters-latino-votes-latino-decisions; MARK HUGO LOPEZ & PAUL TAYLOR, PEW HISPANIC CTR., PEW RESEARCH CTR., *LATINO VOTERS IN THE 2012 ELECTION* 4–5 (2012), <http://www.pewhispanic.org/2012/11/07/latino-voters-in-the-2012-election> (reporting that Latinos made up ten percent of the electorate, up from nine percent in 2008, and were a growing share of voters in key battleground states of the 2012 election).

5 Preston & Santos, *supra* note 4, at P13 (discussing how Latino leaders believe that Mitt Romney’s weak showing exemplifies why Hispanics can no longer be ignored during national campaigns).

equivocally that the road to the White House passes through Latino neighborhoods.”⁶ It looked to be the “Year of the Latino.”

Despite Latinos’ growing political influence, however, discrimination against Latinos persists. In 2011, an Associated Press poll found that fifty-seven percent of non-Hispanic whites harbored anti-Hispanic sentiment,⁷ and a poll conducted by the Pew Research Center found that sixty-one percent of Latinos believed discrimination against Hispanics to be a “major problem.”⁸ The Pew Research Center also reported in 2010 that, when asked which of the various racial and ethnic groups were frequently the targets of discrimination, Americans answered Hispanics more often than any other group.⁹

W.E.B. DuBois wrote in 1903, “The problem of the Twentieth Century is the problem of the color line”¹⁰ Today, the color line has expanded beyond the white-black racial dichotomy, and Latinos stand at the forefront of our national discussion about race, politics, and society. In this discussion and amid evidence of prejudice, a central legal question arises: Does the Supreme Court’s current analytical framework for the Fourteenth Amendment Equal Protection Clause¹¹ adequately protect the Latino population from discriminatory laws and state action?¹² This Comment concludes that the Court’s case law about the suspect class status of Latinos is unclear and unlikely to effectively protect Latinos from stigmatizing legislation. This Comment will provide a new analytical framework that can guide the Court in bringing clarity to the issue and ultimately protect Latinos’ civil rights.

⁶ *Id.* (internal quotation marks omitted).

⁷ Sonya Ross & Jennifer Agiesta, *Poll: Majority Harbor Prejudice Against Blacks and Hispanics*, NBC LATINO (Oct. 27, 2012, 3:38 PM), <http://nbclatino.com/2012/10/27/poll-majority-harbor-prejudice-against-blacks-and-hispanics>.

⁸ PEW RESEARCH CTR., *LATINOS PERCEPTION OF DISCRIMINATION* (2010), <http://www.pewresearch.org/daily-number/latinos-perceptions-of-discrimination>.

⁹ PEW RESEARCH CTR., *DISCRIMINATION AGAINST HISPANICS* (2010), <http://www.pewresearch.org/daily-number/discrimination-against-hispanics> (reporting that twenty-three percent of Americans say Hispanics are frequent targets of discrimination, compared to only eighteen percent of Americans who say the same thing about African Americans).

¹⁰ W.E.B. DUBOIS, *SOULS OF BLACK FOLK*, at xv (Dover Thrift Ed. 1994) (1903).

¹¹ U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

¹² Technically, equal protection applies to the federal government through judicial interpretation of the Due Process Clause of the Fifth Amendment and to state and local governments through the Fourteenth Amendment. *See* *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (“We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.”).

Part I begins by briefly examining the development of heightened scrutiny under the Equal Protection Clause for laws that discriminate based on racial and national origin classifications. Part I finds that the classification of Latinos as a "suspect group" meriting such scrutiny in fact rests on uncertain legal ground due to the Court's confusing case law, aggravating historical factors, and current demographic patterns. It reveals that while the legal conclusions remain muddled about whether Latinos are a suspect class, the public perception of Latinos as a distinct population group has grown. This Part also explains why the application of heightened scrutiny to classifications of various national origin groups, like Mexican Americans or Cuban Americans, is insufficient to adequately protect the civil rights of Latinos as a broader population group. Part I thus advocates that the Court solidify the constitutional status of the broader Latino classification as a suspect class.

Part II examines how the Court, when determining which racial and ethnic categorizations merit suspect class analysis, often describes race as a purely biological concept. Part II argues, however, that race is not a biological concept, but is instead a social concept. It asserts that if the biological conception of race continues to prevail in suspect class determinations, then it is unlikely that Latinos, an incredibly diverse population, will fit within a coherent racial classification. As a result, the constitutional status of the Latino classification will remain in jeopardy. Part II thus urges the Court to embrace the scientific and anthropological research showing that race is in fact a socially constructed concept. It maintains that the Court must analyze race in a new and sensible way that reflects its social, instead of biological, foundations. A new framework will not only align the Court with modern science, but it will also subsequently better accommodate the Latino categorization.

Part III introduces such a new analytical framework, relying on the work of anthropologist Edward Said in his seminal work *Orientalism*.¹³ Said explains how the Western world developed an "us" versus "them" political dichotomy when conceptualizing the Middle East, resulting in the creation of the foreign and inferior "Other." Part III proposes that the Court borrow this "us" versus "them" framework to rework suspect class analysis to ask whether a group has become "otherized" by the dominant Anglo-American society to an extent that subsequently warrants suspect class analysis and heightened scrutiny. By asking this new question, the Court will develop an analysis that

13 EDWARD W. SAID, *ORIENTALISM* (1978).

properly foregoes a biological discussion, adequately acknowledges the social construction of race, and ultimately reflects the social and political reality of the way that discrimination operates in the United States. This new “otherization” framework will also ensure that Latinos, a population group often described as outsiders who do not speak English and who do not share American values, are sufficiently protected through the Equal Protection Clause. Part III concludes by addressing questions and critiques about the framework’s implementation.

I. THE CURRENT STATUS OF THE LATINO CLASSIFICATION FOR SUSPECT CLASS ANALYSIS AND THE NEED FOR ITS CLARIFICATION

A. *Introduction to Suspect Class Analysis*

The Court first articulated that it would apply heightened scrutiny to laws that discriminated against various racial or national origin groups in *Korematsu v. United States*,¹⁴ which infamously upheld the constitutionality of the relocation of Japanese Americans during World War II.¹⁵ The Court declared,

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.¹⁶

In footnote four of *United States v. Carolene Products Co.*,¹⁷ the Court identified a central reason why strict scrutiny is appropriate for racial and national origin classifications. It explained that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities,” and thus, a “more searching judicial inquiry” is needed.¹⁸

It is now well-settled that racial and national origin classifications will be permitted under strict scrutiny only if the government can meet the heavy burden of demonstrating that the discrimination is necessary to achieve a compelling government purpose.¹⁹ The racial

¹⁴ 323 U.S. 214 (1944).

¹⁵ *Id.* at 218–19.

¹⁶ *Id.* at 216.

¹⁷ 304 U.S. 144 (1938).

¹⁸ *Id.* at 153 n.4.

¹⁹ *See, e.g.,* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986) (laying out the Court’s two-prong test for examining government preferences based on racial or ethnic

and national origin groups so singled out are considered "suspect classes," and belonging to such a racial and/or national origin group constitutes an immutable characteristic.²⁰ Applying strict scrutiny to racially discriminatory laws will be referred to simply as suspect class analysis in this Comment.

B. Problematic Case Law on Whether Latinos Constitute a Suspect Class

The first Supreme Court case to apply suspect class analysis to a segment of the Latino population was *Hernandez v. Texas*.²¹ In this case, the Court unanimously reversed a Mexican American petitioner's murder conviction on equal protection grounds, finding a discriminatory application of state law.²² Chief Justice Earl Warren, writing for the Court, found evidence that persons of Mexican descent were a separate class, distinct from whites, in Jackson County, Texas and found that there had been a systematic exclusion of members of this class from jury service.²³ Instead of finding a per se suspect class classification, however, the Court explained that "[w]hether such a group exists within a community is a question of fact."²⁴ It cited testimony by local Jackson County residents that the community distinguished between "white" and "Mexican," evidence of mandated school segregation, the existence of a sign at a local restaurant reading "No Mexicans Served," and the existence of a sign above the men's toilets in a local courthouse saying "Hombres Aqui" ("Men Here").²⁵

criteria: first, that any racial classification "must be justified by a compelling governmental interest" and second, that the "means chosen by the State to effectuate its purpose must be narrowly tailored to the achievement of that goal" (citations omitted) (internal quotation marks omitted).

²⁰ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (explaining that sex is an immutable characteristic, like race and national origin, as it is a characteristic determined solely by the "accident of birth").

²¹ 347 U.S. 475 (1954).

²² *Id.* at 482 ("[Defendant's] only claim is the right to be indicted and tried by juries from which all members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution.")

²³ *Id.* at 480–82 ("Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years.")

²⁴ *Id.* at 478.

²⁵ *Id.* at 479–80 (highlighting the various fact-specific considerations that allowed the Court to determine that persons of Mexican descent constitute a class in Jackson County distinct from whites).

The Court's holding was thus fact-specific and turned on the particular social stigmas and attitudes about the Mexican Americans in Jackson County.²⁶ One scholar notes that "[w]hereas the Court had historically understood (and accepted without question) the protected status of African Americans in terms of race, in *Hernandez* the Court relied on the dynamics of variable 'community prejudices' to hold that under certain circumstances," Mexican Americans could be a suspect class.²⁷ It is also particularly noteworthy that this case was not described as a "race" case as neither the State of Texas nor the defendant argued that Mexican Americans were non-white for purposes of the Equal Protection Clause.²⁸ Thus, although *Hernandez* marks the first case in which the Court recognized that persons of Mexican descent constitute a suspect class, the case did not create a new per se racial classification under the Fourteenth Amendment.

White v. Regester,²⁹ a case decided twenty years after *Hernandez*, involved an equal protection challenge by both Mexican Americans and blacks to a Texas legislative redistricting plan, and it shows the persistence of a fact-specific inquiry for Mexican Americans.³⁰ The Court affirmed the lower court's finding that Mexican Americans were a suspect class by reviewing the historic and present discriminatory conditions of the Mexican American community in Bexar County.³¹ The black plaintiffs, however, were not required to make such a showing of local discrimination,³² as the Court bypassed an analysis about the specific social position of blacks in the districts in question. Although the Court once again struck down a law in order to protect Mexican Americans from discrimination, the status of this community for purposes of equal protection analysis continued to be "dependent on extrinsic attitudinal factors that require demonstration in each case."³³

Hernandez was then apparently, yet problematically, extended in *Keyes v. School District No. 1*,³⁴ which considered the segregation of

26 Jamie L. Crook, *From Hernandez v. Texas to the Present: Doctrinal Shifts in the Supreme Court's Latina/o Jurisprudence*, 11 HARV. LATINO L. REV. 19, 19–20 (2008).

27 *Id.*

28 *Id.* at 35 (explaining that although this case was brought under the Fourteenth Amendment, neither side argued that "Mexican Americans were non-white").

29 412 U.S. 755 (1973).

30 *See id.* at 765–69.

31 *Id.* at 767–69.

32 Richard Delgado & Vicky Palacios, *Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME LAW. 393, 396 (1975).

33 *Id.*

34 413 U.S. 189 (1973).

Hispanic students in the Denver, Colorado school system.³⁵ Justice William J. Brennan, Jr., writing for the Court, stated, "We have held that Hispanics constitute an identifiable class for purposes of the Fourteenth Amendment."³⁶ Despite its seeming definitiveness, this statement proves to be extremely problematic for two reasons. First, the only Supreme Court precedent cited in support of this proposition was *Hernandez*.³⁷ However, *Hernandez*'s case-by-case, fact-specific inquiry that proves central to its holding is unacknowledged in this brief citation.³⁸ Second, *Hernandez* only discussed the social position of Mexican Americans, but in citing *Hernandez*, *Keyes* uses the ambiguous and potentially broader term of "Hispanos." Justice Brennan notes the ambiguity of the term in a footnote, writing, "'Hispano' is the term used by the Colorado Department of Education to refer to a person of Spanish, Mexican, or Cuban heritage. . . . In the Southwest, the 'Hispanos' are more commonly referred to as 'Chicanos' or 'Mexican-Americans.'"³⁹ The Court used the more inclusive definition of "Hispanos," as did the Colorado Department of Education, representing an unexplained broadening of *Hernandez*'s holding beyond a localized Mexican American community to include a generalized population of Cubans, Spaniards, and possibly other ethnic groups. Thus, as a scholar noted, the Court "afforded *Hernandez v. Texas* a stronger reading than that decision actually warranted."⁴⁰

Keyes's problematic reliance on *Hernandez* is further exemplified by the disagreement in the Eleventh Circuit about the meaning of *Keyes*. In *Valle v. Secretary for the Department of Corrections*,⁴¹ involving habeas review, the circuit court discussed *Keyes* and denied a rehearing en banc of a Florida Supreme Court case.⁴² The court had previously concluded that the term "Latin American" failed to represent a single cognizable class for equal protection analysis and that such a conclusion was not contrary to, or an unreasonable application of,

³⁵ *Id.* at 191.

³⁶ *Id.* at 197.

³⁷ *See id.* Five other cases were cited in support of the proposition, but all of these additional cases were lower court decisions.

³⁸ *See* Steven Harmon Wilson, *Some Are Born White, Some Achieve Whiteness, and Some Have Whiteness Thrust upon Them: Mexican Americans and the Politics of Racial Classification in the Federal Judicial Bureaucracy, Twenty-Five Years After Hernandez v. Texas*, 25 CHICANO-LATINO L. REV. 201, 202 (2005) (noting that *Hernandez* is often "cited but passed over quickly").

³⁹ *Keyes*, 413 U.S. at 195–96 n.6.

⁴⁰ Crook, *supra* note 26, at 41.

⁴¹ 478 F.3d 1326 (11th Cir. 2007).

⁴² *Id.* at 1326–27.

federal law as it stood in 1985, when the case was originally decided.⁴³ In denying the rehearing, a concurring judge commented that *Keyes* had not clearly established in 1973 that “Latin Americans were a constitutionally cognizable group” because “each case the Supreme Court cited in support of its conclusion that Hispanics were an identifiable class referred *only* to persons of Mexican descent.”⁴⁴ A dissenting judge disagreed, writing that the Supreme Court had legitimately chosen to use the broader term “Hispanos” instead of the limited term “Mexican American” in *Keyes*, thereby making “Latin Americans” a cognizable class.⁴⁵ Simply, *Keyes* remained suspect to the circuit.

The Supreme Court has not clarified *Keyes*’s scope, as it has never cited the case to support a finding that any Latino population group constitutes a suspect class for equal protection purposes. In addition, even in its continued citations to *Hernandez*, the Supreme Court remains inconsistent. While *Castaneda v. Partida*,⁴⁶ *Regents of the University of California v. Bakke*,⁴⁷ and *B.P.O.E. Lodge No. 2043 of Brunswick v. Ingraham*⁴⁸ indicated that *Hernandez*’s holding applied to Mexican Americans, a parenthetical in *City of Richmond v. J.A. Croson Co.* curiously suggested that *Hernandez* instead involved discrimination against a broader group of Hispanics.⁴⁹ The puzzle about *Hernandez* and *Keyes*’s legacy remains.

C. Aggravating Factors That Complicate Conclusions About Latinos’ Constitutional Status

These citation anomalies, however, are not the only factors that create a question about when Latino population groups should be found to constitute a suspect class under the Fourteenth Amendment and about which ethnic population groups should be included. Three other considerations also aggravate the confusion. The first is a theoretical argument that because the “Civil War amendments were

⁴³ *Id.*

⁴⁴ *Id.* at 1327 (Wilson, J., concurring) (emphasis added).

⁴⁵ *Id.* at 1329–30 (Barkett, J., dissenting). Note that the judge did not find a difference between the terms “Hispanos” and “Latin Americans.”

⁴⁶ 430 U.S. 482, 495 (1977) (“[I]t is no longer open to dispute that Mexican-Americans are a clearly identifiable class.”).

⁴⁷ 438 U.S. 265, 292 (1978) (indicating in a parenthetical that *Hernandez* involved Mexican Americans).

⁴⁸ 411 U.S. 924, 927 (1973) (Douglas, J., dissenting) (describing that *Hernandez* involved discrimination against persons of Mexican descent).

⁴⁹ 488 U.S. 469, 523 (1989) (Scalia, J., concurring) (indicating in a parenthetical that *Hernandez* involved Hispanics more generally).

aimed at redressing injustices to blacks, principally slavery," the Equal Protection Clause conceptualizes a "black-white" racial binary that becomes ill suited to protect other racial minority groups.⁵⁰ Simply, the historical black-white paradigm does not incorporate the experiences of Latinos and other minority groups.⁵¹ Courts thus have difficulty using the Equal Protection Clause to redress discrimination against non-black minority groups when that discrimination takes a form that has not been traditionally experienced by blacks.⁵² This implication is particularly relevant for Latinos in the context of discrimination based on their use of the Spanish language and their immigration status. As Professor Angela Harris wrote, "[T]he assumption that rights and especially remedies crafted for a biracial society will fit a multiracial" society has become "increasingly problematic" as the United States becomes a nation of many minorities, including Latinos, "rather than a nation of black and white."⁵³ Finding Latinos to be a suspect class may require new judicial investigations and evaluations.

A second consideration as to why the courts have found it difficult to define Hispanics as a suspect class drawn by racial lines is because of the supposed inherent racial instability of this population group.⁵⁴ Hispanics' fluctuating racial status on the United States Census acutely demonstrates what some scholars consider to be Latinos' "racial indeterminacy."⁵⁵ The census first began counting Mexicans in 1930 and made "Mexican" a separate race category.⁵⁶ The Census Bureau, however, eliminated this category in the 1940s and instead created a category for "the White population of Spanish mother tongue."⁵⁷ This new category required interviewers "to report all Mexicans as

50 Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1190 (1997) (reviewing LOUISE ANN FISCH, *ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE* (1996)).

51 Enid Trucios-Haynes, *Why "Race Matters": LatCrit Theory and Latina/o Racial Identity*, 12 LA RAZA L.J. 1, 8 (2000-2001) ("Racial inequality in this country is assessed through the prism of the Black-White paradigm and Latinas/os are rendered invisible in this construct of race relations.").

52 See Crook, *supra* note 26, at 28-29 (noting how the black-white paradigm marginalizes the struggles of non-black minority groups such as Latinos).

53 Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 852 (1997) (quoting ANGELA HARRIS, *WHAT WE TALK ABOUT WHEN WE TALK ABOUT RACE* (1997)).

54 See Crook, *supra* note 26, at 32 (describing the unwieldy nature of Latino identity).

55 *Id.*

56 Patricia Palacios Paredes, Note, *Latinos and the Census: Responding to the Race Question*, 74 GEO. WASH. L. REV. 146, 151 (2005).

57 *Id.* (internal quotation marks omitted).

white, unless the interviewer determined [that] the person was definitely Indian or another non-white race.”⁵⁸ In 1980, the census began asking all respondents whether they were “Of Spanish/Hispanic origin or descent,” and since 2000, the census has asked respondents to identify themselves ethnically as “Hispanic or Latino” or “Not Hispanic or Latino,” and racially as one or more of six race categories.⁵⁹ These racial categories are American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; White; or “Some Other Race.”⁶⁰ Despite the Census Bureau’s attempts to separate Latino ethnicity from racial identity, many Latinos indicate in the “Some Other Race” category that they racially identify as “Latino.”⁶¹

Thus, the evolution in how the United States government classifies Latinos and the dynamics of Latino self-identification make it unsurprising that the courts have been reticent to definitively create a per se suspect class for the Latino “race” as it has done for African Americans. The result of this “Latina/o indeterminate racial group identity,” as argued by Professor Enid Trucios-Haynes, has more broadly been that discrimination against Latinos has been ignored and remained unredressed.⁶² Accordingly, the history of both the Fourteenth Amendment and the census demonstrate why finding a definitive suspect racial classification for minority groups as a judicial remedy for discrimination has been a poor fit for Latinos.

A more modern phenomenon becomes a third aggravating factor to the confusion about Latinos’ constitutional status under the Equal Protection Clause. Persons of Mexican descent historically made up an enormous percentage of the Latino population,⁶³ and thus a discussion by the courts about the status of Mexican Americans, as opposed to a discussion about the status of a broader Latino classification, was sensible.⁶⁴ As immigration from a broad range of countries

58 John A. Powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 *FORDHAM URB. L.J.* 1395, 1408 (2002).

59 Crook, *supra* note 26, at 33.

60 *Id.*

61 *Id.*; Paredes, *supra* note 56, at 152.

62 Trucios-Haynes, *supra* note 51, at 33 (arguing that Latinos’ identity encourages discrimination against them).

63 See *U.S. Hispanic Population Is Up 34% Since 1980*, *N.Y. TIMES*, Sept. 7, 1988, at A20, available at <http://www.nytimes.com/1988/09/07/us/us-hispanic-population-is-up-34-since-1980.html> (stating that Mexicans make up the largest group of Hispanics in the United States).

64 See EILEEN PATTEN, PEW RESEARCH CTR, *STATISTICAL PORTRAIT OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES, 2010*, at tbl.8 (2012), <http://www.pewhispanic.org/2012/02/21/statistical-portrait-of-the-foreign-born-population-in-the-united-states-2010>

in Central and South America continues into the twenty-first century, however, the diversity within the Latino classification will continue to increase. While the rates of immigration from Mexico have slightly decreased from a period before 1990 to after 2000, the immigration rates from other countries in Central America and South America have moderately increased.⁶⁵ These dynamic immigration patterns quickly increase the number of naturalized and U.S.-born citizens considered to be Latinos who are not of Mexican descent.⁶⁶ The Mexican American classification can no longer be considered a stand-in for a Hispanic classification. Case law, notably not citing to *Keyes*, that assumes Hispanics to be a cognizable class based on evidence associated almost solely with Mexican Americans is thus of weak precedential value. This case law inadequately supports a finding that Latinos, a group made up of citizens from nearly twenty countries, are truly a single suspect class.

Examples of this questionable case law from the Supreme Court are *Bush v. Vera*⁶⁷ and *League of United Latin American Citizens v. Perry*.⁶⁸ In *Bush*, the Court "simply accepted"⁶⁹ that Hispanics constituted a racial group, and it struck down a majority Hispanic district as unconstitutional racial gerrymandering.⁷⁰ In *Perry*, the Court treated Latinos as a racial group able to assert a violation of the Voting Rights Act in a redistricting case.⁷¹ Crucially, however, both of these cases came from Texas, a state in which Mexican Americans are essentially the only Latino subpopulation.⁷² There is scant evidence in either case that the Supreme Court conceptualized its Hispanic classification as encompassing minority groups besides Mexican Americans in the Texas counties. In addition, the Ninth Circuit, again not citing to *Keyes*, announced that "Hispanics have long been recognized as a 'distinctive' group in the community,"⁷³ but it cited principally to *Cas-*

(noting the extraordinary size of the Mexican-American population when compared to the size of other Latino ethnic groups in 1988).

65 *Id.*

66 *See id.* at tbl.6.

67 517 U.S. 952 (1996).

68 548 U.S. 399 (2006).

69 *Valle v. Sec'y for the Dep't of Corr.*, 478 F.3d 1326, 1331 (11th Cir. 2007) (Barkett, J., dissenting).

70 *Vera*, 517 U.S. at 973–95.

71 *Perry*, 548 U.S. at 427.

72 *See* PEW RESEARCH CTR., HISPANIC POPULATION IN SELECT U.S. METROPOLITAN AREAS, 2010 (2013), <http://www.pewhispanic.org/hispanic-population-in-select-u-s-metropolitan-areas> (showing that the Latino population in San Antonio, Texas, for example, is over ninety percent Mexican).

73 *United States v. Rodriguez-Lara*, 421 F.3d 932, 941 (9th Cir. 2005).

taneda, a case that only considered the status of Mexican Americans.⁷⁴ Thus, while facially supporting the idea that Hispanics are conclusively a suspect class, these Supreme Court and Ninth Circuit cases show that such a finding is in fact still unsettled.

D. National Origin Classifications Are Insufficient and the Court Should Definitively Find Latinos to be a Suspect Class

In 1989, the Second Circuit, despite finding that Hispanics were a cognizable class, admitted that “issues may arise as to whether a particular individual is properly included within the category of ‘Hispanics.’”⁷⁵ Now, twenty-five years later, such issues have come to the fore. The problematic citations to and extension of *Hernandez*, the theoretical incongruence of the Equal Protection Clause remedies for non-black minorities, the historical “racial flexibility” of the Latino population, and the increasing diversity within the Latino population have muddled the conclusions about whether Latinos in fact constitute a suspect class and about who is included in this racial or ethnic classification. While these conclusions have become increasingly ambiguous, the public perception of Latinos as a unified and established minority group has dramatically increased.⁷⁶ Sociologist Cristina Mora has researched what she calls the “institutionalization of Hispanic panethnicity in the United States.”⁷⁷ She explains that in the 1960s and 1970s, the Latino communities were geographically, culturally, and politically disparate, but by 1990, through a congruence of various factors, a united Hispanic identity emerged.⁷⁸ Today, a “networked chorus of state, market and civic organizations . . . loudly insist on the real existence of the Hispanic vote, the Hispanic market and the Hispanic community.”⁷⁹ Other scholars have also remarked that Latinos are consistently considered a concrete racial group in “public policy debates about government benefits, immigration law, [and] affirmative action.”⁸⁰ This juxtaposition of confusing Supreme Court precedent about whether Latinos constitute a cognizable class

74 *Castaneda v. Partida*, 430 U.S. 482, 483–85 (1977) (describing how the case involved discrimination against Mexican Americans in the grand jury selection process).

75 *United States v. Alvarado*, 891 F.2d 439, 444 (2d Cir. 1989), *vacated on other grounds*, 497 U.S. 543 (1990).

76 See G. Cristina Mora, *Hispanic Panethnicity*, *BERKELEY REV. LATIN AM. STUD.* 7 (2011–2012), <http://clas.berkeley.edu/Publications/Review/Fall2011/pdf/BRLAS Fall2011-Mora.pdf>.

77 *Id.* at 9.

78 *Id.* at 7–8.

79 *Id.* at 11.

80 Trucios-Haynes, *supra* note 51, at 17.

with a clear social perception of an established minority group is troubling. The Court ought to resolve this tension by clarifying its case law.

Critics may argue, however, that the social perception of Latinos as a definite minority group is not a proper legal argument to support a finding that Latinos are a recognizable suspect class under the law. Critics may further point to the fact that under current Equal Protection Doctrine, the classifications of various national origin groups (i.e., Puerto Rican Americans, Cuban Americans, etc.) that would likely be included in the Latino category already receive heightened scrutiny based on these national origin classifications. Thus, they argue, a new legal classification for Latinos is unnecessary. Even without establishing a Latino classification, it must be acknowledged that courts will apply heightened scrutiny to legislation that explicitly creates disparate treatment for Latin American national origin communities.⁸¹ But it is in the context of facially race neutral laws, however, that the solidification and clarification of the broader Latino classification becomes legally important. The Supreme Court announced in *Washington v. Davis*⁸² that laws that are facially neutral as to race and national origin receive heightened scrutiny only if there is proof of a discriminatory purpose.⁸³ Proving a discriminatory purpose behind a facially race neutral law will become relevant for Latinos, particularly in cases challenging the constitutionality of re-districting plans and the enforcement of English-only laws, as both of these types of legislation are considered race neutral.⁸⁴

There are two problems with proving this discriminatory purpose without the solidification of the Latino classification. First, without a broad Latino classification, each national origin group must sue separately to ensure the application of heightened scrutiny. This creates repetitive and inefficient litigation. Second, and more importantly,

81 See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”); see also Jenny Rivera, *An Equal Protection Standard for National Origin Subclassifications: The Context That Matters*, 82 WASH. L. REV. 897, 918 (2007) (“[D]ifferential treatment based on . . . any national origin race surrogate that appears to act like a race marker is subjected to strict scrutiny.”).

82 426 U.S. 229 (1976).

83 *Id.* at 242.

84 The Court has made clear that “[e]lectorate district lines are ‘facially race neutral.’” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (quoting *Bush v. Vera*, 517 U.S. 952, 958 (1996)) (internal quotation marks omitted). Language classifications have also been considered “invariably facially race-neutral.” Andrew P. Averbach, *Language Classifications and the Equal Clause Protection Clause: When Is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481, 499 (1994).

the discrimination experienced by Latinos is not primarily based on being a member of a particular foreign origin group. Professor Jenny Rivera has described how Latinos from various national origin groups experience discrimination because of their national origin and also because they are “perceived to be ‘Latinos.’”⁸⁵ She writes,

[A]n individual of Puerto Rican, Mexican, Cuban, Dominican, or other Latin American descent may experience different treatment not only because the person is part of a Latino [ethnic] population [group] within the United States, but also because the person’s ancestral roots are located within Latin America or the Latino Caribbean.⁸⁶

She also explains how “those hostile to Latinos have relied on Latino homogenization to facilitate the construction of all Latino sub-classification members as foreigners.”⁸⁷ Further, the English-only movement has been described as “an expression of the underlying insecurity about and prejudice towards Hispanics,”⁸⁸ and not as a movement against a particular national origin group. Thus, it is a person’s perceived Latino identity, instead of their membership to a specific national origin group, that becomes particularly relevant to that person’s discriminatory experience. In the context of facially race neutral laws, the discriminatory purpose that must be proved should reflect how persons falling under the “Latino label” experience discrimination as a generalized “outside” group that is not fragmented by national origin distinctions. Simply, the litigated discriminatory purpose should correspond to the discrimination in fact experienced. For these reasons, heightened scrutiny based on national origin classifications is insufficient, and a clarification that the broader Latino population group constitutes a suspect class deserving such heightened scrutiny becomes necessary from both a social and legal perspective.

Amid these arguments, it is crucial to note that the potential for new discriminatory legislation based on negative reactions to the growing Latino political presence is on the rise.⁸⁹ The enormous influx of cultures has led to a growing anti-immigrant sentiment, and nativism is emerging as a counterforce growing in reaction to an in-

⁸⁵ Rivera, *supra* note 81, at 919, 927.

⁸⁶ *Id.* at 919.

⁸⁷ *Id.* at 906.

⁸⁸ Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 294 (1989).

⁸⁹ Carmen B. Tigreros, Note, *Constitutional Challenges to Official English Legislation*, 12 ST. JOHN’S J.L. COMMENT. 295, 318 (1996) (describing how in response to changing trends, the majority, by passing racially biased legislation, is discriminating against immigrants).

creasing number of minorities asserting constitutional rights.⁹⁰ The rise of the English-only movement is an example of the influence of such nativist and reactionary attitudes.⁹¹ It is fueled by prejudice against Hispanics and has resulted, and will continue to result, in discriminatory laws against them.⁹² To ensure equality in this dynamic time, it is important to apply heightened scrutiny to such laws and state actions that may discriminate against Latinos. The time is ripe to clarify that Latinos are in fact a cognizable suspect class.

II. WHY THE COURT'S CURRENT DISCOURSE ON RACE IS PROBLEMATIC AND THE SEARCH FOR A NEW FRAMEWORK

A. *The Court's Understanding of Race as a Biological Concept Is Misleading*

To definitively create a Latino cognizable class, the Court must examine the ways in which it describes racial categories to ensure that a Latino classification will fit within its current suspect class jurisprudence. This may consequently require the Court to understand race in a nuanced fashion that acknowledges the diversity and dynamics of the Latino population. Presently, however, the Court embraces a limited notion of race as a fixed, biological essence.⁹³ Several examples follow. To begin, in *Regents of the University of California v. Bakke*,⁹⁴ Justice Brennan wrote that "race, like gender and illegitimacy, . . . is an immutable characteristic which its possessors are powerless to escape or set aside."⁹⁵ In addition, the Court asserted in *Frontiero v. Richardson*⁹⁶ that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."⁹⁷ Justice Potter

⁹⁰ *Id.* at 309, 318.

⁹¹ *Id.* See Jeffrey D. Kirtner, Note, *English-Only Rules and the Role of Perspective in Title VII Claims*, 73 TEX. L. REV. 871, 897 (1995) ("[T]he English-only rule must be viewed in the context of an often hostile relationship between Hispanics and the dominant culture.").

⁹² Califa, *supra* note 88, at 294 (explaining that the English-Only movement is an expression of the underlying insecurity and prejudice towards Hispanics).

⁹³ Susan Kiyomi Serrano, *Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only*, 19 U. HAW. L. REV. 221, 235 (1997); see Crook, *supra* 26, at 20 (finding that the Court has moved towards a "formalistic understanding of racial identity as biology, devoid of historical or social meaning"); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 4 (1991) (noting that the Court often uses a formalized conception of race that is unrelated to ability, disadvantage, or moral culpability).

⁹⁴ 438 U.S. 265 (1978).

⁹⁵ *Id.* at 360 (Brennan, J., concurring in part and dissenting in part); see also Serrano, *supra* note 93, at 235 (describing examples of the Court's reliance on immutable, biological race).

⁹⁶ 411 U.S. 677 (1973).

⁹⁷ *Id.* at 686.

Stewart made a similar pronouncement in his dissent in *Fullilove v. Klutznick*,⁹⁸ in which he wrote, “The color of a person’s skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, [or] moral culpability.”⁹⁹

Further, in *Saint Francis College v. Al-Khazraji*,¹⁰⁰ the Court purported to recognize that “racial classifications are for the most part sociopolitical, rather than biological, in nature,”¹⁰¹ but appeared unable to reject the concept of biological race. Justice Byron White, writing for the Court, ultimately agreed with the lower court that 42 U.S.C. § 1981 “reaches discrimination against an individual ‘because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.’”¹⁰² Lastly, in oral arguments for *Astroline Communications Co. v. Shurbey Broadcasting of Hartford, Inc.*,¹⁰³ Justice Antonin Scalia stated that a policy of granting minorities broadcasting licenses was reduced to a question of “blood, . . . blood, not background and environment.”¹⁰⁴

This conception of racial identity as a matter of biology, devoid of social and historical meaning, is extremely problematic for two reasons. First, as will be further discussed below, the rejection of race as a scientific concept by biologists and anthropologists is now nearly complete.¹⁰⁵ In fact, the idea that races exist in nature has been described as “abandoned” by science.¹⁰⁶ Second, due to a history of colonization, slavery, and intermarriage, the Latino population group encompasses “a variety of national origins, cultures, and languages, not to mention racial phenotypes.”¹⁰⁷ These historical dynamics

98 448 U.S. 448 (1980).

99 *Id.* at 525 (Stewart, J., dissenting).

100 481 U.S. 604 (1987).

101 *Id.* at 610 n.4.

102 *Id.* at 613 (quoting *Al-Khazraji v. Saint Francis Coll.*, 784 F.2d 505, 517 (3d Cir. 1986)); see also Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 16–17 (1994) (describing how the Court has been unwilling to sever race from biology).

103 *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (opinions consolidated), *vacated as moot*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

104 Oral Argument at 21:19, *Astroline Commc’ns Co. v. Shurbey Broad. of Hartford, Inc.*, 497 U.S. 547 (No. 89-700), available at http://www.oyez.org/cases/1980-1989/1989/1989_89_700.

105 See López, *supra* note 102, at 16; Paredes, *supra* note 56, at 150 (describing how most modern scholars agree that race is socially constructed).

106 IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 100 (1996). See generally STEPHAN JAY GOULD, *THE MISMEASURE OF MAN* (1981); NANCY STEPAN, *THE IDEA OF RACE IN SCIENCE: GREAT BRITAIN, 1800–1960*, at 170 (1982) (explaining that in the late 1950s and 1960s, “[r]ace simply no longer occupied the centre of the scientific stage as it once had done”).

107 Crook, *supra* note 26, at 31.

mean that the diverse Latino population will not fit within a narrow and biological conception of race. Ultimately, if the Court continues to rely on its flawed conception of race, it is likely to leave the status of a Latino racial classification in jeopardy. It will be unable to clarify that Latinos are a suspect group, like African Americans, because it will have difficulty conceiving the Latino group as a race as the term is currently understood. As Professor Trucios-Haynes stated, Latinos will not be "fully protected by anti-discrimination law because they do fit within a narrow biological definition of race that focused [sic] on color and bloodlines."¹⁰⁸

B. The Court Must Understand Race to be a Social Concept

The Court must finally accept the overwhelming scientific and anthropological research that shows that race is in fact a social construct.¹⁰⁹ This new understanding will align Supreme Court doctrine with well-settled scientific findings and will consequently better accommodate a Latino racial classification for suspect class analysis. The Court must accept that modern science has recognized that race does not have a biological component and that racial classifications are largely arbitrary.¹¹⁰ Features usually "coded to race, for example, stature, skin color, hair texture, and facial structure, do not correlate strongly with genetic variation."¹¹¹ Indeed, genetic differences between individuals considered to be from the same race are often greater than the differences between individuals of different races.¹¹² Instead, races are created through social and political processes.¹¹³ Race theorists Michael Omi and Howard Winant define race as "a concept which signifies and symbolizes social conflicts and interests

¹⁰⁸ Trucios-Haynes, *supra* note 51, at 17.

¹⁰⁹ See López, *supra* note 102, at 16 ("The rejection of race in science is now almost complete."); Paredes, *supra* note 56, at 150 (describing how most modern scholars agree that race is socially constructed).

¹¹⁰ Paredes, *supra* note 56, at 149 (discussing the social construction and arbitrary nature of race).

¹¹¹ López, *supra* note 102, at 15.

¹¹² Paredes, *supra* note 56, at 149 ("[I]t has been found that differences between individuals of the same race are often greater than the differences between the 'average' individuals of different races." (quoting *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987)) (internal quotation marks omitted)).

¹¹³ DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RECREATE RACE IN THE TWENTY-FIRST CENTURY* 5 (2011) ("These racial reclassifications did not occur in response to scientific advances in human biology, but in response to socio-political imperatives.").

by referring to different types of human bodies.”¹¹⁴ Similarly, critical race scholar Ian Haney López writes, “Race can be understood as the historically contingent social systems of meaning that attach to elements of morphology and ancestry.”¹¹⁵

While advocating for a shift in the conception of race may appear dramatic, it in fact only calls for a return to the Court’s Civil Rights Era sensibilities.¹¹⁶ As discussed above, in *Hernandez*, Chief Justice Warren examined the social stigma and exclusion of the Mexican American communities in Jackson County, Texas and found that Mexican Americans constituted a suspect class for equal protection purposes.¹¹⁷ Chief Justice Warren reviewed sociopolitical factors instead of relying on a finding that Mexican Americans were biologically distinct from Whites and African Americans. Moreover, because judges play an important role in reflecting and shaping our society’s dominant understanding of race,¹¹⁸ judges have a societal obligation to align their equal protection jurisprudence with modern science. Scholars have remarked that it is “astounding how much our perception of race is law-oriented”¹¹⁹ and have noted that courts “not only decide disputes, they also transform particular legal controversies and rights claims into larger public messages.”¹²⁰ The Court thus has a responsibility to analyze race in a sensible way that reflects its actual social, rather than biological, foundations. Through this necessary realignment, the Court will consequently develop a framework that will better accommodate a Latino racial classification for equal protection purposes.

114 MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S, at 55 (2d ed. 1994) (emphasis omitted).

115 LÓPEZ, *supra* note 106, at 14.

116 Crook, *supra* 26, at 20 (“The Court has moved away from a Civil Rights Era sensibility that understood racial subordination as a primary force in the ordering of U.S. society, toward a formalistic understanding of racial identity as biology, devoid of historical or social meaning.”).

117 See Part I.B (discussing Justice Warren’s decision in *Hernandez* as to the subjugation of Latinos).

118 See Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1591 (1997) (“Legislators and judges reflect society’s dominant understanding of race.”).

119 *Id.* at 1588 (describing the role of the law in the perception of race).

120 Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians’ Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 20–21 (1994).

C. *Searching for a New Framework to Take the Social Construction of Race into Account*

Such realignment, however, will not be easy to accomplish. The race-as-biology definition appears ingrained in both modern Supreme Court case law and in public discourse. Properly acknowledging the social foundations of race will not be as simple as providing a new definition of the word "race" each time that it is used. The popularized conception of race as genetics remains powerful and will conceivably overcome efforts to merely redefine the term "race," a redefinition likely to be relegated to a footnote in legal opinions.

But attempting to remove the term because it is too often used erroneously is a futile pursuit as well. Race theorists Omi and Winant posed the questions, "If the concept of race is so nebulous, can we not dispense with it? Can we not 'do without' race, at least in the 'enlightened' present?"¹²¹ They concluded that "race" cannot be dispensed with because "despite its uncertainties and contradictions, the concept of race continues to play a fundamental role in structuring and representing the social world."¹²² Even if the biological basis for race is an illusion, race is not imaginary.¹²³ In fact, regardless of how race is defined, it is one of the first "attributes" we notice about a person when we meet them for the first time.¹²⁴ Further, as evidenced by the way Americans classify themselves as being of a certain race on the U.S. census, race is also important for self-identification.¹²⁵ Thus, to properly acknowledge the social construction of race within its suspect class analysis framework, the Court must resist both merely redefining the term and doing away with it altogether. Accordingly, the Court needs a new vocabulary that both signifies a clean break from the race-as-biology concept and acknowledges the importance of race in our society.

121 OMI & WINANT, *supra* note 114, at 55.

122 *Id.*

123 ROBERTS, *supra* note 113, at 5 (refuting the idea of race as an imaginary concept).

124 *See* OMI & WINANT, *supra* note 114, at 96.

125 *See* LÓPEZ, *supra* note 102, at 20 ("To cease speaking of races . . . would hinder our understanding of the way people think about their daily lives . . .").

III. USING AN “OTHERIZATION” THEORY AS A NEW FRAMEWORK FOR FINDING RACIAL CLASSIFICATIONS

A. *Said’s Orientalism and How It Fits in Public and Scholarly Discourse*

The late Edward Said, through his seminal work *Orientalism*,¹²⁶ can provide such a new vocabulary and framework for the Court. *Orientalism*, as both the title and the book’s dominant theory, examines the ways in which the Western world perceives the Arab world, what he terms the Orient.¹²⁷ Said explains that in conceptualizing the Middle East, Europe and the United States developed a clear “us” versus “them” schema. He writes, “Orientalism was ultimately a political vision of reality whose structure promoted the difference between the familiar (Europe, the West, ‘us’) and the strange (the Orient, the East, ‘them’).”¹²⁸ He notes that “[m]en have always divided the world up into regions having either real or imagined distinction from each other”¹²⁹ and that no cultural distinctions were made between the various Arab countries as all Arabs were conflated into a single “Oriental” category.¹³⁰ He remarks that this binary between the West and the East helped to establish political conceptions of “Western superiority and Oriental inferiority.”¹³¹ The “Oriental” becomes a “subject race”¹³² and “the Other” who remains a stranger and foreigner to the Western world of rationalism and maturity. Simply, Said’s theory of orientalism describes how the “Oriental” becomes “otherized” by Western society.

It is striking how well modern theories of racial formation correspond with Said’s theory of orientalism. He explains how the Arabs came to be considered an inferior race through social and political processes of creating imagined boundaries between different cultures. We can universalize this orientalism to examine the ways in which our American society has “otherized” various minority groups and found them to be a “race” by drawing clear lines between different population groups. For example, Professor López describes the racial line drawing in which white Americans engaged in the context

126 SAID, *supra* note 13.

127 *Id.* at 1.

128 *Id.* at 43–44.

129 *Id.* at 39.

130 *Id.* at 37–38 (“One of the convenient things about Orientals for Cromer was that managing them, although circumstances might differ slightly here and there, was almost everywhere nearly the same.”).

131 *Id.* at 42.

132 *Id.* at 44.

of naturalization laws in the early nineteenth century.¹³³ He remarks how "blacks [were] constructed as lazy, ignorant, lascivious, and criminal . . . [while whites were constructed] as industrious, knowledgeable, virtuous, and law-abiding" and how South Asians and other aliens were considered to be of an inferior character to whites.¹³⁴ He describes how "Whites fashion an identity for themselves that is the positive mirror image of the negative identity imposed on people of color"¹³⁵ much in the same way that Said describes how the Western world constructed a negative identity for the Arab world.

Orientalism theory and the process of "otherization" thus provide the courts with a crucial new vocabulary that recognizes the ways in which racial distinctions have been socially constructed in our society. It provides an intellectual tool kit from which the Court can rework suspect class analysis. In determining which groups constitute a racial classification deserving heightened scrutiny, the Court should no longer ask whether a group constitutes a biological race or even whether a group has become racialized through social and historical processes. Instead, to determine which groups constitute a racial classification, the Court should ask whether a group has become "otherized" by the dominant Anglo-American society. By asking this new question, the Court will develop an analysis that properly foregoes a biological discussion, adequately acknowledges the social construction of race, and ultimately reflects the social and political reality of the way that diverse Americans are perceived and racially differentiated in our society. Importantly, this new "otherization" framework will also make it likely that Latinos, a diverse population group often described as outsiders who do not speak English and who do not share American values,¹³⁶ will be found to be a racial classification under the Equal Protection Clause. Fundamentally, this "otherization" framework will provide the Court with the tools with which to clarify and solidify the Latino racial classification.

A recent series of articles in the *New York Times*¹³⁷ shows how despite the seeming theoretical nature of Said's orientalism theory,

133 LÓPEZ, *supra* note 106, at 28.

134 *Id.*

135 *Id.*

136 See e.g., Trucios-Haynes, *supra* note 51, at 20 (describing how racism burdens the lives of Latinos and how racism is evident in recent public policy debates about immigration reform in which Latinos are racialized and are viewed as non-white in the U.S. racial caste system).

137 *Crossing the Line Between 'Immigrant' and 'American,'* ROOM FOR DEBATE, N.Y. TIMES (Nov. 15, 2012), <http://www.nytimes.com/roomfordebate/2012/11/15/how-immigrants-come-to-be-seen-as-americans>.

Said's "otherization" concerns are popular in public discourse today. This series of articles, collectively entitled "Crossing the Line between 'Immigrant' and 'American,'" asks the question, "Why are some immigrants and their descendants considered simply 'American,' while others are still thought of as 'outsiders'?"¹³⁸ These articles implicitly acknowledge a societal organization schema of "us" versus "them," especially in the context of Latino immigrant communities.

Moreover, the late constitutional scholar John Hart Ely echoes Said's schema, demonstrating that Said's analysis is not foreign to the equal protection academic discourse. Ely makes a distinction between "us-they" and "they-they" classifications made by white legislators when drafting laws.¹³⁹ He argues that both of these classifications are typically based on stereotypes but that the danger is greater in "us-they" classifications that "we will overestimate the validity of the proposed stereotypical classification by seizing upon the positive myths about our own class and the negative myths about theirs."¹⁴⁰ Thus, laws that draw an "us-they" distinction, particularly in the context of race, in which legislators draft laws favoring their own racial group and disfavoring another racial group, should be subject to heightened scrutiny.¹⁴¹ Ely's analysis echoes Said's "us" versus "them" political framework. In addition, Said's orientalism framework relieves scholars' concerns that the Equal Protection Clause will only properly address discrimination against African Americans¹⁴² because the "otherization" framework examines the unique discriminatory experiences of different groups to determine whether these groups have in fact been "otherized."

Further, Professor Bruce Ackerman has recommended that the courts modernize the suspect class analysis rationale¹⁴³ presented in

138 *Id.*

139 John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933 n.85 (1973).

140 *Id.* at 934 n.85.

141 *Id.* at 933-34 n.85; see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 159-60 (1980) ("A statutory distinction built on a comparison of the qualifications of optometrists and opticians occupies an in-between position, since neither of the groups being compared is one to which most of the legislators belong. Such a law—and most legislative classifications are of this 'they-they' contour—may lack the special safeguard that a self-deprecating generalization seems to provide, but it also lacks the unusual dangers of self-serving generalization and is consequently correctly classified as constitutionally unsuspecting." (footnote omitted)).

142 *See supra* notes 50-53 and accompanying text.

143 Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723-24 (1985).

Carolene Products,¹⁴⁴ and Said's framework fits well within his proposal. Ackerman explains that *Carolene Products* predicated the need of heightened scrutiny on the relationship between societal prejudice and the historic and then-existing political exclusion of minorities.¹⁴⁵ He describes that today, however, prejudices still persist despite the greater inclusiveness of our political process.¹⁴⁶ Instead of doing away with the *Carolene Products* rationale for offering special protection to stigmatized racial and ethnic groups in light of their improved political participation, he suggests that courts shift focus to one of the key words in the famous footnote: "prejudice."¹⁴⁷ He asserts that courts must critically examine persistent prejudices by applying heightened scrutiny to laws perhaps motivated by these prejudices.¹⁴⁸ Said's "otherization" question is an excellent mechanism for examining these prejudices because it analyzes the ways in which groups conceptually differentiate themselves from other groups. Thus, Said's framework corresponds neatly with a modernized interpretation of *Carolene Products*, a case which is key to the very development of heightened scrutiny for racial and ethnic groups.

B. Addressing Likely Critiques

Despite the ways in which Said's theories fit within both public discourse and current legal scholarship, a likely critique is that Said's anthropology, sociology, and political science research is not suited to American judicial decision-making. The argument is that his work is beyond the expertise of the Court and thus should not be included in legal opinions. Returning again to *Carolene Products*, it is clear that one of the rationales for developing suspect class analysis was the necessity of safeguarding "discrete and insular minorities" for whom the political process offers insufficient protection.¹⁴⁹ This rationale, however, is inherently a political science argument, and it turns out to be unsound. Professor Ackerman points out that discreteness and insu-

144 United States v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see Part IIA for an explanation of the traditional rationale.

145 Ackerman, *supra* note 143, at 715 (describing how the Court decided to give special protection to those who had been deprived of their fair share of political influence).

146 *Id.* at 717 ("[D]espite the existence of pervasive social prejudice, minorities can and do participate in large numbers within the normal political process.").

147 *Id.* at 731 ("I have meant to emphasize how heavy a burden the idea of prejudice must carry in the overall argument for *Carolene Products*.").

148 *Id.* at 741 ("*Carolene's* emphasis on 'prejudice,' however, announces a . . . different[] conception of judicial review. Here the courts do not enter as the perfecters of pluralist democracy, but as pluralism's ultimate critics.").

149 *Carolene Prods.*, 304 U.S. at 152–53 n.4.

larity will normally be a source of significant bargaining advantage, not disadvantage, in the American political system.¹⁵⁰ He argues that judges should instead “protect groups that possess the opposite characteristics from the ones *Carolene* emphasizes—groups that are ‘anonymous and diffuse’ rather than ‘discrete and insular’” because it has been these groups that have been “systematically disadvantaged” in our democracy.¹⁵¹ Thus, in truth, the Court has been relying on political science theory in suspect class analysis for decades, and the introduction of Said’s theories will help to ensure that the political logic behind the application of heightened scrutiny to minority groups is in fact reliable.

Further, the practice of deciding who falls into socially constructed racial categories is not foreign to the Court. In every naturalization act from 1790 until 1952, Congress restricted naturalization to “white persons,” and the Court examined the racial construction of “Whiteness.”¹⁵² Essentially, the Court was operating within a clear “us” versus a “non-white them” schema. It was deciding who was *not* to be considered a foreign “Other” and could therefore become naturalized. From 1909 to 1923, state and federal judges ruled that people of Asian or mixed Asian descent did not qualify as white, but did find Armenians to be white in 1909.¹⁵³ Perplexingly, judges qualified Syrians as “white persons” in 1909, 1910, and 1915, but not in 1913 or 1914; and Asian Indians were “white persons” in 1910, 1913, 1919, and 1920, but not in 1909 or 1917, or after 1923.¹⁵⁴ When making classifications, the Supreme Court announced in 1923 that it would use “familiar observation and knowledge” instead of “speculations of the ethnologist.”¹⁵⁵ The Court adopted the “understanding of the common man” as its interpretive principles, rejecting any role for science in making its determinations.¹⁵⁶ The Court thus recognized that race was socially constructed.¹⁵⁷ If the Court was equipped to turn to popular discourse to examine who is considered “White” for naturalization procedures, then the Court is equipped to use modern political science and sociology research to decide who is considered an “Other” under the Equal Protection Clause. The Court’s analysis

150 Ackerman, *supra* note 143, at 723–24.

151 *Id.* at 724.

152 LÓPEZ, *supra* note 106, at 1, 19.

153 *Id.* at 67.

154 *Id.*

155 *Id.* at 92 (internal quotation marks omitted).

156 *Id.* at 90 (internal quotation marks omitted).

157 *Id.* at 9.

used to exclude and reject can now be powerfully used to include and protect.

Another foreseeable critique of applying Said's orientalism theory is that it reflects dynamic social processes that the Court disfavors. Justice Lewis F. Powell, Jr., argued in *Regents of the University of California v. Bakke*,¹⁵⁸ "[T]he mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation."¹⁵⁹ He refused to allow the level of judicial scrutiny of racial and ethnic classifications to be subject to the "ebb and flow" of "political forces."¹⁶⁰ But as Professor Ackerman has remarked, in a clash between outdated constitutional rhetoric and the political reality, "the constitutional center will not hold."¹⁶¹ The Court ought to rely on evolving political forces, like Said's process of "otherization," if relying on these dynamic processes leads to the most effective present-day protection of minority groups. Said's framework will be based on modern experiences instead of outdated conceptions of race as biology. And as Justice Oliver Wendell Holmes, Jr., wrote,

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed.¹⁶²

To follow Holmes's advice, Said's "otherization" framework will acknowledge the civil rights necessities of our time and the prevalent theories about how we create divisions between population groups in order to better shape our governing equal protection framework. Thus, Said's "otherization" theory is an effective framework from which the Court can solidify and maintain a Latino racial classification.

CONCLUSION

As Omi and Winant pronounced, "Race will *always* be at the center of the American experience."¹⁶³ The goal of this Comment has been to highlight the particular challenges to the Court's creation of

¹⁵⁸ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹⁵⁹ *Id.* at 299 (Opinion of Powell, J.).

¹⁶⁰ *Id.* at 298.

¹⁶¹ Ackerman, *supra* note 143, at 745.

¹⁶² O.W. HOLMES, JR., *THE COMMON LAW* 1 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881).

¹⁶³ OMI & WINANT, *supra* note 114, at 5.

a Latino racial classification and to propose a new framework for the Court to use in clarifying the equal protection status of the Latino population. Edward Said's orientalism theory provides a coherent way for the Court to examine the discrimination experienced by Hispanics and to protect the group from stigmatizing legislation. His theory asks the fundamental question about whether the Latino group has been "otherized," thus deserving a special racial classification and heightened scrutiny. The hope is that this Comment will contribute to the academic dialogue that, in the words of one race theorist, attempts to account "for the role of racism in American law and that works toward the elimination of racism as part of a larger goal of eliminating all forms of subordination."¹⁶⁴

¹⁶⁴ Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 n.7 (1991).