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“Colored Men”

AND

“Hombres Aquí”

Hernandez v. Texas and the Emergence
of Mexican-American Lawyering

Michael A. Olivas, Ed.

Foreword by Mark Tushnet



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“The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from ‘whites.’ One method by which this may be demonstrated is by showing the attitude of the community. Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between ‘white’ and ‘Mexican.’ The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school the first four grades. At least one restaurant in town prominently displayed a sign announcing ‘No Mexicans Served.’ On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked ‘Colored Men’ and ‘Hombres Aquí’ (‘Men Here’). No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof.”

Hernandez v. Texas, 347 U.S. 475, 479-80 (1954) (footnotes and references omitted)

Dedication

To the attorneys who brought this case and worked so hard on behalf of the community: Gus Garcia, Carlos Cadena, Johh J. Herrera, and James de Anda. They leaned against power when it was dangerous to do so, and left the trail clear for those who followed so long after. All Latino and Latina lawyers and advocates stand on these shoulders, even if they do not realize it.

every night to their homes in Houston and San Antonio.³³ Many of these same lawyers learned the lesson from Thurgood Marshall and the NAACP Legal Defense lawyers, and with LDF assistance, established the Mexican American Legal Defense and Educational Fund (MALDEF) in Texas in 1968.³⁴ MALDEF has since exceeded the modest expectations of its founders, and has evolved to become the major organizational legal force on behalf of Latino communities.³⁵

In its fiftieth year anniversary in 2004, all of America has remembered the towering *Brown v. Board* decision, and assessed its impact.³⁶ Others have remembered the occasion of a young white Tupelo, Mississippi truckdriver, Elvis Presley, wandering into a Memphis, Tennessee recording studio the same year, and changing the world in another racially significant manner.³⁷ However, this is the only major scholarly occasion devoted to this fascinating Texas case, decided within days of *Brown*, and which signaled the start of Mexican-American lawyering. That development is still in progress, and the scholarship evident here is in the tradition of George I. Sánchez and the others who provided the intellectual foundation of this movement.³⁸ I thank all the authors who contributed to this volume and to the conference that led to this discussion.

I welcome all of you to *Hernandez*.

³³James de Anda, Nov. 2004 Remarks, at pp. 229-239 in this volume. See also GUSTAVO GARCIA, A COTTON-PICKER FINDS JUSTICE, THE SAGA OF THE HERNANDEZ CASE (Ruben Munguia ed., 1954). This fascinating pamphlet was published by the San Antonio printer Ruben Munguia in June, 1954, following the announcement of the decision a month earlier. Few copies exist, and I consulted the one from the Special Collection of the Library at the University of Texas, Permian Basin. I placed the public domain document on the Hernandez at 50 conference website at <http://www.law.uh.edu/hernandez50> (last visited May 3, 2005), and it is reprinted in the Appendix of this volume.

³⁴GUADALUPE SAN MIGUEL, "LET ALL OF THEM TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981 (1987).

³⁵*Id.* To review MALDEF's range of litigation efforts see <http://www.maldef.org> (last visited May 3, 2005) (listing recent cases filed in civil rights actions).

³⁶Many law schools and organizations have celebrated the decision with commemorations and special law review issues. For a listing of several such activities see <http://www.brownat50.org/index.html> (last visited May 3, 2005).

³⁷PETER GURALNICK, LAST TRAIN TO MEMPHIS: THE RISE OF ELVIS PRESLEY (1994).

³⁸George I. Sánchez was one of the first Mexican-American scholars, and served on the University of Texas Education faculty for many years, until his death in 1972. See, e.g., George I. Sánchez, Group Differences and Spanish-Speaking Children: A Critical Review, 16 J. APPLIED PSYCHOL. 5 (1932); GEORGE I. SÁNCHEZ, FORGOTTEN PEOPLE: A STUDY OF NEW MEXICANS (1940). For a volume that reviewed his career and scholarship see HUMANIDAD: ESSAYS IN HONOR OF GEORGE I. SÁNCHEZ (Americo Paredes ed., 1977).

Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico

Laura E. Gómez*

Introduction

In their studies of mid-twentieth century civil rights litigation involving Chicanos, several scholars have reached the conclusion that, in this era, Mexican Americans occupied an ambivalent racial niche, being neither black nor white.¹ The Supreme Court case *Hernandez v. Texas*,² decided in 1954 during the same term as *Brown v. Board of Education*,³ is cited as evidence for that proposition because it reveals tensions among members of the bench and bar involved with the case regarding claims to whiteness, claims to protected status under the Constitution, and the social reality of 1950s Texas for Chicanos, especially working class Chicanos such as Pedro "Pete" Hernandez. Hernandez was a 24-year-old cotton picker who was convicted by an all-white jury of murdering 40-year-old Joe Espinosa, a tenant farmer, outside a bar one Saturday afternoon.

Hernandez's lawyers, who would come to include one of the first Mexican Americans appointed to the federal bench in Texas and the first Mexican American law professor, appealed Hernandez's conviction and sentence of life imprisonment.⁴

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¹See George Martinez, The Legal Construction of Race: Mexican-Americans and Whiteness, 2 HARV. LATINO L. REV. 321, 326-29 (1997); George Martinez, Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980, 27 U.C. DAVIS L. REV. 555 (1994); Ian Haney López, Retaining Race: LatCrit Theory and Mexican American Identity in *Hernandez v. Texas*, 1 Harv. Latino L. Rev. 297 (1997); Steven H. Wilson, Brown Over "Other White": Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation, 21 LAW & HIST. REV. 145 (2003); Clare Sheridan, "Another White Race:" Mexican Americans and the Paradox of Whiteness in Jury Selection, 21 LAW & HIST. REV. 109 (2003); See also, Ariela Gross, Texas Mexicans and the Politics of Whiteness, 21 LAW & HIST. REV. 195 (2003).

²*Hernandez v. Texas*, 347 U.S. 475, 482 (1954).

³*Brown v. Board of Education*, 347 U.S. 483, 496 (1954).

⁴The four lawyers who worked on the Hernandez appeal were Gus García, John J. Herrera, Carlos C. Cadeña (the first Mexican American law professor, who taught at St. Mary's Law School), and James DeAnda (one of the first Mexican Americans appointed to the federal bench in Texas).

They argued that their client's constitutional right to equal protection under the law had been violated because, despite being 16 percent of the Jackson County population, no Mexican American had ever been summoned for service as jury commissioner, grand juror or petit juror in the county in 25 years. One of the deep ironies in the case was the reasoning used by the Texas appellate court in 1952 to conclude that Mr. Hernandez's rights had not been violated: "Mexicans are white people . . . The grand jury that indicted appellant, and the petit jury that tried him being composed of members of his race, it cannot be said, in the absence of proof of actual discrimination, that appellant has been discriminated against . . ." The Supreme Court overturned the Texas appellate court, concluding that Mr. Hernandez's constitutional rights had been violated and, for the first time, broadening the equal protection clause to cover Mexican Americans.

I share the view of scholars who have identified the mid-twentieth century as a formative period in the formation of Chicanos' racial identity and position in the U.S. racial order as an "in-between" racial group that was neither Black nor fully white. At the same time, I join other scholars in arguing that this racial ambivalence had its origins a century earlier, by virtue of the American occupation of Mexico's northern territories.⁶ In part due to unique demographics, the 60,000 Mexicans then living in New Mexico,⁷ existed both as a racially subordinate group in the U.S. racial hierarchy and as a group that at times successfully claimed white status (and, thereby, a dominant position relative to other racial minority groups).⁸ Armed with this

⁵*Hernandez v. State*, 251 S.W.2d 531, 536 (Tex. Crim. App. 1952), rev'd sub nom. *Hernandez v. Texas*, 347 U.S. 475 (1954).

⁶See, e.g., DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS 1836-1986* (1987); NEIL FOLEY, *THE WHITE SCOURGE: MEXICANS, BLACKS AND POOR WHITES IN TEXAS COTTON CULTURE* (1997); JOHN M. NIETO-PHILLIPS, *THE LANGUAGE OF BLOOD: THE MAKING OF SPANISH-AMERICAN IDENTITY IN NEW MEXICO 1880S-1930S* (2004); and CHARLES H. MONTGOMERY, *THE SPANISH REDEMPTION: HERITAGE, POWER, AND LOSS ON NEW MEXICO'S UPPER RIO GRANDE* (2002). An increasing subset of studies explores how groups change status from "white" to "non-white" or from "non-white" to white. See THEODORE W. ALLEN, *INVENTION OF THE WHITE RACE* (1994); DAVID R. ROEDIGER, *WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1999); MATTHEW F. JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1999); KAREN BRODKIN SACKS, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* (1998); RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993); NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); MICHELLE FINE, ET AL., *OFF WHITE: READINGS ON POWER, PRIVILEGE AND SOCIETY* (2004).

⁷As the northern Mexican region, New Mexico was an expansive geographic area that included all of present-day New Mexico, present-day Arizona, as well as parts of present-day Colorado, Nevada, Utah and Wyoming. In all, with the end of the war with the U.S., Mexico ceded around one million square miles or half its territory, if you include Texas (which Mexico had continued to claim during the war). GENE M. BRACK, *MEXICO VIEWS MANIFEST DESTINY, 1821-1846: AN ESSAY ON THE ORIGINS OF THE MEXICAN WAR*, 2, 54, 135 (1975).

⁸In this paper, I use the term "Mexican" as an ethno-racial category distinct from Euro-American whites, blacks, Pueblo Indians and other Indians. I include in that category Mexicans regardless of their status as Mexican nationals or U.S. citizens (this is especially important given that in the first 20 years of the American occupation it was not always clear whether Mexicans had elected to maintain their Mexican citizenship or become U.S. citizens). In the contemporary literature of the period (whether newspapers, court records, government documents, or private papers), "Mexican" (or "Mexicano" in Spanish) was used almost exclusively to refer to the former Mexican citizens of the region whose ancestry was mestizo (Spanish and Indian). Variants of "Spanish," "Hispano" and the like did not become widespread in the region until the late 19th and early 20th centuries—partly as a result of some of the racial formation processes I describe in this study. For analyses that consider that latter process, see NIETO-PHILLIPS, supra note 6; MONTGOMERY, supra note 6; PHILLIP B. GONZALES, *FORCED SACRIFICE AS ETHNIC PROTEST: THE HISPANO CAUSE IN NEW MEXICO AND THE RACIAL ATTITUDE CONFRONTATION OF 1933* (2001); A. GABRIEL MELENDEZ, *SO ALL IS NOT LOST: THE POETICS OF PRINT IN NUEVOMEXICANO COMMUNITIES, 1834-1958* (1997); DORIS MEYER, *SPEAKING FOR THEMSELVES: NEOMEXICANO CULTURAL IDENTITY AND THE SPANISH-LANGUAGE PRESS, 1880-1920* (1996).

nineteenth-century historical reality, mid-twentieth-century civil rights litigation such as *Hernandez* is easier to comprehend and, in fact, to have predicted.

In this chapter, I use Mexicans' "off-white" racial status in nineteenth-century New Mexico as a point of departure for exploring four themes. The first theme concerns the extent to which we can and should understand the transition from Spanish-Mexican to Anglo-American control of the Southwest as a key period that shaped American race relations both in the Southwest and nationally. Mexicans' status as an off-white or wedge racial group is crucial for understanding that period as well as for understanding the twentieth and even the twenty-first century trajectories of Latinos in the U.S. A second theme is how the study of Mexican American political agency in New Mexico opens up a range of nationally important nineteenth-century debates. For example, studying Mexicans' status under the Treaty of Guadalupe Hidalgo (as well as the status of Pueblo Indians under that law) prompts questions about the nature of citizenship, the links between race and citizenship, and the parameters of federal as compared to state citizenship. Similarly, studying New Mexico politics yields new insights and raises new questions about slavery of Blacks in the South and comparisons with the enslavement of Indians in the Southwest.

A third theme is how Mexicans' position in nineteenth-century New Mexico functioned simultaneously to challenge and buttress white supremacy. Mexicans' sometimes successful claims to whiteness challenged white supremacy by forcing a rupture in categories. At the same time, Mexicans' claim to whiteness was fragile and continually contested; as a result, Mexican elites sought to subordinate non-white groups lower on the racial hierarchy, including Pueblo Indians, Blacks (free and enslaved), and other communities of Indians. The fourth and final theme concerns the way in which Mexicans' second-class citizenship interacted with their precarious white status to produce conditions under which Mexicans sought to continually distance themselves from other non-white groups. Mexicans' citizenship was circumscribed in ways both symbolic and real by their non-white racial status; at the same time, Mexicans had certain citizenship rights precisely because they could sometimes successfully claim they were white. Both conditions provided incentives for emphasizing their whiteness, when it was possible to do so, and for distancing themselves from other non-white groups by excluding them as full citizens and rights-holders.

This chapter is organized into five remaining parts.⁹ Part II provides background about the Spanish-Mexican and Anglo-American racial orders at mid-nineteenth-century and the socio-political context. In the subsequent three sections of the paper, Parts III-V, I examine laws passed by majority-Mexican legislatures that affected the rights of Pueblo Indians, free and enslaved African-Americans, and other, non-Pueblo Indians in the region (including Navajo, Apache, Comanche, and Ute). In

⁹This chapter is part of a forthcoming book that focuses on the first 45 years of the American occupation of the Southwest, from 1846 to 1890. Tentatively titled, *MANIFEST DESTINIES: LAW AND RACE IN THE NINETEENTH-CENTURY SOUTHWEST*, the book is under advance contract with New York University Press. For related, already published work, see Laura Gómez, *Race, Colonialism and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 *LAW & SOC'Y. REV.* 1129 (2000) and Laura Gómez, *Race Mattered: Racial Formation and the Politics of Crime in Territorial New Mexico*, 49 *UCLA L. REV.* 1395 (2002). Due to space limitations, I have necessarily had to simplify and sometimes omit discussions of important events and processes.

each of those three parts, I argue that Mexican elites (who were the majority of territorial legislators) enacted legislation in order to reinforce their fragile claim to whiteness. In Part VI of the chapter, I conclude by reflecting on the significance of these dynamics for understanding our nation's legacy of racial inequality and the emerging twentieth-century racial order. I argue that Mexican American political agency in nineteenth-century New Mexico functioned simultaneously to challenge white supremacy (with the insistence of the expansion of the white category to include Mexicans under certain conditions) and to buttress white supremacy (with Mexicans themselves functioning as a wedge racial group that reproduced the subordination of Pueblo Indians, Blacks, and nomadic Indians).

Conflict in New Mexico at Mid-Century

The American military occupation of New Mexico in 1846 and Congress's subsequent designation of the region as a federal territory resulted in an ambiguous political status that evoked both a colonial legacy and the promise of eventual annexation as a state.¹⁰ Against the backdrop of vigorous congressional and press debate about the propriety of U.S. military aggression against Mexico, it was not at all clear what would become of New Mexico's 60,000 ethnic Mexicans, 60,000 nomadic and semi-nomadic Indians (including members of the Navajo, Apache, Comanche, Ute, and Kiowa Tribes), 15,000 Pueblo Indians, and 1,000 Euro-Americans.¹¹ Despite their differences, the pro-war (mostly Democrats) and anti-war (mostly Whigs) factions in Congress were united in their fears about incorporating New Mexico's population of Mexicans and Indians, which both camps deemed racially inferior and unworthy of citizenship.¹² This was in sharp contrast with congressional views toward California, which by 1848 had a majority of Anglo-American settlers in the San Francisco region and, it was presumed by all, would quickly be admitted to the Union.

In many ways, New Mexico was merely an annoying obstacle to reaching the Pacific Coast.¹³ As is often the case, however, the law of unintended consequences was at work. Unfolding events in the war and its conclusion in 1848 with the Treaty

¹⁰With 1700 troops following the Santa Fe Trail (and what would become, 30 years later, the route of the Atchison, Topeka, and Santa Fe Railroad), Colonel Stephen W. Kearny asserted American control of New Mexico at Las Vegas on August 14, 1846, moving to take the capital at Santa Fe four days later. Over the next month, Kearny supervised construction of Fort Marcy in Santa Fe, the compilation of a code of laws known as "The Kearny Code" (drawn substantially from the laws of Missouri and Texas), and appointed a civilian government. Kearny was promoted to Brigadier-General for this successful invasion, and then on Sept. 25 led his troops to California. Eventually moving south to fight the war in Mexico's interior, he died in Veracruz, Mexico in October 1848. In October 1846, Kearny's troops were replaced by 1800 men under the command of Colonel Price. HUBERT HOWE BANCROFT, *HISTORY OF THE PACIFIC STATES OF NORTH AMERICA, ARIZONA AND NEW MEXICO, 1530-1888*, VOL. XII, 408-421 (1888); RALPH EMERSON TWITCHELL, *THE LEADING FACTS OF NEW MEXICAN HISTORY*, VOL. II 200 n.138, 205 (1912).

¹¹HOWARD R. LAMAR, *FAR SOUTHWEST, 1846-1912: A TERRITORIAL HISTORY* 92 (1966).

¹²On arguments of Mexicans' racial inferiority in Congress and the American press, see REGINALD HORS-
MAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF RACIAL ANGLO-SAXONISM*, 210-217, 229-
260, 276-278 (1981); ROGERS M. SMITH, *CIVIC IDEALS*, 198, 204-209 (1997); FREDERICK MERK,
MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY: A REINTERPRETATION, 29-40, 157-169
(1963); ANDERS STEPHANSON, *MANIFEST DESTINY: AMERICAN EXPANSION AND THE EMPIRE OF
RIGHT*, 46-49, 55-57 (1995); THOMAS R. HIETALA, *MANIFEST DESIGN: ANXIOUS AGGRANDIZEMENT
IN LATE JACKSONIAN AMERICA*, 133-34, 152-66 (1985).

¹³BANCROFT, supra note 10, at 408.

of Guadalupe Hidalgo, as well as the unique circumstances of the region, made New Mexico more of a problem for the U.S. than had been anticipated. In particular, the U.S., feeling its way as a colonial power for the first time in New Mexico, was unprepared for the relatively unusual dynamics of what I term "double colonization." The U.S. colonization of the 19th century was grafted onto a previous European colonization of the region—the Spanish colonization of the 17th and 18th centuries. For our purposes, one of the most significant features of double colonization was that American military and civil authorities encountered an entrenched set of European-origin political and social institutions that were operated by a largely non-European population consisting of small, widely dispersed mestizo (mixed Spanish and indigenous) and Pueblo Indian communities.¹⁴ For example, Americans encountered a fully developed Spanish-Mexican legal system, as well as an entrenched system of canon law in the Catholic Church.¹⁵ This was, of course, a new scenario for the Americans, since they had previously encountered Indian communities living under circumstances, which from their Euro-centric worldview, did not evoke established societies with institutions.

An important dimension of the Spanish colonization of the region was a system of racial inequality grounded in white supremacy that resulted in a hierarchy of castes based on racial mixture among Spaniards, Indians, Africans, and the various mestizo combinations resulting from those categories. While specific categorizations were complex and localized, the general hierarchy placed Spaniards at the top, Indian/Spanish mestizos in the middle, and Indians and Blacks at the bottom, with a detailed system of rights and privileges structuring property relations, occupational entry, and family relationships according to position in the hierarchy.¹⁶ In Mexico, demographics overwhelmed the system, causing it to collapse of its own weight: consider that in 1646 Mexico's population contained roughly equal numbers of those claiming Spanish descent (most of whom were born in Mexico) and Black descent, but ten times as many mestizos and Indians as either of those groups, so that an inevitable mestizo population resulted in later centuries.¹⁷

¹⁴Writing with no small trace of sarcasm, one historian evoked the dilemma of double colonization for the U.S. in more colorful terms: "But Mexico—there was a problem. Eight million human beings, rooted in soil of their own, covered by a veneer of civilization, and professing the Christian religion!" MERK, supra note 12, at 34.

¹⁵See GÓMEZ, supra note 9, at 1145-46.

¹⁶See generally MARTHA MENCHACA, *RECOVERING HISTORY, CONSTRUCTING RACE: THE INDIAN, BLACK, AND WHITE ROOTS OF MEXICAN AMERICANS* 49-66 (2001). Alonso describes the Spanish racial order as follows:

In this pigmentocratic 'regime of castes' (regimen de castas), somatic distinctions in skin color, eye shape, hair quality, and the like became the visible indexes of what were construed as natural inequalities of social being. Ontological differences, constructed in terms of a series of homologous oppositions in which pure-impure was a core distinction, underpinned the honor of Spanish conquerors and the infamy of conquered Indians and enslaved blacks. A hermeneutics of descent, based on a calculus of types and mixtures of pure and impure blood, specified the quality (calidad) of social subjects and endowed them with a differential value that defined their place in society. Religion, color, blood, and descent became fused in the calculation of status and in the determination of class membership . . . [T]hrough this logic of racial difference, power was personified and embodied; relations of domination and exploitation were produced, naturalized, and legitimated. . .

ANA MARÍA ALONSO, *THREAD OF BLOOD: COLONIALISM, REVOLUTION, AND GENDER ON MEXICO'S NORTHERN FRONTIER* 53-54 (1995).

¹⁷MENCHACA, supra note 16, at 61; see also, ALAN KNIGHT, *RACISM, REVOLUTION, AND INDIGENISMO: MEXICO, 1900-1940*, in *THE IDEA OF RACE IN LATIN AMERICA, 1870-1940*, 72 (Richard Graham ed., 1990).

While it is difficult to document with precision, it appears that the late 18th and early 19th centuries were periods in which the Spanish racial legacy was softening, so that some mestizos were able to successfully claim entitlement to the privileges of whiteness formerly limited to Spaniards. This was a phenomenon well-recognized throughout the former Spanish colonies, so that in Latin America, white skin, money and other attributes of social mobility were perceived as being able to "whiten" otherwise disadvantaged mestizos.¹⁸ Moreover, it appears that the Spanish racial order was especially susceptible to challenge (and so was breaking down) in frontier areas, such as New Mexico.¹⁹ In frontier settings, after all, even those with "impure blood" (meaning, indigenous ancestry) could transform themselves into "civilized" persons in the context of a presumed uncivilized, majority Indian region.²⁰

By the early nineteenth-century, the Spanish racial order was facing tremendous pressure due to the growth of the mestizo and Indian populations, relative to persons of Spanish descent.²¹ Motivated largely by the need to culturally and economically incorporate the majority of Mexicans, the Spanish legislature in 1810 initiated a variety of changes to improve the position of mestizos and Indians.²² Two years later, the Spanish legislature enacted the Law of Cadiz, which abolished the racial castes and promised formal equality regardless of racial status.²³ Additional liberalization policies occurred after Mexican independence in 1821, with the Plan de Iguala declaring all persons equal citizens of the new republic without regard to race.²⁴

Despite substantial support for the abolition of slavery at the time of Mexican independence, the Mexican legislature opted instead to institute what they considered a more "progressive" slave code: it banned the future importation of slaves from Africa and mandated that current slaves would be free after an additional ten years of servitude.²⁵ In practice, the only northern Mexico region affected by the slave code was Texas, where by 1831 American immigrants outnumbered Mexicans.²⁶ The major cause of the breaking away of Texas (by then economically, if not politically, dominated by settlers from the southern U.S.) and formation of the Texas Republic in 1836 was the slavery question, with the central Mexican government insisting that its prohibition of slavery extended to its northeastern frontier and the American immigrants insisting they had the right to hold African slaves in the region. Texas

¹⁸ALONSO, *supra* note 16, at 67; PETER WADE, *BLACKNESS AND RACE MIXTURE: THE DYNAMICS OF RACIAL IDENTITY IN COLOMBIA* 10-11, 297 (1993).

¹⁹Anthropologist Martha Menchaca asserts that, over the centuries, "Blatant racial disparities became painfully intolerable to the non-White population and generated the conditions for their movement toward the northern frontier, where the racial order was relaxed and people of color had the opportunity to own land and enter most occupations." MENCHACA, *supra* note 16, at 66. In her study of northern Mexico, Alonso reaches a similar conclusion. See ALONSO, *supra* note 16, at 54, 65-67.

²⁰ALONSO, *supra* note 16, at 54.

²¹MENCHACA, *supra* note 16, at 158 (noting that by 1810 80% of Mexico's population was either mestizo or Indian).

²²*Ibid.* These changes included lifting occupational restrictions, releasing Indians from paying tribute to the crown, and making Indians liable for taxation like other subjects.

²³*Ibid.*

²⁴*Id.* at 161.

²⁵*Id.* at 163.

²⁶NEIL FOLEY *supra* note 6, 18. Although most Euro-American immigration to Texas resulted from liberalization of Mexican immigration laws, historian Richard White estimates that as much as 40 percent of Euro-Americans in Texas were in violation of Mexican laws or were, according to him, "illegal aliens." White, "IT'S YOUR MISFORTUNE AND NONE MY OWN": A NEW HISTORY OF THE AMERICAN WEST, at 65 (1991).

later became the target of additional anti-slavery laws enacted in the 1820s by both the Mexican legislature and the Coahuila state legislature—laws that culminated in Mexico's abolition of African slavery in 1829.²⁷ Texas entered the Union of states nine years later as a slave state.²⁸

One of the benefits of using the concept of double colonization is to bring into focus the impact of two successive, white supremacist racial orders with the Spanish and then American colonization of New Mexico. The Anglo-American racial order at mid-century rested on the legacy of European colonialism of North America that was openly and forcefully justified by a doctrine that defined the native Indian people as racially inferior—as both an entirely separate, sub-human category that was undeserving of humane treatment, worthy of extermination, and, for the long-term, incapable of incorporation into the newly formed American polity (so long as they maintained political allegiance and cultural affiliations to their tribes).²⁹ Another key dimension of the U.S. racial order was the legalized enslavement of African peoples on the basis of race, justified with claims of Blacks' racial inferiority to whites. Beginning with the first arrival at the port of Jamestown in 1619 of a ship carrying Africans, "slavery developed quickly into a regular institution, into the normal labor relations of [B]lacks to whites in the New World."³⁰ Even in those states in which slavery was not legal (and even among most abolitionists), the idea of Black inferiority was unchallenged, whether speaking of slaves or free Blacks.³¹

A central feature of the 19th century U.S. racial order was the primacy of science to justify the racial subordination of non-white people; scientific racism was crucial because it "explained why some [races] succeeded while others failed, seemed to make clear the reasons for contemporary realities in international relations, and justified the dominance domestically of the few (whites) over the many (colored)."³² Three tenets of "scientific racism" as it was preached in the nineteenth-century heavily shaped later policies and popular attitudes about race. First, there was the core idea "that outer physical characteristics were but markers of inner intellectual, moral, or temperamental qualities." Second, it was believed that such traits were inherited. And, third, was the idea that these traits were fixed and unchangeable.³³

²⁷Menchaca, *supra* note 16, 165-66. The legislation that emancipated Mexico's African slaves was signed into law by President Vicente Guerrero, who was an Afro-mestizo. *Id.* At 166 and 322 (n. 6).

²⁸On the war for Texas and its annexation, see HORSMAN, *supra* note 12, at 213-15, 216-19; HIETALA, *supra* note 12, at 10-54.

²⁹STEPHEN CORNELL AND DOUGLAS HARTMANN, *ETHNICITY AND RACE: MAKING IDENTITIES IN A CHANGING WORLD*, 110 (1998); GEORGE FREDERICKSON, *RACISM: A SHORT HISTORY*, 68-69 (2002). Sociologist Eduardo Bonilla-Silva argues persuasively that the roots of a global racial structure lie in European colonialism and concludes that "racialized social systems, or white supremacy for short, became global and affected all societies where Europeans extended their reach." EDUARDO BONILLA-SILVA *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF INEQUALITY IN THE UNITED STATES* 9 (2003).

³⁰HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT*, 23 (1995).

³¹FREDERICKSON, *supra* note 29, at 80-81.

³²FREDERICKSON, *supra* note 29, at 56-58. On scientific racism, see also, HORSMAN, *supra* note 12, at 139-157; RICHARD GRAHAM, ED., *THE IDEA OF RACE IN LATIN AMERICA, 1870-1940*, 2-3; and SMITH, *supra* note 12, at 203-205 (emphasizing the portrayal of scientific racism in the U.S. popular press of the mid and late 19th century).

³³JACOBSON, *supra* note 6, 32.

Overall, the American racial hierarchy placed whites at the top (with relevant ethnic distinctions remaining in the 19th century) and Indians and Blacks at the bottom. Given the encounter of American settlers and traders with Mexican mestizos in the early and, especially, middle 19th century, it was by no means clear where Mexicans would fit within this hierarchy. Contemporary commentaries were split (sometimes seemingly within the mind of the same commentator) between the views that Mexicans were “really Indians” (because they were more Indian than Spanish in ancestry) or more comparable to Blacks in color, custom, and overall depravity.³⁴ Given that, in either case, the outcome of exclusion from the rights and privileges accorded whites, treating Mexicans as “like Indians” or “like Blacks” in the American context may have been inconsequential. On the other hand, it was precisely the ambiguity of Mexicans’ racial status that positioned them to play a role as an off-white or intermediate white group in the context of the Southwest.

Congressional debate about ratification of the Treaty of Guadalupe Hidalgo reflected racist concerns about incorporating New Mexico’s population that echoed those heard at the start of the war with Mexico. A major concern during these debates was how to get the most land from Mexico with the smallest number of Mexicans.³⁵ Debate over whether and precisely how to incorporate Mexico’s former citizens was not unique for its emphasis on race. The American racial hierarchy (and a patriarchal gender order) had heavily shaped American citizenship laws throughout the nation’s history. In his comprehensive study of federal legislation and judicial decisions on citizenship,³⁶ political scientist Rogers Smith concludes:

[W]hen restrictions on voting rights, naturalization, and immigration are taken into account, it turns out that for over 80 percent of U.S. history, American laws declared most people in the world legally ineligible to become full U.S. citizens solely because of their race, original nationality, or gender. For at least two-thirds of American history, the majority of the domestic adult population was also ineligible for full citizenship for the same reasons. Those racial, ethnic, and gender restrictions were blatant, not “latent.”³⁷

What was meant by “citizenship,” moreover, was not self-evident.³⁸ Smith notes that the Constitution “did not define or describe citizenship, discuss criteria for inclusion or exclusion, or address the sensitive relationship between state and national citizenship.”³⁹ One of the central tensions was how broadly we conceive of “citi-

³⁴In particular, southerners were ambivalent about the nation’s expansion to Mexico because they considered “the Mexican race” a suspect, colored race “but little removed above the Negro.” MERK, *supra* note 12, at 38-39 n.25; See also, *supra* note 12.

³⁵For example, see MERK, *supra* note 12, at 151-52 (quoting editorials in the *Louisville Democrat* and the *Washington Union*).

³⁶Smith surveyed all proposed and enacted federal legislation in these areas and more than 2,500 appellate cases decided between 1798 and 1912. SMITH, *supra* note 12.

³⁷SMITH, *supra* note 12, at 15.

³⁸For thoughtful discussions of how race shapes the meaning of citizenship in other contexts, see Leti Volpp, “The Citizen and the Terrorist,” 49 *UCLA Law Rev.* 1575 (2002) and Leti Volpp, “Obnoxious to Their Very Nature”: Asian Americans and Constitutional Citizenship,” 5 *Citizenship Studies* 57 (2001).

³⁹SMITH, *supra* note 12, at 115. He goes further with respect to the latter: “Issues of state versus national identity and slavery, especially, were so explosive that the framers avoided raising them whenever possible and left them largely unresolved.” SMITH, *supra* note 12, at 116.

zenship.” We can conceive of citizenship as involving a bundle of rights positioned along a continuum. In a narrow sense, American citizenship refers to national identity and the right to carry an American passport (for example, every American, native-born or naturalized, adult or child, retains this right). At the other end of the spectrum, we can think of “citizenship” as entailing full political rights, including voting, office-holding, and jury service (many American citizens do not have that full bundle of political rights, including children, for example).⁴⁰ In between the two, are such rights as the right to sue in federal court, the right to own and alienate property—a bundle of rights seen as economic more than political, but seen as related to being a member of the polity, and hence a citizen. In the remaining sections of the paper, one of the major themes is the various combinations of rights that were accorded racially subordinated groups in New Mexico: Mexicans, accorded rights by Congress; Pueblo Indians as accorded such rights by Congress and the Mexican elite; Blacks as accorded rights by Mexican elites and federal actors; and non-Pueblo Indians, as accorded rights by federal actors and the Mexican elite.

In the end Congress compromised on the Mexican question, ratifying the Treaty of Guadalupe Hidalgo to achieve two ends: a cession by Mexico of the maximum possible amount of land, coupled with the barest (and most legally vague) guarantees regarding the citizenship rights of the former Mexican citizens living in the ceded lands, the majority of whom lived in New Mexico. For instance, Article VIII of the Treaty refers to the rights of Mexican citizens to become “citizens of the United States,” but no where specifies what being a “citizen” means.⁴¹ In Article IX, the Senate rejected the citizenship provisions negotiated in Mexico City, choosing instead substitution language that made it clear that the Mexican citizens residing in New Mexico were not endowed with full rights, since they were not, at the time of ratification or necessarily at any set time in the future, assured of status as citizens of a state within the Union.⁴² Reading the provisions together, we can conclude that the former Mexican citizens had been accorded limited American citizenship. For the purposes of nation-

⁴⁰Free Blacks, who numbered around half a million in the U.S. in 1860 (divided almost evenly between the North and the South), likewise, had an ambiguous political status. According to Smith, southern courts “tended to deny [free] black citizenship altogether”; while “[n]orthern courts generally acknowledged [free] black citizenship formally while rejecting democratic notions of the political privileges inherent in that status.” SMITH, *supra* note 12, at 255-58.

⁴¹Article VIII of the Treaty of Guadalupe Hidalgo contains three references to U.S. citizenship: “[T]hose who shall prefer to remain in the said territories, may either retain title and rights of Mexican citizens, or acquire those of citizens of the United States . . . and those who shall remain in the said territories, after the expiration of that year . . . shall be considered to have elected to become citizens of the United States. [T]he present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guaranties equally ample as if the same belonged to citizens of the United States.” RICHARD GRISWOLD DEL CASTILLO, *THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT, 189-90* (1990) (emphasis added).

⁴²Article IX of the Treaty of Guadalupe Hidalgo reads as follows:

The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States and be admitted, at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of religion without restriction.

GRISWOLD DEL CASTILLO, *supra* note 33, at 190. This phrase implies that full citizenship was linked to being a citizen of a state—a condition to be determined by Congress under Article IX of the Treaty. Americans who were citizens of federal territories, as opposed to states, by definition were second-class citizens.

ality (for example, obtaining a passport) and in terms of relations with nationals of other nation-states, the former Mexican citizens were citizens of the U.S. On the other hand, the second provision made it clear that they were not citizens of any state (and would not necessarily become state citizens), and, within the context of the meaning of citizenship in the mid-19th century, they therefore had a kind of second-class citizenship.⁴³

Compared to Texas and California, New Mexico's population had three distinguishing features. First, by virtue of the Treaty ending the war, the majority of its native population (60,000 Mexicans and 15,000 Pueblo Indians) had at least some claim to citizenship (whether these claims would extend to full citizenship or some kind of second or third class citizenship was not known in 1848, of course). Second, New Mexico's multi-racial demographics were unique among the other former Mexican territories. Neither California or Texas had as large and as diverse an Indian population as New Mexico.⁴⁴ New Mexico's Indian population was divided between the more numerous nomadic and semi-nomadic tribes who were openly hostile to the U.S. (just as they had been hostile to the Spanish and Mexican governments), on the one hand, and the various Pueblo Indian communities who were open to U.S. authority in the region (at least in part as a way to gain protection from raids by the nomadic tribes), on the other hand. In this multi-group, multi-racial context, Mexicans could and would position themselves as a wedge racial group between Euro-Americans above them and Indians below them. A third key feature of New Mexico's racial demographics was the tiny number of Euro-American settlers in the region at the time of the American conquest. Unlike in California and Texas, Euro-American settlers were vastly outnumbered by native Mexicans and Indians in New Mexico, with fewer than 1,000 in the region at the time of the American military occupation.

Given this unique racial context, I will examine how majority-Mexican legislatures responded to Pueblo Indians, Blacks (free and enslaved), and nomadic Indians during the first 25 years of the American occupation (1846-1869). I use the term "Mexican elite" to refer to Mexican men who were the majority of elected officials at the county and territorial levels in New Mexico during this period. During most of the 19th century, New Mexico constitutional conventions and legislatures were conducted in Spanish, and legislative acts were proposed and adopted in Spanish, translated into English, and then officially printed in both Spanish and English. Mexican men were the majority of all legislative bodies and elected political conventions in New Mexico during this time period, ranging from a low of 55% to a high of 95%

⁴³This interpretation is consistent with the Supreme Court's 1828 ruling in *American Insurance Co. v. 356 Bales of Cotton*, concluding that residents of an acquired U.S. territory (whether acquired "by conquest or by treaty") automatically become U.S. citizens, but not state citizens. *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828) (discussed in SMITH, *supra* note 12, at 192). Speaking about the 1829-1856 period, Smith concludes that "At the federal level, the Jacksonian [period] story was one of minimizing the importance of national as opposed to state citizenship, along with yet more explicit recognition of gender and racial restrictions on full civic membership." SMITH, *supra* note 12, at 220.

⁴⁴It should be noted that this distinction resulted both from a more completely executed genocidal policy in California and Texas and also from the enslavement of so-called "Mission Indians" in the two regions. The point I am making here is that, at the time American settlers and armies occupied the three regions, they encountered different demographics and accompanying social dynamics in New Mexico, as compared to California and Texas.

of the membership of these elected bodies.⁴⁵ Thus, the laws and other actions and pronouncements of these bodies were the voice and will of elite Mexican men as a group self-defined and defined by others as distinct both from Euro-Americans and the various Indian communities in New Mexico. Treating Mexican elites as agents with a powerful voice and role in creating their own destinies, even after the imposition of U.S. military and civil rule in the region, is a significant departure from past historic scholarship, which has tended to treat Mexican political elites as mere pawns of the small cadre of Euro-American elites who lived in the region or the small numbers of federally appointed officials sent from outside New Mexico.⁴⁶

Despite the significant ways in which Mexican men had bona fide claims to full American citizenship (though these claims rarely went uncontested), there were several respects in which their agency as political actors was circumscribed. The earliest legislatures and conventions (which convened before Congress had formally declared New Mexico a federal territory in 1850) and the later territorial legislatures existed as less than fully autonomous bodies in two respects. First, for at least the first three decades of the U.S. occupation, military rule trumped civilian rule, meaning that power was, first and foremost, in the hands of military commanders rather than either presidentially appointed officials or elected officials. Second, under the federal statutes that created New Mexico and other western territories, Congress had the power to nullify any act of the territorial legislature.⁴⁷

In addition to these fundamental constraints, there were three additional ways in which Mexican elites' agency was circumscribed. First, the President appointed (with senatorial confirmation) the most powerful positions in civil government for the territory, including governor, secretary and three justices of the Territorial Supreme Court. In the first 15 years of territorial status, these appointees were virtually all Euro-Americans and most had never set foot in New Mexico prior to their appointments. Second, the design and implementation of the Treaty of Guadalupe Hidalgo operated to over-represent the Euro-American population and under-represent the Mexican population.

The Treaty gave the 60,000 Mexicans in New Mexico three options.⁴⁸ First, they could choose to leave their homes to relocate in Mexico, south of the newly estab-

⁴⁵These percentages are my own estimates, based on surname (and, in some cases, first and last name) of legislators for the various legislatures and constitutional conventions between 1846 and 1870. William Gillett Ritch (Secretary of the Territory), *NEW MEXICO BLUE BOOK FOR 1882* (Legislative Directory), which includes legislative membership going back to 1847. For secondary sources, see also BANCROFT, *supra* note 10; ROBERT W. LARSON, *NEW MEXICO'S QUEST FOR STATEHOOD, 1846-1912* (1968); LAMAR, *supra* note 11.

⁴⁶Even as I take this position, however, I am wary of overstating the extent to which Mexican elites "controlled" New Mexico's political sector, much less its legal system and economy. In my forthcoming book, I treat Mexican elites' role as central, but also devote considerable analysis to the role played by Euro-American outsiders who dominated New Mexico's bench and bar throughout the territorial period. Many of these men, including lawyers Thomas Catron and LeBaron Bradford Prince were among the wealthiest men in the territory, in addition to serving variously as New Mexico's first senator and its governor and supreme court chief justice, respectively. For general works on New Mexico history that feature these and other prominent Euro-Americans, see LARSON, *supra* note 37; LAMAR, *supra* note 11; PORTER A. STRATTON, *THE TERRITORIAL PRESS OF NEW MEXICO, 1834-1912* (1969). For a perspective on the territorial period that focuses on Spanish-Mexican actors, see DURAN, *infra* note 55.

⁴⁷In this sense, status as a federal territory was substantially different than status as a state. This was especially true during the 19th century, when the notion and operation of federalism were much different than they are today, such that states had comparatively more power.

⁴⁸See GRISWOLD DEL CASTILLO, *supra* note 33, at 62-72.

lished border with the U.S.; an estimated 4,000 people chose this option, an astounding number given the trauma and cost such moves must have entailed at that time.⁴⁹ A second option for the former Mexican citizens was to remain in their homes in New Mexico and formally elect Mexican citizenship before a county official (usually a probate judge), which substantial numbers appear to have done.⁵⁰ The third option was by default: if the former Mexican citizens living in New Mexico remained in their homes and did not formally move to retain their Mexican citizenship, after a year they would be presumed to be U.S. citizens. The first two options functioned to under-represent the Mexican majority that was effectively enfranchised by the third option, since they decreased the proportion of Mexican citizens relative to the proportion of Euro-American citizens. A third important way in which the Treaty's grant of citizenship was in some sense hollow was that it granted federal citizenship at a time when the most important rights came through state citizenship.⁵¹

Mexican Elites and Pueblo Indians

By 1850, when Congress declared New Mexico a federal territory, New Mexico's 60,000 mestizo villagers and 15,000 Pueblo Indians had lived through two colonizations by European nations, making this a double colonization context.⁵² As Ramón Gutiérrez has noted, one sees parallels in the centrality of race and racism in the two colonial projects: "the Spanish rhetoric of colonialism, particularly the racist tenets that were advanced to describe and justify the vanquishment and enslavement of New Mexico's various Indian groups" was matched by "a very similar discourse

⁴⁹Samuel E. Sisneros, "Los Emigrantes Nuevomexicanos: The 1849 Repatriation to Guadalupe and San Ignacio, Chihuahua, Mexico," (2001) (unpublished M.A. thesis, Univ. of Texas at El Paso) (on file with author). Writing as a roughly contemporary historian, Bancroft notes the absence of any "very definite records on the subject," but concludes that "about 1,200" New Mexicans moved south in 1848-49 to leave the newly established U.S. and also that, in 1850, "a considerable number of wealthy hacendados moved south to Mexico." BANCROFT, *supra* note 10, at 472. Twitchell puts the number significantly lower than Sisneros, at 1500-2000, but it is likely he was referring only to heads of households (he does not provide any sources for his estimate but the surrounding text suggests he based it on Bancroft's estimate). TWITCHELL, *supra* note 10, at 290.

⁵⁰Twitchell reports that "a large number" took this option and that that number included "many names of prominent men," but he is not more specific. TWITCHELL, *supra* note 10, at 65. Griswold estimates 2,000 Mexican men took this route, but does not provide sources for his conclusion. GRISWOLD DEL CASTILLO, *supra* note 33, at 65. Given conflicts during the early 1850s about who was eligible to vote and hold office, it appears that substantial numbers of Mexican elites elected to maintain their Mexican citizenship in the period immediately following treaty ratification. In one instance in 1853, 40 Mexicans were indicted for falsely swearing that they were U.S. citizens in order to vote. When the U.S. Attorney produced record books showing these men had elected to retain their Mexican citizenship, the judge ruled the records unreliable, invalidated the process (in 1849) established by the military commander for so electing, and dismissed all cases. See TWITCHELL, *supra* note 10, at 291 n.216; and W.W.H. DAVIS, *EL GRINGO: NEW MEXICO AND HER PEOPLE* 331-332 (2004).

⁵¹See discussion, *supra* note 33 and 34.

⁵²A large part of my objective with this study is to make visible both moments of colonization, as well as uncover the ways in which both left a racial legacy that continues to affect us today. In his study of the enslavement of Indians by New Mexico's Spanish/Mexican people, Estevan Rael-Gálvez notes the importance of "cycles of conquest through which nuevomexicanos have passed": "It is the overlapping of empires and the imperial transitions that have occurred that have exacerbated this invisibility [of Indian slavery] . . . these subjects are not just heirs to the more contemporary influence of racial slavery in the U.S., but certainly more intimately to that of the impact of Spain's peopling and dis-peopling practices along the banks of the Rio Grande." Estevan Rael-Gálvez, *Identifying Captivity and Capturing Identity: Narratives of American Indian Slavery, Colorado and New Mexico, 1776-1934*, 372-373 (2002) (unpublished Ph.D. dissertation, University of Michigan) (on file with author).

being articulated" by the American colonizers.⁵³ For the mestizo villagers especially, the two colonizations could not have been more different. In the first colonization, they were colonists—"settlers" in the colonial enterprise (and so the subjects of the colonial project); in the second colonization, however, they were "natives" (and so effectively the objects of the colonial project). A central goal of the American colonization became the co-optation of Mexicans, so that they would not resist the colonization as natives (and, particularly, as natives allied with the other numerically large native social groups).⁵⁴

An important form of psychological inducement was allowing Mexicans to claim, publicly and formally, white status.⁵⁵ Mexicans received a kind of collective psychological boost by being allowed to claim whiteness within the American context of white supremacy. Consider that, however, in order for the boost to be meaningful, Indians had to be excluded from it. The assertion that members of the Navajo, Apache, Comanche, Ute and other nomadic and semi-nomadic tribes were not "white" was not in the least controversial. From the Euro-American perspective, these Indian tribes looked like the Indian tribes whom they had been battling, slaughtering, and gradually pushing west from the time of the first New England settlements. But, as noted Pueblo scholar Alfonso Ortiz has said, Pueblo Indians "posed a paradox for American policymakers."⁵⁶ "[American] officials in New Mexico were quick to point out the contrasts between such "savage" tribes as the Apaches, Utes, Navajos, Comanches, Cayugas, Cheyennes, and Arapahos, and the "civilized" Pueblos . . ."⁵⁷

In short, New Mexico's Pueblo Indians puzzled Euro-Americans because they did not correspond to their racist notion of how Indians lived. An additional complication, for the American colonizers, was that Pueblo Indians and Mexicans seemed to share much in common. As historian Marc Simmons has noted, the Americans encountered distinct Pueblo Indian and Mexican communities with many overlapping similarities:

When Anglo-Americans assumed control of the Southwest, they discovered in the upper Rio Grande Valley [of New Mexico] two distinct village culture types: one, an archaic Spanish rural culture, heavily overlaid with Indian elements; the other, the Pueblo, preserving the underpinnings of its indigenous

⁵³RAMÓN A. GUTIÉRREZ, *WHEN JESUS CAME, THE CORN MOTHERS WENT AWAY: MARRIAGE, SEXUALITY, AND POWER IN NEW MEXICO, 1500-1846*, 338 (1991).

⁵⁴In discussing Mexicans as a social group in this way, I am purposefully minimizing other important dimensions of social differentiation. In particular, class and status distinctions (themselves embedded in racial origins) among the region's Mexicans were extremely important. In many ways, the American objective was to co-opt elite Mexicans, rather than all Mexicans. At the same time, my argument is that a racialized collective identity formed during this period of colonial contact, precisely because Americans viewed the native mestizos as racially inferior "Mexicans," often undifferentiated in terms of status, wealth, and regional differences that had been extremely important prior to the American conquest.

⁵⁵By using the phrase "psychological inducement" in this context, I am borrowing from and building on W.E.B. DuBois's concept of "the psychological wages of whiteness." In his monumental *Black Reconstruction in America*, DuBois argued that white workers earned, in effect "a sort of public and psychological wage" in the form of "public deference and titles of courtesy because they were white," which proved a palatable substitute for lower wages that had been undercut by capitalist employers' reliance on black labor made cheaper by the currency of racism. W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860-1880*, 701 (1962); see also DAVID R. ROEDIGER, *supra* note 6.

⁵⁶ALFONSO ORTIZ, *THE PUEBLO* (from the series: *Indians of North America*) (1994), 90.

⁵⁷*Ibid.*

culture, yet showing to a significant degree the assimilation of Hispanic folkways. This situation required an adjustment in Anglo thinking, which then was firmly attached to stereotypes drawn from contact with Indians in the eastern United States and the Mississippi Valley.⁵⁸

Moreover, given the political changes of the late Spanish and especially Mexican independence period, Pueblo Indians were formally recognized as Mexican citizens.⁵⁹ It was, precisely, the region's prior colonization by Spain that had produced these commonalities between Mexicans and Pueblo Indians.⁶⁰

In turn, these commonalities greatly influenced the shape of the second, American-led colonization of the region, such that one of its central aims was to divide Pueblos and Mexicans, as two of the major native social groups. White racial status proved a useful wedge. For whiteness to be a sufficient psychological inducement for Mexicans, it had to be denied to Pueblo Indians. The result was a regional racial hierarchy with four tiers (omitting Blacks, who officially numbered only a handful in the region):⁶¹ Euro-Americans at the top; followed by Mexicans, as a "native" group with a formal claim to white status; followed by Pueblo Indians as a buffer group between Mexicans and non-Pueblo Indians; with nomadic and semi-nomadic Indians at the bottom. It was precisely the tenuousness of Mexicans' claim to whiteness, moreover, that accentuated the need to distinguish themselves from Pueblo Indians and that ultimately drove Mexican elites to follow Euro-Americans' lead in disenfranchising Pueblo men.

Ironically, it was both Mexicans' ability to claim whiteness and the inherent instability of that very claim that stemmed from their mestizo ancestry, as a people that resulted from the sexual and social mixture of Spanish colonizers and indigenous peoples. Precisely because of this mestizo heritage, Mexicans could at least make out a claim of whiteness grounded in their European ancestry and, especially, European culture. And for precisely the same reason—that is, because of their collective mixed Spanish/indigenous ancestry—Mexicans' whiteness was inherently fragile and subject to challenge. These dynamics were further strained by the fact that Mexican elites, although almost always mestizos (rather than pure Spaniards), tended to have more European ancestry (and hence less indigenous ancestry) than

⁵⁸MARC SIMMONS, "History of the Pueblos Since 1821," in HANDBOOK OF NORTH AMERICAN INDIANS, Vol. 9, SOUTHWEST (ed. Alfonso Ortiz) (1979), at 209 (emphasis added). See also, JOE S. SANDO, PUEBLO NATIONS: EIGHT CENTURIES OF PUEBLO INDIAN HISTORY (1992), 9 (noting the influence of "Hispanic traditions" on Pueblo life); ORTIZ, supra note 56, 79 (noting that, beginning in the early 19th century Spanish settlers, became heavily dependent on Pueblo communities).

⁵⁹Some historians have argued that these liberalization policies amounted to equality in form, but not in substance, but Emlan Hall and David Weber caution that the evidence "suggests a greater change in the legal status of Pueblos under independent Mexico than most historians have acknowledged" in the direction of equal rights for Pueblo Indians. G. EMLAN HALL and DAVID J. WEBER, MEXICAN LIBERALS AND THE PUEBLO INDIANS, 1821-1829, 59 NEW MEXICO HIST. REV. 1, 19 (1984).

⁶⁰I do not intend to overstate the extent to which multiple, diverse Pueblo societies resembled Mexican village society in the region. I agree that "[t]he two societies coexisted but were separate in many ways. Since 1598, when Spanish-Mexicans first began to settle among them, the Pueblos had borrowed new kinds of animals, foods, technology, and ideas from their neighbors, but they had borrowed selectively. The essentials of Pueblo culture—language, religion, society—had remained intact." HALL, supra note 59, at 5. An additional, important point is the extent to which Pueblos resisted Hispanicization; these resistance strategies were violent and overt in the Pueblo Revolt against the Spanish in 1680, but they existed in myriad other ways both before and after that time. On the Pueblo Revolt, see GUTIÉRREZ, supra note 53, at 130-140; see also, SANDO, supra note 58. My objective here is merely to emphasize that the new, American colonizers would have seen certain significant similarities between Pueblo Indians and Mexicans and, at the same time, substantial differences between Pueblo Indians and non-Pueblo Indians.

⁶¹For example, New Mexico's 1850 census included only 22 Blacks. RAEL-GALVEZ, supra note 52, 197.

the majority of Mexicans, whose indigenous ancestry far outweighed their European blood. If we imagine New Mexico's Mexican society as a triangle, with elites at the top, we see that, as one moves down to the base of the triangle, one encounters decreasing Spanish ancestry and increasing indigenous ancestry. One of the trademarks of Spanish colonialism was precisely this indigenous-heavy mestizaje combined with intensive cultural assimilation such that most mestizos did not have, even in the mid-nineteenth century, a connection with their indigenous cultures of origin; thus, over the full spectrum of the triangle, Spanish cultural patterns predominated over indigenous cultural patterns.

The American colonizers had multiple reasons for seeking to divide Mexicans and Pueblos. As I have argued, a major reason was the need to make meaningful the admittance of Mexicans (especially Mexican elites) into the white community; the value of whiteness as a psychological inducement that tempered the American conquest was increased because Pueblo Indians were excluded from whiteness. An additional incentive to divide Pueblos and Mexicans was to disrupt the Pueblo/Mexican alliance that actively resisted the American military occupation in its early years. The U.S. occupation of New Mexico has long been touted as "bloodless" and occurring "without a single gunshot."⁶² It is true that the Mexican army did not engage American forces, having received advance notice of their arrival and, apparently, a bribe to abandon Santa Fe.⁶³

There are, however, three ways in which the U.S. conquest of New Mexico is quite appropriately thought of as "bloody" (rather than "bloodless"), as an essentially violent conquest. First, the U.S. occupation of New Mexico led directly to one of the most violent, brutal assault on the non-Pueblo Indian tribes of the region (between 1850 and 1870).⁶⁴ Second, it makes eminent good sense to describe the

⁶²This portrayal of the American invasion has withstood the test of time, embraced by chroniclers spanning from Bancroft's monumental history of New Mexico published in 1888 ("Thus was the capital of New Mexico occupied without the shedding of blood." BANCROFT, supra note 10, at 416), to the official 2004 brochure published by the New Mexico Tourism Department ("Not a single shot was fired [in Las Vegas] and Kearny's army went on to occupy Santa Fe . . ." NEW MEXICO TOURISM DEPARTMENT, OFFICIAL 2004 BROCHURE 26 [2004]). In what is probably the most respected modern chronicle of the invasion of New Mexico, historian Howard Lamar downplays the military's role, instead emphasizing the notion of a presumably non-violent "conquest by merchants." LAMAR, supra note 11, at 51-70.

⁶³TWITCHELL, supra note 10, 203-204. See also, BANCROFT, supra note 10, 415-416.

⁶⁴During the first full decade of the occupation, the 1850s, the American army conducted a series of genocidal raids on the nomadic and semi-nomadic tribes living in the New Mexico region. In his 1912 history, New Mexico lawyer and history Ralph Emerson Twitchell is unabashedly racist (referring repeatedly, for example, to the nomadic and semi-nomadic Indians as "savages"; he nonetheless provides a catalogue of the American military's deadly raids (which he portrays as purely defensive in nature) against the Jicarilla Apaches (1854), the Utes (1855), the Mescalero Apaches (1853-57), the Gila Apaches (1852-53), the Mogollon Apaches (1857), the Mimbres Apaches (1855); and the Navajos (of whom Twitchell says, "They caused the military more trouble between 1850 and 1860 than all the other New Mexico Indians combined." See Twitchell, supra, note 10, at 200, 299-300, 301 n.225, 302, 302-303, 303-304. For their part, native Mexicans in the region complained repeatedly of the increase in violence against them by the nomadic and semi-nomadic tribes, blaming the Americans for the increased hostilities. In a resolution passed by the first Territorial Legislature in 1851, lawmakers declared that "since the entrance of the American army under General Kearny this Territory has been a continual scene of outrage, robbery and violence carried on by the savage nations by which it is surrounded; that citizens daily are massacred, stock stolen, our wives and daughters violated and our children carried into captivity." TWITCHELL, supra note 10, at 292. Anthropologist Ana Maria Alonso has argued that the American occupation of northern Mexico produced a political economy in which Apache and Comanche warriors responded to encroachments on their territory by increasing violent raids on mestizo and Euro-American settlements and, at the same time, found such raiding to be more lucrative given the availability of weapons, horses and livestock that could be subsequently traded. ALONSO, supra note 16, at 25-26. Very likely, Pueblo communities also experienced an increase in attacks from nomadic and semi-nomadic tribes during this time period, and Indians from six Pueblos formed the Pueblo Volunteer Militia that participated in the U.S. Army's campaign against the Navajos in 1849. FRANK MCNITT, ED., NAVAHO EXPEDITION: JOURNAL OF A MILITARY RECONNAISSANCE FROM SANTA FE, NEW MEXICO, TO THE NAVAHO COUNTRY MADE IN 1849 xxix (1964).

conquest and subsequent land takings from Mexicans and Indians in the region as violent and accomplished only with the threat of military action (even when it was not exercised).⁶⁵ A third way in which the American conquest of the region was far from "bloodless" centers around a series of armed revolts carried out by an alliance of Mexican and Pueblo men in several northern New Mexico villages and pueblos during the first year of the occupation.⁶⁶

With the capitulation of the Mexican army, New Mexico's mestizo and Pueblo Indian communities had to plot their resistance methodically, over a period of months in order to assemble the cache of weapons needed to launch a multi-village resistance against the American occupiers. There were a number of armed revolts in late 1846 and early 1847, about six months after the initial American occupation. The most successful and well coordinated of these revolts was the January 1847 attack in Taos which resulted in the be-heading of the Euro-American civil governor (a Taos merchant named Charles Bent), the murder of several other American-appointed officials, and the murder of some members of the governor's household.⁶⁷ The attack on the Americans was well-planned and carried out by a coalition of Taos Pueblo men and Mexican men from villages in the Taos area.⁶⁸ Within a few days, U.S. military forces moving to contain the rebels had encountered an Indian/Mexican force of 1500 men.⁶⁹ Within a few weeks, American forces had killed several dozen rebels in skirmishes and 150 who had barricaded themselves in the church at Taos Pueblo. Taos Pueblo felt the brunt of the crushing defeat by the American army: its church was destroyed in two days of bombing and large numbers of Taos men, women and children died in the conflict. Some fifty male survivors of the raid on Taos Pueblo were arrested and several were tried on murder and treason charges; eight Mexican and Taos Pueblo men were eventually hanged after their convictions.⁷⁰

A central figure in New Mexico politics during the Mexican period and the early decades of the American occupation was Antonio Jose Martinez, who served as the

⁶⁵At Las Vegas, Santa Fe and other locales, Kearny and later military commanders of New Mexico repeatedly warned the native population that they had superior military power and untruthfully said that additional troops were on their way to New Mexico. TWITCHELL, supra note 10, at 206, 211 n.148; see also TOBIAS DURAN, *WE COME AS FRIENDS: VIOLENT SOCIAL CONFLICT IN NEW MEXICO, 1810-1910*, 40, 46-47 (1985) (unpublished Ph.D. dissertation, University of New Mexico) (on file with author).

⁶⁶See DURAN, supra note 65, at 3, 48-65; ROBERT J. TORREZ, *CRIME AND PUNISHMENT IN SPANISH COLONIAL NEW MEXICO*, Research Paper No. 34, Center for Land Grant Studies 1-2 (1990).

⁶⁷In addition to Bent (the civil governor of New Mexico appointed by Kearny, who had been prominent in the region as a trader and who was married to a Mexican woman), others assassinated included the Euro-American sheriff and prosecutor, two Mexicans identified as allies of the Americans (one because he was an appointed official and one because he was Bent's brother-in-law), and the young, mixed-race son of a prominent Euro-American trader (who had been appointed a judge) and Mexican woman. See TWITCHELL, supra note 10, at 233-35 n.170; BANCROFT, supra note 10, at 432 n.27.

⁶⁸Twitchell reports that "the lower order of Mexicans of the Taos valley [sic] and of the small towns in the vicinity rose en masse and joined with the Pueblo Indians in the work of pillage and murder." TWITCHELL, supra note 10, at 236.

⁶⁹DURAN, supra note 65, at 59.

⁷⁰See BANCROFT, supra note 10, at 432-436; TWITCHELL, supra note 10, at 248-261. There are numerous ways in which the trial—the first American criminal trial held in the Southwest—did not meet the fundamental, constitutionally guaranteed protections for criminal defendants. My forthcoming book discusses the trials in detail.

Taos priest from 1826-1856.⁷¹ Although he was not among those prosecuted for the 1847 Taos revolt, Martinez is credited by some as one of its major organizers.⁷² It is likely that he had both a direct and indirect leadership role, the latter via the large network of youths and young adults who were or had been under his tutelage at the only school in the Taos Valley during the Mexican period.⁷³ Martinez was born in 1804 into one of the most land-rich families of the region.⁷⁴ As a young man, he witnessed and partook in the ideological republican movement that spawned Mexico's independence from Spain.⁷⁵ As a middle-aged man, he both actively resisted the U.S. occupation and later held leadership roles in the American territorial government.⁷⁶

Martinez was a complex figure who in many ways epitomized the dilemmas of Mexican elites. On the one hand, he subscribed to the liberal ideology that resulted in a Mexican Constitution that proclaimed all Mexicans equal under the law, without regard to their racial status, and specifically sought to incorporate "civilized" Indians (including Pueblos) and heavily indigenous mestizos into the Mexican polity. He also worked closely with the Taos Pueblo community, as their priest and, at times, advocate before various Spanish and Mexican officials. At the same time, Martinez was a social and economic elite who owned Indian slaves and who, at times, may have grossly abused the trust placed in him by members of Taos Pueblo.⁷⁷

But Martinez's dilemma reflected a long-standing janus-like quality in Mexican policy toward "civilized" Indians such as the Pueblo peoples of New Mexico. As I have discussed in Part II, supra, the Mexican Constitution promised equality without regard to Indian versus non-Indian status. Several caveats are worth bearing in mind, however, when considering the citizenship status of Pueblo Indians under Mexican law. First, while the law on the books granted "civilized Indians" (including Pueblo

⁷¹Martinez eventually resigned his position over conflict with then-newly appointed Archbishop Lamy, who initiated an overt campaign to replace New Mexico's Mexican priests with French, Italian and Spanish priests. Some time after his resignation as parish priest (and replacement by Spanish-born Damaso Talarid), Lamy formally suspended Martinez, forbidding him to perform church rites under any circumstances. TWITCHELL, supra note 10, at 337-339. I rely on Twitchell's account with some hesitation, as I believe he had an anti-Martinez and pro-Lamy bias (e.g., he describes Lamy's suspension of Martinez thusly: "No alternative was left to Bishop Lamy, after all sorts of fatherly advice and admonitions had been unheeded, but to suspend Father Martinez from the exercise of every priestly function," and he describes Martinez as "very crafty" and motivated to oppose the U.S. occupation because it "was a death blow to his power and prestige"). Father Martinez also was the model for the arrogant protagonist in the novel *DEATH COMES FOR THE ARCHBISHOP* by WILLA CATHER. On the roots of anti-Catholic sentiment as it affected the U.S. conquest of New Mexico, see DURAN, supra note 65, 30-35.

⁷²TWITCHELL, supra note 10, 337-38 n.264 (singling out the leadership of Father Martinez).

⁷³Martinez also owned the only printing press in the region during the Mexican period (and through the first few decades of the American period), which he used to published textbooks for his pupils, a short-lived newspaper, and the many treatises he wrote. TWITCHELL, supra note 10, at 337-338 n.264.

⁷⁴RAEL-GÁLVEZ, supra note 52, at 105-106; LAMAR, supra note 11, at 34-36 [Lamar erroneously gives Martinez's year of birth as 1793 and misidentifies his name throughout his work as "Jose Antonio Martinez" rather than Antonio Jose Martinez.]

⁷⁵In the 1830s, Martinez served three terms in the Mexican legislature. RAEL-GÁLVEZ, supra note 52, at 109; see also, BANCROFT, supra note 10, at 311 n.3.

⁷⁶As early as 1843, Martinez wrote a manifesto warning of the encroachments of Euro-Americans and portending the future invasion of northern Mexico. RAEL-GÁLVEZ, supra note 52, 109-112 (noting also that Martinez harbored special enmity for Charles Bent, the American governor assassinated in the 1847 rebellion).

⁷⁷Although I have been unable to find any secondary references to it, a 20th century Taos Pueblo leader, Governor Porfirio Mirabel, alleged before Congress that Father Martinez had reneged on a promise to obtain leniency for some of the Taos Pueblo men tried for the 1847 uprising. Martinez allegedly took and kept pueblo land in exchange for the assistance, which he either failed to extend at all or tried but failed to achieve. Hearings of the Committee on Indian Affairs, House of Representatives (printed by the Government Printing Office, 1920, as "Indians of the United States: Investigation of the Field Service") p. 599-602.

Indians) full citizenship rights, the law in practice likely recognized differences among Pueblo Indians, mestizos and other racial groups—differences that are difficult to discern in official government documents.⁷⁸ Second, it is very likely that at least one motivation for the liberalization toward Indians was the plan to strip them of protections on their land grants and, thus, facilitate the dispossession of Indian lands into Mexican hands. As Pueblo historian Joe Sando puts it, “The doctrine of equal rights . . . soon became the right for all equally to take Pueblo land.”⁷⁹ At the same time, a third important dimension of the liberalism that characterized the transition from Spanish monarchy to Mexican republic was the anti-clerical bent that led to greater religious autonomy for New Mexico’s Pueblo nations.

Though the Mexican law regarding land ownership proved not always beneficial to the Pueblos, the Mexican neglect of the Spanish missionary system helped strengthen the Pueblo religion. The liberal spirit that inspired Mexico’s independence movement was often anticlerical, and after independence the Mexican government showed little interest in rebuilding the mission system. By the 1830s, only five missionaries were assigned to the [New Mexico pueblos].⁸⁰

Beyond reflecting the ambivalence Mexico felt toward its “civilized” Indians, Martinez’s views also represent the dilemma Mexican elites faced with respect to their Pueblo brethren. As the majority of legislators in the post-war period, Mexicans held in their hands the fate of Pueblo Indians, and their actions revealed a deep ambivalence. Martinez was involved in all the early conventions and legislatures, frequently holding a leadership position. He was elected president of the first constitutional convention (organized in 1850 before Congress had officially declared New Mexico a federal territory), in which a majority-Mexican body proposed a state constitution for New Mexico that enfranchised Pueblo, Mexican and Euro-American men over 21 who had lived in New Mexico for at least six months.⁸¹ In the same section, Mexican elites denied the franchise to Blacks and afro-mestizos (“africanos o descendientes de africanos”) and nomadic and semi-nomadic Indians (“indios bárbaros”). Given liberalization toward Pueblo Indians under Mexican independence, this is perhaps unsurprising, but it is interesting that Mexican elites’ liberalism did not extend to Blacks and afro-mestizos, despite similar liberalization aimed at them under Mexican rule.

But prior to the 1850 convention, the majority-Mexican legislature in 1849 (operating under a military regime, since Congress had yet to grant New Mexico federal territorial status) limited the franchise to “free white male inhabitants,” intending to exclude Pueblo Indians. As part of the Compromise of 1850 establishing New

⁷⁸DEBORAH A. ROSEN, “PUEBLO INDIANS AND CITIZENSHIP IN TERRITORIAL NEW MEXICO,” 78 *NEW MEXICO HISTORICAL REVIEW* (2003), 21 n.1. But cf. Hall and Weber, supra note 59, 8, 19 (“Liberalism, then, with its most immediate antecedents in the legislation of the Spanish Cortes, dramatically altered the legal status of Pueblo Indians in theory and in practice.”).

⁷⁹SANDO, supra note 58, 83; see also, HALL AND WEBER, supra note 59, 20-21 (“By defining the Pueblos as citizens, and by removing government restrictions that gave the Indians special protection, the liberals left the way open for Pueblos to sell parcels of real estate” and also discussing the legality of squatting on Pueblo land by Mexicans.)

⁸⁰ORTIZ, supra note 56, 80.

⁸¹Article VII of the proposed New Mexico State Constitution of 1850.

Mexico as a federal territory, Congress restricted the right of suffrage to “free white males.”⁸² Even after Congress and successive territorial legislatures excluded Pueblo men from the franchise, however, evidence suggests that these laws may have been laxly enforced in elections, with local variation existing such that in some communities Pueblo Indian men voted and otherwise participated in the territorial polity. According to the chief justice of the territorial supreme court, in the early years of the American occupation, Pueblo Indians “not only voted, but held both civil and military offices. In many localities, they, by their numerical strength, controlled the political destinies of [towns and counties].”⁸³

Indeed, Pueblo electoral participation spawned its own cycle of protest and politics. In 1853 a committee of the territorial legislature considered a complaint that more than 100 Pueblo Indians had voted illegally. The contest at issue was critical in that it involved the most important elected position in the Territory (for nonvoting delegate to Congress) and pit against each other candidates that were racially polarizing. The race pit the native, monolingual-Spanish priest, Jose Manuel Gallegos, against a Missouri politician, William Carr Lane, who prior to a presidential appointment had never set foot in New Mexico and could not speak Spanish.⁸⁴ Gallegos won, but Lane contested the results, alleging that Pueblo men had illegally voted and that, in some precincts, votes for Lane had been destroyed.⁸⁵ The territorial legislative committee had to decide whether to follow the 1850 constitutional convention’s extension of voting rights to Pueblo men or Congress’ 1850 restriction of voting to white males (including Mexicans). Not surprisingly (given that all their acts were subject to congressional nullification), they chose to follow the congressional mandate, an outcome affirmed by Congress in the following year. Still, even with the disputed Pueblo votes removed, Gallegos was declared the winner.⁸⁶

During the early years of the American occupation, Mexican elites took a variety of positions toward Pueblo Indians—from working with Pueblo men to actively combat the American colonizers (in the Taos revolt), to disenfranchising Pueblo men. These positions undoubtedly reflected deep material conflicts between the groups (as when Mexican settlers encroached on Pueblo lands) but also reflected, at least in part, the efforts of Mexican elites to negotiate their position in the new, post-occupation racial order. In terms of the latter, Mexicans sought to differentiate themselves from Pueblos by claiming whiteness and, relatedly, the bundle of full citizenship rights reserved for white males in American society (including voting and holding office). In this way, Mexicans insured their position as second-from-the-top

⁸²Senate Bill 225, Thirty-first Congress, 1st Session, May 8, 1850 (“A Bill to admit California as a State into the Union; to establish Territorial Governments for Utah and New Mexico, etc.”).

⁸³U.S. v. Lucero, 1 N.M. 422, 456 (1869).

⁸⁴BANCROFT, supra note 10, at 650-651. Like Father Martinez, Gallegos was among the fiercely nationalist Mexican priests who butted heads with Archbishop Lamy.

⁸⁵Laguna Pueblo and Taos Pueblo men voted in the election. BANCROFT, supra note 10, at 650, n.23.

⁸⁶TWITCHELL, supra note 10, at 309; LOOMIS GANAWAY, *NEW MEXICO AND THE SECTIONAL CONTROVERSY, 1846-1861*, 61 (1944) (citing original congressional report). Gallegos’ election travails were not at an end, however. When he was up for reelection in 1855, Gallegos faced Miguel Antonio Otero; rather than support their fellow, Mexican priest, newly appointed French and Italian priests backed Otero. Gallegos won the election by 99 votes, but Otero appealed, this time alleging that 1400 Mexicans who had retained their Mexican citizenship had voted illegally. Congress sided with Otero and he was seated as delegate. See BANCROFT, supra note 10, at 650-651.

in a four-group racial hierarchy. What ultimately became an anti-Pueblo project of Mexican elites played into the hands of the American colonizers, who sought to divide Mexicans and Pueblos in order to disrupt a potentially powerful native resistance.

These dynamics are illustrated by how the question of Pueblo Indian citizenship played out in the judiciary, legislative and executive branches. Pueblo Indians entered the U.S. only by virtue of the Treaty of Guadalupe Hidalgo, which ended the Mexican war in 1848.⁸⁷ What followed was a long period of contestation among the three branches (and within them, in some cases) about the place of Pueblos in the American polity. There were two central questions, which both ultimately led to the question of how Pueblo lands would be treated and, specifically, whether they could be transferred to non-Pueblo buyers, whether they be Mexican or Euro-American. One question was whether Pueblo Indians were federal citizens, like Mexicans, under the Treaty of Guadalupe Hidalgo. The second question was whether, in essence, Pueblo Indians were like other Indians and, hence, subject to federal legislation such as the Trade and Intercourse Act of 1834 (which prohibited the sale of Indian lands).⁸⁸

These issues were at the center of a land dispute regarding Mexican settlers and Cochiti Pueblo, which is located south of Santa Fe.⁸⁹ U.S. Attorney Stephen B. Elkins initiated the case against the Mexicans under the Indian Trade and Intercourse Act of 1834, seeking to eject and fine them \$1,000.⁹⁰ Testifying to the precedent-setting nature of the case and its potential impact on land sales, lawyer Kirby Benedict and his partner represented the Mexican defendants. Only recently returned to private practice after having served a total of 17 years on the territorial supreme court (first as associate justice then as chief justice), Benedict was one of the most influential lawyers in the state.⁹¹ As was the case throughout the territorial period, New Mexico's judicial system consisted of a two-tiered federal court (one court hearing cases under the laws of the territory, one under federal laws), with the same judges filling the roles of both trial judges riding circuit and sitting en banc as an appellate court.⁹² In this case, both Chief Justice Slough, the trial judge who first decided the case, and Chief Justice Watts, who wrote the appellate decision, sided with the defendants, finding that the federal legislation did not apply to Pueblo Indians.⁹³

Both opinions rested on the twin conclusions that: (1) Pueblo Indians held Mexican citizenship and so, under the Treaty of Guadalupe Hidalgo, became federal citizens of the U.S., and so they occupied a distinctive position with respect to other

⁸⁷U.S. v. Lucero, 1 NM 422, 425 (1869).

⁸⁸25 U.S.C. § 180 (1983).

⁸⁹See U.S. v. Lucero, 1 N.M. 422, 425 (1869) (quoting the full text of the unpublished trial court opinion, U.S. v. Ortiz (1867)).

⁹⁰The records do not state whether Elkins acted independently or at the behest of Cochiti Pueblo.

⁹¹It has been noted that three of seven lawyers for the defendants (who sought Indian lands as squatters or purchasers) were former New Mexico Supreme Court justices. ROSEN, *supra* note 78, 25, n. 31. While it is not known what kind of fee arrangement Benedict and his partner had with his Mexican clients, it was common for lawyers in land dispute cases to receive a portion of the land in question as a fee. LAMAR, *supra* note 11, at 131 (noting that lawyers were generally paid in land in real estate cases).

⁹²GÓMEZ (2000), *supra* note 9, 1147, n. 39 (on trial judges serving as part of their court of appellate review).

⁹³Slough's ruling was issued in 1867; by the time Watt's opinion was published in 1869, Slough had been killed and replaced by Watts as chief justice. Arie Poldervaart, *Black-Robed Justice* (1948 [1999 reprint]), 72 On the duel with a legislator that led to Slough's death, see, *id.*, 71.

Indians; and, (2) Congress did not intend to treat Pueblo Indians like they did other Indians. The first conclusion was grounded in Mexico's extension of citizenship rights to "civilized" Indians and the citizenship provisions of Article IX of the Treaty.⁹⁴ The courts' rulings on the second question embroiled them in a multi-decade battle with Indian agents in the executive branch (who advocated treating Pueblo Indians like other Indians, in terms of assigning federal agents, making their land inalienable, and in other respects), Congress (which took various actions regarding Pueblo Indians, culminating in 1910 legislation specifying that "Indian country" included Pueblo lands), and the U.S. Supreme Court (which ruled, first, to uphold Lucero and, later, to overrule it).⁹⁵

In essence, the Lucero court argued that Congress did not intend to treat Pueblo Indians like other Indians because they had, on the whole, not done so in the past. The Lucero court emphasized the Congress had not ratified treaties with any Pueblo nations, had not appointed Indian agents to the Pueblos, and had not specifically mentioned Pueblo Indians in legislation other than that confirming the titles of Spanish land grants to 17 Pueblos in New Mexico.⁹⁶ Perhaps reflecting its author's former status as a legislator (he had been New Mexico's congressional delegate), the opinion dared Congress to act, if it saw things differently: "If such destiny is in store for a large number of the most law-abiding, sober, and industrious people of New Mexico, it must be the result of the direct legislation of congress [sic] or the mandate of the supreme court [sic]."⁹⁷ At one level, the Lucero opinion reflects a tension between Euro-American outsiders to New Mexico in Congress and the executive branch and Euro-American insiders (that is, those within New Mexico), who asserted a personal knowledge of Pueblo Indians and sought to vouch for their distinctiveness from other Indians.⁹⁸

The New Mexico-based Euro-American judges, in the Lucero opinion, made two related moves in reaching their conclusion that the Trade and Intercourse Act did not apply to Pueblo Indians (and, as a result, that their property could be bought and sold). First, as illustrated above, they portrayed Pueblo Indians in a positive light, emphasizing that they were citizens equal to the "one thousand best Americans" and "one thousand best Mexicans" in New Mexico in terms of their "virtue, honesty and industry."⁹⁹ The more dominant strand of reasoning in the Lucero opinion, however, was the drawing of a hard classificatory line between Pueblo Indians, as "civilized,"

⁹⁴"But as a race, we think it impossible to deny that, under the [Mexican] constitution and the laws of the country [of Mexico], no distinction was made as to the rights of citizenship and the privileges belonging to it, between this ["civilized" Indian] and European or Spanish blood." U.S. v. Lucero, 1 N.M. 422, 429, 431-432, 434, 454-457 (1869) (quoting the lower court decision).

⁹⁵See generally, ROSEN, *supra* note 78.

⁹⁶See generally, U.S. v. Lucero, 1 N.M. 422(1869). On December 22, 1858, Congress confirmed the titles of Spanish land grants to 17 Pueblos in New Mexico. U.S. v. Lucero, 1 N.M. 422, 435 (1869).

⁹⁷*Id.* at 441.

⁹⁸As I have noted, the chief justice quoted the full opinion of the trial judge, Chief Justice Slough, who had died by the time of the release of the Lucero opinion. As to the other two appellate judges, the chief justice specifically alluded to their familiarity with New Mexico's Pueblo Indians in order to bolster their authority, stating that the court had known "the conduct and habits of these Indians for eighteen or twenty years" and that Associate Justice Joab Houghton had been a judge and lawyer in New Mexico for the same period, during which time "not twenty pueblo [sic] Indians have been brought before the courts in all New Mexico, accused of violation of the criminal laws of this territory." *Id.*

⁹⁹*Id.* at 442.

and other Indians, as "savage." The court repeatedly asserted that Congress had passed the 1834 legislation to govern the class of Indians who were "wandering savages, given to murder, robbery, and theft, living on the game of the mountains, the forest, and the plains, unaccustomed to the cultivation of the soil, and unwilling to follow the pursuits of civilized man."¹⁰⁰ In contrast, the court found the Pueblos to be "a peaceful, quiet, and industrious people, residing in villages for their protection against the wild Indians, and living by the cultivation of the soil."¹⁰¹

Beyond creating a sharp divide between Pueblos and other Indians, the Lucero court braided an additional strand into its racial narrative of the territory recently ceded from Mexico. In what was a preview of public efforts by Euro-Americans to create and enshrine a "Spanish" identity and heritage among New Mexico's mestizo villagers in the late nineteenth-century,¹⁰² Chief Justice Watts signaled his admiration for "the true Spanish adventurers," whom, he emphasized, had begun colonizing Mexico (and what would become the American Southwest) long before "our timid forefathers, who peeped out into the wilderness from their colony of Plymouth."¹⁰³ The region's first European colonizers were credited for bringing "civilization" and, especially, the Catholic religion to the Pueblos, but, simultaneously, criticized for their "cruelty," "cupidity," and "despotic rule" over the Pueblo Indians.¹⁰⁴ The final trope in this racial narrative was the juxtaposition of Spanish despotism with Pueblo victimhood, expressed as "this condition of domineering on the part of the Spaniards, and meek obedience on the part of the pueblo [sic] Indians."¹⁰⁵ A similar narrative had appeared in an opinion by Chief Justice Benedict more than a decade earlier, when he sided with Acoma Pueblo and against Mexicans accused of encroaching on their lands. Benedict called Mexicans "the better-instructed and more civilized race" compared to Pueblo Indians and admonished them for trying to take advantage of Pueblos. He saw the role of the American courts as evening the playing field: "It is gratifying to us to be the judicial agents . . . affirming the rights of Pueblo Indians."¹⁰⁶

My analysis is not meant to lessen the devastating material impact of the Lucero decision, which allowed Pueblo lands to be freely alienated in the marketplace, thereby leading directly to the transfer of Pueblo lands to Mexicans and Euro-Americans. Yet my primary interest in the opinion is as a racial narrative that makes several key moves. Even as with one hand the Euro-American judges annointed Pueblo Indians as "civilized," and therefore racially superior to non-Pueblo Indians, with the other hand, they reinforced the divide between Pueblos and Mexicans, emphasizing the Spanish dominance of the former (rather than, for example, the mestizo character of the latter). At the same time, the representation of Mexicans as possessing Spanish ancestry (even within the context of the demonization of Spanish cruelty to

¹⁰⁰*Id.* at 425-426.

¹⁰¹*Id.* at 427.

¹⁰²See generally, MONTGOMERY, *supra* note 6; and NIETO-PHILLIPS, *supra* note 6.

¹⁰³*U.S. v. Lucero*, 1 N.M. 422, 427 (1869).

¹⁰⁴*Id.* at 427.

¹⁰⁵*Id.*

¹⁰⁶*De La O v. Acoma*, 1 NM 226 (1857). It was, of course, Benedict who later represented the Mexican squatters against Cochiti Pueblo in the Lucero case.

Indians) fostered the basis Mexicans' claim to whiteness, while Pueblos' exclusion from whiteness was taken for granted such that it was not subject to challenge.

From the vantage point of the American colonizers, this move was a predictable divide-and-conquer strategy: by allowing Mexican men to claim white status (and therefore vote and hold elected office), but denying such opportunity to Pueblo Indian men, they achieved multiple goals. This strategy allowed for the operation of a civilian government (in the dark shadow of military rule) that could not have functioned without natives (given the paucity of Euro-American settlers in the region prior to the occupation). Neither could it have functioned without the interruption of the mestizo Mexican/Pueblo Indian coalition that had resisted the American occupation at Taos and elsewhere. Consider the racial positioning that occurred. *Vis a vis* Mexicans, the Americans positioned themselves as racially generous, allowing Mexicans to take a position under the white tent. This occurred against a reality in which American writers, newspapermen, and politicians had denounced Mexicans as racially inferior and unfit to govern themselves or join the Union.¹⁰⁷ Mexicans mobilized their Indo-hispano mestizo heritage in a way that emphasized their European roots (hence, whiteness), despite the fact that their racial stock, overall, was much more indigenous than European. In ways that likely were akin to moves under the Spanish-Mexican racial system, mestizos sought to distance themselves from Pueblo Indians, even as they shared much in common with these communities.

Mexican Elites and Blacks, Free and Enslaved

In 1829, Miguel Antonio Otero was born into a wealthy ranching family in Valencia County, New Mexico.¹⁰⁸ He would have been 17 years old when the Americans claimed control of the region, and, hence, among the first generation to come of age under American rule. He spoke English fluently, which at that time was rare even among Mexican elites of Otero's generation.¹⁰⁹ Otero attended college in St. Louis and New York, studied law in Missouri, and returned to New Mexico in his early twenties. He quickly ascended to a political career, first as a representative of Valencia County in the 1852 and 1853 Territorial Legislatures (where he was among the youngest legislators) and then as New Mexico's nonvoting delegate to Congress from 1855-1859 (winning election to two consecutive two-year terms).¹¹⁰

¹⁰⁷See the sources cited in note 12, *infra*.

¹⁰⁸Some reports claim that his parents, Gertrudis Aragon and Vicente Otero, were born in Spain. See e.g., TWITCHELL, *supra* note 10, at 309 n.234. If this was the case, they would have been among a very elite population indeed. Out of 13,204 people legally married in the region between 1693 (the date of the Spanish reconquest after the Pueblo Revolt of 1680) and 1846, a mere 10 persons listed their parents' birthplace as Spain. GUTIÉRREZ, *supra* note 53, at 149. More likely is that Otero and his parents claimed "Spanish" heritage in a less strictly ancestral sense, a phenomenon that became popular in New Mexico in the late 19th and early 20th centuries. Twitchell's often romanticized history of this period, written in 1912, reflects a desire to designate elite Mexicans as "Spanish" that was common among some Euro-American elites. On Otero's biography, see, TWITCHELL, *supra* note 10, at 309-310 n.234; RAEL-GÁLVEZ, *supra* note 52, at 192.

¹⁰⁹The first Mexican generation with a sizable segment of bilingual Spanish-English speakers came of age in the 1880s and 1890s. See GÓMEZ, *supra* note 9, at 1144 n.31.

¹¹⁰See discussion, *supra* note 87, regarding Otero's first run for delegate, against Father Gallegos.

He was an outspoken Democrat during his years as delegate, aligning himself politically and socially with southerners.¹¹¹ During his third year serving in Washington, D.C., Otero married Mary Blackwood of Charleston, South Carolina, whose father was a slaveholder.¹¹² In the years before the Civil War, Otero took a strong pro-slavery stand and used his influence to persuade New Mexico legislators to enact a slave code in 1859.¹¹³ After secession, however, Otero did not openly advocate that New Mexico join the fledgling Confederacy. In an 1861 letter written early in the Lincoln administration and published in the Santa Fe Weekly Gazette, Otero seemed genuinely wrought over the question and recommended siding with California and Oregon.

If a dissolution of this country should take place, we of New Mexico will be expected to take sides with one of the two or three or four of the Republics into which it would be divided. What will be the determination of the people of New Mexico if such deplorable consequences should come to pass, I cannot say. My own opinion and my counsel to them would be, in that event, a union with the Pacific free states, west of the great prairies. If California and Oregon declare their independence of this Government I am for joining them.¹¹⁴

On the other hand, Otero may simply have been preserving his options with a Republican administration; Lincoln appointed him Secretary of the Territory in 1861.¹¹⁵

Whereas Mexicans and Pueblo Indians lived near each other, shared some common cultural and other practices, and regularly clashed over material resources such as land and water, Mexicans had little interaction or resource competition with African Americans. When New Mexico became a U.S. territory in 1850, the Census recorded 22 Blacks living in New Mexico; ten years later, there were 64 Blacks.¹¹⁶

¹¹¹LAMAR, supra note 11, 91 (describing Otero's many "Southern connections" in politics and noting that Otero's brother-in-law William Blackwood was appointed to the Territorial Supreme Court).

¹¹²TWITCHELL, supra note 10, at 309-310 n.234; and RAEL-GÁLVEZ, supra note 52, at 192. Providing a glimpse into the extent of Euro-American historians' unwillingness to credit even elite Mexicans with agency and self-determination, Loomis Ganaway, writing in 1944, claimed Otero did not have an opinion on slavery until marriage and attributed his pro-slavery views to his wife's influence. Ganaway, supra note 86, at 61, 90. In contrast, one does not find in the literature on the prominent Euro-American settlers of New Mexico who married native Mexican women a corresponding tendency to attribute their views or actions to their Mexican wives.

¹¹³LAMAR, supra note 11, 91.

¹¹⁴GANAWAY, supra note 86, at 89. On the other hand, Bancroft refers to contemporary references to an 1861 speech by Otero "which incited the New Mexicans to rebellion," but states that he (Bancroft) had not been able to confirm such reports. BANCROFT, supra note 10, at 684 n.9. According to Bancroft, the Southern cause was largely rejected in New Mexico, "the masses favoring the union cause, and furnishing five or six thousand troops, volunteers, and militia, to resist the [Confederate] invasion" and "without avail, most of the wealthy and influential families being pronounced union men." *Id.* at 684.

¹¹⁵TWITCHELL, supra note 10, 310, n. 234.

¹¹⁶RAEL-GÁLVEZ, supra note 52, 197. Brooks speculates about the Blacks in New Mexico in the two censuses, suggesting that most of those in the 1860 census were servants of army officers. JAMES F. BROOKS, CAPTIVES AND COUSINS: SLAVERY, KINSHIP, AND COMMUNITY IN THE SOUTHWEST BORDERLANDS 309-310 (2002). Given the history of anti-Black racism, it is likely that the official records of all types undercounted afro-mestizo Mexicans who could pass for Spanish/Indian mestizos. There is, however, little data that allows us to draw a more precise conclusion than this about New Mexico's afro-mestizo populations. For an analysis of African and Indian racial mixture in Mexico and the Southwest. See generally, MENCHACA, supra note 16.

The census records did not distinguish, so we do not know whether New Mexico's Blacks were slaves or free persons, but the tiny numbers relative to the population suggest that New Mexico's legislative politics around slavery and the rights of free Blacks fall into the category of symbolic politics. Rather than reflecting resource competition with other social groups and/or their material interests, or even some reflection of interests and symbolism, we should read Mexican elites's actions regarding Blacks as primarily representative of other struggles and conflicts in the mid-nineteenth-century.

The conventional interpretation is to link the shift from an anti-slavery to a pro-slavery position to the politics of statehood. Virtually continuously from the end of the war in 1848 until 1911, when Congress passed a resolution recommending statehood for New Mexico and Arizona, a significant segment of elites (both Mexican and Euro-American, but probably predominantly Euro-American) had pushed, within New Mexico and at the congressional level, for statehood.¹¹⁷ According to the stock story, New Mexico elites took an anti-slavery position when they felt their chances of being admitted to the Union would be best as a free state, and then shifted to a pro-slavery position when they felt their odds improved as a slave state. The argument is rarely made with respect to the majority of legislators and convention delegates who were Mexican, but is instead attributed to Euro-American elites in New Mexico and in Congress. For example, Ganaway claims that anti-Black legislative acts

[r]eflected the growing influence of southerners in territorial politics. During the next three or four years, their control was tightened by the alignment of Miguel Otero, territorial delegate from 1855-1861, with southern political leaders and institutions.¹¹⁸

Ganaway's use of the passive voice to discuss Otero is consistent with his attribution of important political shifts in New Mexico politics to Euro-American political actors (in New Mexico and nationally) and to national issues.

Absent from this approach is serious attention to the ways in which Mexican elites constructed their interests, in either symbolic or material terms. A recent exception is offered by Estevan Rael-Gálvez, who provides an analysis that takes seriously the interests and strategies of Mexican political elites. He argues that Mexican legislators enacted a slave code that legalized Black chattel slavery in order to better protect their actual interest in slavery—the enslavement of Indians taken captive from nomadic tribes and sold into Mexican households.¹¹⁹ Rael-Gálvez cites a letter written by Territorial Secretary Alexander Jackson (the likely author of the 1859 Slave Code) in which he states, "we have assured the Mexicans that [passage of a slave code] would protect their own system of peonage."¹²⁰ Both the conventional interpretation related to statehood politics and Rael-Gálvez's argument link-

¹¹⁷The most complete analysis is provided by LARSON (supra note 45). In asking the question why it took almost 64 years from the ratification of the Treaty of Guadalupe Hidalgo for New Mexico to become a U.S. state, Larson concludes that the best explanation has to do with the distinctive racial character of New Mexico's population. *Id.* at 303-04.

¹¹⁸GANAWAY, supra note 86, at 59.

¹¹⁹In the section on Mexican elites' relationship with non-Pueblo Indian groups, I discuss the issue of Indian slavery in part V, *infra*.

¹²⁰RAEL-GÁLVEZ, supra note 52, at 198. See also, BROOKS, supra note 114, at 329 (quoting the same letter).

ing a pro-slavery position and Mexicans' interest in maintaining Indian slavery are important explanations, but I do not believe they exhaust the range of possibilities.

Given the fragility of Mexicans' claim to whiteness, an additional interpretative angle is to view Mexican elites' acts regarding African Americans as means of distancing themselves from the group undeniably at the bottom of the American racial order. Mexicans would have been well-aware of Euro-Americans' presumptions of racial superiority and concomitant Mexican inferiority at the time of the occupation; in the following decade, Mexican elites essentially were allowed to claim white status in the political sphere,¹²¹ while inequality remained entrenched in the social sphere. The questions that plagued Congress and the rest of America at the outset and conclusion of the war with Mexico still remained: Where do Mexicans fit? Are they more like Blacks or Indians? Mexican elites, too, were well aware of these questions, and Euro-America's potential answers to them helped shape their position on the question of slavery.

In early actions, majority-Mexican bodies took anti-slavery positions. In the first Constitutional convention (held in October 1848, only a few months after Congress had ratified the Treaty of Guadalupe Hidalgo), Father Martinez presided over a majority-Mexican body that strongly opposed slavery.¹²² The resolution issued by the convention stated the following: "We do not desire to have domestic slavery within our borders; and, until the time shall arrive for admission into the union of states, we desire to be protected by Congress against the introduction of slaves into the territory."¹²³ In 1850, the proposed New Mexico state constitution said that New Mexico would join the Union as a free state; in a popular vote on that constitution, 6,771 New Mexican men voted in favor, with only 39 voting against it.¹²⁴ In the first meeting of the New Mexico legislature (which occurred in 1848, after ratification of the Treaty of Guadalupe Hidalgo but well before Congress declared New Mexico a federal territory in 1850), a majority-Mexican legislature, with Father Martinez as president, banned African slavery. This anti-slavery sentiment likely reflected Mexico's historic opposition to African slavery, as well as ongoing hostilities with Texas.¹²⁵ Between 1845 when Texas joined the Union as a slave state and 1850, Texas actively claimed that its western border extended into New Mexico, going so far as to claim Santa Fe within its boundaries.¹²⁶ Hostilities between New Mexico and

¹²¹See GÓMEZ, *supra* note 9, at 1140-1144.

¹²²Of 13 delegates to the convention, 10 were Mexican. GANAWAY, *supra* note 86, 40.

¹²³Congressional Globe, 30th Congress, 2nd Session, Tues., Dec. 19, 1848. See also, GANAWAY, *supra* note 86, 40-41.

¹²⁴GANAWAY, *supra* note 86, at 49-52.

¹²⁵For example, in the 1848 Resolution to Congress, the clause immediately preceding the anti-slavery clause read as follows: "We respectfully but firmly protest against the dismemberment of our territory in favor of Texas or from any other cause." *Id.* At 40-41.

¹²⁶Texas relinquished its claim on New Mexico only when Congress paid it \$10 million to drop its claims against New Mexico. As part of the same legislative package known as the Compromise of 1850, Congress admitted California as a free state; established New Mexico and Utah as federal territories (with the proviso that the slavery issue would be determined in the future by "popular sovereignty" in those territories); abolished the slave trade but kept slavery legal in the District of Columbia; and enacted the Fugitive Slave Act to protect slaveholder's property across state and territorial boundaries. White, *supra* note 26, 159. See also, SMITH, *supra* note 12, at 262 (referring to the Fugitive Slave Act as "horribly Kafkaesque"); and ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 175 (1975) (describing the Fugitive Slave Act and concluding it significantly modified the Act of 1793).

Texas remained intense for decades (and persist in some quarters into the present), and some historians have credited animosity toward Texans as fueling volunteer participation in Civil War militias.¹²⁷

Seen in this historical light, the early anti-slavery positions by the majority-Mexican conventions and legislatures could have been anticipated, but the shift to a pro-slavery position in the late 1850s would not have been. In 1857, the territorial legislature enacted a law severely restricting the rights of free Blacks.¹²⁸ The heart of the law was the restriction to 30 days of the presence of free Blacks and mulattos in New Mexico, with a violation punishable, in the first offense, by fine and imprisonment and increasing in severity to "hard labor" if the free Black person refused to leave New Mexico after serving their sentence. The law also required free Blacks and mulattos already in New Mexico to "give bond for their good conduct and behaviour . . . with two or more honorable securities." Finally, the law banned marriage and cohabitation between Black men and white women, and we can presume that Mexican men would have intended to include Mexican women within the category of "white women."¹²⁹ The latter move is especially interesting given the widespread, historic marriage, cohabitation and/or reproduction between Indians from various tribes and descendants of the Spanish. In other words, "miscegenation" between Mexicans and Indians was widespread and in fact implicitly condoned by the movement of descendants of Indian-Spanish unions into the general mestizo category. This provision also supports the claim that these laws were primarily symbolic in intent: given the small numbers of Blacks, it was feasible to prohibit Black/white sexual unions in a way that was impossible for other inter-racial unions.¹³⁰

In 1859, two years after the law targeting free Blacks, a nearly unanimous legislative body composed of 34 Mexicans and three Euro-Americans enacted a slave code.¹³¹ Entitled "An Act to Provide for the Protection of Property in Slaves in this Territory," the law imposed stiff criminal penalties for stealing slaves, assisting slaves in escape, or otherwise inducing them to leave their masters. It also made it illegal for free persons to gamble with slaves, to sell or give them weapons, and to trade or do business with them. New Mexico's slave code included provisions for private individuals and public officials to deal with runaway slaves, constituting a mini version of a fugitive slave law within the slave code. Like many slave codes of the era, the law imposed more severe and different sentences on slaves convicted of crimes than provided for by the general penal code; for example, it imposed the penalty of hang-

¹²⁷BANCROFT, *supra* note 10, at 684, 686; DURAN, *supra* note 65, at 22-23.

¹²⁸"An Act Concerning Free Negroes," New Mexico Laws, 1857. The law appears typical of other, contemporaneous so-called "Black Codes" passed by states that banned slavery. Legislators in such states were motivated by the racist fear that they would be "overrun" by Blacks from the South, whether they were illegally fleeing their owners or had been manumitted. For a discussion of these laws, see EUGENE H. BERWANGER, THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY 118-19 (1967); see also, *Id.* at 18-32.

¹²⁹Offending Black males were punished more harshly than offending white females, with male violators subject to 2-3 years at hard labor and female violators subject to a fine of \$100-\$200.

¹³⁰For studies that focus on inter-racial intimacy in New Mexico, see GUTIERREZ, *supra* note 53, and BROOKS, *supra* note 114. For a legal history of miscegenation laws involving various racial groups, see Rachel Moran, INTER-RACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE (2001).

¹³¹Chap. XXVI, Laws of NM (1859). New Mexico's slave code never became law as such because it was repealed by Congress in May 1860. H.R. Res. 64, 36th Cong. (1st Sess. 1860). Recall that under federal territorial status, the New Mexico legislature's acts were subject to review and approval by Congress.

ing for the rape or attempted rape of a white woman by a slave or free Black or mulatto. Like the Black Codes enacted three years earlier, the slave code banned marriage between "white persons" and Blacks, free or slave (but, this time, did so without regard to gender, e.g., it criminalized Black women and white men along with Black men and white women, as the earlier law had done). In the first provision of its kind in New Mexico, the law prohibited Blacks, free and slave, from testifying "against a free white person" in any court of law.¹³² Perhaps most significantly, the New Mexico slave code ended with a declaration that the law applied only to "the African race" and did not affect the question of Indian slavery.¹³³

Within a decade, Mexican elites went from supporting abolition to enacting a harsh and comprehensive slave code. They went from little concern for Blacks, one way or the other, to enacting a "Black code" that severely restricted the rights of free Blacks, aiming to lock them out of the Territory. The laws are as harsh as those of the southern states (in the case of the slave code) and "the early old northwest states" (Illinois, Indiana, Ohio), who enacted Black Codes to deal with increases in their free Black populations.¹³⁴ The irony here is that while, for example, Illinois enacted a Black Code in reaction to a 258% increase in its population of free Blacks between 1820 and 1830,¹³⁵ the New Mexico legislature enacted its law when there were fewer than 100 Blacks in a geographic area that spanned all of present-day New Mexico and Arizona. Rather than being motivated by fear of being overrun by free Blacks or labor or land competition with free Blacks, something else was at work. The laws reflected the preoccupation with degrading and separating the races; for instance, both contained miscegenation clauses that protected the "white" daughters and sisters of Mexican elites (although the Black Code also punished transgressing "white"/Mexican women). The Slave Code banned Blacks' testimony against "whites" at a time when Mexicans controlled the grand jury and petit juries. In these ways, the laws served to harden the line between Mexicans as whites and Blacks.

In 1857 the U.S. Supreme Court issued its infamous Dred Scott opinion, deciding that neither free Negroes or slaves had federal citizenship and, therefore, the right to file suit in federal courts.¹³⁶ At one level, here was another opportunity for

¹³²While statutes restricting the right of Blacks, Indians and Asians were common in other jurisdictions (e.g., California), no such practices had existed in New Mexico regarding Indians or others. On California's statute, see *People v. Hall*, 4 Cal. 399 (1854); on the rights of Chinese persons in California, see generally, CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* (1994).

¹³³Section 30, the last substantive section of the act, states: ". . . this act shall in no manner apply to relation[s] between masters and contracted servants in this Territory, but the word "slave" shall only apply to the African race." In Part III, I discuss the issue of Indian slavery in New Mexico.

¹³⁴BERWANGER, *supra* note 126, at 30-59.

¹³⁵*Id.*, at 31.

¹³⁶60 U.S. 393 (1856). Historian James Kettner has described the broad holding of the case as follows: "Taney's majority opinion denied that Scott or any other black man could be a citizen of the United States within the meaning of the Constitution." Kettner, *The Development of American Citizenship, 1608-1870* (1978), 326. Dred Scott has been called "the most famous of all American judicial decisions," and a voluminous literature on it exists, but a thorough discussion of the case is beyond the scope of this article. Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978), vii. Fehrenbacher's discussion of the division in the contemporary popular reaction to the case is important to keep in mind. He distinguishes "three major streams of opinion": "most conspicuous by far was the roar of anger and defiance from antislavery voices throughout the North . . . From southerners, in contrast, came expressions of satisfaction and renewed sectional confidence at this overdue vindication . . . Meanwhile, northern Democrats and certain other conservatives were . . . [relieved] at the settlement of a dangerous issue and [delivered] pious lectures on the duty of every citizen to accept the wise judgment of the Court." *Id.*, at 3.

Mexicans to distinguish themselves from Blacks, for they were, under the Treaty of Guadalupe Hidalgo, federal citizens. Otero, then New Mexico's congressional delegate and as previously noted a slavery proponent, wrote a series of letters about the Dred Scott opinion. In one letter, written to the territorial secretary Alexander Jackson in 1858, Otero writes:

I know that the laws of the United States, the Constitution, and the decision of the Supreme Court in the Dred Scott case, establishes property in slaves in the Territories, but I think something should be done on the part of our Legislature to protect it. You will perceive at once the advantages that will result from the passage of such a law for our Territory, and I expect you will take good care to procure its passage. Immediately after its passage, you will dispatch copies to all the principal newspapers in the Southern States for publication, and also a copy to the New York Herald "very quick."¹³⁷

It is difficult to gauge Mexican elites' reactions to the case—other than this pointed example from Otero who was in Washington, D.C. at the time the case was decided. However, a legislative committee consisting of five Mexican elites wrote, shortly after passage of the 1859 slave code, a report inviting whites to migrate to New Mexico and identifying the Dred Scott decision as one of the factors that convinced New Mexico legislators of the need to act to support slavery.¹³⁸ My review of surviving newspapers of that time, for instance, did not uncover any mention of the Dred Scott case in the English or Spanish language press of New Mexico.

Otero's letter provides support for the conventional analysis. A Supreme Court decision widely viewed as pro-South and pro-slavery, indicated the direction of the political winds (and, in many scholars' opinions, was one of the catalysts for secession and the Civil War). Otero's letter speaks of benefits to New Mexico, which could be interpreted to mean the potential for Congress's grant of statehood as a slave state. On the other hand, for those who had been genuinely committed to an anti-slavery position, the Supreme Court's opinion must have given them great pause. It was a resounding statement of the official exclusion of Blacks (free and slave) from the polity and from all but the minimum sense of citizenship. In this climate, one can imagine Mexican elites wanting to distinguish themselves from this pariah group, and enacting the Slave Code to do just that. In addition, we need not rule out the importance of the link between African slavery and Indian slavery, noted by Rael-Gálvez. Very likely, all three things were working together to motivate Mexican elites to switch from an abolitionist to a pro-slavery position.

Mexican Elites and Indian Slavery

The decade of the 1860s witnessed the election of Lincoln, the formation and secession of the Confederacy, the Civil War, and the passage by a largely northern, Republican Congress of the most sweeping civil rights laws ever in the form of the

¹³⁷GANAWAY, *supra* note 86, at 68. Otero's letter became widely available when an abolition organization reprinted it in a pamphlet that was published in both English and Spanish and widely distributed in Washington and New Mexico. *Id.* at 68 n.29 (noting that "[w]hen this letter was made public, Otero did not deny its authenticity, although he had an opportunity of doing so in a number of public letters which he issued early in 1861.").

¹³⁸*Id.* at 73-74.

Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. In 1862, Lincoln issued the Emancipation Proclamation freeing all Black slaves and, three years later, Johnson issued the "Special Proclamation" seeking the same result with respect to Indians in New Mexico.¹³⁹ That presidential act and federal legislation in 1867 that made it illegal to hold Indian slaves brought the national preoccupation with slavery to New Mexico in more than symbolic terms, as had the enactment in 1859 of the slave code.

In 1868, nearly three hundred New Mexicans were served with arrest warrants charging them with the crime of holding Indian slaves or peons, and they were subpoenaed to testify before a federal grand jury (that would decide whether or not to grant indictments in the cases).¹⁴⁰ Among them were many prominent citizens, including elected and appointed officials, priests, and merchants. Those testifying included Juan Jose Santistevan, who at the time was between stints as the elected probate judge of Taos County; later, he would preside over the Taos County Commission and serve in the Territorial Legislature.¹⁴¹

Santistevan testified without shame and, apparently, without fear of indictment or conviction—since he implicated his mother as a fellow slaveholder (though she was not one of those initially charged). About the Indians in his own and his mother's households, he said:

They are there of their own free will. I don't know that they are paid especially . . . I know as long as I can remember that the Indians have been as servants, that campaigns have been made against Indian tribes [Navajos] and the captives brought back and sold into slavery by parties making a campaign. In this way most of the Indians held and now living in the territory were obtained. In years past the Pah Utahs [Paiutes] before the American conquest used to sell and trade their children to the citizens of New Mexico as slaves. The descendants of these slaves or servants now live in the families of the people.¹⁴²

Even in such a brief excerpt, Santistevan succinctly catalogues the various justifications for Indian slavery. He presents the "custom" of holding Indian slaves as a product of military conflict and as historically rooted. And, like southern slaveholders, his justification of the practice ("they are here of their own free will") is belied by his own description (they were not paid, they were captured and sold into slavery). He speaks about the history and mechanics of slavery in a detached way (for example, Indian slaves "were obtained" rather than purchased by himself or his ancestors), as if he is not personally implicated, despite the fact that he has been charged with being a slaveholder. Moreover, Santistevan's description presents a system of slavery that includes inter-generational transmission of slave status—the children and grandchildren of the slaves originally purchased or traded remain as

¹³⁹BROOKS, *supra* note 114, at 346 n.63 (citing June 9, 1865 proclamation by President Andrew Johnson).

¹⁴⁰RAEL-GÁLVEZ, *supra* note 52, at 292-93.

¹⁴¹*Id.*, at 312-313 n. 597.

¹⁴²*Id.* at 294-295 (quoting from Santistevan's grand jury testimony); see also, BROOKS, *supra* note 114, at 352.

"slaves or servants" within the households of the original owners and their descendants.¹⁴³

In the end, the grand jury refused to return indictments against any of those charged with Indian slavery. This is not surprising, given that the grand jury likely was composed of Mexican men who knew or knew of Santistevan.¹⁴⁴ If Santistevan's experience is any guide, there was no lasting stigma in being charged with this crime, in either the community of Mexican elites to which he belonged or among Euro-American elites. In the decade following his indictment as a slaveholder, Santistevan played an active role as a layperson in the American court in Taos County.¹⁴⁵ On four occasions, three different Chief Justices of the Territorial Supreme Court (all Euro-American) appointed Santistevan as one of three lay jury commissioners, whose task was to select grand jury and petit jury venirees for the following court session (along with the Chief Justice and the elected county Probate Judge). Several chief justices, who also served as presiding judges riding circuit in the first judicial district that included Taos County, named Santistevan interpreter to the grand jury seven times during the 1870s, a position for which he was paid \$3/day. During the Sept. 1875 term of court, Chief Justice Palen selected Santistevan foreman of the grand jury.¹⁴⁶ In short, Santistevan was a model citizen—and an elite Mexican who owned Indian slaves.

There is a kind of cognitive dissonance that radiates from all sides of the post-Civil War efforts by American officials to contain Indian slavery in New Mexico. In this section of the paper, my aim is to analyze the multiple, cross-cutting ways in which these efforts shaped relations among the various racial groups in the region during the first decades of the American colonization. As a point of entry, let me briefly describe the parameters of Indian slavery in the region.¹⁴⁷ Despite the formal prohibition of Indian slavery under Spanish law, enslavement of Indians by Spanish and mestizo settlers in New Mexico occurred throughout the 17th and 18th and well into the 19th centuries. Gutiérrez describes slaves captured directly from nomadic tribes and those purchased from middle-man captors (other nomadic tribes) as crucial to the frontier economy: "Slaves were a medium of exchange and were pieces

¹⁴³For a defense of Indian slavery by another Mexican elite that raises similar themes, see BROOKS, *supra* note 114, at 346-47 (quoting Felipe Delgado, New Mexico Superintendent of Indian Affairs in 1865).

¹⁴⁴The federal grand jury empaneled to hear these charges in 1868 would have been similar in racial composition to grand jury and petit jury venirees at the county-level, territorial district court. In the Taos County District Court in the 1860s and 1870s, grand jury and petit jury venirees had no more than three Euro-Americans and many venirees in that period had no Euro-Americans. Taos County Record Book AA (1863-1877), Taos County Record Book (1877-1884), Taos County District Court Records, New Mexico State Records Center and Archives.

¹⁴⁵Taos County, like other northern New Mexico counties, only began to have a substantial caseload—and hence a routinely functioning court apparatus—in the 1870s. Prior to that time, it is likely that disputes were settled informally or in lower courts such as the justice of the peace courts or the probate court. See GÓMEZ, *supra* note 9, at 1136 n.10, 1153-58.

¹⁴⁶During the 1870s, Santistevan was appointed jury commissioner during the Apr. 1871, Sept. 1874, Mar. 1877, and Sept. 1879 terms of court. He served as grand jury interpreter in the Apr. 1873, Apr. 1875, Sept. 1875, Mar. 1876, Sept. 1876, Mar. 1877, and Apr. 1879 terms. I have compiled Santistevan's record of court participation as a layperson from the following: Taos County Record Book AA (1863-1877), Taos County Record Book (1877-1884), Taos County District Court Records, New Mexico State Records Center and Archives.

¹⁴⁷Given space limitations, my description cannot do justice to the richness and complexity of the situation. Interested readers should see generally BROOKS, *supra* note 114, and RAEI-GÁLVEZ, *supra* note 52.

of movable wealth.¹⁴⁸ Using a quantitative analysis of baptisms in New Mexico of nomadic Indians between 1700 and 1849, Gutiérrez shows that the number of Navajo, Apache, Ute and Comanche Indians baptized correlated strongly with the number of deaths of Spanish/Mexican settlers, revealing the links between slavery and cyclical armed conflict between settlers and nomadic tribes.¹⁴⁹

In a comprehensive study of slavery in the Southwest, Brooks describes the complex political economy of exchange in humans that included both captivity of Spanish-Mexican settlers by nomadic and semi-nomadic tribes and captivity and enslavement of Indians by the settlers.¹⁵⁰ This political economy was gradually transformed and eventually destroyed with the American conquest of the region.¹⁵¹ In the short term, however, the effect of the transition from a Mexican to an American sovereign in the region was to greatly increase hostilities between the non-Pueblo Indian tribes and both Americans and Mexicans. Using a slave census taken in 1865 by an Indian agent in southern Colorado and northern New Mexico, Rael-Gálvez concludes that the vast majority of Indian slaves were Navajo (others were Utahs, Utes, Pi-Utes, as described in the document) and that almost three-fifths had been sold to Mexican households by Mexican middle-men, while two-fifths having been sold to Mexican households by members of other nomadic tribes.¹⁵²

For our purposes, perhaps the most striking fact was that conflict with nomadic Indians increased dramatically in the first two decades of the American occupation, likely leading to a correspondingly dramatic increase in the number of Indian slaves held in mestizo households. Even after the Civil War, when American military and civil officials were charged with eliminating Indian slavery and peonage from New Mexico, evidence suggests that campaigns to do so sometimes resulted in the production of more captives who were then sold into slavery.¹⁵³ Ironies abound. After emancipation and the Civil War, the U.S. government participated in the transfer of Indian captives into slavery in New Mexico. While anti-peonage initiatives were underway in Washington, the army was, literally, engaged in a war against the same peoples who were the objects of the peonage legislation (the nomadic and semi-nomadic tribes). In effect, the U.S. was simultaneously warring against Indians and warring against Indian slavery.

¹⁴⁸GUTIÉRREZ, *supra* note 53, at 152.

¹⁴⁹*Id.* at 153-54; see BROOKS, *supra* note 114, at 124 [arguing that a regional exchange in people (especially women and children) of different nomadic Indian tribes predated the Spanish conquest].

¹⁵⁰Brooks concludes that Mexican captives "continued to face a range of possible fates from full cultural assimilation through subordinate labor status to resale among the expectant capitalists of American Texas." BROOKS, *supra* note 114, at 324. He also describes the experience José Andrés Martínez, a mestizo who was taken captive by Mescalero Apaches as a ten-year-old in 1866: after being renamed Andali, he grew up with the Apaches, returned to his birth family as an adult, only to decide to return to live permanently with the Apaches, where he eventually played a role as a translator and spokesman for a Kiowa, Apache and Comanche delegation to Washington, D.C. in the 1880s. *Id.* at 356.

¹⁵¹*Id.* at 327, 331-337. Ultimately, the American campaign to pacify Indians and the fight against slavery intertwined to destroy the system, though not in ways that necessarily improved conditions for Indians: "This campaign involved eliminating the use of livestock and captives as exchangeable resources in the system, placing Indians on reservations to disrupt their exchange economy, and replacing kin-based subjectivity with state-sponsored individual autonomy—all to clear the way for a capitalist system." *Id.* 331.

¹⁵²RAEL-GÁLVEZ, *supra* note 52, at 249.

¹⁵³For example, Kit Carson's First New Mexico Volunteers conducted campaigns against the Navajos, in an effort to limit their raids and captive-taking, but rewarded his Mexican militiamen and Ute scouts with Navajo captives! BROOKS, *supra* note 114, at 331-32.

At the federal level, a number of Reconstruction-era initiatives were directed at ending the so-called "custom" of Indian slavery in New Mexico. President Johnson's "Special Proclamation of 1865" indicated that Emancipation Proclamation extended to Indian slaves in the federal territories.¹⁵⁴ In 1867, multiple bills were introduced in Congress on the subject, culminating in the passage of the so-called Peon Law whose purpose was "to abolish and forever prohibit the system of peonage in the Territory of New Mexico. . . ." ¹⁵⁵ There is little evidence to suggest, however, that change resulted from either of these federal initiatives, as neither contained enforcement provisions.¹⁵⁶

My concern is with the symbolic politics of these debates, even against a backdrop that suggests little change for either slaves or slaveholders. Indian slavery emerges, then, as a site for multiple conflicts among racial groups—between Indian slaves and their Mexican masters, between Mexican and Euro-American elites, and even as a dramatic status difference between Pueblo Indians and other Indians in New Mexico. Americans' efforts to dislodge Indian slavery can be read in multiple ways. On the one hand, they are consistent with the principles of equality and liberty and with the abolition of slavery and eventual Emancipation of enslaved Blacks after the Civil War. At the same time, Euro-Americans' advocacy of Indian slaves can be read as an effort to further entrench American hegemony against the interests of Mexican elites. Whether conscious or not, the war against Indian slavery (concomitant, as noted above, with the war against Indians) also became a political war against Mexican elites who held Indian slaves.

Some evidence against the notion that the Euro-Americans fighting Indian slavery comes from the fact that Euro-Americans themselves kept Indian slaves. Writing almost contemporaneously and speaking of Euro-American elites in New Mexico, Bancroft wrote that "[t]here were few military or civil officials who did not own captive slaves, and they were found even in the service of the Indian agents."¹⁵⁷ Lafayette Head, the former New Mexico Territorial legislator and Indian Agent charged specifically with identifying and liberating Indian slaves, held multiple Indian slaves in his southern Colorado household in the mid-1860s.¹⁵⁸ Indeed, Head justified his slaveholding in a manner resonant with Santistevan's testimony before the grand jury, saying they "enjoy the full privilege of returning to their people whenever they have the inclination or disposition to do so," but failing to note that they were children who had been taken in raids and whose family's whereabouts were both distant and unknown.¹⁵⁹ Rael-Gálvez documents that, although the majority of those prosecuted in 1868 for holding Indian slaves were native New Mexico Mexicans, they included, as well, significant numbers of Euro-Americans.¹⁶⁰

¹⁵⁴RAEL-GÁLVEZ, *supra* note 52, at 277, 279.

¹⁵⁵RAEL-GÁLVEZ, *supra* note 52, 286-87.

¹⁵⁶*Id.*, 288 (noting that few Indians were liberated and "the system continued, as did the baptisms of captives").

¹⁵⁷BANCROFT, *supra* note 10, at 681. Like the majority of Euro-American and Mexican elites whose history he chronicles, Bancroft conceives of Indian slavery as benign, noting that "in most instances" slavery had improved the living conditions of the slaves. *Id.* at 681.

¹⁵⁸RAEL-GÁLVEZ, *supra* note 52, 274.

¹⁵⁹*Id.*, 276.

¹⁶⁰*Id.* 301, 306-309 (noting, as well, that those charged with holding slaves including numerous Mexican women married to Euro-American men).

For Mexican elites, holding Indian slaves marked them as both economically and racially privileged. While it is difficult to determine with accuracy, it appears that slaveholding occurred primarily in elite families. Brooks reports that 288 households in Taos County were identified by American authorities in 1868 as having Indian slaves or peons out of a total of 2,820 households in the county.¹⁶¹ Extrapolating from these numbers, this would mean that just over six percent of Taos County households included Indian slaves or peons, and even if we reasonably assumed this number to be a substantial undercount, even doubling the numbers would bring us only to 12 percent of households.¹⁶² Brooks also shows that, typically, households with Indian slaves held only one or two such persons: 87 percent of those holding Indian slaves held only one such person and 85 percent of those holding Indian peons held only one or two such persons.¹⁶³ This provides another contrast with the South: in New Mexico, Indian slaves provided mostly household labor (perhaps because they were predominantly captive women and children), rather than labor of a capitalist nature.

Mexican families with Indian servants were not restricted to the very richest native New Mexicans, but they were an indication of wealth and, perhaps more so, past status under the Spanish and Mexican governments. Within the context of American colonization and the intensifying debates over Black slavery, the holding of Indian slaves may have become a different kind of status marker, one which marked white racial privilege in addition to wealth. From this perspective, Mexican elites' defense of the system of Indian slavery constituted resistance to American hegemony. One sees this in the strained dance between three sets of actors in the legal system: Mexican justices of the peace, Mexican legislators, and Euro-American judges (who, it is recalled served both as justices of the territorial supreme court and trial judges riding circuit in one of three judicial districts). Over the course of the first two full decades of the American occupation of New Mexico, these three sets of actors engaged each other in a series of legal battles that reveal the contestation and ultimate negotiation of a new racial order.

Often, these disputes entered the legal system at the level of justice of the peace courts, where Indian slaves complained of unfair or mis-treatment by their Mexican masters or where Mexican slaveholders sought to regain control of an Indian slave who had been stolen or who had run away. Because these forums were not courts of record, we have relatively little data about how these disputes typically proceeded. In what we can assume is a small number of special cases, however, the losing party in the justice of the peace court appealed to the district court, presided over by one of the territorial supreme court justices (appointed, you will recall, by the President); and, in an even smaller number of cases, the loser in this second litigation forum pursued an additional appeal to the territorial supreme court. The pattern in these cases was for justices of the peace—who were overwhelmingly native Mexicans during

¹⁶¹BROOKS, *supra* note 114, at 403 app. C.

¹⁶²*Id.* at 351-52.

¹⁶³*Ibid.*

the 1850s and 1860s—to rule in favor of slaveholders and for Euro-American judges to rule against Mexican slaveholders.¹⁶⁴

Two additional patterns can be teased out. First, majority-Mexican legislatures continually sought legislative solutions to what they perceived as an activist judiciary composed exclusively of Euro-Americans. They formalized the ownership of Indian slaves by other names—under the rubric of an expanding master-servant law, drawing heavily on Anglo-American common law traditions.¹⁶⁵ As Brooks notes, this meant that “after 1851, peonage and slavery became densely interwoven” and, he concludes, virtually merged.¹⁶⁶ Even as this route was increasingly stymied by Euro-American judges, Mexican slaveholders turned to county probate courts to use the guardianship system to essentially disguise the master-slave relationship in euphemistic familial language.¹⁶⁷ By taking the guardianship route, Mexican slaveholders accomplished two things simultaneously: first, establishing their forum as probate court (rather than either the justice of the peace courts or the Euro-American controlled district courts), and, second, cloaking the practice of slavery in familial terms (such that they were rescuing “orphaned” Indian children).¹⁶⁸ Like justices of the peace, probate judges (like Juan Santistevan) were elected officials and in this era were virtually all Mexicans.¹⁶⁹

Euro-American judges responded in two ways that substantially curtailed the power of Mexican elites. First, they overturned or narrowly construed master-servant legislation in the interests of litigants who were Indian slaves.¹⁷⁰ Second, and more comprehensively, they sought over a period of decades to curtail the power of the justice of the peace courts, with the effect of gradually emasculating these largely Mexican-controlled courts of first resort.¹⁷¹ Eventually, Euro-American elites appealed to higher authority—not in the form of the U.S. Supreme Court, but in the form of the Congress, which, as the reader will recall, had the authority to nullify any act of the territorial legislature. Frustrated by unsuccessful attempts to use general slavery and

¹⁶⁴For example, Rael-Galvez traces the case of Tomas Heredia, who sued Jose Maria Garcia, who fled Garcia's residence, arguing that the peonage contract under which he worked was illegal. Multiple justices of the peace in Dona Ana County sided with Garcia, ordering Heredia to return to him. On a habeas corpus petition to the Territorial Supreme Court, the justices reasoned that “peonage must be as illegal as Negro slavery” and ordered Heredia freed. RAEL-GALVEZ, *supra* note 52, 284-85 (citing records of the New Mexico Supreme Court [no published opinion exists]).

¹⁶⁵The first master-servant law was enacted by the territorial legislature in 1851, and was expanded in a variety of ways over the 1850s and 1860s. RAEL-GALVEZ, *supra* note 52, 188 (citing the various pieces of legislation). The legislature formally abolished peonage in 1867, but the practice apparently continued well into the next decade, according to Brooks. BROOKS, *supra* note 114, at 349 n.70.

¹⁶⁶BROOKS, *supra* note 114, at 348.

¹⁶⁷RAEL-GALVEZ, *supra* note 52, at 200 (citing legislation enacted in 1859).

¹⁶⁸Rael-Galvez powerfully observes: “While terms such as “genizaro” and “criado,” were much more common, “guardianship” may also have begun to be used in similar ways. As is true with all these euphemisms, however, what this reveals is precisely what it attempts to hid: a continually constructed ideology of a legally mandated benevolence, which while read outside of slavery, was in fact constitutive of an uniquely situated colonial paternalism, hierarchy and racism.” *Id.*, 201.

¹⁶⁹GÓMEZ (2000), *supra* note 9, at 1156, n. 65 (describing probate judges and the probate court).

¹⁷⁰For example, see, Jaramillo v. Romero (1857).

¹⁷¹GÓMEZ (2000), *supra* note 9, at 1158 (noting that the Territorial Supreme Court curtailed the power of justices of the peace in several cases in the 1860s). In my forthcoming book, I analyze how these various conflicts in the legal sphere challenged Mexican men's masculinity and power and ultimately reinforced Euro-American men's masculinity and power.

peonage prohibitions to address Indian slavery in New Mexico, in 1867 Congress directly prohibited Indian slavery and the practice of Indian peonage.¹⁷²

One way to read these actions on the part of Euro-American judges and federal legislators is to view them as champions of civil rights and, in particular, advocates of the extension of recently won Black civil rights to Indians. In order to fully understand these dynamics, however, we must consider the constellation of racial groups, racial ideologies, and the new racial order that was in formation. From the actions of Mexican elites in the first 25 years of American colonization, it is clear that they perceived it in their interest to defend and elaborate the practice of Indian slavery. It also is clear that Euro-Americans, especially judges, were increasingly critical of the practice euphemistically labeled peonage. What were the motivations of each group? What do the debates between Mexican elites and Euro-Americans over Indian slavery reveal about the deeper, highly racialized conflict in this colonial moment?

The broader historic context is extremely important because, at this same point in history, the American military was engaged in its most intense "Indian wars" against the nomadic tribes of New Mexico.¹⁷³ The culmination was Kit Carson's forced march of 8,000 Navajo men, women and children over 300 miles from their homeland to the Bosque Redondo Reservation, where they were held as captives of the U.S. from 1864-68. Historian Richard White's description provides additional context:

The "Long Walk" became an event seared into the Navajo memory, a lasting reminder of the power and ruthlessness of the federal government. It would be four years before the Dine, as the Navajos call themselves, returned to their own country . . . These were four years of humiliation, suffering, death, and near starvation.¹⁷⁴

Against this context, consider what "choices" a hypothetical Navajo woman enslaved in a Mexican household would have had in 1868, the year of the indictment against Santistevan and the other slaveholders. Griffin described how he liberated the Indian slaves and peons in 1868:

Upon the examination of each [of the] persons charged as aforesaid and finding the charges true, I at once had the Indians so held as slaves brought before me, and informed them that under the laws of the United States and the holding of the Supreme Court of New Mexico thereunder, they were strictly and absolutely free to live where and work for whom they desired, and were at perfect liberty to go where and when they pleased . . . that slavery could not exist in the United States and if they should prefer changing their homes, and go to the Navajo Country . . . they could do so . . .¹⁷⁵

¹⁷²RAEL-GÁLVEZ, supra note 52, 286-87.

¹⁷³One result of the American-led Indian wars of the 1860s was the largest number of baptisms of nomadic Indians ever recorded in Catholic records. RAEI-GÁLVEZ, supra note 52, at 215. As Rael-Gálvez notes, these military campaigns revealed a shift "from the wars against slavery to the wars against Indians." *Id.* at 211. Admittedly, Mexicans, as army volunteers and in other support capacities, supported this assault on Navajos and other nomadic tribes. See *Id.* at 203 n.387 (citing an 1860 proclamation exhorting Mexican men to join up to "create a force of 1,000 men" to fight the "savage" Navajos.)

¹⁷⁴WHITE, supra note 26, at 100.

¹⁷⁵RAEL-GÁLVEZ, supra note 52, at 292. Oddly, Griffin's emancipations apparently occurred at the time he issued arrest warrants and subpoenas of the alleged slaveholders, but before the federal grand jury had opportunity to consider (and, in these cases, reject) indictments.

Had the hypothetical Navajo slave in a Mexican household sought emancipation and return to her people, she would have been forcibly removed to Bosque Redondo.¹⁷⁶ To say this is not to in any way justify Indian slavery, but instead to point out the disingenuousness of American liberation efforts.

Instead, I read Americans' actions here as part of a larger project of institution-building for the purpose of extending and preserving American material and ideological interests in this newest colony. From this perspective, the Mexican/Euro-American conflict over Indian slavery represented both a power struggle between colonizer and native and between dominant (Euro-American) and subordinate (Mexican) racial groups. Mexican elites attempted to resist American hegemony by, literally, holding on to one of their most valuable assets (even as their land holdings plummeted during the 19th century). At another level, Mexican elites sought to maintain their honor and status, which under the Spanish and Mexican periods had been deeply connected to making raids, taking captives, and holding Indian slaves in their households. This tradition surely resonated with the transfer of power to the Americans, who, after all, understood both the traffic in human beings and its justification on the basis of racial inferiority. In the context of American racial hierarchy, then, we must also read Mexican elites' fierce battle to maintain Indian slavery as an effort to legitimize (and, thus, fortify) their ever-tenuous claim to whiteness.

Conclusion

Racism and the ideology of white supremacy were bound up with colonialism in New Mexico. The American colonizers needed a native governing elite, both because they had insufficient numbers of Euro-American settlers in the region and in order to legitimize the military occupation. The latter was especially important given extensive Whig criticism of the war with Mexico and of imperialism more generally. Americans did not want to see themselves as a colonial power. One of the striking features of the standard American history of this period—of the Mexican War and the subsequent annexation of more than half Mexico's territory—is the sheer absence of colonialism as a topic or theme. In the national mythmaking constituted by this conventional history, this encounter of peoples is not presented as one of conquest and colonialism. Instead, most histories of U.S. imperialism begin in 1898, with the end of the Spanish-American War and the acquisition by the U.S. of Puerto Rico, Guam, and the Philippines, and with the annexation of Hawaii.¹⁷⁷ But we cannot fully understand the second imperial moment of the 1890s without understanding what occurred in the first imperial moment in the 1840s, in what is today the American Southwest.

¹⁷⁶Rael-Gálvez similarly observes: "The irony here is profound, since the Dine [the Navajo] were also just then being held captive by the United States government, removed from their homeland and bound within military control." *Id.*, 270.

¹⁷⁷Reliance on 1898 as the beginning of U.S. imperialism cuts across the political spectrum, with even left-leaning scholars evoking that year as the start of "the New American Empire." SMITH, supra note 12, at 429. See also RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM* (1973) (arguing that American imperialism begins in 1893 with efforts to annex Hawaii). Recent legal scholarship on U.S. imperialism in Puerto Rico includes PEDRO MALAVET, *AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* (2004) and EDIBERTO ROMAN, *AMERICAN COLONIES: EXAMINATION OF U.S. ISLAND CONQUESTS* (2005).

Even as American colonizers tapped a native elite to govern in a region with far more Euro-American soldiers than civilians, they also needed to keep Mexicans and Indians in their racial place. For Mexicans incorporated as the native elite in the colony, the distinction between political and social equality became paramount, if not always openly discussed. Though Euro-American men ceded formal political equality to Mexican men, this did not translate into social equality between Euro-Americans and Mexicans. An essential element of the colonial strategy hinged on breaking up the military alliance and cultural affinity between Mexicans and Pueblo Indians. The lure of whiteness proved an ideal tool; with it, the American colonizers could, in one move, co-opt Mexicans willing to trade on their mestizo, part-European heritage and divide Mexicans from their Pueblo Indian neighbors.

Ultimately, the power of racism is ideological, achieving its apex when racially subordinated groups themselves help to reproduce racism. I have shown how this worked by describing situations in which Mexicans gained the upper-hand over non-white groups lower on the racial hierarchy, including Pueblo Indians, free and enslaved Blacks, and nomadic Indians. Despite evidence of ambivalence in both the law on the books and the law in action during the early years of the American occupation, Mexican men disenfranchised their Pueblo brothers to the extent that the latter were virtually excluded from the new, American polity in the region. Acting in symbolic terms because of the tiny numbers of Blacks in the region, Mexican elites sided with pro-slavery and scientific racism to enact a draconian Black Code and Slave Code in the 1850s. Partly in order to affirm their whiteness, Mexican elites actively sought to continue the enslavement of nomadic Indians during the first 25 years of the American occupation.

Mexicans took up the American racial project by claiming whiteness for themselves and seeking to distance themselves from non-white groups including Pueblo Indians, free and enslaved Blacks, and Indians from the nomadic tribes. But Mexicans paid a price for the legal fiction that they were "white," and, therefore, that their men were eligible to vote and hold office; they ultimately were co-opted by the American colonizers. By the end of the 19th century, we begin to see shifts in the political system reflective of Euro-Americans' ascendancy in the region and the end of the period of power-sharing with Mexican elites. At the same time, in all of these contexts, the divisions between Mexicans and other subordinated groups gave tremendous power to the American colonizers, increasing divisions among potential allies in an anti-American campaign, legitimizing the American presence as "protector" of Indians, and entrenching the American legal system as a neutral, fair forum for dispute resolution and punishment.

At the same time, conquest was not a totalizing experience. At the edges of a system of co-optation and colonial authority, Mexican elites exercised more self-determination than other non-white racial groups in New Mexico and, perhaps, anywhere in the U.S. at the time. Given their control of lower court forums such as the justices of the peace and probate courts, Mexican men exercised considerable control over disputes among themselves, disputes with Euro-American merchants and ranchers, and disputes with members of various Indian communities. Although these victories were sometimes literally overruled by the higher, Euro-American con-

trolled district courts, Mexicans held the balance of power even in those forums, where they were the majority of grand jurors checking the power of Euro-American prosecutors and the majority of petit jurors checking the power of Euro-American judges.

Mexicans' status as a middle-man or wedge racial group simultaneously buttressed and challenged white supremacy. Mexicans' sometimes successful claims to whiteness challenged white supremacist ideology by forcing a rupture in categories; what was "whiteness" if it was a permeable rather than a closed category? At the same time, race relations in New Mexico served to buttress white supremacy. Mexicans' claim to whiteness was fragile because, while they were formally recognized as whites, they were informally treated as non-white, as racially inferior to Euro-Americans. As a result, Mexican elites vigorously sought to distance themselves from non-white groups lower on the racial hierarchy, including Blacks (free and slave) and Pueblo and nomadic Indians. In this way, they played a leading role in reproducing the American racial hierarchy in the Southwest and, ultimately, in the nation.

In this chapter, I have frequently emphasized the agency of Mexican elites and the extent to which they exercised rights under the banner of claims to whiteness. In so doing, it is easy to overstate the extent to which Mexicans' racial subordination—even as elites—impacted them on a daily basis. An important reminder of this comes from the Mexican American elites who represented Mr. Hernandez in his appeal to the Supreme Court. Although the lawyers and various members of the bench involved in the case debated in both formal and informal venues the extent to which Mexican Americans were "white" or not, there never really was any doubt about the daily, pernicious ways in which Mexicans were subordinate to whites, whether or not they were allowed to officially claim white status.

One of the lawyers, John J. Herrera, made the point in a letter to the editor of the *Houston Chronicle* he penned twenty years after the *Hernandez* decision. Writing in 1974 in response to an article on discrimination against Blacks, Herrera recalled his memories of a Jim Crow Texas that singled out both African Americans and Chicanos:

The story brought back many memories to me. The signs in West Texas cafes: NO CHILI! "They mean us, son. Don't go in there," dad would admonish me. The rest of Texas was no better. Seguin [Texas]: a public park with the sign, Negros y Mexicanos Afuera! In a Houston personnel office: "No Mexicans hired." On Washington Ave.: "No Mexicans Allowed in Dance Hall." In a refinery, all water fountains were painted white, black, or brown. You know where I had to drink.¹⁷⁸

Herrera did not mention here but recalled in many other instances the signs in the county courthouse where Pete Hernandez was tried and convicted of murder, where men's bathrooms were separately marked for "Colored Men" and "Hombres

¹⁷⁸JOHN J. HERRERA, Editorial, HOUSTON CHRON. May 31, 1974, § 1, at 27 (emphasis in original). I am indebted to University of Houston Law Center Professor Michael A. Olivas for bringing this letter to my attention.

Aquí." The fact that Herrera was one of the most elite Mexican Americans in Texas did not change the fact that he was required to use a segregated washroom in 1950s Texas. The fact that Herrera was a lawyer (even one who would soon argue before the U.S. Supreme Court) was secondary; first and foremost, he was a Mexican.

Race and Colorblindness after *Hernandez* and *Brown*⁺

Ian Haney López*

The fiftieth anniversary of *Brown v. Board of Education*¹ has been widely commemorated, but has also occasioned concern regarding the persistence of racism and racial inequality. *Brown* stands for some as the shining moment when the United States finally and fully committed itself to treating its citizens equally without regard to race; for others, it represents a failed promise, a moment of important but only partial transition when the United States moved from Jim Crow, not to equality, but only to a new, less overt, but hardly less oppressive or pervasive racism. Despite this disagreement, however, almost all view *Brown* as the first case in which Chief Justice Earl Warren unified the Supreme Court to begin dismantling Jim Crow. This quality of being "the first case" adds to *Brown's* prominence, whether that's understood as representing a complete rupture or heralding instead only a shift in racial practices.

But *Brown* is not the first case. Instead, that distinction belongs to a jury exclusion case decided two weeks earlier, *Hernandez v. Texas*.² *Hernandez* deserves our attention, not least for reasons of historical accuracy. The Mexican American community has long been an active participant in the struggle for racial justice in the United States, and *Hernandez* brings this fact to the fore. *Hernandez* also has contemporary relevance because it represents the first extension of constitutional protection to Latinos as a class, no small matter now that Hispanics constitute the largest minority group in the United States. But I concentrate on *Hernandez* here for yet another reason: because it comes much closer than *Brown* to explaining when and why the Constitution should concern itself with race. *Hernandez* unambiguously insists, in a way that *Brown* does not, that it is race as subordination, rather than race per se, that demands constitutional intervention.

*This is a slightly different version of a paper of the same title which I presented at the American Anthropological Association's Conference on Race and Human Variation held in Alexandria, Virginia, in September 2004. The Association has kindly granted permission for the use of this paper.

⁺Professor of Law, Boalt Hall, University of California, Berkeley. My thanks to Professor Michael A. Olivas for his dedicated efforts to raise *Hernandez v. Texas* to its proper place in legal history as well as in the pantheon of great constitutional cases.

¹*Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²*Hernandez v. Texas*, 347 U.S. 475 (1954). For an earlier article on *Hernandez v. Texas*, see IAN HANEY LÓPEZ, RACE, ETHNICITY, ERASURE: THE SALIENCE OF RACE TO LATCRIT THEORY, 85 CAL. L. REV. 1143 (1998); see also IAN HANEY LÓPEZ, HERNANDEZ VS. BROWN, N.Y. TIMES, May 21, 2004, A2.