ONE ADVOCATE'S ROAD MAP TO A CIVIL RIGHTS LAW FOR THE NEXT HALF CENTURY: LESSONS FROM THE LATINO CIVIL RIGHTS EXPERIENCE

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THE FOLLOWING IS AN EDITED AND FOOTNOTED TRANSCRIPT OF THE 2013 LATINOS AND THE LAW LECTURE, SPONSORED BY THE BICKEL & BREWER LATINO INSTITUTE FOR HUMAN RIGHTS. THE LECTURE WAS DELIVERED AT NEW YORK UNIVERSITY SCHOOL OF LAW ON OCTOBER 22, 2013.[1] THROUGH A REVIEW OF SOME OF THE SIGNIFICANT CASES THAT MALDEF HAS UNDERTAKEN IN RECENT YEARS AND OF THE HISTORICAL EXPERIENCE OF THE LATINO COMMUNITY IN THE LEGAL SYSTEM, THE LECTURE SEEKS SUPPORT FOR AN EXPANDED NOTION OF WHAT CONSTITUTES "CIVIL RIGHTS LAW" GROUNDED IN THE LATINO CIVIL RIGHTS EXPERIENCE.[2]

Twenty-five years ago this fall, I began my journey as a lawyer when I commenced law school. Even as a first-year student, I went to law school intending to do civil rights work after graduation. I knew that my desire and ambition was what was going to get me through the difficult times that I expected to experience in law school. The law students here in the audience are all far enough along to know that, even at the best of law schools, there can indeed be some difficult times; you have to have something to sustain you through those times. The opportunity to work on behalf of the Latino community

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1. The lecture itself is viewable online at http://www.law.nyu.edu/news/thomas-saenz-delivers-latinos-and-the-law-lecture.

2. The basic thesis is not a new one. *See, e.g.*, Ingrid Eagly, Tom Saenz, Karen Tumlin, Julie Su & Hiroshi Motomura, David Epstein Program in Public Interest Law Speakers Series, From Emma Lazarus to Arizona SB1070, Can Progressives Meet New Challenges to Immigrants Rights? (Sept. 20, 2010), *in* 31 CHICANA/O-LATINA/O L. REV. 47, 62–63 (2012) (comment of Tom Saenz) ("I have tried to argue since Proposition 187 in the progressive legal movement we have to have a comprehensive constitutional theory because the other side has always had it.").

in civil rights is what I knew would empower me and enable me to endure the tough times and make it through law school.

I entered law school with a particular belief about what "civil rights law" meant. This belief rested on both my learning in history—as a history major in college studying, in particular, the Latino community's experience with the United States legal system—and on my limited experience with and exposure to the law. I went into law school believing that I should study the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, and related federal statutory law. My rudimentary understanding, then, was that "civil rights law" was about taking the post-Civil War amendments—the Fourteenth and Fifteenth Amendments in particular—and applying them to deter and prevent the kind of ongoing discrimination still affecting the Latino community.

Looking back now, of course, I was woefully wrong about what "civil rights law" is. And I learned this almost immediately when I began as a practicing civil rights lawyer at MALDEF in 1993, after two years of clerking for federal judges. The first case to which I was assigned—involving an issue that I ended up working on throughout my career to date—was a First Amendment case.[3] Some of you might conclude that that is not really such a stretch for a civil rights lawyer, that the First Amendment is a civil rights amendment. However, back then, free speech was generally viewed as a civil liberties issue, and the First Amendment was ordinarily seen as a provision to be used to protect the right to political engagement.

But, the case to which I was assigned sought to use the First Amendment on behalf of day laborers, specifically to challenge an ordinance that had been adopted to restrict the right to solicit work while standing on a public sidewalk.[4] These ordinances had proliferated in California and, subsequently, throughout the country, in an early effort to target and harass Latino immigrants. In fact, some of these anti-solicitation ordinances were modeled after a sample ordinance published on the website of one of the nation's more prominent anti-immigrant organizations, FAIR, the Federation for American Immigration Reform.[5] The notion was that those who feel afflicted by immigration—those wanting to restrict immigration—should target day laborers by convincing their city to enact an ordinance preventing the solicitation of work from the sidewalk.

Again, what was different about the court challenge to these ordinances, in comparison to other First Amendment cases, is that the approach was not about

3. The case was already on appeal to the California Court of Appeal following an adverse decision from the Superior Court. Unfortunately, the appellate court affirmed the decision. *See* Xiloj-Itzep v. City of Agoura Hills, 24 Cal. App. 4th 620 (Cal. Ct. App. 1994).

4. *See id.* at 628–31.

5. The FAIR website continues an exhortation to "[p]ress[] local governments to enact an ordinance to prohibit all solicitations of moving vehicles." *Day Laborer Hiring Sites*, FED'N FOR AM. IMMIGR. REFORM, http://www.fairus.org/issue/day-laborer-hiring-sites (last visited June 21, 2014).

political engagement. Instead, it was about using the First Amendment's protection of free speech to enable workers, primarily immigrant laborers, to earn a living—to earn sustenance for their families. The First Amendment also became the means to challenge legislation that was specifically adopted to target and to discriminate against Latino immigrant day laborers. It was a long journey, but ultimately, after a number of successes in federal district court,[6] MALDEF and its day laborer clients convinced the en banc Ninth Circuit Court of Appeals that these anti-solicitation ordinances are a violation of the First Amendment.[7]

Upon entering law school, I perceived the First Amendment as a critical part of the Bill of Rights and an important civil liberties issue. But, I did not necessarily expect the First Amendment to be a part of civil rights work, and particularly a part of challenging laws that specifically target the right and ability of Latino immigrants to work. So, my first MALDEF assignment demonstrated the power of constitutional rights, other than simply the right to equal protection of the law, to defend against discrimination.

The second significant litigation assignment I received as a young civil rights lawyer at MALDEF was to join a group of lawyers, from a number of different organizations, preparing for the expected enactment of California's Proposition 187. As that infamous proposition becomes more and more of a distant memory, I have become accustomed to explaining what Proposition 187 was, particularly to younger audiences. Even if you were quite young at the time, it is important for people to remember that, nineteen years ago, California was much like the Arizona of today.[8] Like Arizona and its infamous S.B. 1070 and related laws today,[9] California in the early 1990s was regrettably taking many significant steps to restrict the rights of immigrants within the state.[10] Perhaps the high point of "success" for those anti-immigrant forces in California was the enactment in November 1994 of Proposition 187.[11]

The initiative was an attempt to restrict the rights of everyone in the name of targeting undocumented immigrants. Proposition 187 would have restricted the

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6. *See, e.g.,* Coalition for Humane Immigrant Rights of Los Angeles v. Burke, No. CV 98-4863-GHK(CTX), 2000 WL 1481467, at *13 (C.D. Cal. Sept. 12, 2000) (striking down Los Angeles County anti-solicitation ordinance on First Amendment grounds).

7. *See* Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 951 (9th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1566 (2012). I was fortunate to argue the case before the en banc court after my return to MALDEF as President and General Counsel.

8. *See* Thomas A. Saenz, *A New Nullification: Arizona's S.B. 1070 Triggers a National Constitutional Crisis*, 21 BERKELEY LA RAZA L.J. 5, 8–9, 11–13 (2011) (discussing parallels between Proposition 187 and S.B. 1070).

9. *See* Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration: A Debate Flares Anew Noncitizens Must Carry Papers—Police Get Broad Powers*, N.Y. TIMES, Apr. 24, 2010, at A1.

10. These steps included adopting one of the first laws restricting immigrants' access to driver's licenses, S.B. 976, ch. 820, 1993 Cal. Stat. 4450 (codified at CAL. VEH. CODE § 12801.5) (modified 2013), and a law requiring job placement and training agencies to verify immigration status, S.B. 733, ch. 819, 1993 Cal. Stat. 4449 (codified at CAL. UNEMP. INS. CODE § 9601.5).

11. Proposition 187, 1994 Cal. Stat. A-317 (approved by electors Nov. 8, 1994).

rights of every person in California to access every type of public service imaginable, whether social services, health care, K–12 education, higher education, and even, in certain circumstances, police services.[12] Every public servant would face the necessity of determining your status, arriving at some conclusion about your status, and, if you were suspected of being undocumented, taking a series of steps to prevent you from accessing services, and to convince you to self-deport.[13] Lots of folks believe that Arizona originated the concept of "self-deportation," but nineteen years ago, there was a provision in Proposition 187 that would have compelled civil servants in every one of those service areas to send notice—official government notice—to anyone they suspected of being undocumented, telling them: the state of California believes you to be undocumented, so you must change your status or leave the state.[14]

So, Proposition 187 really had embedded within it this notion of self-deportation that has now understandably and justifiably become so infamous after being invoked not just by S.B. 1070 in Arizona,[15] but also by the five other states that replicated that 2010 legislation in whole or in part.[16] And, of course, presidential candidates also invoked the concept; candidates whom, one would hope and assume, now regret having voiced support for the policy of self-deportation.[17] But, there it was—the concept of coerced self-deportation—in Proposition 187.

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12. *See id.* §§ 4 (requiring local law enforcement to enforce immigration laws), 5 (placing restrictions on provision of social services), 6 (placing restrictions on provision of publicly-funded health care), 7 (placing restrictions on enrollment in public elementary and secondary schools), and 8 (placing restrictions on enrollment in public institutions of higher education); League of United Latin Am. Citizens v. Wilson (*LULAC I*), 908 F. Supp. 755, 763 (C.D. Cal. 1995) ("The initiative's provisions require law enforcement, social services, health care and public education personnel to (i) verify the immigration status of persons with whom they come in contact; (ii) notify certain defined persons of their immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care, and education."). *See also id.* at 764–65, 787–91 (describing Proposition 187's provisions and appending its text).

13. *See* Proposition 187, §§ 4-8, 1994 Cal. Stat. at A-317 to A-320; 908 F. Supp. at 764–65.

14. *See LULAC I*, 908 F. Supp. at 765 (describing "notification" provisions). *See also* Proposition 187, §§ 4(b)(2), 5(c)(2), 6(c)(2), 7(e), 8(c), 1994 Cal. Stat. at A-317 to A-320 (notification provisions affecting different public services).

15. S.B. 1070, ch. 113, 2010 Ariz. Sess. Laws 450, *amended by* H.B. 2162, ch. 211, 2010 Ariz. Sess. Laws 1070 (declaring the intent of the Act to be "attrition through enforcement").

16. *See* H.B. 56, Act No. 2011-535, 2011 Ala. Acts 888; H.B. 87, No. 252, 2011 Ga. Laws 794; S.B. 590, P.L. 171, 2011 Ind. Acts 1926; S.B. 20, No. 69, 2011 S.C. Acts 325; H.B. 497, ch. 21, 2011 Utah Laws 261.

17. *See* Zeke Miller, *Mitt Romney Comes Out for "Self- Deportation,"* BUZZFEED (Jan. 23, 2012, 9:16 PM), http://www.buzzfeed.com/zekejmiller/mitt-romney-comes-out-for-self-deportation; *see also* Aaron Blake, *Priebus: Romney's Self-Deportation Comment Was "Horrific,"* WASH. POST (Aug. 16, 2013, 2:01 PM), http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/16/priebus-romneys-self-deportation-comment-was-horrific/ ("The comment is widely believed to have hurt the GOP in the general election, when Latinos voted for Obama in even higher numbers than they did in 2008."); Rick Ungar, *Romney's Demise May Be Traceable to These Two Words—"Self Deportation,"* FORBES (Nov. 7, 2012, 6:46 PM), http://www.forbes.com/sites/rickungar/2012/11/07/romneys-demise-may-be-traceable-to-these-two-words-self-deportation/.

The main legal claim that MALDEF, together with the ACLU of Southern California and a team of other civil rights lawyers from throughout the state, successfully used to strike down the bulk of Proposition 187 was one that today is much more familiar to those who know this area of the law.[18] Despite the existence of precedent from decades—and in some cases, half a century or more—earlier,[19] the notion of federal supremacy as a basis to challenge immigration regulations at the state or local level was, at the time, relatively novel.

So, there I was, a relatively young staff attorney at MALDEF, thrust into my second significant litigation assignment, and working on novel issues of preemption and federal supremacy. When I was in law school just a few years before, that is not what would have been viewed as a civil rights claim. In law school, I viewed federal preemption, consistent with the bulk of the case law at the time, as primarily a mechanism for businesses to duck state and local regulation. Businesses would point to federal statutes that regulated in the same area, and argue that they should not be subject to more stringent regulations at the state or local level.[20] Federal preemption was simply not viewed as a tool of civil rights lawyers.

Yet, preemption was the main claim in the second significant case to which I was assigned as a practicing civil rights lawyer.[21] As an aside, to the law students, I say this: I was fortunate enough that, when I was a third-year student, my moot court problem involved a preemption issue. While participating in that moot court competition, I was exposed to the basics of the doctrine of federal supremacy and preemption, though never believing at the time that it was knowledge that I would use in my planned career as a civil rights lawyer.[22] In fact, I would spend much time working on the Proposition 187 legal challenge,

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18. Indeed, as a result of the challenge to S.B. 1070, the United States Supreme Court has recently provided what is certainly its most comprehensive discussion ever of preemption in the context of immigration regulation. *See* Arizona v. United States, 132 S. Ct. 2492 (2012) (addressing various theories of preemption as applied to four provisions of S.B. 1070).

19. *See, e.g.*, DeCanas v, Bica, 424 U.S. 351 (1976) (preemption challenge to California law on immigrant employment); Hines v. Davidowitz, 312 U.S. 52 (1941) (preemption challenge to Pennsylvania alien registration law); Chy Lung v. Freeman, 92 U.S. 275 (1876) (preemption challenge to California law creating state commissioner of immigration).

20. *See, e.g.*, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Shaw v. Delta Air Lines. 463 U.S. 85 (1983), Jones v. Rath Packing Co., 430 U.S. 519 (1977).

21. *See* Gregorio T. *ex rel.* Jose T. v. Wilson, 59 F.3d 1002 (9th Cir. 1995) (upholding preliminary injunction against major provisions of Proposition 187); *Gregorio T. ex rel. Jose T. v. Wilson*, No. CV 94-7652 MR, although it was the most comprehensive of the cases filed against the initiative on the day after the election, it was eventually consolidated under the name of an earlier-filed case that commenced on the same day, *League of United Latin American Citizens v. Wilson*. *See* 908 F. Supp. 755 (C.D. Cal. 1995).

22. I had taken an immigration course in law school, but, reflecting the contemporary novelty of the issue of state and local attempts to regulate immigration, federal supremacy and preemption were not a part of the course curriculum. The flip side of that doctrine of preemption—plenary federal power—was a part of the course curriculum, another important "head start" for me on the Proposition 187 case.

which continued for four years. Again, the primary claim in the federal case led by MALDEF and the ACLU of Southern California to strike down this obviously discriminatory initiative, which plainly targeted the Latino community, was that the entire proposition violated the Supremacy Clause[23] of the Constitution.[24]

This theme of non-traditional claims against discriminatory law and policy does not end there. Indeed, in the challenge to Proposition 187, MALDEF and the coalition of lawyers across California used every claim possible, even while focusing on preemption.[25] Appropriately viewing the initiative as a major and novel threat not just to the Latino immigrant community, but to the civil rights of everyone seeking to access public services throughout California, the lawyers endeavored to include every possible constitutional objection to Proposition 187 that could be imagined and developed. And, this extended beyond the preemption-focused federal case to other cases filed against the proposition.

MALDEF and others were so concerned about Proposition 187 that lawyers were also looking at state-law claims against the initiative, to be pursued in state court cases. When the dust had settled after those first few weeks following the election in November 1994, there were, from my recollection, half a dozen or more cases filed throughout the state challenging portions of the initiative.[26] MALDEF had not just joined in filing the federal case—the case that ultimately succeeded in striking the bulk of Proposition 187 as a violation of the exclusive federal authority to regulate immigration—but had also filed a state-court challenge to the provision related to public higher education.[27] Had Proposition 187 taken effect, the University of California, California State University, and community colleges throughout the state would have been required to attempt to verify the status of every student, new and continuing.[28] And, again, if one of these entities concluded or suspected that a student—prospective, new, or continuing—was undocumented, the institution would have had to follow the prescribed drill of sending notice to the student, denying services, and reporting

23. U.S. CONST. art. VI, cl. 2.

24. *See* League of United Latin Am. Citizens v. Wilson (*LULAC I*), 908 F.Supp. 755, 764 (C.D. Cal. 1995) ("[T]he League of United Latin American Citizens ('LULAC') and Gregorio T. plaintiffs brought motions for summary judgment in which they contend that Proposition 187 is unconstitutional on the sole ground that the initiative is preempted by the federal government's exclusive constitutional authority over the regulation of immigration, Congress' exercise of that power through the Immigration and Nationality Act ('INA'), and other federal statutes.").

25. The other claims included, for example, an equal protection claim challenging the education provision that directly violated *Plyler v. Doe*, 457 U.S. 202 (1982), and a procedural due process claim tied to the procedures required in denying statutory entitlements under *Goldberg v. Kelly*, 397 U.S. 254 (1970).

26. *See, e.g.*, *id.* at 763 & n.1 (indicating consolidation of five federal cases challenging Proposition 187).

27. *See* Proposition 187, § 8, 1994 Cal. Stat. A-317, A-320 (approved by electors Nov. 8, 1994).

28. *Id.* § 8(b).

the student to the INS[29] and to state authorities.[30] In other words, the colleges would be required to take every possible measure to prevent immigrants from accessing higher education.

In the course of that state-court challenge to the higher education provision,[31] and ultimately when the case went to trial in San Francisco, one of the claims that received the greatest attention from the court and the litigants was a Contracts Clause[32] claim. When I started law school a quarter of a century ago, I never would have suggested or believed that the Contracts Clause of the U.S. Constitution could or would become a valuable tool to secure a civil rights objective in the court system. For those who may not recall—I am sure the Clause likely received as much attention in your Constitutional Law course as in mine, which is to say, zero—the Contracts Clause prohibits the impairment of contracts. As interpreted, it is not an absolute bar, but it is more difficult for a state to defend a law that impairs contracts to which the state itself is a party.[33]

The claim pursued against the higher education provisions of Proposition 187 focused on continuing students who had been admitted and had begun their degree course of higher education before the initiative's passage. The argument was that once these students were admitted to a degree program, they had an implied contract with the public college or university that permitted them to complete the program so long as they satisfied reasonable academic requirements. Plaintiffs argued that Proposition 187 took that state contract and rendered it null, completely impairing it. The Contracts Clause thus became a part of the trial in the state court review of Proposition 187—specifically its higher education provisions. Like my experience with preemption, my perception of the Contracts Clause as a potential civil rights tool was changed by my participation in litigation against Proposition 187.

My professional adventure in non-traditional civil rights claims continued as the national reaction to Proposition 187—which at the time did receive substantial media and political attention nationwide—developed. Slightly digressing, I note that the initial political reaction to the initiative twenty years ago differed significantly from the reaction in recent years to Arizona's notorious S.B. 1070 and its replications. Back then, there was bipartisan opposition to what California had done in enacting Proposition 187.[34] Leaders

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29. The Immigration and Naturalization Service (INS) was the precursor to Immigration and Customs Enforcement (ICE) and several other agencies now part of the U.S. Department of Homeland Security.

30. Proposition 187, § 8(a)–(c), 1994 Cal. Stat at A-320.

31. Doe v. Wilson, No. 965090 (San Fran. Cty. Super. Ct., filed 1994).

32. U.S. CONST. art. I §10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

33. *See* United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 21–26 (1977) (discussing differing standards for review of legislation impairing private contracts and impairing state contracts).

34. *See* Jesse Katz, *Prop. 187 Gives Texas a Selling Point in Mexico*, L.A. TIMES, Feb. 6, 1995, at A1 ("[S]tate leaders from across the political spectrum [have] condemned California's

of both parties, including then-Governor George W. Bush of Texas, publicly proclaimed that this was not an approach that they approved of, or would pursue, in their own states.[35] This reaction was markedly different from the reaction to S.B. 1070, which—to the current detriment of the entire country and specifically of one of its major political parties—has been embraced by far too many leaders in the Republican Party and replicated in five other states.[36]

However, despite this bipartisan opposition to the California initiative, part of the reaction to Proposition 187 took the form of regrettable changes in federal law that were enacted two years later in 1996. Specifically, the first post-Proposition 187 step to restrict the rights of immigrants at the federal level was in Title IV of the Welfare Reform Act, formally known as the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996.[37] Among its provisions regulating immigrant access to benefits and services, Title IV of the act—with which many are becoming familiar again today for reasons I will explain in a minute—restricts the ability of states to provide benefits and services from state funds to undocumented immigrants.[38] It includes a specific requirement that a state that wishes to provide its own state-funded benefits to undocumented immigrants must enact a law that explicitly includes that eligibility; moreover, that state law must be adopted after the effective date of the federal act.[39]

That timing provision surely seems odd, begging for an explanation of its inclusion. It was about what was going on in the state of California. Pete Wilson, who was then California's governor, was the lead champion of Proposition 187. He had tied his reelection to the anti-immigrant measure; by so doing, he experienced short-term success, but ultimately acquired a toxic reputation that has made him an anathema in California politics, with its growing Latino

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Proposition 187."); Gebe Martinez, *California Elections / Proposition 187: Kemp Defends Criticism Before Hostile Audience*, L.A. TIMES, Oct. 20, 1994, at 3 (reporting that Jack Kemp and William Bennett strongly opposed the ballot initiative).

35. *See, e.g.*, Patrick J. McDonnell & Dave Lesher, *Clinton, Feinstein Declare Opposition to Prop. 187 Immigration: President Calls Measure Unconstitutional. Senator Admits Her Stance Could Cost Her the Election,* L.A. TIMES, Oct. 22, 1994, at A1; Steve Daley, *2 Key Republicans Warn Party Against Taking Anti-Immigrant Stance*, CHI. TRIB., Nov. 22, 1994, at 9 (reporting opposition to Proposition 187 by three GOP leaders, including George W. Bush). *See also* Paul West, *Bush Courts Hispanic Vote in California Campaign Visit*, BALT. SUN, June 30, 1999, at 1A ("Unlike Republican leaders in California, Bush opposed Proposition 187 . . . .").

36. *See* Kim Severson, *Immigrants Are Subject of Tough Bill in Georgia*, N.Y. TIMES, April 16, 2011, at A14 ("30 states have considered anti-immigration legislation, most of which are styled after Arizona's."); *supra* note 17 and accompanying text (citing sources discussing 2012 Republican presidential nominee Mitt Romney's support of S.B. 1070).

37. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400–53, 110 Stat. 2105, 2260–77.

38. *See id.* § 411, 8 U.S.C. § 1621 (2012).

39. 8 U.S.C. § 1621(d) ("A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.").

electorate.[40] One of Wilson's frustrations as governor lay in his inability to cut off certain benefits being provided to immigrants.

Specifically, the state of California had previously concluded that it should provide prenatal care benefits to undocumented mothers,[41] a wise and logical decision because the investment in such care actually pays for itself many times over, in the prevention of injuries and illnesses to children who, once born, will be United States citizens eligible for state-provided medical care.[42] Thus, it was a seemingly logical and financially responsible decision to make prenatal care benefits available without regard to immigration status.

Yet, Pete Wilson, adhering to his virulently anti-immigrant stance, viewed this policy decision as an affront, and sought desperately to prevent the provision of those benefits.[43] Year after year, he would zero out the allocation in the proposed state budget.[44] But, he could not prevent the statutory mandate to provide those services to undocumented mothers from continuing in effect. This meant that his blue-penciling the budget item had no practical impact whatsoever because there was still a mandate to provide those services. Wilson's problem was this: the state senate at the time remained in the hands of legislators who would not act to repeal the mandate. As governor, he could do nothing to secure a repeal of the mandate.

Wilson's concundrum takes us back to the federal Welfare Reform Act. That provision requiring a new post-PRWORA state legislative enactment to provide a service or benefit to undocumented immigrants seemed to be mainly about Pete Wilson's California conundrum. While Wilson could not force the Legislature's hand, the Legislature itself lacked enough of a supportive majority to override a veto from the governor. Thus, as a result of that provision in the Welfare Reform Act, the burden shifted in California. The Legislature could enact the required new law to provide prenatal care benefits time after time, and

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40. *See, e.g.*, Amanda Paulson, *In California, Meg Whitman Leans Less Overtly on Pete Wilson*, CHRISTIAN SCI. MONITOR (Aug. 30, 2010), http://www.csmonitor.com/USA/Politics/The-Vote/2010/0830/In-California-Meg-Whitman-leans-less-overtly-on-Pete-Wilson ("Whitman is giving less visibility to the former governor, who's variously lionized or vilified for championing Proposition 187 . . . ."); Joe Garofoli, *Wilson's Return May Hurt GOP Latino Outreach*, S.F. CHRON., Mar. 20, 2010, at A8.

41. *See* Doe v. Wilson, No. C97-2427-SI, 1997 WL 811788, at *2 n.2 (N.D. Cal. Dec. 16, 1997) (excerpting CAL. WELF. & INST. CODE § 14007.5(d) (West 1997) (amended 1999)).

42. *See, e.g.*, Joanne Spetz, Op-Ed, *Spending More to Save a Little on Prenatal Care*, SAN DIEGO UNION TRIB., Feb. 25, 1998, at 1.

43. *See* Tim Golden, *Pregnant Immigrants Wait Out Policy Storm,* N.Y. TIMES, Oct. 16, 1996, at A1 ("Wilson has celebrated the welfare law as a long-awaited victory in the state's efforts to eliminate aid to illegal immigrants"); Patrick J. McDonnell, *Wilson Sets Prenatal Care Cutoff Dec. 1*, L.A. TIMES, Oct. 24, 1996, at A26 (describing Wilson's action in response to PRWORA); Patrick J. McDonnell & Dave Lesher, *Court Upholds State Plan to Cut Prenatal Care for Immigrants*, L.A. TIMES, Aug. 26, 1997, at A3 ("[G]overnor's oft-thwarted attempts to cut prenatal care for illegal immigrants . . . .").

44. *See, e.g.*, Douglas P. Shuit, *Prenatal Care Cut Urged for Illegal Immigrants*, L.A. TIMES, Jan. 8, 1994, at A1 (describing Wilson's shift in position and proposed budget cutting prenatal care for undocumented mothers).

Wilson could veto each and every time. Without a legislative super-majority to override a veto, the mandate that Pete Wilson was so desperate to repeal simply disappeared—entirely as a result of that intervention by the federal Welfare Reform Act.

MALDEF, together with a coalition of other advocates in California, challenged that offending provision of the federal Welfare Reform Act.[45] The difficulty for us was that, at the same time, we were continuing our challenge to Proposition 187, a case in which our main constitutional thesis was that the federal government has exclusive authority to regulate immigration. So, we could not credibly contest that Title IV and the federal decisions about immigrant eligibility were within congressional and presidential authority. This presented a conundrum in trying to challenge the federal provision's withdrawal of prenatal care benefits in California. The answer led to what may be one of the first instances of civil rights lawyers using a particular constitutional amendment: the Tenth Amendment, the so-called "states' rights" amendment.[46]

In cases around this time, the Supreme Court had reinvigorated the Tenth Amendment. When I was in law school, I had been taught that the Tenth Amendment was a virtual dead letter, at least as a means to litigate challenges to federal legislation. The Court had previously determined—in what appeared to be a conclusive pronouncement—that the main protection for states' rights lay in the states' congressional representation and the opportunity to change federal law. Therefore, Tenth Amendment claims were effectively not justiciable.[47] Soon after I graduated from law school, the Supreme Court changed that determination. A conservative majority of the Court decided that the states' rights amendment was real and enforceable; states could call upon the constitutional reservation of power to the states in challenging federal law.[48]

Thus, our challenge to that unusual provision of the Welfare Reform Act was not related to federal authority to regulate immigration, but to the illegitimate authority asserted and exercised to change the legislative process in California. Specifically, our argument rested on California's decision to allow all laws to remain in effect perpetually, absent a sunset clause adopted by the legislature. Of course, that's not unusual—most state legislatures follow the

45. Complaint, Doe v. Wilson, No. C 97-2427 SI (C.D. Cal. filed June 27, 1997). On file with the author.

46. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

47. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) ("But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated."). *See also id.* at 560 (Powell, J., dissenting) ("[T]oday's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.").

48. *See* New York v. United States, 505 U.S. 144, 174–77 (1992).

same practice. But, it is conceivable that a state could decide otherwise, sunsetting all laws automatically after five or ten years unless reenacted, or requiring that all laws on the books be reaffirmed and reenacted at the beginning of each new legislative session. Basically, a state democracy could decide that its laws would not have perpetual viability, but would automatically lose effect over time.

MALDEF and its co-counsel argued that that decision about the presumptive life of duly-enacted state laws is a core attribute of a state's democracy, and in such an area, the federal government, under the Tenth Amendment, has no authority. Twenty-five years ago, as I entered law school, to the extent I had any concept of the Tenth Amendment, the states' rights amendment, I would not have conceived of it as a civil rights amendment. Indeed, many would view it as an anti-civil rights amendment because of the incredibly important role that federal power has historically played in ensuring the enforcement of civil rights throughout the country.[49]

Regrettably, the courtroom story of our attempt to use the Amendment to achieve a civil rights goal does not end well. Our judge decided that we had a severability problem—that we could not sever the provision we were challenging from the authority of states to provide benefits to the undocumented at all.[50] However, we and others successfully kept the issue alive through the election of Gray Davis as governor of California, when reenactment of the longstanding mandate to provide prenatal care services, regardless of immigration status, could and did occur in full compliance with the unusual requirement in PRWORA.[51]

You can see that my experience in practice as a civil rights lawyer—using the First Amendment, Supremacy Clause and preemption, Contracts Clause, and the Tenth Amendment in somewhat unexpected ways—was dramatically different from what I anticipated upon entering law school a quarter of a century ago. Indeed, I cannot remember the last case that MALDEF has pursued all the way through to conclusion involving an Equal Protection Clause claim. We often include equal protection claims in our cases, but generally do not end up litigating those claims through to resolution, as other claims inevitably come to the fore.

Some may think my experience aberrational, a result of happenstance and coincidence, reflecting just one civil rights lawyer's idiosyncratic experience.

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49. This federal role extends at least back to President Dwight Eisenhower's intervention in the face of the active and aggressive opposition of Arkansas Governor Orval Faubus to court-ordered desegregation in the well-known case of Little Rock Central High School in 1957. *See* Exec. Order No. 10730 ("Providing Assistance for the Removal of an Obstruction of Justice Within the State of Arkansas") (1957).

50. *See* Doe v. Wilson, No. C 97-2427 SI, 1997 WL 811788, at *6 (N.D. Cal. Dec. 16, 1997) (granting defendants' motion to dismiss).

51. A.B. 1107, ch. 146 § 33, 1999 Cal. Stat. 1906 (adding CAL. WELF. & INST. CODE § 14007.7).

Yet, these unusual or unexpected civil rights claims still have resonance today. For example, many of you are aware that there is a current, ongoing controversy in a number of states about whether undocumented law graduates may be admitted to the bar.[52] MALDEF has participated through amicus briefs in matters pending in Florida and California before each state's supreme court as they consider this question. Although the California court's consideration may well have been mooted by the recent enactment of state legislation permitting undocumented graduates to be admitted,[53] our amicus briefs asserted both Contracts Clause and Tenth Amendment arguments in urging both supreme courts to avoid these difficult constitutional issues by interpreting federal law as permitting the admission of these law graduates, even in the absence of state legislation.

The Contracts Clause argument that MALDEF has asserted is this: when a student is admitted to a public law school, that student is admitted under an implied contract that if he or she completes the requisite course of study and passes the bar exam, the state will allow that law graduate to actually practice law in the state. While there are some who take their law degrees and accomplish wonderful things without ever taking the bar, "graduates practicing law" fulfills the basic point of having public law schools. We argued that the courts should avoid the impairment of these contracts by interpreting federal law to permit bar admission for undocumented graduates.

Our Tenth Amendment argument is that the federal government cannot require that a state legislature determine bar admission by requiring state legislation under that PRWORA provision I described previously.[54] Such a federal requirement would inappropriately override states' own decisions about separation of powers. Separation of powers in the states usually assigns bar admission decisions to the judicial branch of state government, not to the legislative branch. If the Welfare Reform Act provision requires state legislatures alone to determine undocumented law graduates' eligibility to be admitted to the bar, the federal government would violate the Tenth Amendment by invading states' sovereign conclusions about separation of powers in constructing their democratic governments. Therefore, the doctrine of "constitutional avoidance" counsels interpreting PRWORA not to require state legislative action to admit undocumented graduates to the bar.[55]

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52. *See, e.g.*, *Undocumented Law Students Pass State Bar Exams, But May Not Be Able to Practice*, HUFFINGTON POST (May 18, 2012, 4:45 PM), http://www.huffingtonpost.com/2012/05/18/undocumented-law-students_n_1524641.html; Maura Dolan, *Court Takes Up Bid of Illegal Immigrant to Be Attorney*, L.A. TIMES, May 17, 2012, at AA1.

53. A.B. 1024, ch. 573, 2013 Cal. Stat. 4658 (amending CAL. BUS. & PROF. CODE § 6064). *See also* In re Garcia, 315 P.3d 117 (Cal. 2014) (admitting Garcia in light of legislation).

54. *See* 8 U.S.C. § 1621(d) (2012); *supra* text accompanying notes 34–35.

55. Unfortunately, after this lecture was delivered, the Florida Supreme Court held that state legislation is required before it may admit an undocumented law graduate; two justices urged the enactment of such legislation in a concurring opinion. *See* Florida Board of Bar Examiners Re Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Florida Bar,

In my view, considering this modern relevance, my experience is not idiosyncratic, but indicative of the need to take a much broader view about civil rights law and civil rights jurisprudence. I think that doing so will inure to the benefit of not only the Latino community, but of the entire nation. Still, I think it is particularly appropriate that the Latino community—through organizations like MALDEF and others working on behalf of the Latino community—is at the forefront in using these non-traditional claims based on unexpected constitutional provisions to achieve civil rights aims. It is appropriate because of the Latino community's particular historical experience with the legal system in this country. That experience has largely been characterized by a struggle to fit within pre-established parameters of civil rights protections.

I hope that many of you know of a case called Hernandez v. Texas, resulting in a 1954 decision by the United States Supreme Court, the first major Latino rights case before the Court.[56] In many ways, the case marks the beginning of the Latino experience with civil rights protections in our legal system. To reacquaint you with the case, Hernandez was a case involving jury exclusion, specifically the then-prevailing practice in Texas of excluding Mexican American citizens from jury service.[57] It was a criminal case challenging the Mexican American defendant's indictment and conviction by juries, grand and petit, from which Mexican Americans were systematically excluded. The backstory was this: the then-prevailing practice of exclusion had been the practice forever. What had changed was the state's characterization of the excluded Mexican Americans following the Supreme Court's decision in Norris v. Alabama.[58]

The Norris decision established that a longstanding pattern of exclusion of one race from jury service was prima facie proof of unconstitutional exclusion, requiring no statements of intentional racial discrimination.[59] A longstanding pattern of excluding qualified members of a particular race, alone, could prove a constitutional violation.[60] In likely response to that holding, there appears a

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134 So.3d 432 (Fla. 2014). The court's decision and justices' exhortation epitomize the Tenth Amendment issue. The judicial branch, ordinarily in charge of such decisions, must ask a separate branch to act on its behalf. *See id.* at 438 n.9 (Labarga, J., concurring) ("Typically, this authority is reserved exclusively for this Court pursuant to the provisions of the Florida Constitution, subordinate in this instance to the supreme law of the land.").

56. 347 U.S. 475 (1954).

57. *See, e.g.*, *id.* at 481 ("The State of Texas stipulated that 'for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County.'").

58. 294 U.S. 587 (1935).

59. *Id.* at 591 ("The testimony . . . tended to show that 'in a long number of years no negro had been called for jury service in that county.' . . . That testimony in itself made out a prima facie case of the denial of the equal protection which the Constitution guarantees.").

60. *Id.* at 596 ("We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson county, that there were negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of negroes were placed on

subtle change—though not so subtle in retrospect—in how state prosecutors refer to Mexican Americans. You begin to see them referred to as white—no longer as a different race, but as a subgroup of whites.[61]

When the Hernandez case makes it to the Supreme Court, the main matter of contention is how to treat the state of Texas' assertion that the Norris precedent does not apply because the exclusion being challenged is intraracial, not interracial.[62] The anachronistic argument went something like this: "How can Mr. Hernandez complain about jury exclusion of his racial group. As a Mexican American, he is white, and look—his entire jury was white as well." Of course, there was not a single Mexican American on his jury, or on anyone else's for that matter. Yet, the state of Texas actually asserted that this logic meant that Hernandez could not call upon the Norris precedent in challenging jury exclusion.

Fortunately, the Supreme Court unanimously rejected that argument.[63] The Court basically concluded that if society treats a group like a separate race, no matter what the group is labelled, it should be treated like a separate race for purposes of the law.[64] The Court further concluded that the Norris precedent applies to any class treated as a separate social group.[65]

Hernandez v. Texas, marking the Latino community's first major experience with Supreme Court civil rights jurisprudence in this country, is emblematic of the group's broader experience throughout subsequent history. The previously established rule in Norris v. Alabama should have easily transferred and applied to the Latino community in Texas, but instead the community had to labor and struggle, and go to the Supreme Court, to actually benefit from that pre-established civil rights framework, all because the state of Texas re-characterized the group.

Following Hernandez, a pattern emerges of the Latino community

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the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of negroes, established the discrimination which the Constitution forbids.").

61. *See* Thomas A. Saenz, Mendez *and the Legacy of* Brown*: A Latino Civil Rights Lawyer's Assessment*, in SYMPOSIUM, REKINDLING THE SPIRIT OF *BROWN V. BOARD OF EDUCATION*, 6 AFR.-AM. L. & POL'Y REP. 194, 198–99; 11 ASIAN L.J. 276, 280–81; 15 BERKELEY LA RAZA L.J. 67, 71–72; 19 BERKELEY WOMEN'S L.J. 395, 399–400; CALIF. L. REV. (2004).

62. *See Hernandez*, 347 U.S. at 477 ("The State of Texas would have us hold that there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment.").

63. Chief Justice Warren authored the opinion for the unanimous Court, just as he did in the more renowned *Brown v, Board of Education*, 347 U.S. 483 (1954), a decision issued only two weeks after *Hernandez*.

64. *See Hernandez*, 347 U.S. at 478 ("When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro.").

65. *Id.* at 480 ("This [*Norris*] holding, sometimes called the 'rule of exclusion,' has been applied in other cases, and it is available in supplying proof of discrimination against any delineated class.").

struggling to fit its experience into pre-established tests, categories, and claims in civil rights law. In large part, this is because the Latino community's experience has, for decades, been one of discrimination not often posed as racial discrimination. Instead, the community has regularly experienced discrimination by proxy, as in: "we are not discriminating on the basis of race, but on the basis of language." Yet, in 1991, in Hernandez v. New York, the Supreme Court declined to conclude that the law should treat the exclusion of bilingual jurors, specifically because they were bilingual, as it does racial exclusion from juries.[66] Or, in another context: "we are not targeting you on the basis of race, but on the basis of immigration status, or citizenship." In 1973, in Espinoza v. Farah Manufacturing Co., the Supreme Court determined that employment discrimination on the basis of citizenship is different under the law from racial discrimination.[67] There are more examples: accent, presumptions about immigration status, etc.

Policymakers, both public and private, regularly make decisions based on proxies that are closely related to race. The Latino community has struggled and continues to struggle with the day-to-day challenges posed by laws targeting day laborers, targeting immigrants, and targeting others that seem plainly, in practical terms, to be tantamount to targeting the Latino community, but without the "smoking gun" of statements expressing intentional anti-Latino discrimination. Indeed, it seems as though public discourse is replete with examples of the proponents of these laws asserting that this is not racial discrimination, that they have nothing against any Latinos who do not share the specific "other" characteristic they are targeting.

Thus, the Latino community's experience with civil rights jurisprudence has been one of trying to fit challenges to the daily experience of discrimination into legal frameworks that were developed for related, but different, circumstances. This experience means that the Latino community is often at the cutting edge in pursuit of a broader conception of civil rights law—encompassing not just the post-Civil War amendments, but structural provisions in the Constitution, like the Supremacy Clause, the Contracts Clause, and the Tenth Amendment. The historical experience of the Latino community—now the nation's largest minority community—renders it well suited to be at the forefront of a new civil rights jurisprudence, which we might call Civil Rights 2.0.

Many of our nation's critical civil rights laws are hitting their 50-year mark in coming years, and, in some cases, we have been forced to revisit these laws, not merely commemorate them. Shelby County v. Holder, the Supreme Court's regrettable decision this past term, which struck down the coverage formula for pre-clearance under the Voting Rights Act, is one example of our being forced as a nation to come up with a Civil Rights 2.0.[68] Shelby County is a wrongheaded

66. 500 U.S. 352 (1991).
67. 414 U.S. 86 (1973).
68. 133 S. Ct. 2612 (2013).

decision to be sure, and an unfortunate and unwanted obligation to revisit what has been one of the most powerful elements of civil rights legislation in our history. Yet, the decision requires us to focus—legislatively and, I believe, in the court system—on an expanded vision of civil rights that will ensure that our laws will root out and deter every form of irrational discrimination.

Out of every crisis springs opportunity. The current crisis—Supreme Court rollbacks of civil rights protections—is no exception. The opportunity for the legal profession is to arrive at an expanded view of civil rights laws—certainly broader than my misinformed conclusion as I commenced law school a quarter century ago. The right wing has had a comprehensive theory of the Constitution for many, many years. On the progressive side, we need the same. We need to see the entire Constitution as a civil rights tool.

As I told a group of students earlier today, I am looking for a civil rights lawyer who knows the Takings Clause[69] encyclopedically, in order to challenge what may be the next species of anti-immigrant law, seeking to take away existing business licenses from those who cannot prove status. I need that Takings Clause lawyer. I need a tax lawyer and a property lawyer, who can take concepts from those fields and apply them to inform our pursuit of civil rights aims.

With a more comprehensive, shared, and strategic view and theory of our Constitution and laws, I am confident that as the Latino community matures into its status as the largest minority group in the country—as a significant factor in the future of this country—we are situated well to ensure that the civil rights laws and civil rights jurisprudence of the next 50 years will prevent the patterns of discrimination and exclusion we have seen, and ensure our nation's ability to thrive with a renewed commitment to the constitutional principles and values that tie us all together.

69. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").