REKINDLING *BROWN*: 6 AFR.-AM. L. & POL'Y REP. 194 11 ASIAN L.J. 276
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Mendez and the Legacy of *Brown*: A Latino Civil Rights Lawyer's Assessment*

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While we appropriately celebrate the fiftieth anniversary of the revolutionary Supreme Court decision in *Brown v. Board of Education*,[1] this is also an occasion, particularly for the Mexican-American community, to reflect on two other important twentieth-century civil rights cases: *Mendez v. Westminster School District*,[2] and *Hernandez v. Texas*.[3] Decided in 1947, *Mendez* held the segregation of Mexican-American school children in Orange County, California, to be unlawful. *Hernandez*, a landmark Supreme Court decision decided the same month as *Brown*, recognized Mexican Americans as a distinct class with the right to challenge systematic exclusion from juries.

Why do we celebrate the fiftieth anniversary of *Brown* rather than the fiftieth or fifty-fifth anniversary of a (hypothetical) Supreme Court decision in *Mendez*? In other words, why did *Mendez* not reach the high court and result in an outcome that might have had as revolutionary an impact as *Brown*? While it seems almost heretical some fifty years later even to ask such a question, it is often instructive to explore the seemingly obvious—such as the unassailable truth that *Brown* was a singular achievement, not seriously anticipated by any other case. I raise the query not to challenge this truth, but to attempt to discern lessons from *Mendez* for the Latino and, more broadly, the entire civil rights community, as we look forward to 2004 and beyond.

The Ninth Circuit Court of Appeals decided *Mendez* in 1947, seven years before the Supreme Court's decision in *Brown*. *Mendez* itself was the most recent of a series of intermittent challenges to a very common practice in California and throughout the southwestern United States—the establishment of separate and inferior "Mexican schools." Districts segregated Latino children ostensibly on grounds of language.[4] In practice and intent, the discrimination was based on racial/ethnic background. Plaintiff parents Gonzalo and Felicitas Mendez and others challenged such segregated schooling in Orange County's Westminster School District and neighboring districts.[5] Their lawsuit was successful in the district court and, after a school district appeal, in the Ninth Circuit.

Mendez was in many ways an important, albeit unrecognized, precursor to

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1. 347 U.S. 483 (1954).
2. 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947).
3. 347 U.S. 475 (1954).
4. *See, e.g., Mendez*, 64 F. Supp. at 546 (language justification for separate schools).
5. *See* GILBERT G. GONZALEZ, CHICANO EDUCATION IN THE ERA OF SEGREGATION 147-56 (1990) (describing motives and leading role of Mendez family and other plaintiffs).

Brown. While not litigated by the brilliant team of lawyers at the NAACP Legal Defense and Educational Fund ("LDF" or "the Inc. Fund"), which was then engaged in their years-long campaign leading up to *Brown*, the *Mendez* case nonetheless attracted their attention. Thurgood Marshall and the Inc. Fund filed an amicus brief in the case, urging the federal court to rule all educational segregation unconstitutional.[6] However, the federal court rejected this call and concomitantly denied the school district's request to apply the "separate but equal" doctrine of *Plessy v. Ferguson*,[7] which had not yet been overruled.

There are two basic reasons that *Mendez* did not become *Brown*. First, *Mendez* was not part of a concerted litigation campaign to achieve the reversal of the broad and pernicious *Plessy* precedent. While there were earlier challenges to the educational segregation of Mexican Americans, the *Mendez* case was not connected to these earlier cases as part of any coordinated strategy. Of course, the careful and prescient litigation campaign, through university and then primary school challenges, leading up to the *Brown* decision, has been well documented.[8] This litigation campaign should be celebrated as perhaps the greatest legacy of *Brown*. Through their patient and successful pursuit of a long-term lawsuit-based strategy, the Inc. Fund lawyers and their outside cooperating counsel demonstrated for the first time that litigation could be a useful and directed tool to accomplish significant social change.

Yet we in the contemporary civil rights community have not taken full advantage of this powerful legacy. The example of the *Brown* litigation campaign has undeniably yielded great benefits. Indeed, the founding of the Mexican American Legal Defense and Educational Fund (MALDEF) in 1968, a decade and a half after *Brown*, stems in no small part from this legacy. When Pete Tijerina formed the idea for MALDEF, he surely found inspiration in the example of the NAACP Legal Defense and Educational Fund and its successful antisegregation campaign. There developed an even closer connection between LDF and MALDEF's founding when Jack Greenberg, then director-counsel at LDF and previously a member of the *Brown* litigation team, met with Tijerina, offered his advice and assistance, and helped secure MALDEF's first substantial foundation funding.[9] Other progressive legal defense funds also trace their beginnings to LDF's *Brown* model.

Though these laudable institution-creating successes continue to play a role in improving our society, the civil rights community today does not closely follow the pre-*Brown* example of a concerted strategic litigation campaign. Despite frequent co-counseling and consultation, the civil rights community today operates more as a set of separate, though usually complementary, campaigns. Within these separate campaigns, perhaps the demands placed by so much that needs to be done prevent long-term strategic campaigns that focus on a single or limited set of goals.

Indeed, to a great extent, our opposing forces—those of civil rights retrenchment and retrogression—have been more successful at assimilating and applying the litigation-campaign legacy of *Brown*. The best example is the now well-

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6. *See id.* at 28 (discussing amicus brief and possible influence of *Mendez* on strategy in *Brown*).

7. 163 U.S. 537 (1896).

8. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE (1975).

9. *See* ANNETTE OLIVEIRA, MALDEF: DIEZ ANOS 9-10 (MALDEF 1978) (describing history of MALDEF founding).

documented campaign by right-wing interest groups to pursue litigation and advocacy nationwide directed toward dismantling affirmative action in higher education admissions. Though dealt a serious blow by the recent civil rights victory in *Grutter v. Bollinger*,[10] this well-financed litigation campaign will surely continue. We cannot let this perverse application remain the strongest contemporary example of one critical legacy of *Brown*.

Thus, the first lesson from any exploration of why *Mendez* did not become *Brown* lies in recognizing the importance of the Inc. Fund's strategic litigation campaign. We in the civil rights community must reclaim this important legacy by seeking to better coordinate our work around long-term strategic plans toward critical objectives.

The second reason that *Mendez* did not become *Brown* stems from a peculiar stipulation during the district court resolution of the case. In *Mendez*, both parties stipulated that Mexican Americans are part of the white race and that the case, therefore, raised "no question of race discrimination."[11] The plaintiffs proposed the stipulation, which the school districts initially opposed.[12] The stipulation proved pivotal in distinguishing *Plessy* and the South's ongoing legally sanctioned Jim Crow practices. Thus, the Ninth Circuit differentiated these troubling precedents on two grounds: 1) California state law did not sanction the segregation that the districts practiced, and 2) the practiced segregation was not between "children of parents belonging to one or another of the great races of mankind."[13]

This stipulation obviously prevented *Mendez* from becoming as significant as *Brown*, and it would be easy to conclude that the lesson is to avoid stipulations that are so wildly inconsistent with social norms and practices. Yet, such a facile conclusion would be unfairly anachronistic—after all, the stipulation secured plaintiffs a legal victory that surely must have seemed unlikely at the outset—and would mask a more valuable insight that arises from deeper analysis.

The "white race" stipulation did not reflect the history or reality of the treatment of Mexican Americans in California or elsewhere in the United States. From Mexican Americans' earliest introduction to the nation, as a result of the United States-Mexico War, United States society viewed Mexican Americans as non-white.[14] The initiation of war saw many such acknowledgements at the highest levels of government. Former Vice President John Calhoun asked his Senate colleagues in 1848 whether it would be wise to "incorporate a people so dissimilar from us in every respect."[15] Calhoun was not alone in his sentiments as the debate around war against Mexico and expansion into Mexican territory revolved around racial difference; as one early historian put it, "[t]he annexationism of the Mexican

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10. 539 U.S. 306 (2003) (holding that diversity interest supports tailored race-conscious affirmative action program).

11. *See Mendez*, 64 F. Supp. at 546; *see also* Mendez v. Westminster Sch. Dist., 161 F.2d 774, 780 (9th Cir. 1947).

12. CAREY MCWILLIAMS, NORTH FROM MEXICO 281 (1948).

13. *Mendez*, 161 F.2d at 779-80.

14. *See* Brief of Amici Curiae Latino Ogranizations et al. at 8-10, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) [hereinafter MALDEF Amicus in *Grutter*], *available* at 14 BERKELEY LA RAZA L.J. 25 (2003).

15. ALBERT K. WEINBERG, MANIFEST DESTINY: A STUDY OF NATIONALIST EXPANSIONISM IN AMERICAN HISTORY 361 (1935) (describing a general "apprehension of the political danger of amalgamation with a dissimilar racial stock").

War represented a conscious change to a toleration of amalgamation with other breeds."[16] Members of the Supreme Court also acknowledged that Mexico's population was non-white. For example, in the notorious *Scott v. Sandford* decision,[17] two dissenting justices cited the incorporation of Mexican citizens through the Treaty of Guadalupe Hidalgo as proof that the United States had previously accorded citizenship to non-whites.[18] Although nearly a century had passed since the United States-Mexico War by the time of *Mendez*, the view of Mexican Americans as non-white had persisted; they were still "regarded as a racial minority."[19]

The very facts of *Mendez* itself belie any societal treatment as white. Moreover, Mexican Americans were not only segregated in school, but faced widespread discrimination in other realms as well. Thus, at first glance, the "white race" stipulation seems inexplicable. Yet, there is an explanation for why both sides would agree to the stipulation. The Plaintiffs likely sought to avoid state law, which, despite the Ninth Circuit's conclusion, positively invited segregation of Mexican Americans in school.[20] At the time, California Education Code § 8003 provided that, in addition to segregating Asian Americans, "any school district may establish separate schools for Indian children, excepting children of Indians who are wards of the United States Government and children of all other Indians who are descendants of the original American Indians of the United States."[21] With these broad exceptions, the remainder—and target of the permitted segregation—would be Mexican Indians, or the entire Mexican-American population as then conceived in United States society.[22] Understandably, the plaintiff Mexican Americans would have sought the stipulation both to avoid the *Plessy* precedent and to avoid state law, a strategy echoed and rewarded in the Ninth Circuit's opinion.

The California statute the plaintiffs sought to avoid employed a proxy for the segregation of Mexicans—status as "Indian," rather than directly as Mexican,

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16. *Id.* at 160.

17. 60 U.S. (19 How.) 393 (1857). This case is also known as *Dred Scott v. Sanford*, but that designation, using full name rather than surname for the petitioner, follows the naming convention for property not persons, epitomizing Chief Justice Taney's obnoxious ruling in the case.

18. *See id.* at 533 (McLean, J., dissenting) ("Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors."); *id.* at 586, 587 (Curtis, J., dissenting) ("by solemn treaties, large bodies of Mexican and North American Indians . . . have been admitted to citizenship.").

19. *See, e.g.*, Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CALIF. L. REV. 662 (1975) (tracing historical treatment of Mexican Americans as non-white); PAUL TAYLOR, AN AMERICAN-MEXICAN FRONTIER 254 (1934) (quoting Texas farmer as stating that Mexicans "are a cross between Aztec Indian and Spanish, and are not white."); ERNEST GRUENING, MEXICO AND ITS HERITAGE 69 (1928) ("Not Latins but Indians dwell south of the Rio Grande.").

20. *See* MALDEF Amicus in *Grutter*, *supra* note 14, at 12.

21. CAL. EDUC. CODE § 8003 (repealed 1947), *quoted in* Mendez v. Westminster Sch. Dist., 64 F. Supp. 544, 548 (S.D. Cal. 1946). While it might appear that the statute also aims at immigrants from India, at the time, these immigrants were referred to in the United States as "Hindus." *See* RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 295 (1989).

22. MEYER WEINBERG, A CHANCE TO LEARN 166 (1977) (explaining a 1930 ruling by the California Attorney General that made the initial suggestion that Mexican Americans could be segregated as Indians, and a 1935 amendment to the statute that was carefully crafted to maintain this possibility); *see also* GONZALEZ, *supra* note 5, at 23. Others have placed the initiative for segregation of Mexican Americans as Indians much earlier. *See Historical Background, Public School Segregation and Integration in the North*, 4 J. INTERGROUP RELS., 3, 10 (1963) (arguing that "Indian" meant "Mexican" as early as in a 1909 amendment to a California segregation statute).

formed the basis for permissible segregation. It would have been much more difficult to avoid the statute had it been more direct in sanctioning the creation of separate and inferior "Mexican schools." The defendant school districts' reasons for agreeing to the peculiar "white race" stipulation seems to lie in the use of another proxy for racial discrimination. Consistent with the as-yet-undeveloped jurisprudence in the area of equal protection, the districts used the proxy of ethnic discrimination, seeking to distinguish it—in a way that would favor their discriminatory practices—from racial discrimination. Accordingly, the school districts argued before the Ninth Circuit: "We submit there is much more ground for the [African] race to feel they were being stamped as inferior by separation than there is for a group of white people to contend they are so stamped by separation."[23] Today we recognize that ethnic discrimination is largely indistinguishable from racial discrimination. In 1947, however, the school districts could reasonably calculate that they could hide what was, in intent and effect, racial discrimination, behind a facade of intra-racial ethnic discrimination, and assume that the courts would find the latter as acceptable or more acceptable than the former.

This highlights another critical effect of the "white race" stipulation. Not only did it prevent the *Mendez* case from becoming *Brown*, it also meant that the case could not go to the Supreme Court and establish anti-Mexican discrimination as proscribed racial discrimination. Instead, the Court's opportunity to provide such a decision came in *Hernandez v. Texas*, decided like *Brown* in 1954. In *Hernandez*, the Court squarely faced an argument that discrimination based on ethnicity is legally distinct from race discrimination.

Into the mid-1930s, Texas criminal courts routinely excluded African Americans and Mexican Americans from juries and, when challenged, required defendants to produce direct evidence of racial discrimination. For example, in *Carrasco v. State*, the Texas Court of Criminal Appeals rejected a claim of "discrimination against the Mexican race" in the composition of the grand jury, despite a pattern of long-term exclusion.[24] The court found "nothing in the record to indicate that Mexicans were excluded or discriminated against solely because of race."[25] However, in 1935, in *Norris v. Alabama*, the United States Supreme Court adopted the "rule of exclusion," holding that evidence of longtime exclusion of African Americans from jury service despite the existence of qualified potential African-American jurors constitutes prima facie proof of unconstitutional discrimination.[26]

Once forced to apply this exclusion rule to African Americans, Texas seized upon a new racial classification of Mexican Americans as "white" to continue barring them from juries while requiring challengers to provide direct proof of discrimination.[27] Thus, the Texas Court of Criminal Appeals held that "[i]n the absence of a holding by the Supreme Court of the United States that nationality and race bear the same relation . . . we shall continue to hold" *Norris* inapplicable to

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23. Appellant's Reply Brief at 3, Mendez v. Westminster Sch. Dist., 64 F. Supp. 544 (S.D. Cal. 1946) (No. 11310).

24. 95 S.W.2d 433, 433-34 (Tex. Crim. App. 1936). African Americans faced similar treatment in Texas. *See, e.g.*, Johnson v. State, 50 S.W.2d 831 (Tex. Crim. App. 1932).

25. *Id.*

26. 294 U.S. 587 (1935).

27. *See* MALDEF Amicus in *Grutter*, *supra* note 14, at 10-12.

Mexican Americans.[28] Despite legal efforts to challenge this new official racial classification of Mexican Americans,[29] Texas courts persisted in this practice, leading to the Supreme Court's consideration of *Hernandez v. Texas*. In *Hernandez*, the state court again required the defendant, who was challenging the all-white grand and petit jury to prove "actual discrimination" because the juries "were composed of members of his race."[30]

Thus, what came to the Supreme Court in *Hernandez* was yet another effort, like the districts' failed attempt in *Mendez* to use an invented intra-racial, ethnic discrimination as a proxy for what was in fact racial discrimination. Fortunately, the Supreme Court rejected Texas's cynical practice, holding that "[t]he Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and [African American]," and that the *Norris* "rule of exclusion" applies to any distinct class.[31] The Court therefore rejected, albeit incompletely, the attempt to use ethnicity as a proxy for race in order to permit pernicious discrimination.[32]

This use of proxies in discriminating against the Mexican-American community explains in large part why *Mendez* did not become *Brown*. In that insight lies an important contemporary lesson. The use of proxies has persisted to this date. Much current adverse discrimination, by both state and private actors, against Latinos is rhetorically justified on the basis of immigration status or language.[33] While immigration status and language surely justify certain distinctions in government policy, too often this façade of legitimacy serves to mask the most unjustified and unfair practices of discrimination against persons, like Latinos, assumed to have a particular immigration status or assumed not to speak English. This remains a great challenge for society and for law. The civil rights community must work toward the adoption of a legal regime that recognizes and eliminates the use of actual or perceived immigration status and language as proxies for unlawful racial discrimination. For example, discrimination on the basis of immigration status is virtually never legitimate when engaged in by private actors, yet it routinely occurs, and the legal system has yet to rule it out with the kind of resounding precedent that would yield real change.

The two reasons that *Mendez* did not become *Brown*—because it was not part of a litigation campaign, and because of the use of proxies to justify racial discrimination—here converge. A proposed effort to delineate through court or legislation the contours of illegitimate racial discrimination falsely presented as

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28. Sanchez v. State, 181 S.W.2d 87, 90-91 (Tex. Crim. App. 1944).

29. In the 1951 case of *Sanchez v. State*, the appellant filed "an exhaustive brief" presenting decisions "which refer to Mexican people as a different race." 243 S.W.2d 700, 701 (Tex. Crim. App. 1951).

30. Hernandez v. State, 251 S.W.2d 531, 536 (Tex. Crim. App. 1952). Ignoring arguments in the case itself and in earlier cases, the Texas court also stated that, "[i]n so far as we are advised, no member of the Mexican nationality challenges" the classification of Mexicans as white. *Id.* at 535.

31. Hernandez v. Texas, 347 U.S. 475, 478, 480 (1954).

32. *See id.* at 478-79. The decision in *Hernandez* is unsatisfying because it fails to reject wholly the artificial designation of Mexican Americans as "white" and to recognize them as a distinct, national class. Instead, the Court's ruling required Mexican American challengers, like petitioner Hernandez, to "prove that persons of Mexican descent constitute a separate class . . . distinct from 'whites'" in a particular local community.

33. Of course, as noted above, the use of language as the purported basis for discrimination stretches back to *Mendez* itself.

rational distinctions based on immigration status or language seems an appropriate candidate for the kind of long-term strategic litigation campaign modeled in *Brown*. As discrimination has become more subtle and discriminators more sophisticated, too often immigration status or language has been used as masks for what is racial discrimination, and the law has not developed sufficiently to address this phenomenon. If the Latino community's commemoration of the fiftieth anniversary of both *Brown* and *Hernandez*, as well as of the *Mendez* case that bridges the two, can inspire an effort to address this issue, then we will have appropriately adopted and adapted the civil rights legacy of *Brown*.