THE LIMITS OF EQUALITY AND THE VIRTUES OF DISCRIMINATION

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ABSTRACT

This Article focuses on the application of antidiscrimination regimes to groups faced with *de jure* and *de facto* discrimination. The suggested approach diverges from the dominant view that discrimination is a purely destructive force. The central argument of this Article is that *de jure*, overt and blatant discrimination, contributes to the creation of a coherent group identity recognized by law, which enables the group suffering from discrimination to obtain remedial relief. In contrast, the law fails to recognize a coherent group identity for *de facto* discriminated against groups and requires these groups to overcome a structural challenge to obtain remedial relief to counter the discrimination. Thus, once one considers both the discriminatory and the remedial phases, groups that are discriminated against *de jure* might be better off than groups that are discriminated against only *de facto*. After establishing the *de jure/de facto* distinction, this Article explores the effects of this distinction on the equal protection claims of discriminated against groups by contrasting the experiences of African-Americans and Mexican-Americans.

INTRODUCTION

"[S]tate power has made a significant difference — sometimes between life and death — in the efforts of Black people to transform their world."

—Kimberle Williams Crenshaw [1]

Imagine discrimination as an advantageous stratagem – unimaginable? Not necessarily. This Article suggests that formal, overt, and blatant discrimination in an early discriminating stage could be helpful by enabling a group suffering discrimination to establish itself, creating group recognition, and positioning itself for antidiscrimination relief at a later, remedial stage.

Antidiscrimination laws are some of the most significant laws that recognize and seek to redress suffering and injustice. They allow formerly discriminated against groups to utilize the legal system to redistribute social power through a variety of remedies. A prerequisite to access these antidiscrimination law remedies is that there be some past or ongoing discrimination. The proposed argument diverges from the dominant view that discrimination is a purely destructive force. In contrast, this Article argues that discrimination can be a positive force inasmuch as it provides legal recognition for a discriminated against group. In other words, sometimes legal

1. Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1382 (1988).

discrimination can make a group better off than it otherwise would be by creating a group cohesiveness that the group can later use to access powerful legal remedies against past wrongs.

This Article advances a novel argument that discriminatory legal rules have potentially important constructive, constitutive value for groups. This notion does not mean that discrimination is good. Rather a specific form of discrimination, namely *de jure* discrimination, not only negatively influences the well-being of the discriminated against group, but also has indirect positive effects on the well-being of the group by improving its ability to access the legal system to fight against this discrimination. In addition to influencing the well-being of the *de jure* discriminated against group, *de jure* discrimination also indirectly influences groups that mainly suffer from *de facto* discrimination. Groups in the latter category often cannot access the legal system the same way that groups in the former category generally can. Thus, once one considers both the discriminatory and the remedial phases, groups confronted with *de jure* discrimination might be better off than groups only facing *de facto*. The explanation for this paradox is simple: it is easier to fight legal battles for a group remedy when a group has already been identified as the "outlawed" and is asking to be "inlawed." In doctrinal terms, this argument is apparent in the prerequisite of Equal Protection Clause jurisprudence that one should be discriminated against due to one's membership in a recognizable, distinct group. Groups that suffer from *de facto* discrimination, as opposed to *de jure* discrimination, face structural barriers in fulfilling this requirement.

The hypothesis is that *de jure* discrimination has important effects. *De jure* discrimination perpetuates the identity of the discriminated against group, it increases the sense of "realness" of the discrimination-based suffering, and it vindicates the group's need for and entitlement to legal redress. Restated, although groups suffering from *de jure* discrimination were brutally excluded from society by the law, they were, at the same time, included in society's primary legal text, received "visibility" (albeit notorious visibility), and were constituted as a legal entity (albeit as a discriminated against entity).[2] These effects become evident through what this Article calls the "streaming from *de jure* discrimination paradigm," a phenomenon in which a group's struggle to become recognized by law as being discriminated against is reinforced when that discrimination is *de jure*. In other words, a group suffering *de jure* discrimination at an early stage, designated as the "discriminating stage," dramatically increases that group's prospects of recognition as a "legally discriminated against group" that enjoys the

2. In typifying "primary legal text" I exclude any non-regulatory official action and include federal and state constitutional provisions, state primary legislation, and local-specific regulations. My usage of this distinction as a version of the *de jure* / *de facto* distinction will be further elaborated at length below.

right to obtain antidiscrimination relief during the later "curing stage."[3] This understanding of the interaction between *de jure* discrimination and legal relief demonstrates that the past existence of *de jure* discrimination is a key factor in determining the quality and quantity of the legal relief later available to the group and in determining how difficult it is for the group to obtain such relief. This Article challenges the justness of the current "streaming from *de jure* discrimination paradigm" and proposes an alternative approach that is more sensitive to different modes of discrimination and thus more effective at fighting both substantive and formal discrimination, whether that discrimination is *de facto* or *de jure*.

This analysis is relevant to any regime where dichotomous *de jure* and *de facto* discriminatory practices exist simultaneously during the discriminatory stage and where antidiscrimination laws are used to remedy past discrimination during the curing stage.[4] Although this Article's theoretical application is more general, to demonstrate its implications, it concentrates on a real world example, contrasting American experiences of African-Americans and Mexican-Americans. The divergent experiences of these groups represent the different remedial treatments available to groups along the scale of *de jure* to *de facto* discrimination and help illustrate the implications of this Article's approach.[5]

African-Americans are the most prominent group to suffer from *de jure* discrimination[6] and represent how "the streaming from *de jure* discrimination paradigm" creates a legally cognizable discriminated against group. This group was the main target of America's *de jure* discrimination. Both slavery and the Jim Crow laws were aimed at African-Americans, creating a state-sponsored, constitutionally-protected system of racial discrimination that took place after the abolition of slavery from 1890 through the mid-twentieth century.[7] Mexican-Americans, on the other hand, do not fit into the *de jure* paradigm and demonstrate why the typical "streaming from *de jure* discrimination paradigm" needs to be revised. Mexican-

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3. The stage of commitment to the "antidiscrimination principle" began gradually after the Civil War and during the Reconstruction, but is much more evident, coherent, and holistic since the mid-20th century. Paul Brest, *The Supreme Court, 1975 Term - Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976). Kimberle Crenshaw marks the abolishment of the Jim Crow legal system as the crucial point of transition into the "formal equality" era. Crenshaw, *supra* note 1, at 1377.

4. During the discrimination stage, all groups are subject to de facto discrimination, while only some of them are also explicitly subject to de jure discrimination.

5. This Article's argument is limited to racial discrimination since it is the hardest category to identify and determine, as opposed to gender-based groups or the group of the disabled, for example.

6. See *infra* text accompanying note 13.

7. For more information about the Jim Crow legal system of segregation, see F. JAMES DAVIS, WHO IS BLACK? 51-70 (1991). For more on the constitutionality of slavery, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 422-431 (4th ed. 2001).

Americans are considered America's "forgotten minority"; indeed, their status as a legally cognizable minority group is fragile even in the present day.[8] Mexican-Americans did not explicitly fall under any of America's *de jure* discriminatory regulations during the Jim Crow era, despite the fact that Mexican-Americans were a substantial minority group at the time.[9] However, although they almost did not suffer from prominent or legally visible *de jure* discrimination,[10] Mexican-Americans did suffer from discriminatory practices such as chronic abuse and segregation.[11] This discrimination was quite similar in its outcome to that suffered by *de jure* discriminated against groups,[12] except that the discrimination against Mexican-Americans did not primarily occur through the use of the formal legal system. To date, despite being the largest minority group in America,[13] Mexican-Americans remain largely invisible in the American antidiscrimination discourse.[14]

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8. Richard Delgado & Vicky Palacios, *Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME L. REV. 393 (1975) (arguing that a huge change has occurred with Mexican-American identity); REYNALDO ANAYA VALENCIA ET AL., MEXICAN AMERICANS AND THE LAW: ¡EL PUEBLO UNIDO JAMÁS SERÁ VENCIDO! 16 (2004).

9. *See* Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 681-84 (1975) (surveying southern states where most Mexican-Americans resided, such as Arizona, California, Colorado, New Mexico, and Texas).

10. This Article does not intend to state that there was no formal regulatory *de jure* discrimination against Mexican-Americans whatsoever. However, this form of discrimination was sporadic and rare. *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 29 (1994) (citing, for example, 113 Cal. Stat. 175 (1855), a Californian regulation known as the "Greaser Act" from 1855, in which vagrancy was banned on "all persons who are commonly known as 'Greasers' or the issue of Spanish . . . blood"). For an exploration of the experience of Mexican-Americans under the legal system of the United States from 1848 to 1946 see Martha Menchaca, *Chicano Indianism: A Historical Account of Racial Repression in the United States*, 20 AM. ETHNOLOGIST 583 (1993). Menchaca's historical review reveals some differentiation between the American discriminatory treatment of Mexicans of Indian descent and Mexicans of European-Spanish descent, in favor of the latter. Mexicans of Indian descent were simply perceived as "Indians" rather than as "Mexicans." *Id.* at 585-91.

11. For a brief history of Mexican-American encounters with the law see Valencia et al., *supra* note 8, at 4-10.

12. Greenfield & Kates, *supra* note 9, at 687.

13. U.S. Census figures identify Latinos as "the largest minority group in the U.S.". Margaret E. Montoya, *A Brief History of Chicana/o School Segregation: One Rationale for Affirmative Action*, 12 BERKELEY LA RAZA L.J. 159, 162 (2001).

14. Eduardo Luna, *How the Black/White Paradigm Renders Mexicans/Mexican Americans and Discrimination Against Them Invisible*, 14 BERKELEY LA RAZA L.J. 225 (2003) (suggesting that Mexican-Americans have not suffered from discrimination or that they never resisted it).

The dominant position of African-Americans over Mexican-Americans in the antidiscrimination discourse has been widely discussed.[15] This Article sheds new light on the discussion and suggests that the difference between the two groups represents the different forms of discrimination suffered by them. Although one may consider it fairly obvious that different types of discrimination lead to different treatment in the discrimination discourse, this specific difference between the groups--where African-Americans have enjoyed genuine legal recognition as a discriminated against group, while Mexican-Americans have not--nonetheless demands further inquiry.

Methodologically, this Article focuses on litigation involving segregation, primarily in education, as the way in which these different groups engage in the discrimination discourse. It traces the various ways in which segregation litigation has contributed to producing legal recognition of groups that have suffered *de jure* segregation and has failed to shape the legal recognition of groups that have suffered primarily from *de facto* segregation. The former have come to be recognized as strong cohesive groups, whereas the latter have acquired at best fragile group recognition.

This Article proceeds in four parts. Part I discusses the intersection of discrimination theories and equal protection theories as they relate to my main argument. Part II explores the advantages of *de jure* discrimination in enhancing the ability of the discriminated against group to obtain *de jure* relief. Part III describes how the current rights discourse fails to acknowledge the process by which groups that suffer from *de facto* discrimination can seek *de jure* relief. The focus in this part is on the ways in which American courts, dealing with segregation litigation in education, have

15. See generally Leslie Espinoza & Angela P. Harris, Afterword: Embracing *the Tar-Baby - LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1596 (1997) (determining a black exceptionalism to other discriminated groups in America); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 16 (1992) (considers the Fourteenth Amendment and its antidiscrimination jurisprudence as tailored to African-Americans' experience). *But cf.* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1219 (1997). Courts do not necessarily uphold the paradigm. *See* Cisneros v. Corpus Christi Indep. Sch. Dist., 324 F. Supp. 599, 606 (S.D. Tex. 1970) (suggesting that "the Mexican-Americans residing in this district have experienced deprivations and discriminations similar to those suffered by the district's Negroes, and they share with the Negro the special problems involved in overcoming existing divisive conditions and the stigma and disadvantage that have accompanied their segregation"). Other scholars contend that the current socioeconomic status of Mexican-Americans is even worse than that of African-Americans. *See* Luna, *supra* note 14, at 229. The 2000 United States Census reveals that Latinos currently comprise the largest minority group and suffer from greater segregation than African-Americans. *See* Montoya, *supra* note 13, at 162. On the shared conceptual prejudice against both groups see RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 74-76 (2001).

failed to apply antidiscrimination law paradigms to Mexican-Americans that have typically suffered from *de facto* discrimination. Part IV argues for the greater use of contextual tools in applying antidiscrimination rules to *de facto* discrimination.

I. THE ANTI-DISCRIMINATION DISCOURSE—LOCATION, LOCATION

This Article's argument is located at the intersection of discrimination and anti-discrimination theories and discourses, and it challenges the traditional conception of the ways in which they intersect. This part discusses the different ways in which the theories and discourses intersect and how this argument affects them.

A. The *De Jure – De Facto* Distinction Discourse

What makes an act "*de jure*" and thus eligible for judicial review? Is a single, concrete decision by a low-level official as *de jure* as a broadly-applicable rule found in a federal statute? Over time, the distinction between *de jure* and *de facto* action has been progressively blurred, and sometimes this distinction signifies little more than a legal conclusion.[16] This ephemeral distinction has been criticized as having an elusive, false jurisprudential effect, enabling the court to draw a thin, changeable line between *de facto* and *de jure* acts.[17] Though fully aware of this criticism and supportive of it, this Article still maintains that at some level the distinction matters; specifically, the distinction matters to the way in which discriminated against groups perceive themselves politically and how others perceive the discriminated against groups. It employs the distinction consciously in its extreme technical sense to make this theoretical point. When using the phrase, *de jure* discrimination, it has a most materialistic, formal meaning, namely discrimination that is affected by overt, explicit, and systematic laws and regulations. *De facto* discrimination, on the other hand, results from actions that are covert and that are less or not formalized in primary legal texts. These two poles of discrimination, nonetheless, are located along a continuum. The more a particular type of discrimination tends toward one of the poles, the more squarely this argument applies.

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16. See John E. Canady, Jr., *Overcoming Original Sin: The Redemption of the Desegregated School System*, 27 HOUS. L. REV. 557, 589 (1990); Joelle S. Weiss, *Controlling HIV-Positive Women's Procreative Destiny: A Critical Equal Protection Analysis*, 2 SETON HALL CONST. L.J. 643, 687-88 (1992).

17. For a challenge of this distinction, in order to demonstrate a *de jure* discrimination that allows for *de jure* relief, see Jorge C. Rangel & Carlos M. Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R-C.L. L. REV. 307 (1972) (challenging the denial of *de jure* discriminated against status for Chicanos in Texas).

The discussion of the role of the *de jure/de facto* distinction in the current discrimination analysis has been somewhat meager and one-dimensional. The Equal Protection Clause of the Fourteenth Amendment restrains only state action and thus primarily counters *de jure* discrimination. This truth has profoundly limited courts' power to confront non-*de jure* discriminatory actions. Since *de facto* discriminatory practices occur with little if any legal record, they are more difficult to track than *de jure* discriminatory practices. Particularly in the struggle for desegregation in education, artificial and blurred lines were drawn between largely similar discriminating acts by public authorities.[18] These arbitrary lines had a devastating effect on the struggle of *de facto* discriminated against groups to overcome such discrimination.[19] In many cases, courts refused to provide relief for complaints made about segregating practices on the grounds that those practices were not *de jure* and thus did not provide grounds for judicial intervention.[20]

The traditional critique of the distinction between *de jure* and *de facto* discrimination is different than the one this Article emphasizes. The traditional critique's main goal is to facilitate a re-conceptualization of *de jure* acts to include acts that are currently perceived as *de facto* with the goal of dismantling the distinction.[21] Rather, this Article stresses that the distinction, though largely unjustified, has some meaningful effects that are ignored in the attempts to normatively abolish the distinction. It proposes a phenomenological insight into the systematic effects of divergent discrimination forms in creating "legally cognized discriminated against groups."

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18. For this conception see the opinions of Justices Douglas and Powell in *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973). The justices criticized this conception and clarified that any discrimination administered by a state agency, regardless of its informal basis, as in the case of a discriminatory unwritten policy and decisions by officials, is a state action under the Fourteenth Amendment. Referring to the Board of Education's acts presented as "*de facto* discrimination," Justice Douglas declared that "each is but another form of *de jure* discrimination" and suggests there should be no constitutional implications to the distinction once the force of law is placed behind the defendants. *Id*. at 216 (Douglas, J., concurring).

19. *Id*. at 218-19 (Powell, J., concurring). Justice Powell suggested abandoning it in favor of adopting a broader conception of constitutional justice. *See* VALENCIA ET AL., *supra* note 8, at 27-28.

20. *See* George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555, 586-603 (1994) (presenting the various petitions declined based on the *de jure/de facto* distinction).

21. *See* Cisneros v. Corpus Christi Indep. Sch. Dist., 324 F. Supp. 599, 617-18 (S.D. Tex. 1970) (reconceptualizing the facts as *de jure* acts). For a comprehensive example of such a project, see Rangel & Alcala, *supra* note 17.

B. The Judicial Protection of Minorities Discourse

The *de jure/de facto* distinction critique is significant to scholarship on the justification for having judicial review that favors discriminated against groups.[22] In his article on the judiciary's legitimate role in protecting minority rights, Bruce Ackerman used an interest-group analysis to reorient the doctrine of judicial intervention in minority rights.[23] Ackerman pointed out the misconceptions embedded in the Supreme Court's "discrete and insular" definition for determining which groups are entitled to judicial protection through the Equal Protection Clause.[24] He specifically argued that the Court has failed to evaluate the real need for judicial intervention on behalf of "anonymous and defused" minorities; Ackerman argued that these groups need protection since they are typically less politically empowered than the "discrete and insular" minorities.[25] This Article's argument follows Ackerman's and, to some extent, criticizes it as ignoring worsened groups in need for judiciary protection, namely, minorities which are "anonymous, defused, and legally absent."

Although Ackerman's argument focuses on the separation of powers and the judiciary's power to nullify discriminatory statutes, it also suggests a broader, enduring role for the judiciary with regard to protecting minorities.[26] Ackerman's analysis presupposes a viable legal recognition of the minority group since he targets the anti-democratic nature of the *de jure* discrimination against such groups.[27] His basic idea is that the less politically effective a discriminated against group is, the more courts are democratically empowered to protect that group.[28] In the case of legally absent minorities, this political weakness is especially pronounced. For example, these minorities lack the "visibility" necessary for the political system to recognize their suffering or to enable them to accumulate political power. These features are heavily influenced by whether a group is discriminated against *de jure* or *de facto*, which underscores the need for a reconsideration of how we define what a minority group is for remedial purposes.

C. The Equal Protection Discourse

Recognition of a group is a prerequisite to that group asserting an Equal Protection Claim for one of its members. But the group recognition

22. *Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065, 1125 (1969).

23. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

24. *Id.* (citing United States v. Carolene Prods. Co., 304 U.S. 144 (1938)).

25. *Id.* at 724.

26. *Id*. at 715.

27. *Id*. at 719.

28. *Id*. at 713-18.

with which this is concerned is not the commonly discussed group classification that is relevant to a determination of which level of judicial review applies to laws affecting that group.[29] A group's desire to be classified as a "suspect category" to receive the highest level of judicial protection is not a struggle to be recognized as a group; thus, this concept of group recognition is unconcerned with what level of judicial review will apply. For example, laws discriminating against women are subject to a lower level of judicial scrutiny than African-Americans, yet women are the clearest legally cognizable group.[30]

In contrast, this Article concerns the group recognition requirement of the Equal Protection Clause that any group challenging a discriminatory act would have enough distinctiveness so as to have standing to raise the discrimination claim.[31] This requirement, although rarely discussed, is crucial in pleading a constitutional violation: "the first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied."[32] The Equal Protection Clause thus incorporates a group-based ideology even while maintaining the individualistic nature of claims.[33] That is, an individual as a member of a group—and the sameness the individual shares with that group—is necessary as a foundation for any individual allegation of discrimination. In this context, the lack of legal group recognition that is evident in *de facto* discriminated against groups, like Mexican-Americans, means that these groups have only a fragile, partial, and hesitant recognition. This limited recognition requires that the group identity be constantly and repetitively reassured before the court in order to win an equal protection claim. Thus, the effects of *de jure* discrimination structurally limit the scope of equal protection that *de facto* discriminated against groups enjoy.

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29. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 685-92 (7th ed. 2004).

30. *See infra* note 41.

31. This prerequisite is different from the "standing doctrine" requisite embedded in Article III of the Constitution. *See* JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 1507-18 (9th ed. 2001).

32. Castaneda v. Partida, 430 U.S. 482, 494 (1977) (quoting Hernandez v. Texas, 347 U.S. 475, 478-79 (1954)).

33. On the individualistic framework of the equal protection clause, see Kevin D. Brown, *The Dilemma of Legal Discourse for Public Educational Responses to the "Crisis" Facing African-American Males*, 23 CAP. U. L. REV. 63, 71-87 (1994). On the role of the clause as protecting groups, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 123-27 (1976). However, I do not rely on a communal perception of the Equal Protection Clause, since even an individual claimant needs to prove membership in a group.

II. FORMAL *DE JURE* DISCRIMINATION AND ITS EFFECTS—A PHENOMENOLOGY

The *de jure/de facto* distinction is important to understanding the way in which discriminated against groups are constructed through the legal text. The distinction affects a group's recognition in various ways through the different stages of discrimination and through the development of antidiscrimination law. The difficulty, however, is that antidiscrimination law was initially designed to redress *de jure* discrimination.[34] Law is one important source from which people draw their sense of reality and "realness." It is one of society's most reliable mechanisms of producing reality or, as others see it, of reflecting reality.[35] It is the place where social consensus and dominant beliefs are being realized.[36] *De jure* discrimination creates "differences" between groups, recognizes those differences, and construes those differences as meaningful in reality. Therefore, the absence of groups—or their "differences"—from society's legal texts might signify their non-existence.[37]

By asserting that legal texts matter, this Article embraces the basic idea of social construction of reality theories in general and, in particular, through law.[38] It treats primary legal texts as a major symbolic instrument in the production of power structures and thereby calls for a problematization of any alleged naturalness of the antidiscrimination discourse. Discriminated against groups, as political categories, are created within particu-

34. It has been argued that the Court is approaching discrimination issues based on the assumption of formal, blatant discrimination even though *de jure* discrimination is almost rare. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 285 (1997) ("As long as . . . blatant barriers do not exist, the Court has difficulty seeing discrimination.").

35. My interest is not in the ideological controversy over the force of law as a sociological move or the law's role in creating social norms. *See* KIMBERLE W. CRENSHAW ET AL., INTRODUCTION TO CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, xxiv (1995).

36. This is reflective of the operation of the democratic system as producing legal rules that reflect "the people's" wishes and beliefs. *See* Ackerman, *supra* note 23, at 719-22.

37. See *infra* text accompanying notes 41-42. By non-existence this Article seeks to avoid the phrase "exclusion," since this phrase presumes existence without recognition. By not mentioning a group, nor by discriminating against it neither by benefiting it, the legal text signifies the group's total non-existence.

38. *See generally* PETER KOLLOCK & JODI O'BRIEN, THE PRODUCTION OF REALITY: ESSAYS AND READINGS IN SOCIAL PSYCHOLOGY (4th ed. 2005) (discussing social construction of reality in general); Gunther Teubner, *How the Law Thinks: Toward a Constructuvist Epistemology of Law*, 23 L. & SOC'Y REV. 727 (1989) (illustrating social construction of reality through the law).

lar regimes of hegemony-power,[39] and the language of law plays an important role in this ongoing process.[40] The effects presented below manifest the influence that *de jure* discrimination has on the construction of a recognized discriminated against group within the antidiscrimination discourse. This phenomenon is distilled through the utilization of different methods from various disciplines, such as the semiotics of law, the rhetoric of law and the sociology of law. Additionally, the effects apply simultaneously to different players and agents in the construction process of recognizing a group as discriminated against. Some of them affect members of the discriminated against group, while others affect the members of the hegemonic group, who in turn shape others inside the legal system (such as regulators, lawyers and judges) and outside of it. By comprising many of these methodological constituents at different levels, the effects themselves organize around their outcomes, meaning that they are presented in correlation to the way they contribute to the process of defining the discriminated against group as a subject for relief implementation.[41]

What follows is a discussion of the effects that the different types of discrimination have on creating a group as a legal entity in the remedial stage.[42] The effects are all relevant to the way in which a discriminated against group's status as a legal entity, with legal relevance to antidiscrimination relief, is generated. However, the effects themselves are somewhat independent from one another and have cumulative influence on the formation of the group as a legal entity, rather than having a gradual, dependent influence where one effect flows from the other. Nevertheless, the common thread between these effects is the way in which they allow the formation of *de jure* discriminated against groups as legal entities and the way the lack of these factors disadvantages *de facto* discriminated against groups.

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39. A hegemonic group in society is the dominant group in society who holds the power to dictate to the others the basic rules upon which that society is founded and through which it operates.

40. For the legal system as the hegemony's powerful device see generally, Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narative*, 97 HARV. L. REV. 4 (1983); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

41. I am less interested in the methodological motivations of the process of recognizing a group as discriminated against. Rather, I focus on the legal aspects and manifestations of this process, understood through the abovementioned methodological constituents.

42. In tracing these different stages, the Article does not intend to expose a coherent, consistent, and gradual progress of the legal discourse on discrimination. Moreover, the different stages must have been infused with and influenced by one another, and they may not even constitute some developmental phases. *See* Garry Peller, *Frontier of Legal Thought III: Race Consciousness*, 1990 DUKE L.J. 758 (1990) (considering some of the stages as a mere reflection of the opposing political ideologies of the integrationist and the nationalist movements in the late 1960s and early 1970s).

The effects of *de jure* discrimination that will be addressed in this Part confine the ability of a group to participate in the remedial stage, thus structurally barring groups that are not victims of *de jure* but of *de facto* discrimination from benefiting in the curing stage. For these "legally absent groups," the antidiscrimination battlefield is especially difficult, since they have to fight for redress in an area where they were never formally acknowledged as injured.

A. The Semiotic Impact of Discrimination

1. *The Distinctiveness Effect*

Discrimination is a form of exclusion that demands the identification and acknowledgment of the party to be excluded. Identifying the characteristics of the subject upon which exclusion is based requires that the subject share distinctiveness in common with the excluded group. From this viewpoint, the discourse of discrimination both causes the "other" to suffer from deprivation and, at the same time, forms that same "other" as a group.[43] Paradoxically, the discriminating discourse retains some maneuvering potential since the legal language that the *de jure* discrimination employs against the groups plays into the hands of these very same discriminated against groups when the remedial stage begins. Discriminated against groups can use the same classifying rhetoric that was used to define and exclude their group for their own benefit. In a sense, then, discriminated against groups are able to trap the legal system by its own definitional creations. A group's distinct existence at the remedial stage is a consequence of their earlier identification as a legally-cognizable entity for the purpose of discrimination. This existence of a "legal entity" means that the discriminated against group need not prove that the group has any "real" or essential existence; rather, the fact that the legal system treated the group as real is sufficient. The legal system, which creates this group identity and knowledge during the *de jure* discrimination phase, cannot ignore or recontextualize the group identity at the remedial stage. Especially for racially categorized groups, whose composition is socially ambiguous and often based on vague characterizations, this effect of the law creating their legal identity is highly valuable in the remedial stage.[44] It should be stressed, however, that this process does not imply that prior to it there were

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43. This notion is compatible with Foucault's perception of discrimination as an instrument for establishing identities and differences. *See* CHRIS HORROCKS & ZORAN JEVTIC, INTRODUCING FOUCAULT 64 (1999).

44. Here racial groups are being contrasted with the cases of other groups; with women, for example, biology provides rather prominent distinctiveness to the group's members.

no meanings of "race" attached to groups such as African-Americans or Mexican-Americans outside the legal apparatus. Rather, racial groups as we know them today within the antidiscrimination discourse were shaped, in part, by the discrimination discourse.[45]

The experience of the African-American group prominently illustrates this effect. The distinctiveness of the group was created through various discriminatory provisions of the law that needed to, and shamelessly did, define what a "Negro" was.[46] These definitions were designed to meet the need to statutorily identify a person for exclusionary purposes.[47] They thereby created an indisputable "African-American legal entity," sustained by a rhetoric that enabled the courts to identify the group and exempted them from justifying their choices of identification. Moreover, the legal system was indifferent to the divergent definitions used to "identify" the group, as the notorious case of *Plessy v. Ferguson*[48] demonstrates. In *Plessy*, the Court considered Louisiana's legal definition of African-Americans to be a matter of state legislative autonomy.[49] The Court specifically refrained from defining the plaintiff's race, indicating that so long as the segregation laws identified him as "colored," his unique racial condition was legally irrelevant.[50] The Court settled for the adoption of the statute's language as the relevant legal definition for identifying the plaintiff's group.[51] Adopting this definition also allowed the Court to ignore strong objections to the notion that there is any "real" biological meaning to race.[52]

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45. This idea is compatible with Ian Haney Lopez's idea that races, as they form part of our discourse today, should not be understood as constructed by the shared history of their members and nothing else, but rather that it was their members' shared history of oppression that shaped these races into their current appearance. *See* Haney Lopez, *supra* note 10, at 38.

46. The Texas statute, for example, identified "Negros" as "all persons of mixed blood descended from Negro ancestry" or "a Negro or person of African descent." PAULI MURRAY, STATES' LAWS ON RACE AND COLOR 443-44 (1997). For the various terms used for "naming" African-Americans, see generally RANDALL KENNEDY, NIGGER – THE STRANGE CAREER OF A TROUBLESOME WORD (2002).

47. For the myriad "naming" of other groups in America who were not whites, see the comprehensive research considering discriminatory legislation all over the U.S. in MURRAY, *supra* note 46.

48. 163 U.S. 537 (1896).

49. *Id.* at 540.

50. The petitioner, as the Court admitted, was "only 1/8 black" and had "Caucasian looks." *Id.* at 542.

51. The Court cited the terms, "white and colored races" from the pertinent Louisiana act. *Id.*

52. Lisa K. Pomeroy, *Restructuring Statistical Policy Directive No. 15: Controversy over Race Categorization and the 2000 Census*, 32 U. TOL. L. REV. 67 (2000) (showing that racial categories are not generic or natural but rather are a social construct). There is a clear discrepancy between the social science acceptance of the social nature of race and the legal system's refusal to accept this notion. *Id*. at 69-70. *See also* Haney Lopez, *supra* note 10.

On the other hand, courts' desire to look to statutory definitions rather than consider racial categorizations on their own initiative stood in the way of Mexican-Americans being recognized as a discriminated against group for remedial purposes.[53] The first case to acknowledge Mexican-Americans as a legally identifiable non-white group was *Hernandez v. Texas*,[54] in 1954, where the Court concluded that the systematic exclusion of Mexican-Americans from jury duty on the basis of their "class" was unconstitutional.[55] Nevertheless, in this decision the Court refused to adopt a broad conception of the affected group and instead pointed to evidence about the local discriminatory practices against Mexican-Americans;[56] thus, the Court established the existence of Mexicans-Americans as an identifiable class only within specific circumstances.[57] The contrasting experience of African-Americans is commonly shown, but is harder to trace, since for the Court, it is unquestioned that the group is identifiable.[58] For example, in *Brown v. Board of Education*,[59] the Court, by introducing the various petitioners from different states as "minors of the Negro race," affirmed and acknowledged petitioners' status as a generally identifiable group.[60] This group recognition not only overarches different geographic areas, but also various realms of discrimination, other than segregation in education, to which the group recognition diffused.[61]

Although celebrated as a landmark step toward achieving legal visibility for Mexican-Americans,[62] *Hernandez* also left a difficult legacy for the group since it relied on a localized rather than nationalized conception of the "group."[63] This localized conception forced later Mexican-American petitioners to bear the heavy cost of repeatedly establishing local discrimination in each case. For example, a plaintiff with a similar claim of dis-

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53. For example, see the cases discussed in Delgado & Palacios, *supra* note 8, in which Mexican-Americans were not recognized as a group for class action and equal protection purposes.

54. 347 U.S. 475 (1954).

55. The Court refused, though, to identify the group on the basis of race or color. For the devastating consequences of this reluctance, see Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1158 (1997).

56. *Hernandez*, 347 U.S. at 479-80 (relating to the local school segregation, local restaurant's segregation, etc.).

57. *Id*. at 479-80.

58. *See infra* text accompanying notes 71-72.

59. 347 U.S. 483 (1954).

60. *Id.* at 487.

61. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (discussing the equal protection claim of a "negro" after the club denied him service); Palmer v. Thompson, 403 U.S. 217 (1971) (discussing the equal protection claims of "Negro citizens"/"black citizens" against local authority which decided that closing a public pool was preferred over desegregating it).

62. *See* VALENCIA ET AL., *supra* note 8, at 16.

63. Hernandez v. Texas, 347 U.S. 475 (1954).

crimination in jury selection in Texas was forced to again prove that he belonged to an identifiable group because his petition related to a different county than the one at issue in *Hernandez*.[64] This legacy caused courts to refuse to recognize the group's standing for purposes of equal protection claims. Even in cases when it was decided that Mexican-Americans were a discriminated against group, as in the important case of *Cisneros v. Corpus Christi Independent School District*,[65] the court's rhetoric was never definitive in recognizing Mexican-Americans as a broad, rather than a local, group. The semiotic[66] impact was apparent: lacking any *de jure* discrimination to define the group before it, the Court has looked for cultural, biological, and social evidence to support the existence of Mexican-Americans as a group.[67] Moreover, the distinctive characteristics of Mexican-American's—such as their surnames, cultural heritage, and appearance—have constantly been questioned on the grounds that they lack social "realness" or relevance to creating a group identity for Mexican-Americans.[68] This confusion is captured in the sincere struggle of courts and their inability to conclusively identify the group before them, 16 years after *Hernandez* was decided:

> It is clear to this court that Mexican-Americans, or Americans with Spanish surnames, or whatever they are called, or whatever they would like to be called, Latin-Americans, or several other new names of identification -- and parenthetically the court will take notice that this naming for identification phenomena is similar to that experienced in the Negro groups: black, Negro, colored, and now black again, with an occasional insulting epithet that is used less and less by white people . . . fortunately. . . . [I]t is clear to this court that these people for whom we have used the word Mexican-Americans to describe their class, group, or segment of our population, are an identifiable ethnic-minority. . . . This is not surprising; we can notice and identify their physical characteristics, their language, their predominant religion, their distinct culture, and, of course, their Spanish surnames.[69]

In searching for "a name," and lacking any prior *de jure* definition of the group, the court is forced to create the group on its own. Trying to come

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64. "It appears and the Court so finds that there is in Bexar County an identifiable ethnic group referred to as Mexican-Americans . . . ." United States v. Hunt, 265 F. Supp. 178, 188 (W.D. Tex. 1967). Ten years later, an all-Texas Mexican-American group was considered identifiable in that same manner. *See* Castaneda v. Partida, 430 U.S. 482 (1977).

65. 324 F. Supp. 599, 606-07 (S.D. Tex. 1970).

66. The most widespread, canonical definition of semiotics is that semiotics is a science (philosophical theory) of signs and/or sign systems regarding "texts" (of any medium). *See generally* ROLAND BARTHES, MYTHOLOGIES (1957).

67. In this case, the court declared that the group was identifiable as an ethnic minority. However, in order to justify its conclusion which was not derived from a *de jure* definition of the group, the court, in a footnote, considered an expert's testimony on the matter and discussed at length the characteristics of an identifiable group. *Cisneros*, 324 F. Supp. at 606 nn.29-30.

68. *See, e.g.*, *Hernandez*, 347 U.S. at 479-80; *Cisneros*, 324 F. Supp. at 606 nn.29-30.

69. *Cisneros*, 324 F. Supp. at 606-08.

up with an acceptable definition, the court compares the naming difficulty with Mexican-Americans to the name changes that have accompanied the African-American group. This comparison, however, exemplifies the differences between the groups caused by their distinct discrimination forms rather than their similarities. As opposed to the court's analogy, the "naming" experiences of the two groups in fact diverged both in reason and in outcome. The courts' "list of names" for African-Americans represents the abundance of identifications that were attached by *de jure* discrimination; thus, there was no confusion or indeterminacy in the remedial stage, only different names attached to a well-defined group. These names have not compromised the ability of courts to consistently identify the group before them as the same group of African-Americans. The Mexican-American "list" of names, however, demonstrates the lack of any prior legal definition of the group for courts to rely on in the curing stage.

Later cases in which the Court again held that Mexican-Americans are an identifiable class, like the infamous *Keyes* case,[70] have not yet had the all-encompassing effect of creating group recognition.[71] In sum, unlike African-Americans, Mexican-Americans have to first constitute themselves as a group in every litigation and only then make their specific allegations of discrimination. The *United States v. Texas Education Agency*[72] desegregation case is a sharp example of that effect. The victims of segregation in this case were both African-Americans and Mexican-Americans.[73] Nevertheless, the court voiced its concern only with whether the latter constituted an identifiable group while having no similar concerns regarding the former.[74]

2. *The Visibility-Witnessing Effect (or "Unhappiness Without a Title Is Double Unhappiness"[75])*

The legal discourse of discrimination not only classifies groups and shapes their distinctiveness, but also manifests their presence. Presence is

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70. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973). The Court declared that this class existed "for purposes of the Fourteenth Amendment." *Id.* at 197.

71. Delgado & Palacios, *supra* note 8, at 396.

72. 467 F.2d 848, 852 (5th Cir. 1972).

73. *Id.*

74. *Id*. ("Mexican-Americans in many cities in Texas are an identifiable ethnic minority."). Nevertheless, in many other cases where members of both groups applied jointly, there was no such inquiry as to the status of Mexican-Americans. This is probably because the presence of African-Americans as petitioners redeemed the group recognition problem of Mexican-Americans since the former substantiated the required eligibility for Fourteenth Amendment relief against the white hegemony anyway. *See, e.g.*, Soria v. Oxnard Sch. Dist. Bd. of Trs., 488 F.2d. 579, 581 n.1 (9th Cir. 1973).

75. HANNA ARENDT, RAHEL VARNHAGEN: THE LIFE OF A JEWESS 173 (1997).

therefore the *signifier* of discrimination, it's *significant*.[76] *De jure* discrimination gives public presence to its subjects and narrates their discriminated experience. In the remedial stage, the same narrative that was used by the legal system for discrimination against the group is used to justify giving anti-discrimination relief to the members of that group. Moreover, the number of different situations in which *de jure* discrimination existed created multiple narratives of oppression and exclusion to be revealed in the remedial stage: where *de jure* discrimination ordered segregated schools, the narrative of exclusion from the education system had been told; where it ordered employment segregation, the narrative of exclusion from the employment market had been told; and so forth. These narratives of discrimination, suffering, and deprivation were outlined by *de jure* regulations and affected the transparency and visibility of both the group's existence and the group's oppression.

This effect is part of a larger theoretical scheme of "visibility," emphasizing the powerfulness of the legal discourse, which excludes minorities by their absence from legal texts and reasoning. This absence from the law's formal and substantive foundations designates the excluded party as the "other" and demonstrates that its needs are as unimportant to the legal world as they are elsewhere in society.[77] The *de jure/de facto* distinction this Article makes stretches the limits of this "invisibility" critique. It argues that "absence" refers not only to absence from receiving the benefits of the law, but also an absence from suffering from the drawbacks of the law, specifically being absent from the legal discrimination mechanism. The alleged invisibility of *de jure* discriminated against groups marks them as the "other," whereas the absence of *de facto* discriminated against groups signifies their complete non-existence.[78] For example, using legal language to determine the "nature" of a person in order to classify him or her under a Jim Crow statute's requirements shapes the notion of a legal category. Silence, on the other hand, is a choice not only not to include but also a choice at the same time not to exclude. Silence is therefore the decision to "nonclude." By "non-cluding," this Article means a situation where a group is being discriminated against yet is not being subjugated by explicit formal expressions of the law. The group is fully "named" by society's coercion since it suffers from *de facto* discrimination, but is nameless under the law. Moreover, it does not exist as a group or entity. Although it is true that dis-

76. For an elaboration on the semiotics of the law, see BERNARD S. JACKSON, SEMIOTICS AND LEGAL THEORY (1997).

77. *See, e.g.*, Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985) (discussing the invisibility of women in contract law).

78. For a close analysis of invisibility and non-existence, see Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 333-34 (1991).

criminated against groups such as women and African-Americans also suffer from injustice and inequality that might be termed "lawlessness," they are at the same time subject to the control of the legal system and thus are subject to lawfulness.[79] These groups are therefore relatively visible; in contrast, *de facto* discriminated against groups, such as Mexican-Americans, fall into a category of extreme invisibility.

"Invisibility" is also commonly used to describe the omnipresence of a group that need not be "named," rather than describe the non-existence of the "un-named" group.[80] Drawing on the work of Pierre Bourdieu and treating the law as a quintessential arena of symbolic power, one can regard the normative classification of "whiteness" as unmarked and "blackness" as marked in an objectified form of white hegemony.[81] The invisible unmarked or "un-named" is the group whose dominance and hegemony shapes the relevant social system and thus does not need to be explicitly named and presented.[82] In legal terms, critical theory argues that the law represents the white-male-heterosexual epistemology and life-experience and thus this group does not need to be named in the law.[83] Therefore, this archetype's absence from the legal texts is misleading since it reflects the group's constituting presence.

However, this Article uses the terminology of "un-naming" in a different manner. By "un-named" groups, it means those that suffer from an impotent absence, and not from an all-encompassing omnipresence. It contrasts the "naming" of minorities, such as African-Americans and women, not only with the "un-naming" of the dominant group of white men but also with the "un-naming" of other discriminated against groups. The traditional understanding of this situation is that "naming" is exclusionary and "un-naming" is inconclusive. Instead, this Article suggests a broader conception that will treat the "un-named" discriminated against groups as being the most invisible groups. Moreover, the invisible normality of whiteness, manifested in the law as well as achieved through it, engages the law as a

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79. *See* Marjorie Maguire Schultz, *The Voices of Women: A Symposium in Legal Education: The Gendered Curriculum of Contracts and Careers*, 77 IOWA L. REV. 55, 58 (1991) (arguing that contract laws deserted paradigmatic contractual issues regarding familial relations). On lawlessness in African-American lives, see FRANKIE Y. BAILEY & ALICE P. GREEN, LAW NEVER HERE: A SOCIAL HISTORY OF AFRICAN AMERICAN RESPONSES TO ISSUES OF CRIME AND JUSTICE (1999) (describing in a short story the devastating meanings that lawlessness had in the lives of black slaves).

80. *See* BAILEY & GREEN, *supra* note 79, at 16-17.

81. *See generally* Pierre Bourdieu, *Social Space and Symbolic Power*, 7 SOC. THEORY 14 (1989).

82. SIMONE DE-BEAUVOIR, THE SECOND SEX (1949) (claiming that men "otherrized" women as a category, whereas "the men" retained transcendental existence). *See, e.g.*, CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 96-105 (1989).

83. *See* Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323 (1997) (discussing the "whiteness of the law").

"white public space" in which the unmarked is simply white.[84] In this symbolic space, the un-named group is eliminated and marginalized as a discriminated against group, by merging into the white public space as an inseparable part of it.[85] However, this process does not signify inclusion of the group, since in reality it is discriminated against, *de facto*.

The theoretical scheme of "invisibility" is affected by the legal visibility of the group as follows. Different relative degrees of legal visibility and invisibility are located on a continuum. At one end there are laws that make the "otherness" of the laws' subjects explicit. For example, laws denying access to public facilities that specifically named "Blacks" made the otherness of African-Americans apparent. In this case the discriminated against group is more overtly distinguished than with laws where the ban is, for example, on "Colored" people, which is a general term encompassing various non-white groups.[86] Next to these explicit laws on the continuum are implied laws, such as laws with a "whites only" requirement. This sort of implicit law does not "name" the other, rather it names the opposite, privileged entity. Here, the group's absence could nevertheless signify its existence because of the statute's "wholeness" impact. According to this impact, discriminatory statutes are always positioned within a semantic field of social power relations where the oppressor and oppressed groups are "different" from one another and can signify one another.[87] In the relatively narrow area of legal discrimination, naming the privileged group in a statute signifies the discriminated against group as missing from the holistic frame of the oppressor and the oppressed, namely, from the statute's wholeness. For example, due to the black-white paradigm, "African-Americans" are members of a set of mutually exclusive forms of discrimination with "whites" as their opposite. This dichotomy is why statutorily privileging a

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84. White public space is fashioned as: "Either in its material or symbolic dimensions, white public space is comprised of all the *places* where racism is reproduced by the professional class. That space may entail particular or generalized locations, sites, patterns, configurations, tactics, or devices that routinely, discursively, and sometimes coercively privilege Euro-Americans over nonwhites." Helan Page & R. Brooke Thomas, *White Public Space and the Construction of White Privilege in U.S. Health Care: Fresh Concepts and a New Model of Analysis*, 8 MED. ANTHROP. Q. 109, 111 (1994).

85. The main tool through which the merging was implemented was the "other white" strategy. See *infra* text accompanying notes 133-36.

86. In the case of *Gong Lum v. Rice*, 275 U.S. 78 (1927), the Supreme Court affirmed a decision that allowed the exclusion of a Chinese child from a white school on the ground that the law required separate schools for "whites" and "colored" races. Chinese were also considered "Indians" by law. *See* People v. Hall, 4 Cal. 399 (1854) (prohibiting the testimony of a Chinese witness because testimony by Blacks, mulattos or Indians was not allowed).

87. Those images are considered to be Greimasian semiotics of law. For the meaning of signification within a semantic field as part of a Greimasian semiotics of the law see generally, JACKSON, *supra* note 76, at 31-43.

"white" group would signify the presence of its "other," specifically African-Americans, but not, for example, the presence of Mexican-Americans, since Mexican-Americans are not the dichotomous opposite of "whites" and thus are not signified by the inclusion of "whites." Alongside this spectrum of visibility, both explicit and implicit *de jure* discrimination enhances the formation of the discriminated against group as an entity.

In sum, *de jure* discrimination affects the magnitude of the visibility both of the existence of the group itself and of its discrimination-based suffering. Working from within the legal system, *de jure* discrimination brought the groups it defined into a canonical status through legal texts. Law canonizes discriminated against groups, providing them the necessary "naming" for all prospective anti-discrimination purposes during the later remedial stage.[88] Being named by the law has implications just as being named by the social sphere or by politicians would. Formal *de jure* discrimination, however, is more systematic and more exposed to the public than *de facto* discrimination is, thereby conveying greater visibility to the subjects of that discrimination. This effect helps explain the weak position of Mexican-Americans in the American anti-discrimination discourse. Although Mexican-Americans are relatively physically distinct, their recognition as a discriminated against group lacks any "legal" support, since they are not discriminated against by the law; this lack of legal support deprives the group of legal viability in asserting their claims during the remedial stage.

B. The Collaborating-Organizational Effect

1. *Through Intra-Group Reactions*

The ability of minorities to politically organize has a key role in determining their political power. Ackerman, who discusses minorities' entitlement to judiciary protection, refers to the idea of a "pluralist democracy," which assumes that various interest groups negotiate with one another about the rules that they eventually democratically legislate.[89] Within this framework, minority groups suffer from a systematic disadvantage due to their lack of power to negotiate with the powerful majority.[90] A famous dictum by Justice Stone in *Carolene Products*[91] suggests that "discrete and insular

88. Though true that a *de jure* discriminated group has to prove each time that a concrete discrimination needs to be addressed, it is not required to prove that the group itself is identifiable.

89. *See* Ackerman, *supra* note 23, at 719-22.

90. *Id.* Although critical of the pluralistic democracy ideology, Ackerman adheres to it as the leading concern of the judiciary. *Id.* at 722.

91. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

minorities" are the ones who suffer most from democratic ineffectiveness and are the ones who are eligible for and entitled to protection from the judiciary when the legislature fails to provide such protection.[92] Ackerman criticizes the Court's definition: both insularity and discreteness, he argues, have an empowering rather than a disempowering effect on the political bargaining power of a group, since these characteristics make the group more able to operate collectively.[93] Here, again, the powerful effect of *de jure* discrimination is of enormous relevance. Using legislation to discriminate provokes a sharper sense of humiliation and alienation.[94] The law functions as a primary social instrument in racializing the group, mainly for subordinating purposes.[95] Consequently, a group member's consciousness of being discriminated against revolves around the notion of the group's oppression as a whole, and formal, *de jure* discrimination makes that group oppression much more powerful, painful, and outrageous, thus enhancing an intra-group interaction and collectivity. On the other hand, groups that do not suffer from blatant, evidential, formal discrimination, but rather from more covert discrimination, are expected to have a lesser sense of group identity and a higher level of both self-denial of their discriminated position and intra-group collectivity.[96]

In the terms of Ackerman's critique, the geographical insularity of the group is less effective and the discreteness of the group is blurred for *de facto* discriminated against groups. The consciousness of any group of its own identity is a crucial prerequisite for any organized political action. Hence, the geographical advantage is particularly effective where the group has a discrimination-oriented consciousness and is less effective in cases where the group lacks such a consciousness or where that consciousness is less pronounced. As history demonstrates, although both African-Americans and Mexican-Americans lived as insular groups, the former was better able to successfully organize as a community, to develop a racially proud consciousness, and to eventually improve their social status, relatively speaking.[97]

Others have previously observed this effect of *de jure* discrimination. In criticizing the transition from the formal discrimination era of Jim Crow to the formal equality era, Kimberle Crenshaw points to the problematic effects that this transition has had on the African-American community.[98]

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92. *Id*. at 153; Ackerman, *supra* note 23, at 722-31.
93. Ackerman, *supra* note 21, at 723-40.
94. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 88-89 (1991).
95. *See* Haney Lopez, *supra* note 10, at 3.
96. These group members would prefer avoiding unnecessary confrontations, as long as they don't suffer from overt discrimination. *See* Ackerman, *supra* note 23, at 730-31.
97. *See generally* Luna, *supra* note 14, at 232-33, 247.
98. Crenshaw, *supra* note 1, at 1382.

Crenshaw criticizes the fact that what was primarily abolished through that transition was the symbolic oppression of African-Americans represented by legal ordinances, rather than actual, material oppression, which consisted of informal discriminating practices.[99] African-Americans derived much of the collective political power within their community from the formal nature of their discrimination, not only vis-à-vis Whites, but also vis-à-vis themselves. The one-rule-to-all discrimination imposed upon African-Americans by *de jure* discrimination had an inclusive effect and almost all the community members—even its most advantaged and pro-assimilationist members—were unable to avoid or deny their belonging to the group.[100] This discrimination imprisoned all of them under its strict rules, without exception, rendering inefficient most assimilationist strategies. Once the shift was made to the formal equality era, important portions of the group, particularly those well-off or assimilationist African-Americans, parted from it in what Crenshaw calls "the loss of collectivity."[101] Prior to that stage, even the Integrationist Movement, a pro-assimilation movement, emphasized difference in its agenda and had no illusions of African-Americans belonging to the white hegemony.[102] Dr. King, an integrationist himself, strictly called for the disobedience of *de jure* discrimination.[103] *De jure* discrimination also prompted the revolutionary Black Civil Rights Movement,[104] whose consciousness was built upon fighting the evil of institutionalized discrimination. A black scholar commented on this battle: "Law does not exist in a vacuum and racism is not solely a by-product of law."[105] This statement is an apt description of the mindset of the Civil Rights Movement of the 1960's. *De jure* discrimination has been a very powerful motivation for the Movement's admirable struggle.[106]

Kimberle Crenshaw located her critique within the relations of African-Americans and White-Americans, but it can be easily applied to my analysis of *de facto* discriminated against groups. Unlike their African-American peers, Mexican-Americans did not suffer from blatant, formal

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99. *See id.* at 1377 (discussing Crenshaw's distinction).

100. *Id*. at 1383-84.

101. *Id*. at 1383.

102. On Dr. King's conceptions of racism see Derrick Bell, *The Triumph in Challenge*, 54 MD. L. REV. 1691 (1995).

103. In the famous "Letter from Birmingham City Jail," Dr. King presented his objection to *de jure* discrimination as derived from respect for law. MARTIN L. KING, JR., WHY WE CAN'T WAIT 77-100 (1964).

104. Peller, *supra* note 42, at 809 (presenting Malcolm X's view on segregation).

105. DAVID HALL, RACISM AND THE LIMITATION OF LAW: AN AFRO-CENTRIC PERSPECTIVE OF LAW, SOCIETY AND COLLECTIVE RIGHTS 13 (Ph.D. diss., Harvard University, 1988).

106. Regardless of the criticism of the Movement's concentration on *de jure* discrimination, the fact that the legal struggle should have been accompanied by a social one does not mean that this struggle was mistaken.

legal alienation and thus were not as easily considered—either by themselves or by others—as "out-laws" from the social system. Drawing on Crenshaw's work, one can infer that the lack of *de jure* discrimination caused "loss of collectivity" within the Mexican-American consciousness and weakened ties between their community identities and a racial identity, as opposed to such strong ties between African-Americans.[107] The absence of *de jure* discrimination sent a message of assimilation and of false belonging to the hegemony,[108] which made an elaborated legal fight appear irrelevant or even unwanted.[109]

The history of the Mexican-American civil rights movements thus is more complex and assimilative than the history of the African-American civil rights movement. Organizations like the League of United Latin American Citizens (LULAC), established in the late 1920's, and the Mexican American's Legal Defense and Educational Fund (MALDEF), established only in the late 1960's, took the lead in litigating against the *de facto* discrimination Mexican-Americans suffered.[110] They overwhelmingly relied on an integrationist and assimilative ideology rather than on a separatist or a group-collectivist ideology;[111] perhaps partly for this reason, these groups failed to receive nationwide attention despite their considerable achievements.[112] Scholars speculate as to the conditions that have shaped this strategy, and the suggestions have ranged from the community's weak social and political condition to an incompatibility among the personalities of the leadership.[113] This Article suggests another factor, namely the ambiguity on the part of the American legal system about the group's legal status. The fact that the law did not discriminatorily define Mexican-Americans has had an anti-radical impact on the self-consciousness and self-perception of its members and leaders with regard to their belonging to a discriminated against group.

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107. *See, e.g.*, Haney Lopez, *supra* note 10, at 10.

108. This Article associates assimilation with the negative quality of false belonging since it is in fact a practice of non-acceptance of the identity of the other, as shaped through her racial community. *See* Haney Lopez, *supra* note 10, at 57-58.

109. MATT S. MEIER & MARGO GUTIERREZ, ENCYCLOPEDIA OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENTS 130 (2000). LULAC had initiated only two lawsuits in the late 1940s, although these lawsuits were fairly substantial. *Id.*

110. *See id.* (discussing the myriad of Mexican-American civil rights movements).

111. *Id.*

112. LULAC's official constitution mentioned Mexican pride, but emphasized that Mexican-Americans were white. *Id.* at 130. Although the nationalist ideology of the Mexican-American civil rights movement was apparent, that nationalism mainly focused on Mexican "border issues." *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S 103-04 (1986).

113. *See* MEIER & GUTIERREZ, *supra* note 109, at 127-29 (reviewing literature regarding group leadership).

Another aspect of intra-group interaction to which Ackerman points is that the more discrete the members of a group are the easier it is to track them and commit them to the group's political struggle.[114] African-Americans are a discrete group, who because of their skin color are easy to track. Ackerman contrasts them with homosexuals: since their membership is more anonymous and not superficially prominent, they are harder to track and politically mobilize.[115] Ackerman further argues that even when tracked, a homosexual group member would have to let go of his or her anonymity in order to engage in a political struggle and that this is something members of anonymous groups would hesitate to do.[116] By so doing, a member of the anonymous group would risk "revealing" his or her identity and would position himself or herself on a social battlefield.[117]

By supplementing Ackerman's argument, this Article manifests its incompleteness. Ackerman's discussion of "discreteness" focuses solely on the physical "visibility" of the group,[118] but there is also a legal dimension of discreteness. Once the group is visible to the law, meaning that it has been defined and recognized by the legal system through *de jure* discrimination, that group also becomes more politically visible. Thus, although homosexuals are relatively "socially invisible," homosexuals are nonetheless "legally present" and enjoy a substantial amount of political visibility.[119] The discourse of sexual-orientation based discrimination initially dealt with prohibitions on sodomy.[120] Later, the struggle for homosexual rights targeted other *de jure* provisions, again triggering a legal discussion that increased the legal visibility of the group.[121] Until *Romer v. Evans*,[122] the Court did not hold that homosexuals constitute a legal group that was entitled to special constitutional protections. In the first case to discuss homo-

114. Ackerman, *supra* note 23, at 729-30.

115. *Id*.

116. *Id.* at 730-31.

117. *Id.* at 729-31.

118. *See id.* at 729 (Ackerman proposes "to define a minority as 'discrete' when its members are marked out in ways that make it relatively easy for others to identify them. For instance, there is nothing a black woman may plausibly do to hide the fact that she is black or female.").

119. Albeit, again, not necessarily a positive visibility, as in cases of demonstrations against homosexuals and legislative attacks on their rights.

120. Janet Halley, *The Politics of the Closet: Legal Articulation of Sexual Orientation Identity*, *in* AFTER IDENTITY: A READER IN LAW AND CULTURE (Dan Danielsen & Karen Engle eds., 1995).

121. A prominent example would be the myriad of state prohibitions on same-sex marriages, as limiting one of the homosexual community's members basic freedoms. For varied examples of *de jure* overt discrimination against homosexuals, see *supra* Halley, note 120.

122. 517 U.S. 620 (1996).

sexuals' right to equal protection, *Bowers v. Hardwick*,[123] the discussion revolved around homosexual activity rather than homosexuals as an entity or a group. But *Romer* led to the law that now considers homosexuals to be a group, even though *Romer* did not grant homosexuals all of the constitutional protection they sought. In *Romer*, homosexuals suffered *de jure* discrimination resulting from a state constitution, so the Court's discussion also had a group-based orientation.[124] Thus, the distinctiveness given to the group by the discriminating legislature made the group legally viable.[125]

Considering *de facto* discriminated against groups extends Ackerman's conception of discreteness to a symbolic level where the law constitutes presence. In contrast to homosexuals, members of *de facto* discriminated against groups suffer from "legal anonymity." They are locked in a "legal closet," which enhances their chances for assimilation and enables them to refrain from political confrontations.[126] In contrast, legally discrete groups who earn their discreteness from *de jure* discrimination cannot as easily ignore or deny their oppression and are more limited in their assimilation ability. Thus, members of these groups are far more likely to be ready to organize politically to fight for better treatment. The legal discreteness of *de jure* discriminated against groups also creates a supportive social-political environment both among the group members and among people outside the group who support the abolition of the recognized *de jure* discrimination.[127] Having said all that, it is important to note that *de jure* discrimination is not the exclusive way through which political collectivity and consciousness can be achieved. These can be attained through different and

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123. 478 U.S. 186 (1986).

124. The discriminatory amendment to Colorado's constitution has used the terms: "[h]omosexual, lesbian or bisexual orientation" and prohibited, acknowledging such as a "class of persons to have or claim any minority status." *Romer*, 517 U.S. at 624. The Court, accordingly, used these phrases (mainly homosexuals). *Id.*

125. The representation of homosexual people as "a group" is yet to be defined by *de jure* provisions, since those provisions tend to address homosexual activities rather than a homosexual entity. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (prohibiting sodomy with *de jure* provisions). In *Lawrence*, the justices were divided as to whether the issue at hand should be considered as an equal protection challenge—conceptualizing the case as group based (the minority) or as a due process one—conceptualizing the case as activity based (the majority). *Id.* On the gay status/conduct distinction, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 872-73 (2002) (introducing the different assimilationist strategies of minorities).

126. Such an analysis adopts the presumption that people would prefer exiting to engaging in a confrontation. Ackerman stresses this assumption, relying on Albert Hirschman's work on confronting unsatisfactory situations. Ackerman, *supra* note 23, at 730-31.

127. The NAACP's struggle, for example, was founded by both whites and African Americans. *See* EQUAL PROTECTION AND THE AFRICAN-AMERICAN CONSTITUTIONAL EXPERIENCE: A DOCUMENTARY HISTORY 179-81 (Robert P. Greed, Jr. ed., 2000).

complex routes of which *de jure* discrimination is only one primary example.[128]

2. Through Inter-Group Reactions

Legally institutionalized discrimination also enhances the consciousness of people outside of the discriminated against group, whose members are now "legally marked out" in a way that makes it relatively easy for others to identify them.[129] Reflecting this notion is Dean Ely's psychological approach to the legislative process, which represents *de jure* discrimination as positioning the relations between the relevant groups in a "we"-"they" dichotomy. "We" refers to the hegemonic oppressor, represented by the legislature, and "they" refers to the *de jure* discriminated against group.[130] In this framework, discrimination constitutes the other as a "minority." The majority manifests political superiority over the minority and hence forces the minority to admit its relative political powerlessness and recognize its proper place within social power relationships.[131] For example, African-Americans, as the addressees of the discriminatory laws, could not see themselves as its authors.[132] Understood this way, a lack of *de jure* discrimination against a *de facto* discriminated against group creates a "we-all" as opposed to a "we-they" political structure, which eases any traces of distinctiveness and discourages the development of a group consciousness among the *de facto* discriminated against group.

This notion is clear when applied to the Mexican-American group. Since they suffered from *de facto* discrimination, Mexican-Americans were treated by courts as "the other white," a group that did not deserve to be discriminated against. This "other white" strategy[133] demonstrates the coalescing effect where neither side in the discriminatory regime develops a consciousness of real power relations between the parties. Moreover, this strategy symbolically is a statement about the inclusiveness of Mexican-

128. *See, e.g.*, Haney Lopez, *supra* note 10, at 50-53 (demonstrating the psychological progression that the Mexican-American activist Guillermo Fuenfrios described in his story: The Emergence of the New Chicano).

129. Ackerman, *supra* note 23, at 729-30.

130. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). This Article refrains from using this analysis as a means of justifying judicial review, as Ely does, and rather borrow the idea of the alienating power of discriminating laws.

131. *Id*. at 157-60.

132. Here the Article adopts Habermasian terms. Jurgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 107, 121-122 (Charles Taylor et al. eds., 1994).

133. On the employment of this strategy by activists see Rangel & Alcala, *supra* note 17, at 342-48.

Americans and their lack of distinctiveness from whites.[134] In *Westminster School District of Orange County v. Mendez*,[135] where Mexican-Americans won the right to have schools integrated because the court considered them to be "white," the court distinguished them from *de jure* discriminated against groups such as "Chinese, Japanese or Mongolian."[136] Relying on California's rules forbidding discrimination unless it was against colored and black people, the court concluded that the discrimination against the plaintiffs was unconstitutional.[137] This decision furthered the symbolic effect of the "we"-"they" dichotomy whereby Mexican-Americans are placed within the "we" group and not in the "they" group. Mexican-Americans are thus considered "one of the great races" and contrasted with other races that were denied equal participation in education.[138] But this placement of Mexican-Americans in the "we" group fails to acknowledge the power relations between Whites and Mexican-Americans. In this power relationship, Mexican-Americans are a discriminated against minority, but the court's decisions instead position Mexican-Americans side by side with whites. Thus, *de jure* discriminated against groups, were marked as "the real" others, whereas Mexican-Americans were not. This explains part of the difficulty Mexican-Americans have in their quest for recognition as a discriminated against group rather than as part of the privileged whites.[139]

C. The Institutional Memory and Blameworthy Effects

Antidiscrimination rules are meant to rectify the countermajoritarian difficulties minorities face and to redress injuries that the law or society has inflicted upon them.[140] Therefore, institutional memory and blameworthiness suggest that it is important for the same legal mechanisms that discriminate to be the mechanisms used to provide the remedies.[141] *De jure* discrimination provides direct formal access to the legal system's remedial functions for *de jure* discriminated against groups. The formalism of the legal system and the documentary nature of *de jure* discrimination make it

134. This strategy was first triggered by the determination of citizenship eligibility of Mexican-Americans after the Mexican-American war. See Menchaca, *supra* note 10, at 584. The strategy was well established at the middle of the twentieth century and was demonstrated at the 1940 national census, which stipulated that "Mexicans were to be listed as white." *See* Haney Lopez, *supra* note 10, at 51.

135. 161 F.2d 774 (9th Cir. 1947).

136. *Id*. at 780.

137. *Id*. at 780-81.

138. *Id*. at 780.

139. *See* Delgado & Palacio, *supra* note 8.

140. The goals of antidiscrimination regimes are varied and are not merely formal. *See* Brest, *supra* note 3, at 6-9. Brest speaks in terms of preventing harms to minorities, whereas this Article focuses on correcting harms already done to minorities.

141. *See* Habermas, *supra* note 132.

impossible for the legal system to ignore it. *De jure* discrimination is less likely to be denied than *de facto* discrimination. Although nations tend to forget their historical evils, institutionalized documents make such forgetfulness harder. A legislative and adjudicative change of heart does not erase the legal history of a nation, but rather places another narrative next to that history. Discriminatory legal rules can be expunged from a nation's book of statutes, but their past existence is always evident and traceable. The vast documentation of the Jim Crow regulations and the judicial revisiting of notorious cases such as *Dred Scott v. Stanford*[142] and *Plessy v. Ferguson*[143] demonstrate the strong presence of the past institutional suffering of African-Americans. During the remedial stage of African-Americans' legal history, this documentation of institutionalized injury provided a firm justification for remediation.[144]

De jure discrimination powerfully situates its subjects within the legal system as the subjects of legal practice. Reflecting again on Ackerman's work, one might observe that the judiciary restricts its activism with regard to "non-legal" issues.[145] The judiciary's commitment to protecting discrete and insular minorities assumes some prior legal recognition of such minority groups. Therefore, it is crucial to understand the discrete and insular minorities test as being inherently legal. This test aims at protecting groups from *de jure* discrimination alone.[146] Other forms of discrimination are not thought of as proper areas for judicial intervention due to the traditional legal/social dichotomy that seeks to preserve the "social" as a sphere beyond equality law and thus allows for the continuation of racial inequality outside the official reach of the state.[147]

Mexican-Americans are only partially recognized by the legal system. Since they do not suffer from *de jure* discrimination, it is easier to consider Mexican-Americans to be a "social" rather than a "legal" entity. The Court's reluctance to declare that the discrimination against Mexican-Americans is *de jure* means that Mexican-Americans have no legal relevance as a group. In *Hernandez*, the Court focused on social motivations

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142. Dred Scott v. Stanford, 60 U.S. (19 How.) 393 (1857).

143. Plessy v. Ferguson, 163 U.S. 537 (1896).

144. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (allowing affirmative action).

145. The Court's activism is being measured within the democratic system, where the elected legislator is considered the most proper, in terms of authoritative power, institute to decide on the rules upon which society will be founded rather than the un-elected judiciary. Only then, in constitutional terms, the Court's activism is being challenged as allegedly undemocratic.

146. Ackerman is specifically referring to Court activism as a mechanism for protecting minorities from a defective legislative process. Ackerman, *supra* note 23, at 715.

147. This tactic is well-established in American equality laws. *See* Angela P. Harris, *Symposium on Law in the Twentieth Century: Equality Trouble: Sameness and Difference in Twentieth Century Race Law*, 88 CAL. L. REV. 1923, 1935 (2000).

for discrimination rather than "legal" ones, thus deriving the emergence of the Mexican-American group from a change in "community prejudices" against them.[148] Moreover, the wisdom of the Court's reliance on "social changes" triggering recognition of Mexican-Americans is challenged by the fact that discrimination against Mexican-Americans is long lasting.[149] In the case of *de jure* discriminated against groups, the law's involvement transforms what might have otherwise been considered a "wholly social" matter into a "wholly legal" one by establishing the group's legal viability. For example, in the famous case of *Strauder v. West Virginia*,[150] the Court focused on the devastating impact of *de jure* discrimination in excluding African-Americans from "civil society." This observation conceives the social harm inflicted on them as also being a legal harm.

Many conservative legal theorists and positive legalists claim that law merely reflects society's desires.[151] The critique from the left argues that the law is actively involved in the production and maintenance of society's power relations.[152] This debate, though, is less important once legal involvement is present in the wronging. Through *de jure* discrimination, the legal system creates as well as reflects reality, unraveling the line between the legal and the social realms.[153] Under these circumstances, adherence to the legal righting process is to be expected because, once the law has been formally involved in "wronging," there is a need for the law to reverse its involvement. The high attention that *de jure* discriminated against groups receive from the legal system during the remedial stage can be understood

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148. Hernandez v. Texas, 347 U.S. 475, 478 (1954).

149. For the history of the subordination and oppression of Mexican-Americans, see ARNOLDO DE LEÓN, THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821-1900 (1983).

150. 100 U.S. 303 (1879).

151. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986) (drawing on history and community structure as the source of the necessary conjunction of law and morality); H.L.A. HART, THE CONCEPT OF LAW (1961) (noting that law contains a minimum moral content and judges exercise a kind of discretion that allows for the consideration of social values). For that matter, both naturalism and positivism of the law share theoretical resemblance, see James Donato, *Dworkin and Subjectivity in Legal Interpretation*, 40 STAN. L. REV. 1517 (1988).

152. *See generally* JURGEN HABERMAS, THEORY AND PRACTICE 253 (John Viertel trans., Beacon Press 1973) (arguing that positivism harbors a normative commitment to a society organized according to technological and scientific rationality); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF THE LEGAL ORTHODOXY (1992) (arguing that nineteenth and twentieth century tort law doctrines concealed in their claim of scientific-objective purity a normative commitment to private property and capitalist ideoligies).

153. Kennedy, *supra* note 78, at 347.

as a result of an aspiration of the legal system to right undeniable past wrongs that were caused by this very same system.[154]

The inclination of courts in these cases to typically hold against general affirmative action programs, while at the same time approving programs that aim to remedy concrete legal discrimination, highlights the importance of *de jure* discrimination.[155] The more concrete and unjust the past discrimination was—particularly where such discrimination resulted from the legal system itself rather than simply from society—the more justified present affirmative action is.[156] This is the essence of antidiscrimination law, as Robert Post describes: "antidiscrimination law always begins and ends in history, which means that it must participate in the very practices that it seeks to alter and regulate."[157] The involvement of the judiciary during the remedial stage can thus be understood as being motivated by institutional remorsefulness.[158]

A story of one Mexican-American battle against discrimination can help illustrate this effect. "The Felix Longoria Incident," occurred in Texas in 1949.[159] Longoria was an American soldier who died during World War II. The local mortician refused to allow him to be buried at the chapel because of Longoria's Mexican origin.[160] Hector Garcia, an activist working for a Mexican-American forum, challenged this discrimination.[161] As with most of the discriminatory acts against Mexican-Americans in Texas, the

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154. OWEN M. FISS, A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS 14 (Joshua Cohen & Joel Rogers eds., Beacon Press 1999).

155. *See* Grutter v. Bollinger, 539 U.S. 306 (2003). The "narrowly tailored mean" requirement of the Equal Protection Claus in cases of race-based discrimination can be read as reflective of this idea. *See id.* This requirement focuses on past discrimination against those who are currently preferred by the program attacked before the court, and past discrimination is, of course, easier to prove through de jure discrimination. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237; Richmond v. J.A. Croson Co., 488 U.S. 469, 507. Past discrimination is therefore a sufficient excuse to implement an affirmative action plan. *See, e.g.*, Barhold v. Rodriguez, 863 F.2d 233, 237 (1988).

156. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). The Court, nonetheless, has recently turned to diversity as the primary justification for affirmative action. *See* Colin S. Diver, *From Equality to Diversity: The Detour from* Brown *to* Grutter, 2004 U. ILL. L. REV. 691 (2004).

157. Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, *in* PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 1, 22 (Robert C. Post et al. eds., 2001).

158. *See* Crenshaw, *supra* note 1, at 1382 (stressing that *de jure* discrimination has encouraged federal involvement in aiding the African-American struggle for equality).

159. This incident is detailed in the biography of the Mexican-American activist Hector P. Garcia. IGNACIO M. GARCIA, HECTOR P. GARCIA: IN RELENTLESS PURSUIT OF JUSTICE 104-39 (2002).

160. *Id*. at 107-08.

161. *Id.* at 110-39.

burial refusal was not *de jure*.[162] As demonstrated by the substantial sympathetic public attention that this case received, the public reaction to the discrimination claim—one of denial—was of a different nature than if the discrimination had been based in law and hence "legal." The incident is portrayed as atypical, even though separate burial services and cemeteries were common.[163] It was resolved as a misunderstanding and misinterpretation of the funeral house owner's words. Moreover, since the mortician's behavior lacked legal approval, the public blamed Garcia for stirring up trouble in an area where problems did not truly exist.[164]

This type of public denial of the reality of discrimination is typical of *de facto* discrimination. Similar *de jure* discrimination could not have been denied. The truth of *de jure* discrimination neither relies on matters of interpretation over what exactly has been said nor does it rely on the credibility of the party alleging discrimination, because in both cases the law is authorizing the discrimination. Since *de jure* discrimination is institutionalized, its effect cannot be dismissed as a private incident, whereas *de facto* discrimination often can be. Declaring war on *de jure* discrimination is more likely to generate public support than war on *de facto* discrimination, to which the public might respond, as it did to Garcia's work, that the activists are just stirring up trouble.[165] *De jure* discrimination is simply more difficult to rationalize or deny.

D. The Presumption of Intentional Discrimination Effect

The presence of *de jure* discrimination is an important factor in establishing that a discriminatory act was intentional. This role is exemplified by the Court's statement that the intent behind explicit *de jure* discrimination in the past may be used in the present to prove intent regardless of chronological remoteness.[166] Unsurprisingly, this logic applies primarily in cases where *de jure* discrimination previously existed.[167] The practical implica-

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162. The mortician himself notified the widow of his refusal, which was not based on any formal regulations of any kind. *Id.*

163. *Id.* at 114.

164. *Id.* at 121-28.

165. *See* Kennedy, *supra* note 78.

166. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 210-11 (1973). The scope of this relevance is nevertheless limited.

167. *See, e.g.*, Cisneros v. Corpus Christi Indep. Sch. Dist., 324 F. Supp. 599, 617-20 (S.D. Tex. 1970) (finding *de jure* discrimination despite no prior history of state law segregation); United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 397 (5th Cir. 1967); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971). Particularly interesting is *Keyes*, where the petitioners were both Mexican-Americans and African-Americans, yet while discussing the injustice of the *de jure/de facto* distinction, Justices Douglas and Powell referred only to the African-American petitioners. 413 U.S. at 214-17 (Douglas, J., concurring); 413 U.S. at 217-53 (Powell, J., dissenting). *See also* Beckett v. Sch. Bd. of Norfolk,

tion of this logic is great because equal protection claims are limited to claims that can prove intentional discrimination, and this logic allows the Court to assume intentional discrimination where *de jure* discrimination existed in the past. This logic thus has a "narrating" effect, where it allows the group's narrative of oppression to be told.[168] The narrated information can be used by the discriminated against group to achieve redress for past discrimination. In other words, the institutionalization of *de jure* discrimination signified a pattern of oppressive behavior that could be used to prove intentionality, whereas *de facto* discrimination was perceived as non-institutional, incidental, and random, and thus could not be used to prove the intentionality necessary to assert an equal protection claim.[169]

The formal, overt, linguistic dimension of different forms of discrimination has powerful effects that both courts and scholars have so far neglected. As with any discourse, the discrimination discourse dictates the way in which discriminated against groups are construed and imposes frameworks that structure what can be experienced or what meaning an experience can encompass. Thus, discourse influences what can be said, thought, and done.

It is important to note though that there is no strict relation between the legal status of a group and the social status of a group as one that is discriminated against. Some groups may not be discriminated against by the law and yet suffer discrimination from society. *De facto* discriminated against groups demonstrate this idea well. At the same time, some groups face *de jure* discrimination without being discriminated against by society in fact.[170] Nevertheless, in between these poles, there is certainly a correlation between the use of the law to order society and between enhancing the social and self-awareness around a group subjugated to *de jure* discrimination in a way needed for that group to initiate an effective legal and political struggle for rights. Moreover, by removing a group from society's legal canon and by no longer discriminating against it under the law, in the anti-

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308 F. Supp 1274, 1304 (E.D. Va. 1969) (holding that intentional state action can easily be identified whenever there is prior *de jure* discrimination against the group).

168. *See, e.g.*, Columbus Bd. Of Educ. v. Penick, 443 U.S. 449 (1979).

169. For examples of the myriad of cases thus decided see Martinez, *supra* note 20.

170. A statute in Massachusetts that ordered the arrest of any Native Americans entering the state is a good example. *See* Keith Reed, *1675 Indian Ban Puts Convention Bid at Risk: Minority Journalists May Reject Boston If Law Isn't Repealed*, BOSTON GLOBE, May 11, 2005, at C1. This 17th century statute has managed to survive on the state's law books, although the state itself obviously abandoned its discriminatory practices against Indians. *Id.* Nevertheless, although not enforced, the statute has caused anguish to and has been widely criticized as being derogating to Native Americans. *Id.*

discrimination stage also creates some sense of social commitment to equality vis-à-vis that group.[171]

III. THE BATTLE FOR SEGREGATION IN EDUCATION AS A TEST CASE

The impact of the abovementioned effects on equal protection doctrine is somewhat elusive and will be introduced in this Part by examining the segregation in education litigation of both African-Americans and Mexican-Americans.[172] The impact is more apparent in the Mexican-American litigation, where the court refused to identify the group, and less apparent in African-American litigation, where the court refrained from any similar discussion of group identity.[173] Rulings on education segregation regarding these groups demonstrate this difference in impact. Both groups suffered from segregation in education, but while African-Americans suffered mainly from *de jure* discrimination, Mexican-Americans suffered almost exclusively from *de facto* discrimination.[174] In terms of judicial success, Mexican-Americans were the first to win a segregation battle in the *Westminster School District v. Mendez,* in 1946.[175] But African-Americans won the war in the broader legal sense with *Brown v. Board of Education* in 1954.[176] Although vastly criticized,[177] the *Brown* decision is a cornerstone for abolishing segregation and the "separate but equal" doctrine. A compelling explanation for *Brown*'s central status in the discrimination discourse is that it emphasizes the suffering and social exclusion of African-Americans through *de jure* discrimination. The NAACP, which argued the case, narrated African-American suffering through briefs and professional opinions and the Court embraced that narrative,[178] stressing the story of the group's oppression: "To separate them from others of similar age and qualifications

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171. Even though it might be that a change of the law does not fulfill the wish of the discriminated group for equality, it undeniably betters its overall position. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (claiming that antidiscrimination laws are aimed at bettering the civil and political rights of African-Americans but not their social ones).

172. *See supra* discussion in Part II.

173. *See supra* text accompanying notes 46 and 74.

174. *See supra* text accompanying notes 9-10.

175. 161 F.2d 774 (9th Cir. 1947). *Independent Sch. Dist. v. Salvatierra* was the first case to challenge segregation against Mexican-Americans. 33 S.W.2d 790 (Tex. Civ. App. 1930). After the lower court gave a desegregation injunction, the appellate court reversed, holding that the segregation was unintentional and reasonably demanded and thus valid. *Id.*

176. 347 U.S. 483 (1954).

177. This criticism is mainly due to the decision following the ruling in *Brown v. Bd. of Educ.* 349 U.S. 294 (1955) and also due to its limited rhetoric. *See* MARK WHITMAN, BROWN V. BOARD OF EDUCATION 310-334 (15th Anniversary ed., 2004).

178. The richness of this narrative was not present in the official decision, but it was exposed to the Court. For a discussion of broad portions of the brief's material, see WHITMAN, *supra* note 177.

solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[179] The Court thus brought the suffering of African-American children—and through them the African-American people—into the legal system and made that suffering intrinsic to the group's legal entity. The institutionalized discrimination at issue in the case also represented the broader story of discrimination of educational bodies against African-Americans nationwide.[180] In *Brown*, the Court recognized African-Americans as a group generally, while introducing the petitioners as "minors of the Negro race." Thus, the Court affirmed and acknowledged without reservation their status as a legally identifiable group.[181]

The impact of *Brown* was "legal recognition," as Derrick Bell states: "The significance of this decision is that it altered the status of African-Americans who were no longer supplicants . . . 'seeking, pleading, begging to be treated as full-fledged members of the human race . . . .'"[182] More importantly, from *Brown* onward, the viability of every segregation claim brought into court by African-Americans was immediately and fully discussed.[183] No special rhetoric and epistemological efforts were required by courts to define the petitioners or their discriminated against position. This ease of asserting claims was the unfelt yet crucial impact of *de jure* discrimination which established African-Americans' group recognition.[184] The conceptualization of the litigation as one seeking equality between different identifiable groups prompted African-Americans seeking equality to bring their segregation claims to court.[185] *De jure* discrimination thus had a

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179. *Brown*, 347 U.S. at 494.

180. The Court employs generalizing language that gathers the different petitioners, stating that "a common legal question justifies their consideration together in this consolidated opinion." *Id.* at 486.

181. *Id*. at 487.

182. DERRICK BELL, RACE, RACISM AND AMERICAN LAW 551 (3d ed., 1992).

183. *See* WHITMAN, *supra* note 177.

184. It is obviously very hard to trace this unfelt impact, since the courts discussing segregation cases simply overlooked the identity of the African-American appellants. Their visibility as a recognized group was unquestioned and was a nonissue. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455 (1973) (describing appellants as "school children's parents," though incidentally discussing the issue of school segregation as relevant to "white" and "Negro" students); Wright v. Council of Emporia, 407 U.S. 451 (1972) (describing appellants as "Negro children"); Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (describing, laconically, petitioners as "a group of Negro school children"); Cooper v. Aaron, 358 U.S 1 (1958) (incidentally declaring that the battle around the implementation of *Brown* was revolving around nine "Negro students").

185. Due to the Equal Protection Clause's prerequisite of being a member of an identifiable group, an African-American petitioner could easily locate himself as fighting against segregation implemented on him vis-à-vis the "white" group.

structural effect that enabled the group to gain control over attempts to reshape the educational system.[186]

The experience of Mexican-Americans seeking to gain legal recognition as a group differed tremendously from that of African-Americans.[187] As discussed earlier, the discrimination against Mexican-Americans is primarily *de facto*, and their status as a legally cognizable minority group was therefore fragile.[188] The scarcity of legislation related to Mexican-Americans led to an insufficient amount of litigation by or against Mexican-Americans, which prevented a coherent and comprehensive identity of the group from forming. *Mendez*,[189] one of the few cases to have dealt with *de jure* discrimination against Mexican-Americans, is thus unsurprisingly considered a milestone in the group's struggle for equality. Nevertheless, the *Mendez* decision blurred the legal status of Mexican-Americans as an identifiable group and blurred their suffering. Considering them to be "whites," the court said that Mexican-Americans were not appropriate subjects for discriminatory treatment since state law did not allow for discrimination against whites.[190] This strategy of labeling Mexican-Americans as white was eventually destructive to Mexican-Americans, since it did not mesh with social behavior toward Mexican-Americans or with the power relation from which Mexican-Americans suffered.[191] And with this rare *de jure* discrimination case, it is clear that a statute explicitly allowing *de jure* segregation of Mexican-Americans would have destroyed the court's reasoning; if *de jure* segregation had been applied against Mexican-Americans, it would have exposed the suffering of the Mexicans-American group.

Mendez was followed by *Gonzales v. Sheely*,[192] in which a federal court in Arizona ruled on a segregation claim. Like *Mendez*, this case was atypical and based on *de jure* discrimination against Mexican-Americans. In *Gonzales*, the court identified the petitioners on the basis of class, due to the fact that the regulations allowed the segregation of "all children of persons of Mexican or Latin descent or extraction"; thus, the court used this *de*

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186. It is true that the aspirations and the hopes that were merged in *Brown* were not fulfilled; yet *Brown* taught that employing social tactics on top of the legal battle is essential to initiating deeper changes to the racial power relations. *See* DERRICK BELL, SILENT COVENANTS (2004).

187. Mexican-American's experience was perceived as secondary and minimal in terms of scholarly and social reputation, as compared the experience of African-Americans. *Luna*, *supra* note 14, at 238-39.

188. *See supra* notes 8-9.

189. Westminster Sch. Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1947).

190. *Id.* at 780.

191. For extensive research on race-based segregation against Mexican-Americans, see Delgado & Palacios, *supra* note 8, at 392-95.

192. 96 F. Supp. 1004 (D. Ariz. 1951).

jure "naming" of the group in its ruling.[193] The Court also referred to such blatant segregation as degrading and fostering antagonism against and inferiority in Mexican-American children.[194]

In later cases, however, where the discrimination was not *de jure* as in *Mendez* and *Gonzales*, legal recognition of Mexican-Americans as a group has not been forthcoming. Courts, frightened by their inability to determine precisely the contours of the group, continued to only apply ad-hoc group recognition to the specific petitioners instead of generally recognizing Mexican-Americans as a group.[195] Without general group recognition, Mexican-Americans have to reassert and reconstruct their group identity each time a member wants to assert a discrimination claim. The prerequisite that challenged discrimination be *de jure* rather than *de facto* blocked many other petitions challenging discrimination against Mexican-Americans.[196] Along with other factors, *de facto* discrimination against Mexican-Americans helps explain why Mexican-Americans continue to attend the most segregated schools and are "more concentrated in high-poverty schools than any other group of students" in the United States.[197]

The end of Jim Crow in the late-1950's and the passage of the Civil Rights Acts in the mid-1960's signified the end of *de jure* discrimination and, with it, the end of the immediate effects of the *de jure*/*de facto* distinction. America has gradually moved from the discriminating stage and entered into the remedial stage, which utilizes a colorblind notion, whereby reason and neutrality replaces prejudice and stereotyping, which governed *de jure* discrimination rhetoric.[198] The shift between the stages symbolizes a shift from negotiating equality through difference to negotiating through sameness, and the gap between discriminated against groups has nar-

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193. *Id.* at 1006 (declaring that the group constituted a class in terms of the right to bring a class action under Rule 23 of the Federal Rules of Civil Procedure). Another source of "naming" is the petitioner's brief, which has had a limited effect on the court. *See, e.g.*, Morales v. Shannon, 366 F. Supp. 813 (W.D. Tex. 1973) (identifying the plaintiff as Mexican-American and explaining that the court inclines to name plaintiffs the way plaintiffs name themselves). The *Morales* court, however, used the word "Negro" for African-Americans without any explanation. *Id*.

194. *Gonzales*, 96 F. Supp. at 1007.

195. *See, e.g.*, United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971) (referring to the students as a legally identifiable group); United States v. Tex. Educ. Agency, 467 F.2d 848, 852 (5th Cir. 1972) (recognizing that "Mexican-Americans in many cities in Texas are an identifiable ethnic minority," though geographically limiting this recognition to only "many cities in Texas").

196. *See* Martinez, *supra* note 20, at 584-606.

197. This was the conclusion of The President's Advisory Commission on Educational Excellence for Hispanic Americans. Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L.J. 1751, 1783 (2001) (citations omitted).

198. Race-consciousness is considered the main component of white supremacy ideology. Peller, *supra* note 42, at 759-61.

rowed.[199] Mexican-Americans (as well as other *de facto* discriminated against groups, for example, Arabs[200]) became actors that are allowed to use antidiscrimination relief in their favor and are allowed to form a "discriminated against group" identity.[201] The current use of more flexible terms like "national origin" to describe groups protected from discrimination has an inclusive effect of helping establish group identity for many *de facto* discriminated against groups.[202] Likewise, the "unreasonable classification" discourse that evolved during this colorblind era displaced the racial oppression discourse which was a key factor in legally recognizing a discriminated against group.[203] Within this new system, the status of *de facto* discriminated against groups has improved because these changes have given hope for recognition of the group and for full participation in antidiscrimination relief.[204] Moreover, the Civil Rights Acts banned a larger range of discriminatory practices than just simple *de jure* ones, including relatively "private" forms that were closer to *de facto* discrimination.[205] The Civil Rights Acts banned both intentional and unintentional discrimination and has largely departed from the old view of the Equal Protection Clause primarily redressing *de jure* discrimination.[206] These notions have influenced the recognition of groups in equal protection claims. In this era the Mexican-Americans began to be recognized as either a "race" or as a "national ori-

199. This is apparent in the evolution of race law in the 20th-century. *See* Harris, *supra* note 147. For Title VII purposes, African- and Mexican-Americans were considered as equally eligible for protection. *See* Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977); Ortiz v. Bank of Am., 547 F. Supp. 550, 558 (E.D. Cal. 1982).

200. *See* St. Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

201. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (noting a "protected ethnic minority group"); Cisneros v. Corpus Christi Indep. Sch. Dist., 324 F. Supp. 599 (S.D. Tex. 1970) (noting an "identifiable ethnic group"). For the refusal of a lower court to consider race and nationality classifications as equally violative of the Fourteenth Amendment, see *Sanchez v. State*, 181 S.W.2d 87, 90 (Tex. Crim. 1944).

202. This shift has, nonetheless, a regressive effect on the notion of "race" as a social construct and its vast implications within LatCrit theory. *See* Haney Lopez, *supra* note 55.

203. *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (stressing the anti-subordination perspective as better at representing the equal protection notion).

204. *See*, *e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (declaring unconstitutional a school board's bargaining agreement that aimed to maintain the percentage of minority personnel during a layoff); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (nullifying as unconstitutional a municipal provision to set aside a certain amount of contracts to minority business enterprises). For a critique of these cases, see BELL, *supra* note 182, at 854-864.

205. This development started with *Shelly v. Kramer*, 334 U.S. 1 (1948) and became more systematic and widely approved of with the enactment of the Civil Rights Acts.

206. For the conceptual shift embedded in the development started by *Shelly*, see Michael W. Combs & Gwendolyn M. Combs, *Revisiting* Brown v. Board of Education*: A Cultural, Historical-Legal, and Political Perspective*, 47 HOW. L.J. 627, 650-56 (2004).

gin."[207] In contrast, in the new legal order where *de jure* discrimination has ceased, the powerful effects of legal symbolization of African-American racial existence and suffering led to the false belief that racism ended, even though the material subordination of African-Americans has not stopped. Rather, discrimination against African-Americans has become more *de facto* than *de jure*, and has thus become harder to claim and to fight.[208]

IV. PLEADING AND PROVING DISCRIMINATION WITHIN THE STREAMING FROM *DE FACTO* TO *DE JURE* PARADIGM—A CALL FOR SUBSTANCE, CONTEXT, AND CONSCIOUSNESS

This Article stresses a phenomenological analysis; thus it is beyond its scope to suggest a full elaboration of the different ways through which the legal system should treat differently discriminated against groups. Instead, this Part briefly points to the general possibility of expanding the limits of the rights discourse through contextualization, so that the rights discourse can include *de facto* discriminated against groups in its remedial stage. In order to accomplish this inclusion, the legal system needs to develop a mechanism for pleading and proving discrimination within the streaming from *de facto/de jure* paradigm that uses a contextualized and historicized approach to inquire into the social-political background of the formation of a discriminated against group.

Law and its rights discourse are highly de-contextualized and de-historicized by their alleged objective and universal nature, and thus they lack the conceptual room to consider contextualized issues.[209] But it is only by being read against a contextual background that the absence of *de facto* discriminated against racial groups from the legal narrative can be understood as signifying double discrimination rather than as signifying no discrimination. The law should move toward a contextual and flexible test when implementing the Equal Protection Clause. Of course, however, there are many factors that go into framing the proper rule, and this Article's focus is too narrow to discuss all of them, but nonetheless the arguments laid out here do suggest at least some movement toward greater contextualization and flexibility in applying antidiscrimination laws.[210]

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207. *See, e.g.*, Ramirez v. Dep't of Corr. 222 F.3d 1238, 1240, 1243 (10th Cir. 2000) (noting "race or national origin"); United States v. Midland Indep. Sch. Dist., 519 F.2d 60, 63 (5th Cir.1975) (noting "race or national origin"); Cisneros v. Corpus Christi Indep. Sch. Dist., 467 F.2d 142, 148 (5th Cir. 1972) (noting "origin").

208. For this effect see Crenshaw, *supra* note 1, at 1369-86.

209. Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

210. A close attempt to contextualize discrimination may be found in the Voting Rights Act, where § 2(B) requires the court to look at the local discrimination against the

Contextualizing the discrimination discourse is compatible with the transformation of discrimination as a social construct, by moving from first-generation discrimination to second-generation discrimination in the last decades.[211] One prominent characteristic of this transformation is that discrimination is typically no longer formal and blatant but rather is contextual and relational. The disappearance of blatant and intentional discrimination practices and the emergence of more subtle ones represent this conceptual and structural shift in the discrimination discourse. First-generation discrimination violated clear and uncontroversial norms of fairness and formal equality.[212] In contrast, second generation discrimination frequently involves patterns of interaction among groups that over time lead to the exclusion of non-dominant groups in a way that makes the discrimination difficult to trace back to the intentional, discrete actions of particular actors.[213] The absence of systematic institutional reflection about these patterns of second generation discrimination contributes to its cumulative discriminatory effect.[214] This generational distinction is helpful in analyzing the *de jure/de facto* distinction's role in forming legally cognizable discriminated against groups. The first generation's institutionalized, horizontal, and formal discrimination scheme is the *de jure* style of discrimination, whereas the second generation's more complicated and contextualized scheme is the *de facto* style of discrimination. But although *de facto* discriminated against groups suffered from second generation discrimination, they nevertheless suffered from it within a system that was also engaged in first generation discrimination. The experience of these *de facto* discriminated against groups challenges the one-dimensional perception of discrimination. These groups are legal non-entities that signify the existence of sophisticated discrimination forms within that first-generation discrimination. Indeed, one role *de jure* discrimination plays is to hide the presence of co-existing *de facto* discrimination, and antidiscrimination laws should keep this role in mind.

In this respect, this Article joins other calls to employ a critical approach to Equal Protection Clause jurisprudence.[215] With *de facto* discriminated against groups, courts must adopt alternative, less formal ways of proving discrimination. An example of this approach is the Supreme

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population in the petitioners' voting area. *See, e.g.*, *White v. Regester*, 412 U.S. 755, 765-70 (1973) (evaluating history of discrimination in accord with 28 U.S.C. 1253).

211. For this distinction and its vast implications, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

212. *Id*. at 465-68.

213. *Id.* at 468-75.

214. *See id*. at 471-72 (characterizing second-generation discrimination).

215. *See, e.g.*, Andrew Luger, *Liberal Theory as Constitutional Doctrine: A Critical Approach to Equal Protection*, 73 GEO. L.J. 153 (1984).

Court's decision in *Castaneda v. Partida*,[216] where the Court applied a substantive test to gauge discrimination. The Mexican-American petitioner alleged a violation of the equal protection clause in a Texas jury selection. Ruling in the Mexican-American's favor, the Court relied on statistical evidence showing a low percentage of Mexican-American jurors to conclude that such a low percentage could only be explained by intent to discriminate.[217] Although it has not waived the intentional discrimination prerequisite for asserting equal protection claims, the Court has relaxed the traditional practice that proving intent requires a demonstration of *de jure* discrimination.[218] Later in this case, the Court also affirmed the status of Mexican-Americans as an identifiable group and on that basis upheld the petitioner's constitutional claim.[219]

A critical test seeking to provide substantial protection against discrimination would need to be aware of and concerned with the formal-substantive discrimination distinction. The unique situation of *de facto* discriminated against groups compels the application of a more flexible, contextualized and historicized test to deal with their discrimination claims. Courts should be more suspicious of the harm that *de facto* discriminated against groups have suffered. In the case of Mexican-Americans, courts should not require petitioners to prove each time that they are a discriminated against group, and courts should also not limit their rulings to the specific circumstances of each case.

The case for Mexican-Americans should be thus contextualized. By reflecting on the relationship between legal recognition and *de jure* discrimination it is possible to explain the higher levels of recognition given to *de jure* discriminated against groups through the supposition that these groups suffered more. This might be true, but as a theoretical matter the nature of the suffering—be it *de jure* or *de facto*—should have no bearing on whether a group is legally recognized as a discriminated against group and is entitled to *de jure* antidiscrimination remedies in its favor, but rather the nature of the suffering should bear on the breadth of these remedies.

Whatever the motives behind the *de facto* discrimination against the Mexican-Americans were,[220] the outcome of that discrimination was legally-

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216. 430 U.S. 482 (1977).

217. *Id.* at 495-98.

218. For a flexible test that finds intentional discrimination of Mexican-Americans, see Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1711 (2000). The use of statistics to find intentional discrimination is rare. STONE, *supra* note 7, at 524.

219. Castaneda v. Partida, 430 U.S. 482, 495 (1977).

220. With regard to Mexican-Americans, for example, one can speculate that the strong oppressive effect of *de facto* discrimination made it unnecessary for the hegemony to use the explicit form of *de jure* discrimination. Another speculation might be that diplomatic issues with Mexico, which strongly opposed a race-based differentiation of Mexican-

untraceable discrimination. This form of untraceable discrimination further disadvantaged them during the remedial stage, especially in comparison to groups who suffered from *de jure* discrimination. Mexican-Americans were subjugated by a hegemony that was not too "different" from them, compared with African-Americans, thus making it complicated for the law to differentiate them from their white hegemonic counterpart: the easier it is for the law to identify the group, the easier it is for the law to discriminate against that group.[221] Moreover, adopting highly contextual group definitions might go against the hegemony's interest in making clear legal distinctions between itself and its "other" as a means of justifying the discrimination against the "other."[222] This inherent difficulty of applying *de jure* discrimination against fairly similar groups led to a false belief—produced by the legal system—that no discrimination occurred against these groups.[223] Instead, although they enjoyed formal equality, Mexican-Americans suffered from substantial *de facto* discrimination. This arrangement caused their "non-clusion" when they were barred from participating in the eventual remedial stage.

Mexican-Americans thus cross into the rights discourse from a special position. The discrimination discourse's rhetorical adherence to the difference-sameness dichotomy guaranteed legal and social inclusion and entitlement for equal rights only to "similar" people.[224] This dichotomy relies on the concept of unity, which prevents a discussion from developing about discrimination that imposes different outcomes among sub-groups of sup-

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Americans, contributed to the United States refraining from using the *de jure* discrimination apparatus. Greenfield & Kates, *supra* note 9, at 683-684. This was especially relevant in light of the U.S.-Mexico treaties that promised citizenship to former Mexicans as "whites." *Inland Steel Co. v. Barcelona*, 39 N.E.2d 800 (Ind. App. 1942). It is also plausible to assume that the Mexican-American elite itself opposed such *de jure* practices mainly out of a belief that this would grant them access to the mainstream (I wish to thank Gerald Torres for this point).

221. Moreover, the Court denied attempts to complicate those categorizations, even when the "new category" contained an intersection of two former familiar bases, such as race and gender. *See* Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 195 (David Kairys ed., 1990) (criticizing the Court's dismissal of a black woman's petition for damages based on being sexually harassed, both on the basis of race and gender).

222. *De jure* discrimination against Mexican-Americans, for example, would have risked blurring the white/black distinction, which was invaluable to whites. *See* George A. Martinez, *Mexican Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997).

223 Mainly through the mechanism of rejecting *de facto* based discrimination claims of Mexican-Americans. *See supra* note 20.

224. Martha Minow describes this as the failure of rights analysis to escape the dilemma of difference. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 147 (1990).

posedly "similar" people.[225] Mexican-Americans share an illusory "sameness" with the hegemony; specifically, they share the fact that they are different from the ultimate defined African-American "other" and they are not subject to *de jure* discrimination. The myth of these commonalities between Mexican-Americans and the American white hegemony is so deeply rooted that it prevents Mexican-Americans from being identified as a distinct discriminated against group that could have legal relevance within the antidiscrimination discourse.

CONCLUSION

Nothing in this Article should be read as favoring discrimination; instead, its goal is to take a more nuanced approach to the effects of different forms of discrimination on the legal recognition of different groups. Being a legally cognizable group might indeed prove insufficient for preventing racial discrimination.[226] However, the law is capable of improving the overall well being of a group. *De facto* discriminated against groups have not suffered the same wrongs that *de jure* discriminated against groups have suffered; nevertheless, a group's status as being discriminated against *de facto* is very important for determining a group's position. This importance is particularly salient in the remedial stage, since the entitlement to legal relief is affected by the existence of *de jure* discrimination and groups that suffer primarily from *de facto* discrimination are unable to take advantage of these remedial mechanisms. This Article illuminates the phenomenology through which these groups have generated their identities and have followed different paths in the remedial legal system based on the different forms of discrimination they suffered.

While the legal system's abstention from overt discrimination against a group may be interpreted as a lack of actual discrimination, it can be also seen as a form of appropriating the realm of discrimination, hence facilitating exclusion rather than producing inclusion of the group. In determining the scope of the eligibility of a *de facto* discriminated against group for antidiscrimination relief, courts should be mindful that the position of *de facto*

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225. I borrowed this idea from the analysis of the non-Israeli-Palestinians as located outside a frame of belonging to the Zionist vision. *See* Raef Zreik, *Palestine, Apartheid, and the Rights Discourse*, 34 J. PALESTINE STUD. 133 (2004). Outside the frame is how they were situated, not as a "missing part" needed to be reconstructed into the frame of Israeli society, but rather as the "different," where the parties involved are presumed to have no common share of norms or ground on which their conflict can be adjudicated. *Id.*

226. *See* Eugene Volokh, *Racial and Ethnic Classifications in American Law*, *in* BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 314 (Abigail Thernstrom & Stephan Thernstrom eds., 2002). Volokh warns against the looseness of the strict scrutiny standard, which might fail to protect against some discriminatory practices.

discriminated against groups is a case study on the foolishness of the belief that what we see in the law is all that exists.