"Another White Race:"
Mexican Americans and the Paradox of Whiteness in Jury Selection

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Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.

Hirabayashi v. U.S.

In 1954, seventy-four years after the U.S. Supreme Court held that African Americans could not be banned from jury service by statute, and fifty-four years after it ruled that they could not be purposely excluded from venires due to their "race or color" through court, executive, or administrative action, the Court found that Pete Hernandez had been denied equal protection of the laws under the Fourteenth Amendment. His constitutional rights were violated because of the de facto, systematic exclusion of Mexican Americans from the pool of potential jurors—and thus juries—in Jackson County, Texas.

In arguing the case before state courts, civil rights lawyers for the appellant were confronted with a paradox: because Mexican Americans were classified as white by the government and not as a separate race, lower

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1. Strauder v. West Virginia, 100 U.S. 303 (1880) and Carter v. Texas, 177 U.S. 442 (1900).
2. Hernandez v. Texas, 251 S.W. 2d 53 (Tex. Crim. App. 1952), rev'd, 347 U.S. 475 (1954). The appeal rested on an equal protection claim. The Sixth Amendment right to trial by an impartial jury was not incorporated into the Fourteenth Amendment to apply to the states, as well as to the federal level, until Duncan v. Louisiana, 391 U.S. 145 (1968).

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courts held that they were not denied equal protection and there was no violation of the Fourteenth Amendment. Attorneys for the state of Texas and judges in the state courts contended that the amendment referred only to racial, not "nationality," groups. Since Mexican Americans were tried by juries composed of their racial group—whites—their constitutional rights were not violated. Using rhetorical analysis, I discuss the implications of the arguments in *Hernandez v. Texas*, which held that "nationality" groups could be protected under the Fourteenth Amendment. I analyze the language used in this and other cases about jury selection to impart how community norms helped to define and circumscribe the meaning of citizenship for Mexican Americans, as well as to shape their strategies to gain full and equal citizenship.

I introduce the case by providing the historical context of Mexican Americans' social and legal status in Texas from World War I through World War II. I describe their initial efforts to challenge their de facto exclusion from jury panels. I then summarize major precedents prohibiting discrimination in jury selection and explain why Texas state courts declined to apply these to cases involving Mexican Americans. The arguments described shaped the strategies used by the attorneys in *Hernandez*. This introduction is followed by a close reading and analysis of the terminology chosen in the *Hernandez* case by the state attorneys and judges, by the attorneys for the appellant, and by the Supreme Court. I show that these choices constituted strategies to construct Mexican American's place in the constitutional order and to define their participation as citizens. Finally, I explore the congruence of whiteness, citizenship, and American identity.

The section entitled "Citizenship and Racial Identity" further explores the themes raised by the terminology chosen in the *Hernandez* case, but in a broader context. In the last major section, "Citizenship as Social Standing," I suggest that the composition of juries is an indicator of the nation's self-understanding at a particular point in time and that *Hernandez* revealed America's self-understanding to be racialized. I then discuss how the strategy chosen by the Mexican American attorneys for the appellant upheld the power of whiteness, while partially challenging America's racialized self-understanding.

**Historical Context**

In 1848, the Treaty of Guadalupe Hidalgo set the framework for Mexicans who resided in the ceded territories to become U.S. citizens and established a precedent for allowing Mexicans to naturalize. Indeed, many prominent Mexican Americans participated in local governance in Texas, California,
and New Mexico. However, as noted historian David Montejano shows, Mexican Americans' influence in governance waned as they lost their property.\footnote{David Montejano, \textit{Anglos and Mexicans in the Making of Texas, 1836—1986} (Austin: University of Texas Press, 1987). For a contemporary account of Mexican Americans' loss of status and political power in California, see Maria Amparo Ruiz de Burton, \textit{The Squatter and the Don}, ed., Rosaura Sanchez and Beatrice Pita (Houston: Arte Publico Press, 1992).} Beginning in the 1910s, Anglo "newcomers" in Texas further challenged Mexican Americans' citizenship rights and even their very inclusion in the polity. A number of factors converged to create the conditions for discriminatory treatment of Mexicans and Mexican Americans. First, as a result of the Mexican Revolution beginning in 1910, many poor Mexicans were displaced and fled across the border. Mexican immigration increased from 0.6 percent of total immigration in 1900–1909 to 3.8 percent from 1910–1919.\footnote{Linda B. Hall and Don C. Coerver, \textit{Revolution on the Border: The United States and Mexico, 1910—1920} (Albuquerque: University of New Mexico Press, 1988). Mark Reisler, \textit{By the Sweat of Their Brow: Mexican Immigrant Labor in the United States, 1900—1940} (Westport, Conn.: Greenwood Press, 1976), 152.} In 1924 the proportion of Mexicans entering the U.S. legally skyrocketed to 12.4 percent of total immigration and rose to a high of 19.9 percent by 1927.\footnote{Note that these figures are from government statistics and do not include the many immigrants who crossed illegally to avoid payment of taxes See Reisler, \textit{Sweat of Their Brow}, 183, n. 4.} The sudden surge was a direct result of the passage by Congress of the Immigration Act of 1924, commonly known as the Quota Act.\footnote{Act of May 26, 1924, chap. 190, 43 Stat. 153. This act, targeted at eliminating immigration from southern and eastern Europe, reduced immigration to 2 percent of the nationals resident in the 1890 census and required five years of residence in a western hemisphere nation before immigrating. The bill also required all immigrants to pay a $10 visa fee, in addition to the existing $8 head tax, and to comply with the provisions of prior statutes, including being literate and not likely to become a public charge.} In this act, Congress exempted immigrants from western hemisphere nations from all provisions of the act because the president wanted to maintain friendly relations with neighboring countries and had threatened to veto the act if passed without the exemption. Agricultural and industrial concerns in the upper Midwest began recruiting Mexicans, who followed the jobs. For the first time, white Americans across the nation began to consider Mexican immigrants as a threat. Second, as Montejano shows, the development of large-scale commercial agriculture in the southwest drove the demand for farm workers and for "cheap labor." Large-scale production not only made small farms uncompetitive but also created a migratory labor force. This undermined and depersonalized long-term relationships between Anglo landowners and Mexican workers and altered the structure of social relations.
As Montejano shows, due to these changes, Mexican Americans found that their image in the minds of white Americans in the southwest was transformed. Anglos rarely distinguished between Mexicans and Mexican Americans and painted a picture of “Mexicans” as an economic and cultural threat to America. In this period, Mexican Americans increasingly were denied many of the rights of citizens. Like the African American population, many were placed in segregated schools with inferior educational resources, barred from restaurants, movie theaters, bathrooms, and public swimming pools, and denied the possibility of living in white neighborhoods.

Yet none of this segregation was formally encoded in law. For legal purposes, Mexican Americans were white. They were counted as white in the census and, unlike non-whites (other than those from Africa), were able to naturalize.\(^7\) However, law clashed with perceptions of racial “reality,” creating a citizenship status for Mexican Americans that many considered to be legal fiction. This gap between their legal and social standing was reflected in local interpretations of the law and in the regulation of their political participation through mechanisms such as poll taxes, literacy tests, and blue ribbon jury commissions. This unequal treatment continued through the war years and into the 1950s. Mexican Americans’ unequal status was especially evident in their representation on juries. While not prohibited by law from serving, they were almost universally excluded on the grounds that they were not qualified to serve.

As early as the 1920s, civil rights activists emphasized the importance of securing Mexican American participation on juries. In this era, emerging Mexican American civic groups in Texas often addressed civil rights issues informally, through discussions with and letters to Anglo public officials requesting reform. For instance, members of the Order of Sons of America, which was established in 1921, claimed that the Order secured for Mexican Americans the rights to serve on juries and sue Anglos in Corpus Christi.\(^8\) One noted, “The first thing we did was to write a request that we be admitted to the jury. I had noticed that in court cases, Mexicans were sent to jail for offenses for which Americans were given suspended sentences or let off.’ The request was acceded to, and those qualified by knowledge of English, etc., for jury service have been admitted.”\(^9\) However, the Order’s claims to victory were shortsighted, as wholesale exclusion of Mexicans continued to be widespread in Texas.

\(^7\) Act of March 26, 1790, chap. III, 1, 1 Stat. 103 and Naturalization Act of July 14, 1870 (16 Statutes-at-Large 254).
After a lull in activism in the 1930s due to the Great Depression and repatriation, in the early 1940s a small contingent of Mexican American leaders began a concerted attack through the courts on discrimination against Mexican Americans. These leaders’ expressed purpose was to test the state’s new Good Neighbor Policy. In 1943, the Mexican Minister of Labor declared that braceros (guest workers) would no longer be sent to Texas because of the poor treatment and racial discrimination they experienced there. The Texas governor responded by issuing a proclamation prohibiting discrimination against all “caucasians,” aimed at reassuring Mexico that Mexicans and Mexican Americans would be treated as white and that Texas was a “good neighbor.” These activists contacted national civil rights organizations for advice on how to test the Good Neighbor policy. In one letter M. C. Gonzalez, who brought an early, unsuccessful jury discrimination case to trial, thanked an American Civil Liberties Union (ACLU) representative for providing him with an outline of a procedure to attack jury discrimination based on the strategy used in the landmark case Norris v. Alabama. A letter from the Texas Civil Rights Fund (TCF) to the Robert Marshall Civil Liberties Trust requested funds to support Mexican Americans’ cases addressing jury discrimination, the white man’s primary, school segregation, real estate covenants, and state sponsored terror. Another letter from a TCF officer to a League of United Latin American Citizens (LULAC) officer explains why they declined to litigate a jury discrimination case involving a Mexican American, demonstrating that activists carefully selected test cases. This coordination resulted in several successes, including Westminster School District vs. Mendez, on school segregation, and Clifton v. Puente, on restrictive real estate covenants, and some failures, like Terrell Wells Swimming Pool v. Rodriguez. Lawyers fighting discrimination in jury selection, however, repeatedly lost their cases.

The qualifications for petit jury service in Texas were: that a juror be a male citizen eligible to vote, a freeholder or householder in the county, that he be of sound mind, and that he be able to read and write. In addition to these requirements, grand jurors had to be of good moral character and could not have been convicted of, or under indictment for, theft or a felony. There were two exceptions to these requirements. First, "the decisions hold that it is not necessary that a person should read and write the English language fluently." That is, judging the ability to read and write was left to administrative discretion. Second, if the state could not find enough qualified jurors, they could disregard the payment of poll taxes as a prerequisite of the "eligibility to vote" requirement. The requirement, reduced to a minimum, was to be a male citizen of the county who could, in theory, exercise the right to vote.

The jury selection process was facially neutral. A judge appointed several jury commissioners, who selected grand and petit jurors from county assessment rolls. However, based on numerous anecdotal reports, it is clear that discrimination against Mexican Americans in jury selection was common. Pauline Kibbe, an advocate for Mexican Americans and Mexicans in the U.S., and executive secretary of the Good Neighbor Commission (1943–1947), estimated that by 1946 fifty counties in Texas with significant Mexican origin populations (fifteen to forty percent) had never called a Mexican American for jury service, even in civil suits. She related a remarkable story of a challenge to a jury panel with one hundred prospective Anglo jurors, despite a countywide "Mexican" population of thirty percent. "Rather than establish the precedent of allowing a Latin American to serve on either a grand jury or a trial jury, the authorities released the accused, and he has never been brought to trial."

This practice denied people of Mexican ancestry the right to equal protection outlined in the Fourteenth Amendment. Because the possibility

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Sanchez v. Texas, 243 S.W. 2d 700 (1951); Rogers v. Texas, 236 S.W. 2d 141 (1951); Bustillos v. Texas, 213 S.W. 2d 837 (1948); Salazar v. Texas, 193 S.W. 2d 211 (1946); Sanchez v. Texas, 181 S.W. 2d 87 (1944); Lugo v. Texas, 124 S.W. 2d 344 (1939); Carrasco v. Texas, 95 S.W. 2d 433 (1936); Ramirez v. Texas, 40 S.W. 2d 138 (1931).

16. "Householder" means the head of a family who rents a room within the county.


19. Pauline R. Kibbe, Latin Americans in Texas (Albuquerque: University of New Mexico Press, 1946), 229. This figure does not distinguish between citizens and noncitizens. Mexican Americans were not categorized racially in the census except in 1930, so accurate statistics are difficult to compile.

20. I consciously use the term "right" in regard to jury service. By the 1950s, jury service was considered a right of citizenship. The Supreme Court ruled illegitimate the de facto exclusion of African Americans in 1935, upheld this interpretation in several cases in the
of participating in the judicial process was proscribed, it also contravened all Mexican Americans’ equal protection rights as prospective jurors. By depriving them of the opportunity to exercise their right to participate on the same terms as others, the state denied that they were peers, or equal members of the polity. Peerage implies a combination of civil and social status. Legally, Anglos could not deny that Mexican Americans were citizens, but they were able to maintain and reinforce social distance and erect legal distinctions (such as qualifications for jury service) by not treating Mexican Americans as peers.

In 1931 Alonso Perales, a lawyer and civic educator, expressed outrage about the unpunished murders of several people of Mexican descent in Willacy and Hidalgo counties in Texas. He emphasized that the presence of Mexican Americans on juries was imperative for justice. “We ought to insist that on all juries . . . there is adequate Mexican American representation. In the murder cases that I just referred to the grand juries of Willacy and Hidalgo counties refused to prosecute the presumed killers. Perhaps this would not have occurred if on those grand juries there had been adequate Mexican American representation.” Further, he recognized the role of local officials in denying those of Mexican descent civil rights and explicitly invoked the Fourteenth Amendment as the source of his claim to equal treatment under the law. “In none of these cases did they punish the murderers, which shows that the authorities do not grant to the unfortunate victims equal protection of the laws guaranteed to us in the fourteenth amendment of the Constitution of the United States of America. In these cases the authorities were deficient in their duty due to racial prejudice or to their incompetence.” Finally, he urged Mexican Americans to vote against these authorities and for officials who would truly represent them.


22. Ibid., 8.
until the Hernandez case reached the U.S. Supreme Court. A lawyer for Hernandez identified jury participation as one of three principal civil rights issues, along with school desegregation and an end to restrictive real estate covenants. With optimism, he commented that *Hernandez* "marks the end of legal relief for our basic social ills. . . . This was the last major issue left for the courts to decide."\(^{23}\)

Clearly, jury service was viewed by Mexican American civic leaders as vital to securing their political and civil rights. The connection between civil and political rights and social equality was made explicit, and they encouraged Mexican American citizens to exercise their rights in order to influence the political process.

**Prior Jury Discrimination Cases**

The Civil Rights Act of 1875 guaranteed African Americans the right to serve on juries.\(^{24}\) The first U.S. Supreme Court case that dealt with non-white representation on juries, *Strauder v. West Virginia*, held that jury service was included in the Fourteenth Amendment’s guarantee to blacks of all the civil rights enjoyed by whites and that the exclusion by statute of a particular class of people based on “color” was unconstitutional, as it would stigmatize them and create a category of second class citizens. The Court stated, “The very idea of a jury is a body of men composed of the peers or equals (as) . . . persons holding the same legal status in society as that which he holds.”\(^{25}\) But in the same year, in *Virginia v. Rives*, the Court did not find the de facto exclusion of blacks from juries problematic.\(^{26}\) In *Strauder* blacks

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25. *Strauder v. West Virginia*, 100 U.S. 303 (1880). Ibid., 308. “The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may in other respects be fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority and a stimulus to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others. The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure.” Ibid., 307–8. However, the Court held that states could specify other qualifications for jurors.

were excluded from the jury pool by statute, while in *Rives* they were not. In case after case, citing *Rives*, the Court refused to find all-white juries unconstitutional so long as selection procedures were facially neutral. Similarly, the findings in *Neal v. Delaware* were overlooked until *Norris*.27 In *Neal* the Court ruled that because African American males were electors under the Fifteenth Amendment, they were also eligible for jury service, which was drawn from voter rolls. However, instead of buttressing the strong statements made in *Strauder*, the Court reversed on the basis that it was incredible to say that there were no blacks qualified to serve. While it ruled that the defendant made a prima facie case of discriminatory treatment, it did not shift the burden to explain the discrimination to the state. Instead, denial by the state of discriminatory intent was deemed satisfactory.

In *Carter v. Texas*, the Court elaborated that discrimination against blacks based on their “race or color” in jury selection was illegal, whether effected through legislation, court decree, or executive or administrative discretion.28 However, the state courts interpreted this as prohibiting express or intentional discrimination. Until *Norris v. Alabama* in 1935, states were able to convince lower courts that the absence of blacks was by chance, not by design.29

In *Norris*, the U.S. Supreme Court reviewed the evidence for the first time. The Court declared that prima facie discrimination could be shown through a pattern of the absence of blacks from juries, not just jury pools. Once this was established, the burden shifted to the state to provide a convincing explanation for the underrepresentation of blacks. It promulgated the “rule of exclusion” as the standard for scrutiny, defined as “long continued, systematic and arbitrary exclusion of qualified negro citizens from service on juries, solely because of their race and color.”30 One way to prove such exclusion was to show a dearth of names of the excluded group on jury rolls. In contrast to past cases, declarations that jury commissioners did not intend to discriminate were not accepted as evidence of nondiscrimination.31 That is, the Court ruled on the result of jury selection procedures,

29. Law scholar Benno Schmidt notes that the U.S. Supreme Court only reversed decisions when faced with clear violations of the Sixth Amendment guarantees for a fair trial. Benno C. Schmidt, Jr., “Juries, Jurisdiction, and Race Discrimination: The Lost Promise of *Strauder v. West Virginia*,” *Texas Law Review* 61 (1983): 1401–99, 1470. In most cases, appellate courts deferred to the lower courts’ findings of facts, as reviewing evidence did not fall within their jurisdiction.
31. Impartiality in Norris’s trial was challenged partly because of the extremely prejudicial circumstances of his previous trial, *Powell v. Alabama*, 287 U.S. 45 (1932), which was reversed by the Supreme Court on due process grounds because effective counsel was not
rather than on the stated intent of officials. Norris's exclusion rule was applied to cases of blacks in Texas in Smith v. Texas, Hill v. Texas, Cassell v. Texas, and Ross v. Texas. Similarly, in Juarez v. Texas, the Texas court held that the systematic exclusion of Catholics from juries was barred by the Fourteenth Amendment. Chief Justice Earl Warren referred to this case as analogous to Hernandez when he noted, “except where the question presented involves the exclusion of persons of Mexican descent from juries, Texas courts have taken a broader view of the scope of the equal protection clause.”

Yet in all of the state level decisions on the exclusion of Mexican Americans from juries, Texas courts denied that Norris was applicable. Instead, the courts held that Mexican or Mexican American defendants had to provide proof of intent to discriminate in each case. For example, in Lugo v. Texas, three years after Norris, the Texas court held that “In the absence of a showing of an abuse of trial court’s discretion, Court of Criminal Appeals would not be authorized to disturb trial court’s finding.” As in cases prior to Norris, the court ruled that the appellant did not provide evidence that there were qualified members of his group available for jury service. There were three hundred to four hundred Mexican Americans who were eligible to vote in San Patricio County. In addition, the sheriff himself testified that in his fifteen-year tenure only two Mexican Americans had been summoned and none had served. But this was not deemed sufficient evidence. The sheriff had also testified, “I know as a fact of my own knowledge that the majority of the Mexican population of this county are unable to speak intelligently in English and are unable to read and write the English language.” This, coupled with the jury commissioner’s testimony that he would not have hesitated to put a Mexican American on the venire if he had known one who was qualified, outweighed indirect evidence of discrimination. The court disregarded Norris and instead cited as its authority the earlier Ross v. Texas, 7 S.W. 2d 1078 (1928), which held that the absence of African Americans from venires did not indicate intentional discrimination.

provided. The trials involving Norris attracted much publicity because he was one of the nine "Scottsboro boys" charged with raping two white women.

35. Lugo v. Texas, 344.
36. Ibid., 348.
37. Ibid., 346.
Mexican American attorneys of the late 1930s and early 1940s appealed to higher state courts to invalidate such local interpretations of citizenship law. They were not successful in their initial efforts. Haney López identifies two periods in Mexican American jury discrimination cases. In Ramirez v. Texas, Carrasco v. Texas, Sanchez v. Texas, Bustillos v. Texas, and, I would add, Lugo v. Texas, the appellants argued that the dearth of Mexican American jurors constituted discrimination against the “Mexican race.”38 The Texas Court of Criminal Appeals ruled in all of these cases except Sanchez that exclusion was not on the basis of race, but due to a lack of qualified candidates. In particular, it speculated that few Mexican Americans read, wrote, and spoke English sufficiently to perform their duties as jurors.39 The sheriff in Lugo even questioned whether the “Mexicans” on the list were U.S. citizens.40 In addition to speculation about their educational qualifications, Mexican Americans’ qualifications as Americans were suspect. Perhaps this is why the qualification argument was sustained even after Norris. Unlike blacks, “Mexicans” could be construed as foreigners, not native or belonging to America. However, this argument was increasingly indefensible in the 1940s, as the nation questioned its commitment to racial equality in the incipient phases of the Civil Rights movement.41 Moreover, in the late 1940s and early 1950s Mexican Americans who served in World War II organized to win veterans’ benefits, highlighting their roles as citizens in protecting the nation. These veterans’ organizations soon began to advocate for equality for all Mexican Americans.42

Sanchez v. Texas ushered in a new approach by state courts and, consequently, new rhetorical strategies by the attorneys for Mexican American appellants. In Sanchez, the appellant tried once again to argue that there was discrimination against “the Mexican race” in the jury selection process. This time, the Texas Court of Criminal Appeals decision referred to the appellant as being of “Mexican descent” or “Mexican nationality” and ruled that the “long, continued, and uninterrupted failure to call members

39. In Ramirez, for example, the county sheriff and tax collector stated that “he did not think the Mexicans of Menard county were intelligent enough or spoke English well enough or knew enough about the law to make good jurors, besides their customs and ways were different from ours and that for that reason he did not consider them well enough qualified to serve as jurors.” Ramirez v. Texas, 139.
41. However, “foreignness” has continued to be an element of the racialization of “other non-whites.” See Robert Chang and Andrew Aoki, “Centering the Immigrant in the Inter/National Imagination,” University of California Law Review 85 (1997): 1395–1447.
of Mexican or Spanish nationalities for jury service did not constitute denial of ‘equal protection of the law’ to one of Mexican descent . . . since nationality and race do not bear the same relation within meaning of constitutional amendment.’”43 For the first time, the appellate court took official notice of *Norris*, but only to deny that it applied to “nationalities.”44 While the court also addressed the issue of Mexican Americans’ qualifications, the nationality argument was to become dominant.

In the cases that followed, *Salazar v. Texas*, *Sanchez v. Texas*, and *Rogers v. Texas*, state courts outlined two contentions that were to become the cornerstone of state attorneys’ arguments in *Hernandez*. These contentions also enabled the courts to avoid ruling on whether Mexican Americans were qualified to be jurors and to circumvent the equal protection issue. First, the justices promulgated the “two classes theory” that the Fourteenth Amendment discusses and applies to only two classes of people—the black and white races. They further claimed that “Mexicans” were part of the white race, and, therefore, as whites, they were not discriminated against when juries were constituted solely of whites. “We said in *Sanchez v. State*, 243 S.W. 2d 700, that ‘Mexican people . . . are not a separate race but are white people of Spanish descent.’ In contemplation of the Fourteenth Amendment, Mexicans are therefore members of and within the classification of the white race, as distinguished from members of the Negro race.”45

Second, they argued that “nationality groups” did not carry the same constitutional meaning as racial groups did, and because “Mexicans” were a nationality group, the equal protection clause did not apply to them. As such, they did not merit protection as a group and were required to prove any bias claims based on individual prejudice in each particular case. Underrepresentation of Mexican Americans on juries was not enough to prove intent to discriminate. Further, no court had applied *Norris*’s exclusion rule to nationality groups. The Texas Court of Criminal Appeals concluded that the situation had not changed, so the reasoning in *Sanchez* applied to *Hernandez*. “In the absence of a holding by the Supreme Court of the United

43. *Sanchez v. Texas* (1944), 87. The case was authored by Judge Krueger, who had also written *Lugo*. Krueger changed his reasons for denying that discrimination existed several times. He wrote the *Bustillos* decision four years later (after *Salazar*, which ruled on the basis of the nationality argument), which returned to the “Mexican race” argument ruling that the appellant had not proved there were enough qualified Mexican Americans. This case cited *Sanchez* and *Lugo*, ignoring *Norris*. The district court judge, W. D. Howe, also authored *Carrasco*.

44. Ibid., 90.

States that nationality and race bear the same relation, within the meaning of the constitutional provision (Fourteenth Amendment) mentioned, we shall continue to hold that (given the statute was obeyed) in the absence of proof showing express discrimination by administrators of the law, a jury so selected in accordance therewith is valid.  

The court concluded that Mexican Americans were requesting a special status with privileges that other nationality groups did not have. It feared this could open the floodgates to claims of proportional representation of groups on juries. This “would write into the equal protection clause proportional representation not only of races, but of nationalities.” Further, it would provide Mexicans as a nationality group within the white race with special status and privileges to which other whites were not entitled. This would deny other whites equal protection. “It is apparent, therefore, that appellant seeks to have this court recognize and classify Mexicans as a special class within the white race and to recognize that special class as entitled to special privileges in the organization of grand and petit juries in this state. To so hold would constitute a violation of equal protection, because it would be extending to members of a class special privileges not accorded to all others of that class similarly situated.”

Because the court did not recognize the validity of Mexican Americans’ claim to protection under the Fourteenth Amendment, it was able to ignore bias against them as a class of people and insist on proof of intentional discrimination by a juror or one of the jury commissioners in each individual case. While recognizing that Mexican Americans may have experienced discrimination, the court denied that the Fourteenth Amendment protected classes of people other than “blacks” and “whites.” As long as members of these two groups were not systematically excluded, the Constitution was not violated. The irony of absorbing Mexican Americans into the category “white” was that it denied them equal protection as a group.

In response to this shift in the court’s language, the attorneys for Mexican American appellants tried several tactics. They first bolstered the “Mexican race” thesis, supplementing it with arguments about nationality discrimination. But then they abandoned the thesis altogether by contending that they experienced discrimination despite being part of the white race. In 1946, two years after Sanchez, attorney M. C. Gonzalez, who had

46. Ibid., 533.
47. Ibid., 536. The Supreme Court rejected the claim to proportional representation in 1880 in Virginia v. Rives. Rives claimed that neutral procedures could not provide a black defendant an impartial jury due to white prejudice, and therefore that one-third of the jury should be black. See Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy (New York: Basic Books, 1994), 105–7.
used the “Mexican race” argument in Lugo, replaced it with a Fourteenth Amendment claim based on nationality in Salazar v. Texas. The Texas Court of Criminal Appeals noted this shift and rejected it: “The complaint is made of discrimination against nationality, not race. The Mexican people are of the same race as the grand jurors. We see no question presented for our discussion under the Fourteenth Amendment.”

Perhaps in reaction to this decisive rebuff, the attorneys briefly and unsuccessfully returned to the “Mexican race” argument in Bustillos. In the next case, Sanchez v. Texas (1951), attorneys John Herrera and James DeAnda, who would later assist in the Hernandez case, pursued a dual strategy. They argued both that Mexican Americans were a race and that they were treated as a separate class.

The Texas Court of Criminal Appeals stated angrily, “Appellant has filed quite an exhaustive brief on the subject in which he discusses decisions of other jurisdictions which, either intentionally or loosely, refer to Mexican people as a different race. They are not a separate race but are white people of Spanish descent, as has often been said by this court. We find no ground for discussing this further.”

Rogers v. State, the last case before Hernandez, relied on the same arguments, which, again, were rejected. Finally, the attorneys for Hernandez formulated a new argument. They contended that Mexican Americans were members of the white race who were treated like “a class apart” and experienced discrimination in violation of the Fourteenth Amendment, which protected whites (including Mexicans), as well as blacks, from unequal treatment.

The Hernandez Case

Pete Hernandez was indicted in September 1951 for shooting Joe Espinosa. His lawyers filed a motion to quash the indictment, objecting to the selection of both the grand jury commissioners and the petit jury on the grounds that it violated the equal protection and due process clauses of the
"Another White Race"

Fourteenth Amendment. No Mexican American had been on a jury in Jackson County for at least twenty-five years. In addition, there were none on the list of talesmen used in selecting the jury in this case, despite the fact that there were Mexican Americans who met all of the qualifications. The motion to grant a new trial was denied, as was the appeal to the Texas Court of Criminal Appeals. Carlos Cadena, Pete Hernandez’s main lawyer, appealed to the U.S. Supreme Court.

Cadena moved to quash Hernandez’s indictment because “persons of his national origin” were “intentionally, arbitrarily and systematically” excluded from the jury selection process in Jackson County, thus denying him an impartial jury of his peers. Cadena’s use of the phrase “national origin” is significant. The expressions used to refer to Mexican Americans by attorneys for the state of Texas on the one hand, and by Cadena on the other, were central to establishing the terms of citizenship for Mexican Americans. This dispute over terminology was more than a matter of linguistic interest. Rather, such conceptual struggles had material consequences. In common usage, words like “race,” “nationality,” and “ancestry” were used interchangeably, and “white” was understood to designate non-Mexican, non-black persons. Indeed, Mexican Americans’ very existence as “in-between” black and white challenged the fixity of these concepts. In turn, the instability of the meaning of “white” left it open to challenge by Cadena. The Hernandez case hinged on clarification of these terms and the meanings they carried within the Fourteenth Amendment. Two key issues in the case centered around the definition of terms: whether Mexican Americans were whites, or were a separate race, and whether race and nationality could be construed similarly under the auspices of the Fourteenth Amendment.

53. According to testimony, fourteen percent of the population, eleven percent of males over twenty-one, and six to seven percent of freeholders had Spanish surnames. Further, according to the 1950 census 1,738 of the 1,865 Spanish surnamed individuals were native born (Hernandez v. Texas, 480, n. 12, and 481).

54. This summary is based on Carlos Cadena’s brief to the Supreme Court. U.S. Supreme Court, Records and Briefs, Pete Hernandez, Petitioner vs. the State of Texas (Washington: Judd and Detweiler, Printers, 1953), hereafter cited as Records and Briefs. Cadena and Gus Garcia presented the case before the Supreme Court and were aided in writing the brief by Maury Maverick, John Herrera, James DeAnda, and Chris Alderete. These men, along with a few others like Alonso Perales, George Sanchez, Ed Idar, Hector Garcia, and M. C. Gonzalez, led the key civil rights battles. Gonzalez brought Lugo v. Texas (1939) and Salazar v. Texas (1946) to trial, while Herrera and DeAnda brought Sanchez v. Texas (1951) to trial.
Are Mexican Americans White?

Cadena’s argument was complex. He first showed that in common usage people contrasted “Mexicans and whites,” but not, for example, “Germans and whites.” This suggested that Mexican Americans were considered a separate race and that it was their race, not their ancestry, that was the key to the distinction. He also provided evidence that the state and federal governments distinguished “Mexicans” as a separate category alongside “negroes” and “whites,” and that Mexicans were segregated in schools, restaurants, and public swimming pools as a matter of practice, although not by law. His most dramatic piece of evidence was his personal observation that the courthouse in Jackson County, where the case was originally tried, had one bathroom for whites and one for “Colored Men” that was also labeled “Hombres Aquí” (“Men Here”). Cadena stated that Anglos referred to Mexican Americans as non-white, but he insisted that they were, in fact, white. It was only because of the way Mexican Americans were treated that they could be considered a distinct class. Anglos’ mistaken perception of “Mexicans” as a race constructed a false distinction, but one that had real effects on Mexican Americans’ rights. He noted, “People of his national origin or class are . . . considered members of a distinct race, separate and apart from the other citizens of Jackson County,” implying that this was false. He blamed this on the U.S.-Mexico war, which had “aroused antagonisms” so that “‘Mexican’ became a term of opprobrium,” and this “led to the establishment of a status for ‘Mexican’ like that assigned by the dominant group to the Negro.”

Cadena then entered the dispute over whether Mexicans were a “race,” a “nationality,” or both. This issue was particularly difficult because in prior decades “race” and “nationality” had been synonymous. But in the 1910s and 1920s, the equation of race and nationality was in flux. As Mae Ngai so cogently describes, nationality-based identities and racial identity decoupled for European immigrants so that they could be both ethnically German and racially white. But those immigrants we recognize today as non-whites experienced the racialization of their national origins. According to Haney López, this shift for Mexican Americans began as early as the 1840s and 1850s, at the time of the battle for Texas independence and the U.S.-Mexico war. Before this, he claims, persons of Mexican nationality in the U.S. could be identified as white, black, or Indian. The racialization of Mexicans deepened considerably in the early decades of the twentieth century, as the

56. Ibid., 37 (emphasis added).
nation grappled with the wave of new immigrants. Once racialized as “Mexicans,” their ethnic characteristics became reified and naturalized as immutable racial ones. In contrast, “Among whites, racial identity (whiteness) and ethnic identity are distinct . . . forms of consciousness.”

Cadena was fighting to decouple Mexican Americans’ national ancestry from race in the hope of following in the footsteps of Germans and other “white ethnics.” He preferred to use the term “national origin” (by which he meant ancestry) in contrast to “race,” but argued that the two were equivalent for the purposes of the Fourteenth Amendment. In an appendix to his U.S. Supreme Court brief entitled “Status of Persons of Mexican Descent in Texas,” he described “natio-racial distinctions” that were used by the state to differentiate people of Mexican descent from other whites. For example, the federal census bureau compiled statistics on “Spanish speaking persons,” the category “Mexican” was used by the Selective Service in World War II, and the state of Texas also treated them as “a class apart” in studies by the Texas Department of Health. Since he did not want to admit that Anglos were correct in their categorization of Mexican Americans as non-white, he relied on the term “national origin” to explain the distinction. For example, he referred to “persons of Mexican descent” and “other white persons” in the same sentence, clearly distinguishing ancestry from race.

Mexican Americans’ racial “in-betweenness” prevented them from fully assimilating into whiteness. Instead, they paired their rejection of racial minority status with an embrace of the notion that they constituted another white race. This was a cornerstone of their civil rights strategy. In fighting to secure quality education for their children in Independent School District v. Salvatierra, Mexican American activists chose to use the argument that they were “another white race” and therefore could not legally be confined to a separate (and unequal) education as blacks were. This was the first case to use the phrase “other white race” in reference to people of Mexican descent. While the counsel for the plaintiffs introduced the term, the court adopted it, holding, “school authorities have no power to arbitrarily segregate Mexican children, assign them to separate schools, and exclude them from schools maintained for children of other white races.”

59. Ibid., 108.
60. Salvatierra, 33 S.W. 2d 790 (1930). The court did allow “separation” for ostensibly legitimate pedagogical purposes, such as the inability to speak English, which rendered the impact of this decision nil until Mendez v. Westminster School District, 161 Fed. 2d 774 (CA-1947), and, in Texas, Delgado v. Bastrop Independent School District, 388 W.D. Texas (1948).
merely or solely because they are Mexicans.” 61 This case used “race” as a synonym for “nationality,” grouping Mexicans with Czechs, Germans, and other “nationality groups” who were simultaneously recognized as white.

By adopting this language, Mexican Americans were able to distinguish themselves from less desirable groups (such as blacks, Indians, and Chinese) in order to claim inclusion and equality as white American citizens. In 1931 Paul Taylor, a Berkeley social scientist, concluded that although Mexican Americans initially befriended blacks in Texas, they “have been moved toward ‘Americanization’ through their desire to protect, and also recently, to enhance, their own social position. In order to prove their American allegiance, Mexican-Americans proclaim upon occasion not only their patriotic military service, but their adoption of the race attitudes of the local white community, in so far as they apply to the black race beneath them.” 62

The “other white race” strategy implicitly acknowledged variations in skin color, while maintaining that racially and culturally Mexican Americans were white and assimilable. The strategy was an attempt to locate themselves on a racial spectrum that allowed for a broader definition of white, yet preserved and reinforced the black/white dichotomy. By doing so, Mexican Americans identified themselves as similar to other national origin groups among whites. They were acknowledging national origin or ethnic difference while claiming whiteness. It was their whiteness that made them assimilable. Their similarity to other whites outweighed any perceived cultural differences, especially when compared to the black antithesis. Mexican Americans used Anglos’ attachment to the dichotomous definition of race as black or white to their advantage in making their claims to citizenship and American identity and to a more inclusive definition of whiteness.

Yet the argument that Mexican Americans were white was more than just a strategy used to gain easier access to the legal privileges and material benefits connected to whiteness. It was also psychologically important to them to distinguish themselves from blacks. As Roediger argues, immigrants whose racial status was “in-between” black and white gained a sense of higher status by distancing themselves from blacks. For example, in fighting against their classification as a separate race for the first (and last) time in the 1930 census, one advocate suggested that Mexican Americans could be categorized as “other White-Mexican,” if necessary, but not as “colored” because this “naturally causes the most violent feelings.” 63

62. Taylor, An American-Mexican Frontier, 268–69. Taylor’s interviews and observations provide an invaluable primary resource for this era.
63. In 1930 the census classified Mexicans as a distinct race. See Mario Garcia, “Mexican Americans and the Politics of Citizenship: The Case of El Paso, 1936,” New Mexico Historical Review 59 (1984): 187–204, 199, for an account of their successful fight to have the category eliminated and be reclassified as white.
Mexican Americans rejected the use of the term “Mexican” to designate a race because it marked them as separate from and inferior to Anglos. In addition many objected to being grouped with blacks. This attitude transcended class lines. Taylor observed the irony of an Indian-looking “Mexican” cotton picker expressing a common sentiment about blacks: “Negroes and Mexicans do not mix. It does not look right to see Mexicans and Negroes together. Their color is different. They are black and we are white. It is all right for Americans and Mexicans to mix. We are both of the white race.”64 Instead, Mexican Americans relied on their ambiguous position in the racial hierarchy—and Anglos’ dichotomous treatment of race as either black or white—to self-identify as white. In fact, some Mexican Americans found the argument used in the Hernandez case controversial because it suggested that their civil status was analogous to blacks’ and it implicitly placed them on the same social level as blacks. In a monograph celebrating the Hernandez victory, Cadena assured his audience, “It must be remembered that this decision is based strictly on a question of national origin—not race. Those of Mexican descent who decry it as classifying ‘our people’ as non-white should keep this in mind.”65

Attorneys for the state of Texas agreed that Mexicans were white, but only to undermine Hernandez’s claim of discrimination. They argued that Mexican Americans were white and lower courts concurred: “Mexicans are white people . . . so long as they are so treated, the guarantee of equal protection has been accorded to them.”66 Lawyers for the state then reasoned that Hernandez had an impartial jury of his peers, composed of members of his race. That is, “Since . . . persons of Mexican descent were members of the white race, and since white Anglos sat on all juries, ‘Mexicans’ had no cause for complaint.”67 The most common term state attorneys used in their brief to refer to “Mexicans” as a distinct group was “nationality.” They conspicuously avoided the term “race” unless declaring that “Mexicans” were white. This enabled them to discuss “Mexicans” as a distinct group, while asserting that they were part of the white race. The choice of the term “nationality” was significant because it simultaneously insisted that “Mexicans” were not of another race and marked them as different from whites, whose nationality was presumed to be American and whose ancestry was


65. Cadena, “Legal Ramifications,” np. To be fair, Cadena also called for unity with other “progressive” minority groups and rejected segregating themselves from other efforts to promote racial justice.


irrelevant for legal purposes. Nationality displaced the language of race by obscuring its operation. It allowed the attorneys to include Mexican Americans by ignoring real differences in treatment and yet exclude them on the basis of their purported racial identity to whites. Haney López comments that the state attorneys’ assertions of sameness “reify the essential racial difference ethnic language purports to deny.” At other times, the attorneys modified their word choice and referred to Mexican Americans as being of “Mexican nationality.” This not only served to distance Mexican Americans racially, but also threw into question their true citizenship status and their very inclusion in the American polity. This conflation of the alien with the citizen betrays the common wisdom that Mexicans Americans are forever foreigners, alien to American national identity. Cadena astutely noted this, complaining, “The use of the term ‘nationality’ by the Texas court is questionable usage. Petitioner does not contend that Mexican citizens have the right to sit on Texas juries. The use of the term ‘Mexicans’ is also incorrect from the point of view of citizenship.” At one point, state attorneys corrected their usage and employed the awkward clause “of Latin American origin as per names.” However, they exposed their common understanding of “Mexican” as a racial category when they commented that the use of surnames was insufficient evidence to indicate the exclusion of “persons of Mexican or Latin American blood” from jury service. That is, there may have been “Mexicans” (defined racially by “blood”) who had “American” surnames. Here, they inadvertently revealed their adherence to the racializing notion that any amount of non-white “blood” marks individuals as part of the (supposedly) inferior race. Although often used metaphorically, the term “blood” is rooted in assumptions about unalterable biological heritage. In treating nationality as conceptually similar to race—as immutable and inherited—they showed that it was Mexican Americans’ racial status, not their status as citizens or peers, that was at issue.

Although state attorneys insisted that Mexicans were “white people of Spanish descent,” they often lapsed into treating Mexicans as a different race, while using the term “nationality.” For example, their brief to the U.S. Supreme Court suggested that Hernandez could only make an equal protection claim if the victim were of a different “national origin.” They argued that the record “shows both the murderer and the murdered to be of the Latin American origin as per names and that no denial of equal pro-

68. Haney López, “Race, Ethnicity, Erasure,” 1205. The strategy of declaring assertions of difference irrelevant, and protecting equality by prohibiting the use of racial language, is eerily similar to the current rhetoric of the affirmative action debates.
69. Records and Briefs, 6.
70. Ibid., 14.
tection of law is shown by the record in this case, as might be otherwise vaguely inferred if the victim had been of some other national origin.”

This implies that the outcome was fair because the jury had no interest in punishing Hernandez based on prejudice. However, if the victim of the crime had been white, Hernandez would have had a more legitimate (though still “vague”) claim of discrimination. Presumably, if there was no bias against Mexican Americans in the selection procedure, and Hernandez was tried by an impartial jury of his peers, there should be no distinctions based on any categories, and therefore no difference in outcome; his Fourteenth Amendment claim was aimed at securing equal application of the rules governing jury selection. The state’s attorneys asked the Court to overlook the significance of race while simultaneously acknowledging its power and the possibility of discrimination. This demonstrates that for “Mexicans” the distinction between race and nationality had collapsed and that the state obscured this through the more neutral language of nationality. Clearly, “national origin” served as a proxy for “race” here.

Is “Nationality” Encompassed by the Fourteenth Amendment?

Having made a case that Mexicans were a nationality group within the white race, Cadena then tried to convince the court that nationality groups should be treated the same as racial groups under the aegis of the Fourteenth Amendment. His key argument was that failure to apply Norris’s “rule of exclusion” to Mexican Americans violated the due process and equal protection clauses because it denied them a way of proving discrimination that was available to blacks. Instead, Texas courts had held Hernandez and all those of Mexican origin to the higher standard of proving that discrimination was committed expressly against them as individuals, requiring them to show intent to discriminate in each case. Cadena commented, “persons of Mexican descent must bear this onerous burden solely because they are not Negroes; i.e., because they are white.”

He then retreated from contrasting “Mexicans” and blacks and returned to contrasting whites (including Mexicans) and blacks. He asserted that the Fourteenth Amendment prohibits discrimination against both blacks and whites, and that as whites, Mexican Americans should be entitled to equal protection. Thus, while partially refuting the lower court’s “two classes” theory by contending that Mexican Americans were treated as a distinct class that should be protected under the Fourteenth Amendment, he then redefined the category “white” to incorporate Mexican Americans and invoked the two class theory in defense

71. Ibid., emphasis in the original.
of Hernandez. He noted, “it does not follow that the Amendment sanctions discrimination against white persons by rules of evidence which imposes (sic) upon them a burden more onerous than that which is placed on Negroes.” In Cadena’s view, the category “white” was not as undifferentiated as the state of Texas assumed. He did not, however, challenge the fixity of the category “black.” Furthermore, he argued that the lower courts misinterpreted the meaning of the amendment when they denied that it applied to nationality or other groups refused representation on juries. In fact, in Strauder v. West Virginia, the U.S. Supreme Court noted that the amendment was applicable to classes based on characteristics other than race or color, although it had not yet ruled on nationality groups.

The Supreme Court agreed with Cadena that exclusion on the basis of distinctions other than race can deprive a group of equal protection. It rejected the state court’s two classes theory because community prejudices change and new groups may need protection. The decision, written by Chief Justice Warren, found that: “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 justices also accepted the proof Cadena offered that people of Mexican descent were treated as a distinct class. Once this was established, they recognized a pattern of de facto discrimination similar to that in Norris, even though, unlike Norris, the rules governing jury selection were ostensibly neutral. They rejected the state attorneys’ claim that the jury commissioners merely chose those best qualified for jury service. The justices wrote, “It taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years.” They also rejected the state attorneys’ claim that allowing national origin claims of discrimination would lead to claims for proportional representation of groups on juries. They noted that Hernandez’s lawyers did not make this argument and that “his only claim is the right to be indicted and tried by juries from which all members of his class are not systematically excluded.”

73. Ibid., 26.
74. Hernandez v. Texas, 477. Strauder v. West Virginia made mention of national origin: “Nor, if a law be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment” (308). See also Yick Wo v. Hopkins, 118 U.S. 356 (1886), in which the Court found that the Fourteenth Amendment’s provisions “are universal in their application, to all persons under the territorial jurisdiction, without regard to any differences of race, or color, or of nationality” (Records and Briefs, 106).
76. Ibid., 482.
77. Ibid.
The Supreme Court, however, declined to rule on whether Mexican Americans constituted a race. It is significant that the Court consistently used the term “class” (meaning “category”), rather than “race,” to refer to Mexican Americans. While the case has been interpreted to extend the equal protection clause to national origin groups, the Court did not define people of Mexican descent as such. It merely stated that in Jackson County, Texas, Mexican Americans were treated as “a separate class” and that the equal protection clause could cover groups that have “other differences from the community norm” when those differences lead to discriminatory treatment of the class. Pointedly, the Court did not define what constituted a nationality group. In allowing Mexican Americans to remain “in-between” racial categories, it perpetuated the Gordian knot of being Mexican American: legally white, yet treated as non-white and subject to the disabilities connected with this status, they were not guaranteed recourse to the laws protecting racial minorities.

Citizenship and Racial Identity

The Supreme Court’s silence is not surprising. The law as a whole was curiously silent or ambiguous regarding Mexican Americans’ position in the racial order. Informal social rules often accomplished the same end as formal, legal prohibitions. Segregation of Mexican ancestry children, for example, was a common practice through the 1940s, despite the fact that Texas law ordered segregation only of “colored” children, defined as anyone descended from a Negro. But unlike blacks and some Asian groups, people of Mexican descent were placed in the position of not being assigned a definitive legal racial identity; they were classified as white by census officials, yet identified as a distinct population alongside other racial categories by state and federal agencies. Other “in-between peoples” (such as Armenians and Asian Indians) who challenged their denial of naturalization in the courts were ruled to be non-white. Yet the legal classification

of Mexicans, Italians, and other southern and eastern European immigrants as white was accompanied by the tacit recognition that many, in fact, were not white, according to common wisdom. Mexican Americans did not easily fit within the dichotomous racial categories that established and maintained whiteness. Recognizing or naming their difference as something other than white or black would undermine the inflexible discipline of a segregated world. "In-between peoples" destabilized the concept of racial purity that justified Jim Crow and threatened its social order. Since they clearly were not black or belonging to a race proscribed by law, Mexican Americans became white by default. The lower courts declared them juridically white, ignoring the consequences of perceived racial difference and local discriminatory treatment. While the Supreme Court acknowledged their experience of discrimination, it accepted this erasure of race, substituting a more nebulous and transitory notion of difference. Thus, the rigidity of "race" was at times advantageous and at times a serious disability to Mexican Americans' citizenship claims. While "Mexican" was not mentioned as a racial category by laws such as antimiscegenation statutes, neither was it recognized as a category encompassing a group of people in need of protection.

As a group "Mexicans" are problematic for theories of race, and particularly for whiteness, because they demonstrate that race is not solely about skin color. Rather, whiteness signifies a complex of social meanings and statuses. It can include class, social power (determined by factors such as ancestry, education, and community influence), and even religion and gender. Whiteness does not carry a stable set of meanings, but always refers to social status relative to other groups. Mexican Americans, for example, could assert some of the privileges of whiteness because they were not black. Thus, it is not curious that Cadena would claim, "While legally white (anthropologically he is predominantly Indian) frequently the term 'white' excludes the 'Mexican' and is reserved for the rest of the non-Negro population." Here whiteness functions on at least four levels: legal recognition, scientific

81. Mexicans' indeterminate status entitled them to greater protection than other groups, such as blacks and Chinese, and afforded them a basis from which to assert legal claims. Yet it hindered efforts to secure legal remediation for discrimination. Those who appeared white also sometimes were accepted as equals by whites, despite knowledge of their "race." This was determined, however, at individual Anglos' discretion.


83. Records and Briefs, 38, emphasis added.
racial classification, social status, and racial “common knowledge” defined in a relational context. The latter two categories of racial classification are informal ones, based on how people apprehend their changing social world. For example, Cadeña recognizes that “Mexicans” are excluded from the category “white” and are not acknowledged as being social equals with Anglos. Further, “Mexican” is defined in comparison to what it is not: neither white, nor black. (He does not mention Asians because they did not play a large role in the social structuring of his world.) Because race is relationally constructed, its meaning and very contours change according to the context in which it is situated. The unsuccessful effort to classify “Mexicans” as a race provides a compelling argument for “an understanding of races, not as absolute categories, but as comparative taxonomies of relative difference. Races do not exist as abstract categories, but only as amalgamations of people standing in complex relationships with each other.”

The one court case besides Hernandez that addressed Mexicans’ racial classification also avoided categorizing them racially, even though determining their race was precisely the question before the court. In In re Rodriguez, the court grappled with the question of whether Ricardo Rodriguez, a citizen of Mexico who was “Indian” in appearance, was eligible to be naturalized, given that statute provided only for the naturalization of free whites and Africans. The 1848 Treaty of Guadalupe Hidalgo, however, contained provisions that guaranteed the automatic conferral of citizenship on the residents of the ceded territory unless they affirmatively chose to remain Mexican citizens by declaring themselves thus or removing themselves from the U.S. within one year. It thus provided for mass naturalization of former Mexican nationals regardless of their perceived race, in spite of the naturalization statute. Did this set a precedent for the naturalization of Mexican citizens? Several briefs were solicited by the court,

85. 81 F 337 (1897). Treaty of Guadalupe Hidalgo, Article VIII, Library of Congress Online, Feb 2, 1998, http://lcweb.loc.gov/exhibits/ghosttreaty. Article IX noted that Mexicans who elected to become U.S. citizens by remaining within the acquired territory “shall be included 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.” The Article also guaranteed the enjoyment of liberty and property of these residents in the meantime. This served as a basis for challenging the citizenship rights of Mexican Americans. In California, their status as U.S. citizens was resolved by People v. de la Guerra, 40 Cal. 311 (1870). Their citizenship status in Texas remained contested because the U.S Supreme Court ruled in McKinney v. Saviego, 18 How. 235 (1856), that the treaty did not apply to Texas. This case served as the basis for conflicting land claims until 1923 when an international conference was convened to settle the question. However, the treaty was most often interpreted as serving as de facto naturalization. See Richard Griswold del Castillo, The Treaty of Guadalupe Hidalgo (Norman: University of Oklahoma Press, 1990).
offering various interpretations of the racial import of the law. One brief by Floyd McGown argued that most Mexicans racially were Indians, and since Indians were not eligible for naturalization, neither were Mexicans. Further, Congress inserted the word “white” in the statute to exclude all but Caucasians, and common usage of “white” would exclude Mexicans. Another brief by A. J. Evans reasoned similarly, but also offered the theory that Indians originated in Asia, traveling to America over a chain of islands, and that therefore Mexicans were of the Mongolian race, and like the Chinese, were ineligible for naturalization. A third brief by T. J. McMinn also argued that Mexicans were Indians and therefore ineligible, but offered a stronger condemnation of their ability to be citizens. It claimed that the Texas revolution “was fought to get rid of the ‘Mexican people,’ who, in the declaration of independence, were declared to be ‘unfit to be free, and incapable of self-government.’”

A fourth, more complex, brief by T. M. Paschal addressed the argument that prior cases (In re Ah Yup, on Chinese exclusion, and In re Camille, on the exclusion of a half-Indian, half-white man from Canada) were not parallel to the Rodriguez case and were poorly decided. He then offered a reading of Elk v. Wilkins, arguing that Elk, an American Indian, was denied naturalization not because of his race, but because the state, within its sovereign rights and in accordance with a treaty, had not agreed to accept him as a citizen, despite his severance of relations with his tribe. Paschal then asked if American Indians could, in theory, be naturalized, why couldn’t Mexican Indians? Finally, he showed that collective naturalization through treaty or conquest was not uncommon historically, and had incorporated large numbers of non-whites and non-blacks.

District Judge T. S. Maxey based his decision on the prior practices of the nation, rather than by settling the race question. He stated:

It is not deemed material to inquire to what race ethnological writers would assign the present applicant. If the strict scientific classification of the anthropologist should be adopted, he would probably not be classed as white. It is certain he is not an African, nor a person of African descent. According to his own statement, he is a “pure-blooded Mexican,” bearing no relation to the Aztecs or original races of Mexico. Being, then, a citizen of Mexico, may he be naturalized pursuant to the laws of congress?

86. In re Rodriguez, 345.
87. Ibid., 347.
88. Ibid.
89. Ibid., 338–44. See In re Ah Yup, 1 F 223 (1878), In re Camille, 6 F 256 (1880), Elk v. Wilkins, 112 U.S. 94 (1884).
90. Ibid., 349.
Maxey rejected prior cases as too dissimilar to Rodriguez’s situation. He noted that not only had Mexicans been incorporated by treaty through collective naturalization and through the admission of western states and territories to the U.S., but that anyone of Mexican descent born in the U.S. enjoyed birthright citizenship despite his racial classification. In addition to collective naturalization, the U.S. had admitted the possibility of individual naturalization of Mexicans by treaty between 1868 and 1882. He concluded, “When all the foregoing laws, treaties, and constitutional provisions are considered, which either affirmatively confer the rights of citizenship upon Mexicans, or tacitly recognize in them the right of individual naturalization, the conclusion forces itself upon the mind that citizens of Mexico are eligible to American citizenship.” Further, “whatever may be the status of the applicant viewed solely from the standpoint of the ethnologist, he is embraced within the spirit and intent of our laws upon naturalization.”

Public consensus held that Mexican Americans were a “mixed race,” regardless of their legal classification as white, but there was no consensus about what this should mean for their status as citizens. Could they responsibly participate in the democratic process? Should they be accorded the same status as whites? Or, like blacks and women, should their participation as citizens be curtailed? Their mode of incorporation—the consequence of conquest—marked their citizenship as illegitimate and cast doubt on their ability to participate in the democratic process as republican citizens.

Mexican Americans’ ambiguous status in the nation’s racial and social orders shaped their strategies to gain full inclusion in the polity. Usually they could argue that, as white people, they were being unfairly excluded from schooling, housing, or public facilities. The Hernandez case posed a different dilemma. Because their exclusion in Hernandez was based on the “fact” of their whiteness, they had to admit that they were treated like an inferior racial group in order to claim the protection of the Fourteenth Amendment. Yet they did not want to admit to being the same as blacks. In an era of formally sanctioned segregation, this was far too risky.

In addition, many Mexican Americans did not believe that people of Mexican ancestry were non-white. For example, Gus Garcia, one of Her-

91. Ibid., 350–55.
92. The legitimacy of U.S. citizens who were descendants of other conquered nations, such as Filipinos, Native Americans, and Puerto Ricans, was also challenged. See Amy Kaplan and Don Pease, eds., Cultures of United States Imperialism (Durham, N.C.: Duke University Press, 1993).
93. Hernandez was decided just two weeks prior to the landmark Brown v. Board of Education.
nandez's lawyers, was convinced that Anglo ignorance was the only obstacle to overcome before Mexican Americans achieved social and political equality. Because he viewed himself as a member of an "ethnic group" that was part of the white race, he confidently predicted, "We are not passing through anything different from that endured at one time or another by other unassimilated population groups. . . . The point to remember is this: all these other ethnic and religious groups have managed to overcome the same obstacles now besetting our path. . . ." His choice of comparison to "ethnic and religious groups," rather than to racial ones, reveals his belief in the whiteness and assimilability of Mexican Americans. He clearly believed in the promise of the melting pot.

In an astute commentary on the assimilation of white ethnic groups in America, Roediger argues that Americanization involved not just acceptance as Americans, but acceptance as whites. This usually was accomplished by allying one's group with whites against another group characterized as non-white and threatening to white privilege. Like other ethnic groups, Mexican Americans sought to be accepted and were willing to enter this "Faustian pact with whiteness." For example, LULAC's mission was to achieve this model of ethnic assimilation. Its main activities were Americanization programs and educating Mexican Americans to be conscientious citizens, but it also supported restrictions on immigration. It even expelled one member for marrying a black woman. LULAC members also attempted to distinguish themselves from lower class Mexican immigrants. It can be argued that the distinction between "American" and "white" disintegrates. If one is white, one is American, as whiteness is the norm. White identity first defines American identity and then is, itself, obscured. Hale summarizes, "This erasure (of whiteness) enables many to fuse their absence of racial being with the nation, making whiteness their

94. Marquez, LULAC, chap. 2, argues that some LULAC members believed racism to be the chief obstacle hindering Mexican American social and economic mobility.
96. Taylor found this attitude common among prominent Mexican Americans. One professed in regard to social discrimination, "The Mexican consul belongs to the best golf club and society club, so it shows that if we have people prepared for it they will be accepted without discrimination. . . . If prepared, you have got a chance the same as anyone else in these United States. . . . One of the worst hated people in this country is a Jew, but he has prepared himself, so he is way up now." An American-Mexican Frontier, 265.
97. Roediger, "Whiteness and Ethnicity."
99. Marquez, LULAC.
100. Taylor, An American-Mexican Frontier, 268.
unspoken but deepest sense of what it means to be an American.” Thus, LULAC members’ campaign to be recognized as Americans was unlikely to be successful because one first must be recognized as white.

Citizenship as Social Standing

The fear that claiming discrimination meant ceding whiteness was partially rooted in Mexican Americans’ anxiety that their social status would be diminished. Political theorist Judith Shklar argues that the desire for equal citizenship is rooted less in a desire to participate in civic activities and more in a yearning for inclusion and recognition, or “social standing.” She comments, “exclusion from public life is a denial of . . . civic personality and social dignity.” Her thesis that social standing is an integral element of citizenship is convincing. In *Hernandez*, the Texas court manipulated this combination of anxiety and desire and simultaneously raised the specter of reverse discrimination, with whites as the victims of unequal treatment. It commented:

We said in *Sanchez v. State*, 243 S.W. 2d 700, that “Mexican people are not a separate race but are white people of Spanish descent. . . .” In so far as we are advised, no member of the Mexican nationality challenges that statement. Appellant does not here do so. It is apparent, therefore, that appellant seeks to have this court recognize and classify Mexicans as a special class within the white race and to recognize that special class as entitled to special privileges in the organization of grand and petit juries in this state. To so hold would constitute a violation of equal protection, because it would be extending to members of a class special privileges not accorded to all others of that class similarly situated.

The court knew it would be anathema to Mexican Americans to claim that they were not white because of the social stigma and civic disabilities attached to this status. It employed Mexican Americans’ reluctance to distance themselves from whiteness to argue that they were asking for special privileges. Mexican Americans did not wish to challenge their status as whites because they recognized the value that inheres in those possessing whiteness. Cadena faced a dilemma: if he claimed racial discrimination, he

would be ceding his claim to whiteness, thus providing Anglos with a rationale to treat Mexican Americans as inferior. In an era of segregation, the consequences of this threat were too real and too high. The value of whiteness, after all, resides in its exclusivity. The state court understood the implications for Mexican Americans of abandoning their claim to whiteness. Thus it was able to use this vulnerability to protect the privilege of “true” whites in the legal arena by including Mexican Americans as white. Including them as white did not upset the meaning or power of whiteness because it preserved Anglo dominance and control over the legal system.

Cadena encouraged this interpretation of Mexican Americans’ role in upholding white privilege by claiming that allowing them into whiteness would not undermine it. The “other white” strategy enabled him to align Mexican Americans with Anglos. He tried to convey that Anglos’ rights were not threatened by permitting Mexican Americas to serve on juries, while simultaneously emphasizing that whiteness was valuable property to which they were entitled. He insisted that he was not asking for special privileges. Rather, he argued, Mexican Americans were denied access to jury service because of their “national origin” despite being white. He highlighted the absurdity of the state court’s suggestion that this would deny equal protection to non-Mexican whites. “Just what white citizens of Jackson county does this Court have in mind when it speaks of all others of that class similarly situated who do not have the right to sit on juries?”

Non-Mexican whites already sat on juries; it was only people of Mexican descent within the white race who were wrongly denied this opportunity.

Cadena puzzled over the difficulties he and others experienced in challenging what he called the “last bastion” of civil rights violations. He asked, “What, then, is peculiar about discrimination in the organization of juries that this court can read into the Fourteenth Amendment a limitation which the Supreme Court has stated in the Strauder case, is not there? . . . What is so sacred about discrimination in the organization of juries that prompts this court to shield it against the reach of the Fourteenth Amendment?”

This is a good question. Jury service is one of the fundamental elements of citizenship. If voting is the most basic political right, the rights to be eligible to serve on juries and to be tried by a jury of one’s peers are central to notions of fairness in judicial procedure and civil rights. Jury service has been treated by the court as one of the incidents of citizenship and further, as one that identifies true republican citizens—those trusted to participate fully in the governance of the polity. The idea that people from the community can be trusted to exercise sound judgment is part of the

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106. Ibid, 106.
liberal notion that people constitute the government. It is also part of the republican notion that community standards are determined through participation, that is, through government by the people. Jury service reflects a notion of citizenship as a collection of civil and political rights and obligations, as well as of citizenship as social standing. Earlier, juries were limited to those most respected in the community. In this case, the community did not consider Mexican Americans to be equal members, deemed both competent and fit to pass judgment on others, while the Supreme Court defined Mexican Americans legally as white, and as deserving all the rights of citizens.

The answer to Cadena’s question involves the acceptance of the Other as a peer, or social equal. While voting requirements varied—historically, in some states women and even aliens who simply declared their intent to become citizens were allowed to vote—jury service has not been so expansive. Jury service is a mark of belonging. It is based on a sense of community, of responsibility for the welfare of the community, and of responsibility as citizens to uphold one another’s rights and security. It recognizes citizens not only as full members of the community, but as moral equals. In this sense, it is more fundamental to citizenship than voting. It is also more threatening to notions of who constitutes the community. While voting is an act of judgment, majority will is not threatened by the vote of a minority. But on juries, the vote of one person has a greater impact on the outcome.

Judging criminal or civil wrongs is also far more intimate than voting. It is intimate in several senses having to do with social distance and social space. First, it requires literally being in close contact and sharing physical space—the jury box—with others. Because segregation was a common practice in Texas, Anglos did not have to come into contact with Mexican Americans in daily life, which exacerbated the sense that they were not part of the community. Second, when Anglos did come into contact with Mexican Americans, it was often for work purposes, in which the white person was in a position of authority. But in a jury setting, every person’s opinion carries equal weight, and the objection of one person can determine the outcome. The notion of treating Mexican Americans as peers, with the respect that the term implies, was unthinkable for many whites. Third, jury service is intimate because it involves the act of judgment. Mexican American participation on juries would require white jurors to view them

as moral equals, whose personal convictions and evaluations were worthy of consideration. Plus, because jury service entails the power to punish, this implies that those who judge are morally superior to those who are judged to be guilty. Felons can not be jurors. The power to punish sets up a paternal relationship between the juror and the defendant, which contradicted the sense of superiority over “Mexicans” that many Anglos felt. And it upended the paternal relations of authority that had been used to maintain Anglo power over the Mexican origin population. Anglos’ reluctance to include Mexican Americans highlights the importance of the composition of juries—and the identities of those absent from them—in revealing the racialized nature of America’s national self-conception. Juan Perea comments in regard to a recent case about Spanish-speaking venirepersons, “by denying them the equal protection right to be visible, responsible jurors, a right routinely associated with whites, the Court perpetuates and encourages the view that Latinos do not really belong within the community that exercises power on juries. By allowing their exclusion from the community of jury decision-makers, the Court also reinforces the outsider status of Latinos.”

The declaration that Mexican Americas were juridically white was employed as a tactic by attorneys for the state of Texas to uphold the status of whites in several ways. First, the state court’s insistence that Mexican Americans were white, despite evidence of persistent discrimination, can be read as an exercise in dominant group definition of subordinate group identity. Those who control the definition of social groupings structure legal relations among groups by assigning privileges to some, and not to others. The judicial system’s recognition of groups has often been contingent on the protection of white dominance via “neutral” principles. In this case, in the absence of a separate racial classification for people of Mexican ancestry, the court adhered to the letter of the law and declared that treating them differently from whites would be unfair to other whites. The use of the “other white” strategy was Mexican Americans’ attempt to work within the parameters of Anglos’ definition of them; Cadena manipulated the definition to assert access to rights.

Second, the power to define reality by encompassing Mexican Americans within whiteness protected the control that Anglos exercised over courtroom judgments. By defining Mexican Americans as whites, state attorneys ensured that jury commissioners would not have to provide for token representation. The consequences of the state court’s decision would have been to enshrine the status quo, placing Mexican Americans beyond

the protection of the Constitution. That is, becoming juridically white would have acted as a barrier to full acceptance of Mexican Americans as whites and as Americans. As insiders in whiteness, Mexican Americans had no basis from which to challenge Anglos’ perceptions or the structure of power that artfully excluded them from participation. Under the guise of neutral rules and formal equality, white privilege to judge others, but not be judged by Others, would be upheld. White control over the judicial system would have remained intact.

Third, underlying the state attorneys’ stance is the unconscious assumption that an all-white jury can be and will be impartial, and that selection procedures that are designed by the white majority are also neutral. It masks white dominance by presenting white preferences, distinctions, and choices as unbiased. Historically, this has proved to be untrue. Selection procedures have ranged from the obviously exclusionary, such as using voter rolls in the Jim Crow south and key man or blue ribbon juries, which selected only the most exemplary citizens (often defined racially), to facially neutral rules that have discriminatory impact. In *Hernandez* Mexican Americans were not represented on juries for ostensibly race-neutral reasons, yet they still were marked as different by the state courts and attorneys. Because Cadena showed that such distinctions were commonly made, the Supreme Court concluded that an all-white jury pool in such a context “bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner.” Yet, the Supreme Court assumed that neutrality could be achieved through procedures designed by those in power.

By controlling the definition of whiteness, Anglos defined and maintained their social status and their control of the judicial process. An all-white jury box was powerful visual confirmation that the Anglo population exclusively held the power to judge and to punish. Thus, defining Mexican Americans as within the boundaries of whiteness was not an exercise in extending equality, but rather was a strategy of domination. Anglos’ power remained intact, as it was easy to exclude Mexican Americans on the basis of qualifications. Boundary crossing—that is, allowing Mexican Americans to be white—in actuality served to police the boundaries of power. Whites symbolically subverted the color line only in order to


strengthen it. Indeed, little changed in terms of the representation of Mexican Americans on juries, as the U.S. Commission on Civil Rights reported in 1970. Several lawyers the commission interviewed that year could not recall a single case in which Mexican Americans actually served on a jury.\textsuperscript{112} Mexican Americans’ citizenship status and ambiguous identity as white and as Americans was largely unchanged by Hernandez.

Conclusion

Today, the composition of juries is once again a matter of controversy. While most citizens think of it as a “duty,” rather than as a right or privilege, it remains significant as an indicator of the boundaries of community and of racial mistrust. For example, in Hernandez v. New York the U.S. Supreme Court held that prosecutors may use peremptory challenges to dismiss prospective bilingual jurors in cases in which testimony would be heard in their language. As long as this is not done on the basis of the venirepersons’ race or ethnicity, it is constitutionally permissible. The plurality stated, “Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.”\textsuperscript{113} The Court’s interpretation relies on a narrow definition of race and of what constitutes racial discrimination. Similar to the early jury cases, the focus is on the thoughts and subjective intentions of the state attorney. The Court noted that the prosecutor offered a reason for the challenges without being prompted to do so, which seemed to demonstrate his good will in the Court’s eyes. As long as he does not make any overtly racist statements, almost any reason for striking a venireperson can be considered race-neutral. Under this standard, the testimony of the jury commissioners in Hernandez v. Texas that they did not intend to discriminate, and instead chose the most qualified to be jurors, would be considered race-neutral.\textsuperscript{114} A perceived effort not to discriminate erases any bias and overrides a claim to


\textsuperscript{114} Records and Briefs, 3. This comparison is problematic because the rules governing peremptory challenges and challenges for cause differ. However, for the purpose of reflection on the broader issues of neutrality and colorblindness, exploring this avenue could be fruitful. It can illuminate similarities among ways of thinking about race that escape narrow rulings. Comparison of early jury discrimination cases and current debates over jury selection procedures, the legitimacy of peremptory challenges, and jury nullification should be pursued. See, for example, Perea, “Hernandez v. New York” and Fukurai, Butler, and Krooth, Race and the Jury.
equal protection. Discrimination is conceived of as individual prejudice, as harm intentionally done by one person to another, and is not seen as unconscious or as structural.115

Despite ruling on whether statements could be considered race-neutral (and similar to the earlier Hernandez case), in this recent case the Court set aside the issue of the definition of race. It stated, “In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes.” It concluded that the peremptory challenges “may have acted like strikes based on race, but they were not based on race. No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is.”116 The Court’s narrow assumptions about race and racial discrimination mean that prosecutors can exclude a class of people so long as they do not specifically mention skin color.

The recent Hernandez case is a logical outcome of the Court’s ambivalence about Latinos’ status as a group. Defined as a class or a nationality group, Latinos have never been treated as a racial group for equal protection purposes.117 While the two Hernandez cases involve questions that rest on different legal distinctions that can not be addressed in detail here, the parallels between them are striking. In both cases how to classify Latinos, and whether other classifications were being used as proxies for race, were issues. In both cases, the Court set aside the question of definition of race and whether Latinos count as a race. Further, they both implicitly involved whiteness as a standard of neutrality and failed to ask whether notions of colorblindness or neutrality conceal white dominance within the justice system. And both cases suggest that Latinos’ “foreign” characteristics, such as language ability, are problematic in carrying out the duties of citizen-

117. One could argue that they were treated as a race in Clifton v. Puente, 218 S.W. 2d 272 (1949). Although the decision used the terminology “Mexican descent” to refer to Mexican Americans, the court concluded that racial restrictive covenants in real estate contracts were precluded by the Equal Protection Clause of the Fourteenth Amendment (274). But the Supreme Court did not discuss Mexican Americans’ status as a group. Cadena, who also worked on Clifton, noted its correspondence to Hernandez (Records and Briefs, 106), but did not argue that Mexican Americans should be protected as a racial group. The Supreme Court merely observed that the amendment had been construed in Clifton to protect people of Mexican descent (Hernandez v. Texas, 478, n. 6).
That is, Latinos are undesirable as citizens because somehow they are not fully "American." Their social standing delimits their participation as citizens. Ultimately, whether exclusion hinges upon race or "nationality," the significance of exclusion is in the denial of Latinos' status as full and equal citizens, entrusted to participate in governance of society and recognized as members of the community.
Brown over “Other White”: Mexican Americans’ Legal Arguments and Litigation Strategy in School Desegregation Lawsuits

STEVEN H. WILSON

The landmark 1954 decision Brown v. Board of Education has shaped trial lawyers’ approaches to litigating civil rights claims and law professors’ approaches to teaching the law’s powers and limitations.1 The court-ordered desegregation of the nation’s schools, moreover, inspired subsequent lawsuits by African Americans aimed variously at ending racial distinctions in housing, employment, and voting rights. Litigation to enforce the Brown decision and similar mandates brought slow but steady progress and inspired members of various other minorities to appropriate the rhetoric, organizing methods, and legal strategy of the African American civil rights struggle.2 Yet Mexican Americans were slow to embrace the constitution-


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al substance of Brown. A prominent minority with a history of successfully litigating, they instead drew upon a long line of favorable judicial opinions to vindicate their own community’s civil rights claims.3

Several generations of Mexican American lawyers had won cases and thus established precedents in both federal and state courts. In the years that followed Brown, Mexican American lawyers—in numerous complaints, briefs, and courtroom arguments—continued to rely on this separate canon. They disregarded Brown’s usefulness to achieving their goals and distanced their clients’ particular claims from the constitutional implications of the Brown decision. Because the Mexican American lawyers maintained this separate path, the revolution in civil rights litigation that commenced with Brown by-passed Mexican Americans until the late 1960s. In this article, by examining key school desegregation cases and judicial decisions, I describe why and with what result Mexican American lawyers avoided making claims under the revolutionary decision that African Americans and their allies found indispensable to their fight against racial discrimination. I also describe how and why the Mexican Americans’ legal strategy evolved, primarily through a line of Texas trials that were in the forefront of a larger trend, until lawyers finally argued in the late 1960s that Brown implicitly applied to and condemned the segregation of Mexican Americans—just as the decision explicitly had applied to and condemned the segregation of African Americans since the mid-1950s.4

The Divide between African and Mexican American Litigation

The different trajectories of African Americans’ and Mexican Americans’ civil rights litigation illuminates the difference between long-term strate-

3. In this article, I address the experiences of Mexican Americans, but a longstanding debate surrounds this and many other terms referring to ethnic, cultural, or racial groups. I bow to the decision made by another scholar, Ian F. Haney López, and intend the term “Mexican Americans” to mean all permanent immigrants to the United States from Mexico and their descendants, as well as persons descended from the Mexican inhabitants of the region acquired by the United States in the late 1840s under the Treaty of Guadalupe Hidalgo. See Ian F. Haney López, White by Law: The Legal Construction of Race (New York: New York University Press, 1996), xiv.

gies that support an entire campaign and arguments that are intended to win individual battles. The latter can, but by no means must, support the former. Early in the twentieth century, the founders of the National Association for the Advancement of Colored People (NAACP) dedicated that organization to work for the end of the degradation and violence that the racial caste system engendered. Mark Tushnet tells us that, among its other efforts, the NAACP conceived a “litigation strategy” against state-supported racially segregated schools, which it pursued “from the inception of the campaign in the mid-1920s to its culmination in the early 1950s.”

Attorneys of the NAACP’s Legal Defense Fund, Inc. (LDF, or the “Inc. Fund”) aimed first to desegregate graduate programs, including law schools, then shifted their efforts to the lower grades. They enjoyed successes and suffered reversals, but steadily laid the groundwork for victory in Brown, in which Chief Justice Earl Warren declared for the unanimous U.S. Supreme Court that race-based public school segregation denied the nation’s African American students the equal protection of the laws, because “[s]eparate educational facilities [we]re inherently unequal.” The Court encouraged high expectations in their follow-up decision, in which the justices charged federal district judges to oversee locally tailored plans for school desegregation. The Brown case, in fact, was at once the culmination of one long campaign of organized litigation and the beginning of another struggle, to be fought in and out of the nation’s courts, that aimed to enforce the ruling and so to fulfill the promise of equal protection embedded in the Fourteenth Amendment.

Like that of African Americans, Mexican Americans’ legal activity was


shaped by the experience of living in a Jim Crow society. Yet in most of the old southern states there were only two racial categories: “colored” and “white.” Under the relevant statutes in Texas, for example, Hispanic Mexican-descended persons were, as judges phrased it, members of one of the “other white races.” Mexican Americans faced discrimination by the dominant Anglos despite an equal status under the law but Mexican Americans clearly experienced discrimination differently than did African Americans. Mexican Americans thus responded to discrimination differently as well. What surprises, looking back from the perspective of the early twenty-first century, is how often lawyers who established the Mexican Americans’ legal “canon” employed arguments—which were also based on the Fourteenth Amendment—that called for better policing of the existing boundaries of Jim Crow, rather than for the dismantling of the system. Often, the impetus for a suit was an objection that Mexican Americans had been or were being denied the privileges of their “whiteness” under Jim Crow. This generally meant that Mexican Americans stressed that discriminatory practices that had not been sanctioned by statute were a denial of due process—rather than a denial of equal protection—guaranteed under the Fourteenth Amendment.9

Mexican American plaintiffs frequently prevailed in their due process claims. Two drawbacks to this approach emerged over time, however. First, because they led merely to the maintenance of the status quo, such victories could not advance the terms of the argument over Mexican Americans’ rights. Second, success bred an overreliance on the winning arguments. Mexican American lawyers continued to employ this strategy even as evidence mounted that a legal argument that had proven to be sound during the Jim Crow era became counterproductive when Jim Crow was constitutionally doomed. The Mexican American legal community would not abandon the “other white” argument for nearly fifteen years. Only in the late 1960s did they finally seek judicial recognition that Mexican Americans were an “identifiable ethnic minority in the United States” and therefore deserving of equal protection.10

9. This provides that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Constitution, Fourteenth Amendment, Section I. Mexican Americans used process-based “other white” arguments in a long line of state and federal suits. George A. Martinez, “Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980,” University of California at Davis Law Review 27 (1994): 555.

James DeAnda and the Traditional Approach

James DeAnda, an attorney at the forefront of the late-1960s effort to change the terms of the Mexican American claims from due process to equal protection, himself had often used the “other white” argument in the courtroom. DeAnda was born in 1925 in Houston, Texas, to parents who had been among the thousands of Mexican nationals who migrated north early in the twentieth century to escape the revolutionary chaos in their native country. Yet, although the DeAndas were not native-born Texans, their son had access to the best public education that the state of Texas offered. DeAnda took his B.A. from Texas A&M University in 1948 and earned a law degree at the University of Texas at Austin two years later.11 His ability to attend these two premier public institutions was unremarkable; middle-class Mexican Americans like DeAnda had been admitted to Texas A&M and U. T. Austin for years. The coincidence that the Supreme Court ordered the desegregation of the U. T. law school, in *Sweatt v. Painter* (1950), the same year that DeAnda graduated, underscored that Mexican Americans were outside the standard racial arguments.12

DeAnda recalled decades later that he personally had faced few obstacles in his college career that he clearly could ascribe to an anti-Mexican prejudice. Yet, DeAnda made no overt efforts to illuminate his fellow students if they assumed—as some did, apparently basing the assumption on his Mediterranean-sounding name and olive complexion—that he was of Italian, rather than Mexican, descent. DeAnda’s experiences after graduation indicate why he might have chosen to leave mistakes uncorrected. Like many U. T. law graduates, he applied to the elite firms in Houston. He saw promising leads vanish unexpectedly, however, and suspected that the reason was that the prospective employers had learned that his parents had been born in Mexico. DeAnda ultimately did find work in Houston, with another Mexican-descended attorney, John J. Herrera. As he worked with Herrera, DeAnda became aware that less-privileged Mexican-descended persons faced more overt and worse discrimination than he had. This led


12. *Sweatt v. Painter*, 339 U.S. 629 (1950). Heman Sweatt, the African American mail carrier who filed the suit, was also from Houston. The Court declared that the separate law school established for Negroes in Houston could never be the equal of the University of Texas law school, because the latter enjoyed “intangible” advantages, such as the reputation of its faculty and the interaction of its students, which rendered it superior. A related graduate desegregation case is *McLaurin v. Board of Regents*, 339 U.S. 637 (1950).
him to support the economic and social uplift of all Mexican Americans. His support often took the form of lending professional expertise to litigation seeking to vindicate Mexican American civil rights. 13

DeAnda was soon introduced to the peculiarities of making Fourteenth Amendment claims in cases that involved Mexican Americans—which meant employing “other white” arguments. A recurring obstacle to these efforts was the difficulty of demonstrating to an individual judge’s satisfaction that for Mexican Americans the practical results of “otherness” often trumped the formal status of “whiteness.” Lawyers had to accomplish this tricky business without actually undermining their general appeal to the privileges that attached to whiteness. The result was a balancing act, and, ultimately, a self-defeating constitutional argument. What follows describes how some lawyers, and DeAnda in particular, came to recognize that “other white” legal arguments were at a dead-end and demonstrates how they put the Mexican American civil rights effort back on track by appealing to Brown.

Early Legal Status of Mexican Americans

Race-based discrimination had existed in customary and eventually in legal form in most realms of American political, social, and economic life, but it was given the protection of the U.S. Constitution when the Supreme Court approved statute-mandated segregation, provided that the separate elements of the system were formally equal, in the 1896 decision Plessy v. Ferguson. 14 The Texas legislature, in parallel with other state governments, established the legal framework for Jim Crow prior to Plessy, and Texas law had conformed to the “separate but equal” principle even before the Court’s decision. In 1893 the legislature had enacted a statute to provide separate but “impartial” “public free schools” for “white and colored” children. The state law defined the “colored” class to include “all persons of mixed blood descended from Negro ancestry.” 15


15. See Act of 20 May 1893. 23rd Legislature, General Laws of Texas, chap. 122, “Public Free Schools,” sec. 15, the relevant part of which states: “The terms ‘colored race’ and ‘colored children,’ as used in the preceding, and elsewhere in this act, include all persons of mixed blood descended from negro ancestry.” See H. P. N. Gammel, compiler, The Laws of
These racial provisions were silent regarding the definition of “white.” However, many persons of northern European descent then held, based on the popular biases and even scientific rationalizations that prevailed during much of the twentieth century, that as Hispanics, Mexicans belonged to the white races, albeit to an inferior branch in the taxonomy. Mexican Americans were neither required to be legally separate from nor accepted as socially equal to the Anglo-Saxon majority. As a result, much of the discrimination Mexican Americans experienced was sanctioned in custom but not supported by statute. Many Mexican Americans in Texas, for example, faced some segregation in public accommodations such as restaurants and theaters, in recreation facilities such as pools and parks, and in jobs, housing, and public schools—but no legislative action or constitutional provision categorically condemned every Mexican American in the state to use only separately maintained facilities in public and even private institutions. Thus, before 1954, Mexican Americans’ courtroom claims to the privileges of “other whiteness” were pragmatic responses to the prevailing statutory rules of racial segregation.

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17. David Montejano, *Anglos and Mexicans in the Making of Texas, 1836–1986* (Austin: University of Texas Press, 1987). The basic facts of this story applied across the nation and especially in the southwest. In this article, I explore in particular the shifting racial identity of Mexican Americans in Texas. The state’s particular history and geography combined to make Texas law and society reflective of regional prejudices from both the South and Southwest. See Neil Foley, *The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture* (Berkeley: University of California Press, 1997), 1–12. The term “Anglo” may need some clarification. It literally refers to those of “English” descent and so is somewhat inadequate to account for descendants of the Bohemians (Czechs), Germans, or other Europeans who settled in Texas. In 1970, however, the U.S. Civil Rights Commission noted that, as it was customarily employed in the Southwest, the term “Anglo” referred “to white persons who are not Mexican Americans or members of some other Spanish surnamed groups”
Establishing “Whiteness”

The Mexican Americans’ white status found early judicial support in the case that marks the beginning of the Mexican American civil rights canon, *In re Rodriguez*. The case involved the right of naturalization. The precedent for granting citizenship to those of Mexican descent was established in Texas before statehood. After Texas declared its independence from Mexico, the 1836 Constitution recognized Mexicans living in the new republic to be citizens. The U.S. Congress in turn recognized all citizens of that republic to be citizens when Texas joined the Union in 1845. The Treaty of Guadalupe Hidalgo—which in 1848 codified the consequences of Mexico’s defeat in the Mexican-American War—transferred Mexico’s vast northern provinces to the United States and stipulated that all inhabitants in the ceded territory, who did not either leave the territory or announce their intent to remain Mexican citizens, would after one year automatically become U.S. citizens.18

The right of individuals to United States citizenship as a consequence of birth on U.S. soil was definitively conferred and the rights of citizenship somewhat clarified by the ratification of the Fourteenth Amendment in 1868. The power to establish procedural mechanisms for extending citizenship rights to the foreign-born individuals, however, remained the prerogatives of Congress. In 1897, a federal district court in Texas upheld the right of Mexicans to naturalize under the terms of the Treaty of Guadalupe Hidalgo. Ricardo Rodriguez, a thirty-seven-year-old native of Mexico who had lived in Texas for ten years, petitioned to become a naturalized U.S. citizen. Government attorneys contested his eligibility for naturalization, on the grounds that Rodriguez was “not a white person, not an African, nor of African descent.” U.S. District Judge Thomas Maxey made his own taxonomical or anthropological analysis. Maxey noted, for example, “as to color, [Rodriguez] may be classed with the copper-colored or red men. He has dark eyes, straight black hair, and high cheek bones.” But, the judge concluded, because Rodriguez “knows nothing of the Aztecs or Toltecs, [h]e is not an Indian.” “If the strict scientific classification of the anthropologist should be adopted,” Maxey conceded, “[Rodriguez] would probably not be classed as white.” But, the judge further noted, the constitution of the Texas Republic, the Treaty of Guadalupe Hidalgo, and other


agreements either “affirmatively confer[ed] the rights of citizenship upon Mexicans, or tacitly recognize[d] in them the right of individual naturalization.” Moreover, Maxey concluded, the stipulations covered “all Mexicans, without discrimination as to color.” Rodriguez was therefore “embraced within the spirit and intent of our laws upon naturalization.” As historian Mae M. Ngai recently wrote, In re Rodriguez “acknowledged[ed] the subjectivity of racial identification.” Despite his belief that the plaintiff was probably Indian rather than “white,” the federal judge bowed to Rodriguez’s claim that he was not Indian, Spanish, or African but “pure blooded Mexican.”

Judge Maxey’s decision that Mexicans were not excludable on racial grounds became the basis of Mexican nationals’ special status in both U.S. immigration and naturalization law in the early twentieth century. Nativist legislators invoked anthropology, scientific racism, and eugenics to create immigration restrictions linked more directly to national origin. The passage of the federal Immigration Act (INA) of 1924 contributed to the categorization of immigrant groups around the notion of whiteness on the side of desirability and eligibility. Other-than-whiteness, the inability to assimilate because of alien values, and permanently foreign characteristics were placed on the side of undesirability and legal excludability. But in 1929 U.S. Secretary of Labor James Davis—who, because immigrants were expected to become workers, had become the federal government’s top bureaucrat on immigration law—advised U.S. Representative Albert Johnson, a member of the House immigration committee and a coauthor of the 1924 INA, that a precedent of mass automatic naturalization in the nineteenth century made it difficult to apply twentieth-century rules of exclusion to Mexican nationals. Davis recognized that the enforcement of a race-based immigration policy was impeded by the vagaries of self-identification. The secretary told the congressman that, “Mexican people are of such a mixed stock and individuals have such a limited knowledge of their racial composition that it would be impossible for the most learned and experienced ethnologist or anthropologist to classify or determine their racial origin. Thus, making an effort to exclude them from admission or citizenship because of their racial status is practically impossible.”

Mexican-descended individuals therefore were given the benefit of the doubt with regard to legal whiteness. Yet, as Ngai notes, “by the late 1920s, a Mexican ‘race problem’ had emerged in the Southwest, impelled by contradictions wrought by the burgeoning of commercial agriculture, an all-time

21. Ibid., 88–90.
high in Mexican immigration, and the formation of a migratory, landless agricultural proletariat and of segregated communities.” 22 Because immigration policy was implicated in the Southwest’s emerging agricultural economy, Congress was reluctant to impose strict quotas on Mexican immigration or to exclude Mexicans on racial grounds. Nonetheless, civil servants did develop categories of difference that were often simultaneously national, geographical, and racial. In 1930 the Census Bureau enumerated Mexicans as a separate race, specifically, as persons born in Mexico or with parents born in Mexico and who were “not definitely white, Negro, Indian, Chinese, or Japanese.” 23 The Mexican government protested the U.S. government’s creation of this separate racial classification. To lessen international tension, the 1940 Census reclassified persons of Mexican descent as “white” if they were not “definitely Indian or of other nonwhite race.” 24

LULAC and the First Mexican American Suits against Segregation

In this social, political, legal, and diplomatic context Mexican Americans organized a number of civic groups that were specifically formed to fight discriminatory practices against their own community. Business leaders created the League of United Latin American Citizens (LULAC) in 1929, for example, at the height of a nativist movement in the U.S. that fostered the revival of the Ku Klux Klan and led the federal government to create a comprehensive regime of immigration controls. The founders of LULAC aimed to integrate Mexican-descended persons into the U.S. mainstream, that is, to “Americanize” the community. LULAC’s constitution called for members to be loyal citizens. It also stressed the importance of learning English. 25 Hector P. Garcia, a Corpus Christi physician and World War II veteran, founded the American G.I. Forum (AGIF) in 1948 in order to promote Mexican American veterans’ interests, welfare, and equal treatment

22. Ibid., 89.
23. Ibid., 91.
by Anglos.26 When demonstrations of civic spirit and patriotism failed to lower the barriers to equality with Anglos, Mexican Americans resorted to litigation. Although neither AGIF nor LULAC established a litigation arm akin to the NAACP’s LDF, both occasionally gave support to lawsuits seeking to protect Mexican American rights.27

The race-conscious Jim Crow laws remained silent regarding the segregation of schoolchildren of Mexican descent. But Texans had developed a way to close this loophole. In 1905, the legislature had enacted a statute that provided: “it shall be the duty of every teacher in the public free schools . . . to use the English language exclusively, and to conduct all recitations and school exercises exclusively in the English language.”28 Many Anglo school officials believed, or at least pretended to believe, that all Mexican-descended students lacked English proficiency. These provisions led to the creation of separate classrooms for the students with Spanish surnames, or even designated “Mexican schools.” By the time LULAC was organized, approximately ninety percent of the public schools in South Texas were segregated according to the “Anglo” or “Mexican” enrollment.29

In 1930, LULAC filed the first suit to challenge the segregation of Mexican Americans. The state judge who heard the case expressed a certain civic pride that he would be the first judge to address the legality of segregating Mexican Americans. He began his opinion, for example, by acknowledging that: “It is to the credit of both races that, notwithstanding widely diverse racial characteristics, they dwell together in friendship, peace, and unity, and work amicably together for the common good and a common


28. Acts of 29th Legislature, chap. 124, sec. 102. Legislators later amended the law to prohibit the use of textbooks not printed in the English language. However, the statutes did not prevent teaching or learning languages other than English. For example, the English-only laws did not prevent the “teaching of Latin, Greek, French, German, Spanish, Bohemian, or other language as a branch of study in the high school grades as outlined in the state course of study.” Acts of 1918, 4th Civil Statutes, chap. 80, sec. 1. Codified in the General Provisions, chap. 19, art. 2904(5a). The latter three languages are included because many Texans or their ancestors originally had emigrated from the regions of Bohemia (the present-day Czech Republic), Germany, and, of course, Mexico, during the nineteenth century, and linguistic enclaves persisted throughout the state. In 1918, patriotic Texas lawmakers authorized criminal sanctions against school teachers who taught students in a language other than English. Convicted violators were subject to fine and dismissal. Texas Penal Code, arts. 1038(a)–1038(f). See Complete Texas Statutes, 492.

country.” He added, moreover, that “[i]t is a matter of pride and gratification in our great public educational system . . . that the question of race segregation, as between Mexicans and other white races, has not heretofore found its way into the courts of the state. . . .”

The facts of the case were simple. Del Rio, a town on the Rio Grande, operated an elementary school exclusively for Mexican-descended children, although no statute authorized the Del Rio Independent School District (ISD) to do so. LULAC-sponsored attorneys sought a state court injunction to end the segregation. The Del Rio ISD superintendent justified the segregation by noting that many of the Mexican American children in question were from migrant families who worked on distant farms well into the school term. Because Anglo children, most but not all of whom were *not* the children of migratory workers, would have several months advantage in class, migrant students would suffer from low esteem if measured against their standard. Also, he claimed, migrant students’ persistently lower English language proficiency resulted in similar damage to their morale. The superintendent claimed that the segregation was not race based, but offered “fair opportunity” to all children. Segregation, he argued, benefited all students by meeting each group’s “peculiar needs.” Despite this contention, he admitted that Anglo migrant students who entered school late each term were not segregated.

The state court refused to enjoin the Del Rio ISD. The LULAC lawyers appealed, and in *Del Rio ISD v. Salvatierra* the Texas Court of Civil Appeals held that public school officials could not “arbitrarily” segregate their Mexican American students solely based on ethnic background. The segregation practiced by the Del Rio ISD was unacceptable since “the rules for the separation are arbitrary [and] applied indiscriminately to all Mexican pupils . . . without apparent regard to their individual aptitudes . . . while relieving children of other white races from the operation of the rule.” But the court rejected LULAC’s request for an injunction, because “to the extent that the plan adopted is applied in good faith . . . with no intent . . . to discriminate against any of the races involved, it cannot be said that the plan is unlawful or violative even of the spirit of the constitution.”

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31. The superintendent testified that he did not send English-speaking children “who came in late over to the school where I sent the Mexican or Spanish speaking children. . . .” Ibid., 792–93.

32. Emphasis added. Ibid., 794–95. The plaintiffs sought to bring this case before the U.S. Supreme Court, but the Court dismissed the appeal for lack of jurisdiction. 284 U.S. 580 (1931).
Many Texas districts continued to apply the linguistic separation criteria indiscriminately, the Salvatierra decision notwithstanding. Segregation of Mexican American children on purported linguistic grounds became rooted even more deeply in the Southwest. Many Texas districts continued to apply the linguistic separation criteria indiscriminately, the Salvatierra decision notwithstanding. Segregation of Mexican American children on purported linguistic grounds became rooted even more deeply in the Southwest.33 On its face, the ruling was a win for LULAC. Yet, because the segregation was motivated by and perpetuated an apparently benign distinction—the “fact” that Mexican Americans were culturally incompatible with Anglos (as Mexicans and Spanish speakers, but also as migrant farm workers)—George A. Martinez has concluded that this 1930 victory “dealt a serious blow to the struggle.”34

The next notable suit Mexican Americans filed featured an example of cooperation between LULAC and NAACP’s LDF. Like the Del Rio ISD in Texas, the Westminster, California, school district maintained segregated classrooms for its Mexican-descended children.35 LDF attorney Robert L. Carter contributed an amicus brief when the case was heard in a federal court in 1946. The case was a “useful dry run” that allowed LDF to test some of the arguments it would later use in Brown without risking a reversal.36 Indeed, in what one commentator labeled a “strikingly similar” precursor to the Brown decision’s condemnation of “separate but equal,” the federal judge ruled that equal protection requirements cannot be met merely by providing “separate schools [that had] the same technical facilities.” Because “[a] paramount requisite in the American system of public education is social equality,” the judge stated, all classes “must be open to all children by unified school association regardless of lineage.”37 He suggested that “commingling of the entire student body” was appropriate in the aftermath of the recently concluded war—a war against racism and

36. Kluger, Simple Justice, 399–400. The civil rights litigators rarely coordinated suits with their counterparts. But organizations representing Mexican Americans and African Americans in civil rights litigation occasionally made common cause, either as interveners in suits or as writers of amicus curiae briefs in support of one another’s positions. However, leaders of the various civil rights organizations were often jealous of their perceived turf and reacted poorly to interference from other organizations. Stephen L. Wasby, Race Relations in an Age of Complexity (Charlottesville: University Press of Virginia, 1995), 123–24.
37. Mendez, 64 F.Supp. 549. Regarding these Mexican American desegregation cases, one commentator noted how “strikingly similar” this 1946 pronouncement is to statements made by the Supreme Court eight years later, in Brown. Salinas, “Mexican-Americans and the Desegregation of Schools in the Southwest,” 940.
fascism—because “commingling . . . instills and develops a common cultural attitude among the school children which is imperative for the perpetuation of American institutions and ideals.”

The U.S. Court of Appeals for the Ninth Circuit, on the state’s appeal, upheld the district judge’s decision for the plaintiff Mexican Americans. The circuit judges were less critical of the doctrine of “separate but equal,” however, and also less sanguine on the supposed benefits of “commingling.” The appellate judges instead reasoned that, because California’s “Jim Crow” statutes (like Texas laws) did not expressly mention Mexican Americans, separation denied them due process and hence equal protection. The court ruled against the school district only because the administrators had acted beyond statutory authority. The judges declared that they were “aware of no authority justifying any segregation fiat by an administrative or executive decree [since] every case cited to us is based upon a legislative act.”

Language Segregation, Language Testing

The plaintiffs prevailed. But the Ninth Circuit court also suggested that the Mexican American children could be segregated if the legislature authorized separate schools for them. The California situation could by statute be made indistinguishable from the Jim Crow system that the U.S. Supreme Court had upheld in Plessy. The Ninth Circuit judges echoed the Del Rio case by noting that language deficiencies in “children of Mexican ancestry . . . may justify differentiation by public school authorities in the exercise of their reasonable discretion as to the pedagogical methods of instruction . . . and foreign language handicaps may . . . require separate treatment in separate classrooms.” With the Ninth Circuit’s support for language segregation in Mendez and implied endorsement of segregation as long as it was rooted in statute, Mexican Americans grew dependent on legal arguments that relied heavily on alleged advantages derived from their “white” status.

38. Mendez, 64 F.Supp., 549.
39. Westminster School District v. Mendez, 161 F.2d 774 (9th Cir., 1947), 781. See also, Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849), in which the Massachusetts courts ruled that in the absence of legislation, local school boards nonetheless had discretion to segregate. Mendez, 161 F.2d 779, n. 6.
40. Mendez, 161 F.2d 784.
41. State courts ruled against Mexican American efforts to desegregate public accommodations until forced to abandon the position by federal courts. As to restrictive covenants, the Supreme Court’s decision in Shelley v. Kraemer, 334 U.S. 1 (1948), prevented the state courts ruling against Mexican Americans. Martinez, “Legal Indeterminacy,” 573.
Texas was in the federal Fifth Circuit, and its Jim Crow laws were not directly affected by a ruling in the Ninth Circuit. Price Daniel, the Texas attorney general and a future governor, nevertheless issued an advisory opinion inspired by the court’s *dicta*. He forbade automatic, blind segregation of its Mexican-descended pupils, but continued to justify the maintenance of separate classes for “linguistically deficient” students.42 Daniels’ advisory opinion became an issue in the next suit that Mexican Americans filed in Texas, *Delgado v. Bastrop ISD*.43 U.S. District Judge Ben C. Rice of the Western District of Texas decided that linguistic segregation in the Bastrop school district, located near Austin, violated the Fourteenth Amendment because, as it was implemented, Bastrop’s segregation was “arbitrary and discriminatory.” Like Price Daniel, Judge Rice did not criticize all language segregation. But he declared that the Bastrop district could segregate any individual student—Anglo or Mexican American—only after school authorities had determined the students’ English proficiency through “scientifically standardized” examinations.44

The Texas state superintendent of public instruction subsequently announced to all school officials that he was “glad to be able to tell you that arrangements have been made for the official tests to be used to comply” with Judge Rice’s *Delgado* decision.45 The “Inter-American Test in Oral English” was to be administered to “[a]ll pupils in the white school, irrespective [sic] of their language ability.” Students in the same grade were to be given the same test at the same time, and “[t]here must be no discrimination at any time in the testing program.” The superintendent specified, for example, that even children of migrant farm workers entering school four months behind the rest of the grade were to be tested with all students who entered at that time. Anglo migrant children were therefore to be measured against Mexican Americans from a similar background. This effort would preserve the objective basis of comparison, since “[t]he tests are ‘scientifically standardized’ as required by the court decision.”46

The superintendent was not directing all district school officials to administer the exams. Testing should be undertaken “only in those schools de-
siring to divide first year children unable to follow instructions in English, from the children who are able to follow such instructions."

After describing the plan to comply with the federal court order, the state’s chief school officer wrote that he trusted that superintendents, principals, and teachers “will move forward courageously and harmoniously, without prejudice, and without bitterness, as we strive to work out for ourselves a more practical democracy.” Most districts either ignored the mandate, or set standards that made it extremely easy for school administrators to prevent any Mexican Americans from sharing public classrooms with Anglo Americans.

First Steps against Jury Discrimination

James DeAnda’s colleague John Herrera was a general practitioner, that is, a lawyer who both accepted criminal defense work and represented clients in civil cases. In 1951 Herrera and DeAnda defended a client in his murder trial in Fort Bend County, adjacent to Houston’s Harris County. Aniceto Sanchez was convicted and received a ten-year sentence. The attorneys appealed on the grounds that there were no Mexican American grand jury commissioners or grand jurors in the county. Herrera and De-

47. Ibid., sec. 1. No district needed to spend its budget on tests. Instead, the superintendent supplied addresses of the Austin publisher of exams and informed local officials that they may “[o]rder [a] supply of tests [for a] price [of] not more than $1.25 for the instructions and tests for 25 pupils.” In the spirit of local control, school district administrators retained discretion to segregate or not to segregate, and the decision was contingent on their willingness to spend their budget for that purpose. In addition, the superintendent would allow local officials to set their own standards for competency, “[s]ince the situation which we face requires immediate action.” He noted, however, that “[a]fter one year of experimentation and adjustment, then we may be ready to fix a state-wide standard.” Ibid., secs. 8–9.

48. Ibid., 3.

49. Salinas, “Mexican-Americans and the Desegregation of Schools in the Southwest,” 941. As noted, Delgado v. Bastrop was unpublished and so lacked much weight outside Texas. But the next reported federal case involving segregation of Mexican Americans, in Arizona three years after Delgado, supported Judge Rice’s essential findings. In Gonzalez v. Sheely, 96 F.Supp. 1004 (D.Ariz., 1951), the judge followed Mendez to find that a district that segregated Mexican American children into one school attended solely by Mexican Americans violated the children’s Fourteenth Amendment rights. The court determined that the physical segregation harmed students’ ability to learn English and retarded development of a common culture, which the judge thought was essential to full participation in American civic life. Further, the court found that the segregation fostered antagonism and wrongy suggested to the Hispanic children that they were inferior to Anglos. Ibid., 1005–7. The court enjoined discriminatory practices where the legislature had not specifically authorized segregation of students of Mexican descent. However, the Gonzalez decision, once again following Mendez, did not forestall the probable result: continued separate classrooms for the language minority. Ibid., 1009. According to Martinez, even given this shortcoming, Gonzalez represented an advance over Salvatierra. Martinez, “Legal Indeterminacy,” 580.
 Anda sought to demonstrate that this was the result of “a systematic, continual, and uninterrupted practice in Fort Bend County of discriminating against the Mexican Americans as a race, and people of Mexican extraction and ancestry as a class.” To indict, try, and convict Sanchez under those circumstances had been, they argued, “a violation of the due process clause.” Herrera and DeAnda filed what Judge Beauchamp of the Court of Criminal Appeals of Texas noted was “quite an exhaustive brief” in the case. In it, they described pronouncements, including judicial rulings from other jurisdictions, that had “either intentionally or loosely, refer[red] to Mexican people as a different race.” But the appellate judges stood firm on the distinction. Beauchamp spoke for the court on 21 November 1951, declaring that the Mexican people “are not a separate race but are white people of Spanish descent, as has often been said by this court. We find no ground for discussing the question further.”

DeAnda and Herrera soon had an opportunity to sharpen this argument and try it again with a new client. Pete Hernandez was a migrant cotton picker who in 1952 was convicted of murder in the district court of Jackson County and sentenced to life in prison. Herrera and DeAnda obtained financial support for their subsequent appeal from both LULAC and AGIF and sought legal assistance from two more experienced attorneys from San Antonio, Carlos C. Cadena and Gustavo C. “Gus” Garcia. Cadena and Garcia now also argued that Hernandez was discriminated against during his trial because Mexican-descended individuals were deliberately and systematically excluded from both the grand jury that returned the indictment and from the petit jury that tried the case. To support their contention that the exclusion of Mexican Americans from the juries must have been deliberate, Cadena and Garcia obtained a stipulation from the state and county attorneys that there were males of “Mexican or Latin American” descent in Jackson County who were eligible to serve as members of either a commission or a jury. The state and county attorneys also agreed to stipulate that, at least during the previous twenty-five years, no one with a Spanish surname had served on a jury commission, grand jury, or petit jury in Jackson County.

50. Sanchez v. State, 243 S.W. 2d 700 (1951), 701; Case No. 25,496, Court of Criminal Appeals of Texas (also published at 156 Texas Cr. R. 468); November 21, 1951. See Haney López, “Race, Ethnicity, Erasure,” 1169–70, especially n. 83.

51. Hernandez v. State, 251 S.W. 2d 531 (1952), 533. Case No. 25,816, Court of Criminal Appeals of Texas; 18 June 1952. The qualifications for jury service in any Texas county included state and county citizenship; qualifications to vote in the county; status as a freeholder within the state, or a householder within the county; possession of sound mind and good moral character; and ability to read and write (presumably in English). Also, prospective jurors could not have been convicted of any felony and could not be under indictment or other legal accusation for theft or of any felony during the jury’s term of service. See Texas Code of Criminal Procedure (Kansas City: Vernon Law Book Company, 1948), arts. 333–50.
Cadena and Garcia extended slightly Herrera's and DeAnda's arguments by claiming that the logical result of a denial of due process was denial of equal protection. When they presented the case before the Texas Court of Criminal Appeals, Cadena and Garcia sought to appropriate a "rule of exclusion" that the U.S. Supreme Court had announced in *Norris v. Alabama* (1935). Alabama's state supreme court had let stand the conviction of Clarence Norris—one of the nine black "Scottsboro Boys" who had been convicted of the rape of two white women—despite the exclusion of African Americans from both the grand and petit juries. The U.S. Supreme Court had reversed, ruling that state action, whether by the legislature, courts, or executive, to exclude from jury service "all persons of the African race, solely because of their race or color," when the same were both available and qualified to serve, had denied "a person of the African race" the equal protection of the laws and was contrary to the Fourteenth Amendment. Cadena and Garcia sought to persuade the Texas court to apply this reasoning to Mexican Americans. The failure to do that, they said, would be tantamount to extending "special benefits" to blacks.

The Texas appellate judges refused to extend a U.S. Supreme Court ruling concerning race-based jury discrimination in order to apply that decision to the present case involving allegations of ethnicity-based discrimination. The Court of Criminal Appeals had heard a similar case in the early 1940s and had written then that "[i]n the absence of a holding by the Supreme Court of the United States that nationality and race bear the same relation, within the meaning of the [equal protection clause of the Fourteenth Amendment], we shall continue to hold that . . . in the absence of proof showing express discrimination by administrators of the law, a jury so selected in accordance [with the statute] is valid." In Hernandez's case, the appellate judges quoted that earlier opinion to support their declaration once more that the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes: the white race comprising one, and the Negro race comprising the other. As they had said in *Sanchez v. State*, the appellate judges reiterated that "Mexican people are not a separate race but are white people of Spanish descent." The judges noted that, moreover, "no member of the Mexican nationality challenges that statement." It appeared to the appellate judges that Cadena and Garcia sought to have the state courts recognize Mexicans to be a "special class" within the white race.

54. *Serapio Sanchez v. State*, 147 Tex. Crim. 436 (1944), 443; Case No. 22,856, Court of Criminal Appeals of Texas (also published at 181 S.W. 2d 87); May 17, 1944.
that was entitled to enjoy the “special privilege” of a trial by juries that included Mexican Americans.55 The Court of Criminal Appeals rejected Cadena’s and Garcia’s argument. Mexicans were white people, the judges said, who were entitled to all the rights, privileges, and immunities guaranteed under the Fourteenth Amendment. In the absence of proof of actual discrimination in the organization of juries, therefore, it could not be said that Hernandez had been denied equal protection of the law.56

With LULAC and AGIF still paying the fees and with Herrera and DeAnda listed as “of counsel,” Cadena and Garcia appealed Hernandez’s murder conviction to the U.S. Supreme Court.57 In their arguments, Cadena and Garcia moved farther away from the “other white” strategy of earlier school cases. They attempted to demonstrate that the Anglos in Texas considered persons of Mexican descent to be a separate, subordinate group, “distinct from ‘whites.’” Cadena and Garcia argued that Mexican American separateness had resulted from Anglo biases in action, not Texas laws on the books. They quoted “responsible officials and citizens” who admitted that Anglo Texans distinguished “white” from “Mexican.” Cadena and Garcia referred to the effect of the Delgado decision and noted that “until recently” children of Mexican descent were required to attend a segregated school for the first four grades. Finally, the attorneys explained to the justices how jury selection in Texas eliminated Mexican Americans from jury consideration. They showed that the county commissioners selected potential jurors from a list of property taxpayers. Although the names of many Mexican Americans were included on tax rolls as “citizens, householders, or freeholders,” those names never appeared in the jury selection pool. This demonstrated that—as Cadena and Garcia had argued before the state appellate judges—the qualified Mexican Americans must have been excluded on the basis of their Spanish surnames.58

Attorneys arguing for the State of Texas continued to deny that the mere reliance on a list of names might facilitate the systematic discrimination that Cadena and Garcia were charging. Texas’s lawyers restated the conventional argument that “there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment.” But the justices were convinced by Cadena’s and Garcia’s evidence that “just as persons of a different race are distinguished by color, these Spanish names provide ready identification of the members of this class.” The Supreme Court announced its decision in Hernandez v. Texas on 3 May 1954—exactly two

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56. Ibid., 536.
58. Ibid., 479–81.
weeks before the justices announced their decision in *Brown v. Board of Education*. Chief Justice Earl Warren spoke for the unanimous Court to reverse Hernandez’s conviction, because the justices had concluded that the “systematic exclusion of persons of Mexican descent from service as jury commissioners, grand jurors, and petit jurors” had indeed deprived him of due process and equal protection of the laws. The Court condemned this practice as obvious discrimination of “ancestry or national origin.” Warren noted further that: “[t]hroughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws.” And because “community prejudices are not static . . . from time to time other differences from the community norm may define other groups which need the same protection.” Whenever the existence of “a distinct class” could be demonstrated, the chief justice continued, and it can be shown that the laws “as written and applied, single out that class for different treatment not based on some reasonable classification, [then] the guarantees of the Constitution have been violated.”

The NAACP’s LDF lawyers finally achieved their own longstanding objective two weeks later, when the unanimous Supreme Court announced its decision in *Brown*. Although the cases are not explicitly linked, the Court’s reliance on the equal protection clause in both *Hernandez* and *Brown* invite association. Yet, it is worth noting that in *Hernandez* both the Texas and the Mexican American lawyers argued that Mexican Americans were in fact legally white. The successful conclusion of *Hernandez* on that basis seemed to justify continued reliance on the “other white” arguments derived from due process jurisprudence. *Hernandez* committed Mexican Americans to defending their whiteness in future litigation, led them to discount the utility of *Brown*, and kept them too long on what proved to be an unfruitful constitutional path.

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59. Ibid., 475, 477–81.
60. Furthermore, the Court held that even unintentional discrimination might constitute a denial of equal protection. Ibid., 475, 477–81.
61. See Haney López, “Race, Ethnicity, Erasure,” 1143–46, 1158–72, and 1187, n. 135. As noted, the *Hernandez* decision preceded *Brown* by two weeks, and *Hernandez* immediately precedes *Brown* in the published decisions of the *U.S. Reports*. Despite both temporal and literal proximity, scholars overlook the *Hernandez* case, or any Mexican American perspective, even in works focused on Texas’s desegregation battles. See Ladino, *Desegregating Texas Schools*. However, as mentioned above, in 1946 LDF’s Robert Carter filed an amicus brief in *Mendez*. Also, Kluger discussed the equal protection aspects of a later school-funding case with a Mexican American focus, *San Antonio ISD v. Rodriguez*, 93 S.Ct. 1278 (1973). See Kluger, *Simple Justice*, 399–400 (Mendez), 669–770 (Rodríguez).
The Limitations of “Other White” Litigation

The Hernandez jury decision, the Delgado school decision, and other decisions in the line of “other white” cases were rather limited victories. This was illustrated further when Mexican American parents decided to sue the Driscoll Consolidated Independent School District (CISD), a small rural system in south Texas that enrolled fewer than three hundred students. DeAnda had moved from Houston to Corpus Christi at the suggestion of AGIF founder Hector Garcia and soon became the lead plaintiffs’ attorney. Given the facts of the case, it is understandable why he did not see Brown as potentially any more useful than the older precedents. Since at least 1949, after the Delgado opinion, the Driscoll CISD had no separate restrooms, cafeteria, buses, or playgrounds for Anglos and Mexican Americans. During first and second grade, however, Mexican Americans were still being taught in separate Spanish language classrooms. In addition, the district required the Mexican Americans to spend four years in the first grade before promotion to a segregated second grade, where they also spent several years. The result—and Mexican American lawyers would argue that this was the intended result—was that the Mexican American students, many of whom were children of migrant farm workers, reached the third grade at the very age when many dropped out to join their families in the fields. The few who stayed in school shared the classroom with Anglo students who were several years younger. After LULAC had threatened in 1955 to file suit to challenge this practice, the Driscoll CISD “experimentally” reduced the period of first grade “linguistic” segregation to three years.

In September 1955, nine-year-old Linda Perez enrolled in the Driscoll CISD and was promptly placed in the “Mexican” class. DeAnda accompanied the Perez family to the school the next day. He informed the administrators that Linda’s parents had taught their daughter to speak English and, in fact, deliberately spoke no Spanish at home. DeAnda demanded that

62. Herminio Hernandez et al. v. Driscoll Consolidated Independent School District [hereafter Hernandez v. Driscoll CISD]; Civil Action (Civ.A.) 1384, U.S. District Court for the Southern District of Texas (S.D.Tex., 1957), Corpus Christi Division. For the published opinion, see 2 Race Relations Law Reporter 329 (S.D.Tex., 1957) [Race Rel. L. Rptr.]. Files for cases heard in the federal courts in Texas and the Fifth Circuit are preserved at the National Archives and Records Administration-Southwest Regional Archives (NARA-SWA), in Fort Worth, Texas. This case may be found in Civil Cases, S.D.Tex., Corpus Christi Division, 1938–1969, Record Group (RG) 21, Boxes 232–33, folders for C.A. 1384 [the hearing transcript for Hernandez v. Driscoll CISD is loose in Box 233]. Subsequent references to the files in Hernandez v. Driscoll CISD are to this NARA-SWA record group.

the school superintendent shift her to the English-speaking class. 64 The superintendent complied, but DeAnda soon discovered many other English-speaking students in Mexican classes; in fact Linda Perez was the only Mexican American the superintendent had allowed into an English-speaking first grade classroom during the dozen years that he had been running the Driscoll district. Despite Delgado, teachers assessed English aptitude without exams and apparently assumed that no Mexican American student could speak or understand English. DeAnda contacted parents and sought assistance from Gus Garcia and the AGIF. In November, DeAnda filed suit in the Corpus Christi division of the U.S. District Court for the Southern District of Texas. Veteran U.S. District Judge James V. Allred, who prior to his appointment to the federal bench had served as attorney general and then as governor of Texas, presided in the case. The lawsuit, Hernandez v. Driscoll CISD, was the first post-Brown school desegregation case to be brought on behalf of Mexican Americans. 65

DeAnda sought to enjoin the Driscoll school board from continuing the segregation that he contended was maintained on ethnic rather than linguistic criteria. In his complaint, he claimed that Driscoll CISD officials had acted “under color of custom, common design, usage or practice” to deprive children of Mexican descent of privileges and immunities guaranteed


65. Hernandez v. Driscoll CISD, 2 Race Rel. L. Rptr. 329 (S.D.Tex., 1957). Judge Allred was a rare specimen in Texas politics in the 1950s—a truly liberal Democrat. See Patricia A. Tidwell, “James V. Allred of Texas: A Judicial Biography” (M.A. Thesis, Rice University, 1991). Also see Charles L. Zelden, Justice Lies in the District: The U.S. District Court, Southern District of Texas, 1902–1960 (College Station: Texas A&M University Press, 1993), 153, 177. Hernandez v. Driscoll CISD was the first post–Brown Mexican American desegregation case to be decided by the federal courts, although it was not the first filed after Brown. The first such case to reach the federal courts was Romero v. Weakly, 131 F.Supp. 818 (S.D.Cal., 1955), in which Mexican Americans filed suit against the El Centro School District. Attorneys for the defendant school district claimed that the state courts had yet to apply and construe applicable California laws and argued that the federal district judge should abstain. (Under the Pullman abstention doctrine, federal courts seek to avoid premature interference with the state courts’ construction of state laws; see Railroad Commission of Texas v. Pullman, 312 U.S. 496 [1941], 501.) The judge agreed with the school district and dismissed the suit. The judges of the U.S. Court of Appeals for the Ninth Circuit reversed that decision and ordered the district court to hear the case. Romero v. Weakly, 226 F.2d 399 (9th Cir., 1955), 402. Significantly, the Ninth Circuit judges observed that the Mexican American plaintiffs might have sought federal intervention after concluding that federal judges would be more open to their arguments than judges in the state courts, because the state judges are elected and federal judges are appointed for life. Ibid., 401. Martinez believes this to be a key point, because Mexican Americans had not enjoyed much success in California state courts. See Martinez, “Legal Indeterminacy,” 581–82. By the time Romero reached rehearing, Driscoll CISD was well underway in Texas.
Brown over “Other White”  

under the Fourteenth Amendment. DeAnda argued that Mexican American students were deprived of the “educational, health, psychological and recreational benefits provided . . . for other school children.” Driscoll CISD’s attorneys denied that the school district discriminated on the basis of ancestry and argued instead that separation of children who could not speak English had long been accepted as necessary.

DeAnda’s pretrial memorandum concisely described the legal grounds for the lawsuit and also clearly revealed his perception that Brown had changed little for Mexican Americans. He stated that, according to earlier judicial rulings, if “Mexicans, being members of the Caucasian or Caucasoid race,” were segregated in separate buildings or classes, they were being denied equal protection of the laws. This had been the settled law “even before” the Supreme Court ruled, in Brown, that “segregation of children based on race pursuant to statutory or State constitutional authority violated the [Fourteenth] Amendment.” DeAnda referred to the Brown decision only to dismiss its relevance. Instead, he resorted to the Hernandez decision for support, noting that the Court “held untenable the argument of the State of Texas that discrimination within the white race did not violate the equal protection clause.” With Hernandez available, Brown was not needed, as DeAnda argued, because “the instant cases do not raise the prob-

66. DeAnda et al., “Complaint to Enjoin Violation of Federal Civil Rights and For Damages,” pp. 1–2. NARA-SWA. RG 21, Box 232, Folder 3: “1384 Hernandez v. Driscoll.” Specifically, the complaint referred to 42 U.S.C. secs. 1981–83 (formerly, 8 U.S.C. sec. 43). These statutes were codifications of the Civil Rights Acts of 1870 and 1871, which provided as follows: “[a]ll persons within the jurisdiction of the United States shall have the same rights in every state ... to the full and equal benefit of all laws ... as is enjoyed by white citizens ...” [Act of 1870, sec. 16, codified 42 U.S.C. sec. 1981]; and “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...” [Act of 1871, sec. 1, codified 42 U.S.C. sec. 1983]. DeAnda also represented similarly situated plaintiffs in Trinidad Villareal et al. v. Mathis Independent School District of San Patricio City et al., which he filed at the same time as Hernandez v. Driscoll CISD, and on the same grounds. Judge Allred granted the defendants’ motion to dismiss the case in May 1957, after DeAnda’s expert witness begged off. Villareal v. Mathis ISD; Civ. A. 1385 (S.D.Tex., Corpus Christi Division, 2 May 1957). NARA-SWA. RG 21, Civil cases of the S.D.Tex., Corpus Christi Division, 1938–69, RG 21, Box 233, Folder “1385.”

67. DeAnda et al., “Complaint to Enjoin Violation of Federal Civil Rights and for Damages,” p. 5. To make up for this deprivation, the plaintiffs also sought to obtain damages from the board. Requested damages for each individual plaintiff were $4000 in actual damages for the estimated wages lost after being unnecessarily held back in school for two years and another $4000 in punitive damages. Ibid., pp. 7–8.

68. In December, Allan Davis of the Corpus Christi firm Boone, Davis, Cox and Hale, answered for Driscoll CISD. “Answer,” NARA-SWA. RG 21, Box 232, Folder 2: “1384 Hernandez v. Driscoll.”
lems present in the Negro cases. There is present in these cases no question of segregation because of race.”

DeAnda carefully distinguished between these two landmark equal-protection decisions for two reasons. First, *Brown* was about race segregation, which he considered inapplicable to the Mexican American complaint, while *Hernandez* specifically referred to national origin. Second, the *Brown* decision was concerned only with statutory segregation (*de jure*), while *Hernandez* had condemned discriminatory practices never authorized by statute (*de facto*). Because he was not contending that the segregation in Driscoll CISD was race based, or that a Texas law authorized it, *Brown* simply did not appear to be a useful precedent. It was actually a well-considered strategy. If DeAnda relied too heavily on *Brown*, he risked losing if the judge decided that differences between *Brown* and the present case overrode resemblances. However, after arguing for these distinctions, DeAnda indicated that he would happily accept support from *Brown* if Judge Allred chose to view the case as favorable precedent. He concluded his brief by stating “cases which have dealt with segregation of Mexican school children control here even without the reinforcement given them by the Supreme Court’s segregation decisions.” DeAnda would refer to *Brown*, as well as the Court’s earlier graduate school desegregation decisions, only sparingly, and only to invoke the general support those cases provided his own case through its discussion of the intangible benefits brought about by contact between students of diverse backgrounds.

On the first day of the pretrial proceedings in late February 1956, Allred asked DeAnda outright if he was seeking to enjoin all linguistic segregation. DeAnda said no: he agreed that there were often good reasons for keeping Spanish-speaking children segregated until they could speak and understand English. He objected to automatic and extended segregation of these children on the excuse that, because they were of Mexican-descent or belonged to migrant families, they could not be as familiar with English as the Anglo students, who were automatically placed in English-speaking classes.

DeAnda examined trustees and teachers of the Driscoll CISD to establish the extent of the district’s segregation. None disputed the fact that it was the policy to segregate Mexican American students for three years in the first grade. The issue for the judge to decide was whether Driscoll CISD’s system was arbitrary and therefore discriminatory. DeAnda brought

69. DeAnda et al., “Plaintiffs’ Pre-Trial Memorandum,” p. 1; NARA-SWA. RG 21, Box 232, Folder 2: “1384 Hernandez v. Driscoll” [emphasis added; the reference is to Mendez].
70. Ibid., pp. 1–2.
71. Hearing transcript of *Hernandez v. Driscoll*, vol. 1, pp. 11–12; NARA-SWA. RG 21, Box 233 [no folder]. Davis retorted that language segregation was necessary for the education of both classes of students. Ibid., vol. 1, p. 4.
72. Ibid., vol. 1, pp. 50–65.
in a number of the school’s Mexican American students to testify, so that Allred could see for himself that they spoke English as well as any Anglo primary schooler. The judge asked the lawyers to waive their rights to make closing statements and to submit briefs instead. But, before he closed the proceedings, Allred gave, as he put it, “some indication of my thinking at the present time.” Allred recognized that there might be reasonable bases for maintaining separate classes for beginners. However, the judge said, even if there were sound justifications behind the policy of holding back non-English speakers “for the first year, or a portion of the year . . . I think any treatment of these students as a class beyond that is unreasonable and discriminatory, any treatment that does not take into consideration the ability of the individual student.”

Judge Allred also had a warning for DeAnda and for future plaintiffs. “In the long run,” he said, “I don’t know whether you are going to be able to accomplish a great deal by lawsuits or not. Considerable progress has been made, you say, as a result of lawsuits. I don’t know.” Moreover, the judge continued, “I don’t know whether the courts should undertake the monumental job of trying to determine the justice [or] injustice of the treatment of particular students. I don’t want to dictate to a school the method they should follow. I don’t think I have the right to do that.” As he stated his reluctance to dictate a drastic remedy, Allred also revealed his sympathy for the plaintiffs.

[T]his method is unreasonably discriminatory and violative of a particular plaintiff’s or particular group of plaintiff’s rights. I know that any treatment of these people, on the basis that they are of Latin extraction, as a group, or treating an individual that way because he happens to come from that group, is, on its face, discriminatory and based on an unreasonable basis. It can’t stand.

“I am just telling you what I am thinking off hand,” Allred concluded. “It is not final. You can direct your arguments to those points if you want to.” He had briefs in hand by December.

DeAnda did not ask for a total and immediate end to language segregation. Rather, he requested that Judge Allred order the Driscoll CISD trustees to end the current system, to maintain no separate classrooms beyond the first grade, to separate first grade children only after proper scientific tests, and to move a separated student to the English-speaking class after he

74. Ibid., pp. 545–46.
75. Ibid.
76. Ibid., p. 548.
77. Docket log, NARA-SWA. RG 21, Box 232, Folder 1: “1384 Herminio Hernandez et al. v. Driscoll Consolidated ISD.”
or she showed sufficient understanding. 78 DeAnda invoked Brown only once in his closing brief, in reply to Davis’s brief. Davis had argued that the judge should allow the district administrators to follow their own “good faith” judgment about what was best for the children. Davis cited testimony by Mexican American children that they were happy with the present arrangement and would only become more aware of their language deficiencies should they be placed in a class with native English speakers. 79 In response, DeAnda suggested that Davis “cannot conjure a more emphatic method of emphasizing or creating differences than by the policy of segregation” at Driscoll CISD. DeAnda suggested that his limited plan was “more than justified under the evidence . . . and actually benign, in light of the holding in Brown.” 80 Once more, he used Brown as a negative comparison, not a model argument. Finally, however, DeAnda quoted Brown positively, to stress the Court’s decision that separate education was “inherently unequal.” 81

On 11 January 1957, Allred’s memorandum opinion condemned Driscoll CISD’s practices. Because the district had clearly violated existing rules and the plaintiffs’ were seeking only to force compliance with them, Allred limited himself to restatements of earlier rulings. The segregation of Mexican Americans was permissible as long as the criteria for separation were not arbitrary. He referred to the ruling in Delgado that language handicaps might justify segregation only upon a credible examination and declared the Driscoll method of administering segregation was “not a line drawn in good faith.” The first and second grade segregation at Driscoll CISD was “unreasonable race discrimination against all Mexican children as a group.” “If scientific or good faith tests were given the result might not weigh so heavily,” but “when considered along with the other facts and circumstances . . . it compels the conclusion that the grouping is purposeful, intentional and unreasonably discriminatory.” 82 Allred enjoined the Driscoll CISD as DeAnda had requested on 15 March and ordered that a new system of assigning students should begin operating by the next academic year, 1957–1958.

78. DeAnda et al., “Plaintiffs’ Brief,” p. 8; NARA-SWA. RG 21, Box 233 [no folder].
79. Davis et al., “Brief for Defendants,” pp. 12–13; NARA-SWA. RG 21, Box 233 [no folder]. Davis attempted to reargue rather than to summarize his case. He concluded that the “only question which the courts should decide” is whether the district acted in good faith. Ibid., p. 6. Davis contended that the plaintiffs did not represent a proper “class” with standing under Federal Rules of Civil Procedure. Fed.R.Civ.P. Rule 23(a). Allred’s reply was a curt: “[t]his contention comes a bit late and is overruled.” Allred, “Opinion,” NARA-SWA. RG 21, Box 232, Folder 1: “1384 Herminio Hernandez et al. v. Driscoll Consolidated ISD.”
80. DeAnda et al., “Plaintiffs’ Brief,” p. 8; NARA-SWA. RG 21, Box 233 [no folder].
81. DeAnda et al., “Plaintiffs’ Reply to Defendants’ Brief,” p. 6; NARA-SWA. RG 21, Box 233 [no folder].
giving “the school authorities ample time to formulate a program accordingly without undue interference with its current work.”

Maintaining “White” Status

The ruling in Driscoll did not condemn public school segregation or other discriminations against Mexican American Texans that were not contrary to Texas statutes. For that reason, some scholars of the Mexican American civil rights struggle have criticized Allred for allowing language discrimination to continue. George A. Martinez, for example, complained that the judge relied on stale reasoning and outmoded precedents to permit language segregation despite “clear evidence that school officials used the linguistic rationale as a pretext for segregating Mexican Americans from Anglos.” He added that Judge Allred could have relied on Brown to prohibit segregation altogether. This criticism is untenable in light of the case record. Once in court, it had proved elementary for DeAnda to demonstrate to Judge Allred’s satisfaction that the administrators had been acting contrary to Texas statutes when they grouped the Spanish-surnamed English speakers with Spanish speakers. Given the ready availability of legal arguments that also led to the Fourteenth Amendment, DeAnda realized that there was no benefit in citing Brown. Indeed, DeAnda specifically denied that the plaintiffs sought to have Judge Allred consider their clients’ claims in light of the Brown decision. Only subsequent events would prove these arguments to be inadequate, and when they had done so, DeAnda was among the first to retool the arguments and find a place for Mexican Americans under the Brown umbrella. His shift did not occur, however, until the late 1960s. The substantial investment in time, energy, and legal costs only brought the enrollment of a few dozen Mexican American children in the Anglo classrooms of Driscoll CISD. The limited benefits of “due process” victories did not justify this investment. For that reason, Hernandez v. Driscoll CISD was the last school desegregation suit that Mexican American civil rights advocates filed for a full decade.


84. Martinez, “Legal Indeterminacy,” 583–84. Martinez analyzes (mostly published) decisions concerning Mexican American litigation of civil rights issues between 1930 and 1980. Among the stated goals of his article is an attempt “to demonstrate that courts’ decisions either for or against Mexican-Americans were often not inevitable or compelled” and to expose the extent to which courts have exercised discretion and “helped or failed to help establish the rights of Mexican-Americans.” Ibid., 559.

Mexican Americans maintained their hard-won “white” status as late as mid-1966 when DeAnda resumed school desegregation litigation after nearly a decade’s hiatus. In the new suit, he sought an injunction to end “ability tracking” in the Odem Independent School District near Corpus Christi. Officials in the Odem ISD assigned students to classes according to past performance, measured aptitude, or a teacher’s estimate of a student’s potential. The district had established two separate “tracks,” one for the college-bound and another for the “terminal” high school students. Students of Mexican descent dominated the latter category. In his complaint DeAnda relied on the precedents he had helped establish in the 1950s. The most recent of these was still his successful 1957 lawsuit to enjoin the segregation of Mexican American elementary students in the Driscoll CISD. DeAnda had argued in that case that the Driscoll CISD officials segregated Mexican Americans on the basis of inaccurately administered tests purporting to assess English-language competence, or without administering any tests. He had convinced U.S. Judge James Allred that this was an arbitrary system that denied the due process guaranteed in the Fourteenth Amendment.

Ten years after his victory over the Driscoll CISD, therefore, DeAnda faced essentially the same discrimination in different guise at Odem ISD, and he attacked it in essentially the same fashion with well-worn weapons. In June 1967, when he wrote the brief in support of his motion for summary judgment, he charged that assignments at Odem ISD were made without testing or else without testing Anglo as well as Mexican American students. When aptitude tests actually were administered, he wrote, principals or teachers who lacked the expertise properly to evaluate results made track assignments that perpetuated the Mexican American segregation. DeAnda’s thinking was stalled at the “other white” strategy Mexican Americans had relied on for decades. He once again based his legal argument against segregated conditions on the due process clause. If he had attempted to base his complaint on an equal protection rationale, and had been able to convince the judge to accept the claim, DeAnda could have sought the sort of expansive court-ordered remedy sanctioned by Brown. But in his brief, as before, DeAnda only mentioned, without explicitly invoking, Brown. As a consequence, when U.S. District Judge Woodrow B. Seals enjoined the Odem ISD ability tracking system on 28 July 1967, he did so solely on the basis of the due process violation. The judge’s hold-

87. For the practice of “tracking,” see Rangel and Alcala, “Project Report: De Jure Segregation of Chicanos in Texas Schools,” 331—33, esp. n. 139.
Brown over “Other White”

ing implied that, if Odem ISD administrators commenced proper testing and evaluation, they could resume tracking.  

The Turn toward Politics, the Growth of Militancy

Mexican American civil rights activists had not been idle during the ten-year hiatus between the Driscoll and the Odem suits. Recognizing that litigation was not a certain or cost-effective method of obtaining reform, however, Mexican American organizations had all but abandoned it and instead sought increased political power. They achieved notable influence in the Democratic Party in 1960, when John F. Kennedy—during his hard-fought presidential campaign against Richard Nixon—depended on a massive “Viva Kennedy” project to deliver crucial votes in south Texas that he needed to win. The successful effort left the administration in debt to Mexican Americans in Texas. President Kennedy paid that debt in short order. The death of Judge Allred in July 1959 left vacant one of the four judgeships in the federal Southern District of Texas. Kennedy announced his intention to appoint a Mexican American. Liberal Mexican American leaders, who had supported U.S. Senator Ralph Yarborough in his struggles with the conservative Lyndon Johnson for leadership of the Democratic Party in Texas, lobbied for state district judge Ezequiel D. Salinas of Laredo. The liberals even suggested DeAnda as an alternative for the federal court appointment. As the new vice-president, Johnson was able to convince Kennedy to appoint Reynaldo G. Garza, a longtime Johnson friend.


89. For these events, see Ignacio M. Garcia, Viva Kennedy: Mexican Americans in Search of Camelot (College Station: Texas A&M University Press, 2000); and J. Gilberto Quezada, Border Boss: Manuel B. Bravo and Zapata County (College Station: Texas A&M University Press, 1999).

90. DeAnda admitted much later that—at thirty-five years old—he was probably too young to be a serious nominee for a federal judgeship. Oral History Interview with DeAnda (20 May 1998). Politicians coveted such judgeships because they could both pay off political debts and advance agendas. In 1959 both U.S. senators from Texas were Democrats—including the ambitious Senate majority leader Lyndon Johnson. Ralph W. Yarborough, who led the liberals in Texas, had been in the U.S. Senate for only one year but became Texas’s senior senator when Johnson became vice-president in 1961. Republican John Tower replaced Johnson after winning a special election. Zelden, Justice Lies in the District, 210. Chandler Davidson, Race and Class in Texas Politics (Princeton: Princeton University Press, 1990), 29–32, 166.
and political ally in South Texas.91 In April 1961, fewer than three months after Kennedy’s inauguration, Garza assumed Alred’s seat and became the first Mexican American federal judge in history.92

The Mexican Americans’ political efforts yielded other notable rewards during the 1960s. They welcomed the election of Henry B. Gonzalez of San Antonio, another Johnson man, to the U.S. House of Representatives in 1961. Two years later, the Political Association of Spanish Speaking Organizations (PASSO, or PASO), founded around 1960, orchestrated a brief Mexican American domination of the municipal government in Crystal City, Texas.93 The Crystal City affair showed that, although Mexican Americans seemed complacent with regard to the politics of race, the dissenting spirit of the decade also animated many members of the liberal middle class. In spring 1966, for example, fifty Mexican American lead-

91. Garza was born on 7 July 1915, graduated from Brownsville Junior College in 1935, and two years later won the B.A. degree from the University of Texas at Austin. In 1939 he received the bachelor of laws degree from the University of Texas law school. While still a student in Austin, Garza worked on Johnson’s early campaigns, and he had remained a keen supporter during Johnson’s runs for successively higher offices. This loyalty gave Garza priority over Yarborough’s claims. See Louise Ann Fisch, All Rise: Reynaldo G. Garza, the First Mexican American Federal Judge (College Station: Texas A&M University Press, 1996), 70–77. Although this appointment pleased the Mexican American community in principle, it was also a practical reminder that Johnson had overridden preferences held by many Mexican Americans. Julie Leininger Pycior, LBJ and Mexican Americans: The Paradox of Power (Austin: University of Texas Press, 1997), 116–24. See also Allsup, The American G.I. Forum, 133, and San Miguel, Jr., “Let All of Them Take Heed,” 164–65. (Allsup and San Miguel incorrectly identify Garza as a Republican, apparently because he had joined Texas Governor Allan Shivers in supporting the Republican Eisenhower against Democrat Adlai Stevenson.)

92. This requires clarification. Garza was not actually first, but he was the first federal judge to be widely recognized as a Mexican American. In 1947, President Truman appointed Harold R. Medina, the son of a Mexican father and an Anglo mother, to the Southern District of New York. Medina was later promoted to the Second Circuit. Judge Medina dedicated a volume of his collected writings and speeches “to my father, Joaquin Adolfo Medina, born in the city of Merida, Yucatan, Mexico, on November 27, 1858.” See Harold R. Medina, The Anatomy of Freedom, ed. C. Walter Barrett (New York: Henry Holy and Co., 1959), v. But Medina was not regarded as Hispanic by Anglo politicians and apparently was not raised as a Hispanic. Therefore, Medina’s appointment is generally not regarded as politically significant as Garza’s. The fact of an earlier, unrecognized or unremarked Hispanic on the federal bench underscores the fluidity of racial and ethnic identity among Hispanics. Fisch, All Rise, 177, n. 1; Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan (New Haven: Yale University Press, 1997), 196, n. kk.

ers exited from a conference hosted by the federal Equal Employment Opportunity Commission because they perceived that EEOC planners were preoccupied with African Americans and had not placed Mexican Americans concerns on the agenda. Mexican Americans began to complain that, as president, Lyndon Johnson seemed to be taking their support for granted. The early results of the exodus were gratifying for those leaders who worried that by the 1960s Mexican Americans had become the “Minority Nobody Knows.” Johnson created an Inter-Agency Committee on Mexican American Affairs, promised to host a White House conference to study discrimination in the Southwest, and stepped up efforts to appoint Mexican Americans to government panels. In order to fulfill this last promise, soon after the walkout, the president appointed Dr. Hector Garcia, the founder of AGIF, to be the first Mexican American member of the U.S. Commission on Civil Rights.

Notwithstanding such political rewards in the decade after Brown, their stubborn embrace of “white” status prevented Mexican Americans from grappling with the practical distinction between the de jure segregation of African Americans that the Supreme Court had condemned in Brown and the de facto segregation of Mexican Americans that prevailed in the Texas public schools. Many Mexican Americans continued to face social discrimination, economic hardship, and inferior education because of their ethnic heritage. Historic disabilities were not lifted by the personal and professional gains of elites like Judge Garza, Commissioner Garcia, and Representative Gonzalez. As a result, dissatisfaction simmered during the 1960s, especially among younger Mexican Americans who perceived that the struggle towards social, political, and legal equality had stalled. Civil rights demonstrations and marches were flowering in the South, the Black


Power movement was emerging in the North, and antiwar activism was energizing campuses across the nation. But Mexican American youth found themselves at a loss for similar opportunities to show their dissatisfaction. After farm workers in California, Texas, and elsewhere marched against unfair wages, dangerous working conditions, and poor treatment, however, both working-class barrio-bound, and middle-class college-bound, Mexican Americans counted among a handful of heroes and role models César Chávez, who had begun to organize farm workers of all nationalities during the 1950s. The heroic image of impoverished but selfless farm workers—many of them Mexican or Mexican American—struggling against corporate growers and defying official repression appealed to many Mexican Americans who came of age during the militant 1960s.

By the mid-1960s, discrimination against Mexican Americans in Texas inspired students at the state’s predominately Mexican American campuses—including St. Mary’s University in San Antonio and Texas A&I University in Kingsville—to reject their parents’ ideals and embrace more radical political ideologies. Budding militants rejected the older generation’s aspirations to “pass” as white, that is, to assimilate with the dominant white culture. They instead self-identified as “Chicanos,” a name intended to show pride in their Mexicano heritage. This was a loosely defined movement, but, in general, the Chicanos were politically progressive relative to established spokespersons for the Mexican American community. They eschewed both the goals and tactics of the middle-class. Instead of seeking to win elections or exchanging votes for patronage, for example, Chicanos celebrated direct action, mass protest, and self-reliance. Despite Chávez’s frequent denials of intentional ethnic factors in his labor organizing, these activists romanticized the farm workers’ marches as demonstrations of Chicanismo.


Becoming an “Official” Minority

Many of the established leaders within the Mexican American community resisted the Chicano movement’s innovations. Yet a variety of tools that proved helpful in refashioning ethnic identity became available to the mainstream leaders during the 1960s. The 1964 Civil Rights Act (CRA), for example, which authorized federal officials to withhold funds from states that allowed racial discrimination, also extended similar protections to “national origin” minorities. The statute authorized the U.S. Department of Health, Education, and Welfare (HEW) to issue goals and guidelines for school desegregation. In a 1965 ruling the federal appeals judges for the Fifth Circuit declared that federal district judges should give “great weight” to the HEW standards.

The value of the Fifth Circuit’s endorsement was limited for a time by the conservatism of HEW’s Office of Civil Rights (OCR). As it investigated allegations of racial discrimination, OCR initially collected and published statistics only within black and white categories. But many school districts

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100. Navarro, Mexican American Youth Organization, 174, 198. Tension grew between generations, and the division was widened by the broader issues of the day. For example, after St. Mary’s University students founded the Mexican American Youth Organization (MAYO) in 1967, they used it as a forum to criticize and to protest the Vietnam conflict as evidence of the continued imperialism, violence, and racism they alleged was a major theme in U.S. history. U.S. Representative Henry B. Gonzalez of San Antonio, the longtime friend of President Johnson, responded by denouncing Chicanos’ militant rhetoric as “hate.” He repeatedly defended Mexican Americans’ patriotism on the floor of the House. In 1969, Gonzalez rejected the label “Chicano” and described himself as “an American of Spanish surname and of Mexican descent . . . what is commonly referred to as a Mexican American.” Henry B. Gonzalez, from the Congressional Record, 22 April 1969, 91st Congress, 1st Session, “An Attack on Chicano Militants,” in A Documentary History of the Mexican Americans, ed. Wayne Moquin with Charles Van Doren (New York: Praeger, 1971), 358.


103. Singleton v. Jackson Municipal Separate School District, 348 F.2d 729 (5th Cir., 1965). The case is known as Singleton I. In Singleton II, which followed the next year, the Fifth Circuit judges declared the HEW guidelines to be minimum standards and made it clear that district judges should not “abdicate” their responsibilities regarding desegregation merely by conforming to the guidelines. 355 F.2d 865 (5th Cir., 1966).
had turned the "other white" argument to their own illegitimate purposes. In order to delay the court-ordered desegregation of all-white schools, and also to obscure its slow pace, school district officials in Texas and elsewhere frequently assigned African and Mexican Americans to the same schools, a practice often made easier under a neighborhood school concept by the close proximity of urban ghettos to barrios. School administrators maintained that because Mexican Americans were "white," these schools had been desegregated under Brown and its progeny. Federal judges and HEW examiners had accepted this logic.\(^ {104} \)

HEW examiners began to accumulate evidence of discrimination against Mexican Americans only after Hector Garcia, in his new role as a member of the U.S. Civil Rights Commission, rebuked OCR for failing to answer Mexican Americans' complaints. In 1967, HEW began publishing data on black, white, and "other" groups. The last category included "any racial or national origin group for which separate schools have in the past been maintained or which are recognized as significant 'minority groups' in the community." Other examples HEW gave included: "Indian American, Oriental, Eskimo, Mexican American, Puerto Rican, Latin, Cuban, etc." Later, HEW published separate statistics on "Spanish Surnamed Americans" and issued a series of "Mexican-American Studies."\(^ {105} \) Yet, despite the emergence around the same time of a new militant attitude, this shift from official "other white" status to "other minority" confused some Mexican Americans of both the younger and the older generations. One student at Texas A&I University, which later emerged as a hotbed of Chicano activism, wrote a column in the October 1967 issue of the liberal magazine Texas Observer. He complained about the Washington bureaucracy's misguided attempt, or perhaps it was a clever ploy, to make "the second largest minority group in the country non-White."\(^ {106} \)

### A Legal Defense Fund for Mexican Americans

Mexican American civil rights lawyers had remained comparatively quiet during the 1960s because lawsuits, even against tiny rural school districts like Driscoll and Odem, were costly. The limited benefits that more "due

\(^ {104} \) San Miguel, Jr., "Let All of Them Take Heed," 175–77.


\(^ {106} \) Carlos Guerra, "Discourse By an Other," Texas Observer, 27 October 1967, 14.
process” victories might bring to the Mexican American community did not justify the expense. In October 1967, a few months after winning in the Odem case, DeAnda described the financial limitations for litigation, during the hearings in El Paso of the newly established Inter-Agency Committee on Mexican American Affairs. DeAnda testified that the lack of resources prevented the large-scale litigation necessary to fight the segregation of Mexican Americans. He also proposed remedies. First, he noted that the 1964 CRA provided for the judicial award of plaintiffs’ attorneys’ fees in certain employment discrimination cases. A similar compensation scheme, he argued, would be appropriate in voting, jury, and school discrimination suits. Second, DeAnda challenged the U.S. Department of Justice to fight the discrimination against Mexican Americans.

The year 1967 saw a turning point in litigation strategy, unrelated to DeAnda’s efforts, when San Antonio attorney Pete Tijerina obtained a $2.2 million, multi-year grant from the Ford Foundation. Tijerina used it to found the Mexican American Legal Defense and Education Fund (MALDEF), which he consciously modeled on the NAACP’s LDF. When the U.S. Civil

Rights Commission held hearings in San Antonio in December 1968, Commissioner Garcia invited Tijerina to describe why he had organized MALDEF. Tijerina said that his experience in defending Mexican American criminal defendants before all-Anglo juries—and this a decade after the U.S. Supreme Court condemned discriminations in jury selection—had convinced him that a legal defense organization was needed. Tijerina also decried the great expense of private litigation and called on the U.S. government to fight discrimination against Mexican Americans. He assured the commissioners, however, that he sought only to broaden the scope of federal efforts, not to compete with black civil rights efforts.\textsuperscript{111} As contrasted with recently increased federal support of African Americans, Tijerina noted, the government had never intervened in a civil rights lawsuit involving Mexican Americans or filed an \textit{amicus} brief to support them.\textsuperscript{112}

Tijerina did not wait for assistance from Washington.\textsuperscript{113} Instead, as \textit{amicus curiae}, MALDEF legal expertise and funds ultimately supported a suit filed by DeAnda that finally confronted and overcame the “other white” legacy. The shift required the lawyers to recognize that most of the Mexican American segregation in Texas was not the result of illegitimate testing in schools, but long-term residential patterns. Under the judicially approved “freedom-of-choice” plans for desegregation, Mexican American parents could not transfer their children into Anglo-majority schools—since, according to existing interpretations of laws, all Mexican American


students were already enrolled in “white” schools. 114 Before Mexican American civil rights advocates could attack the segregation created by “neighborhood” schools, under the constraints of “freedom of choice,” they had to overcome Mexican Americans’ equivocal minority status. DeAnda finally led the retreat from the strategic ground that he had helped conquer during the 1950s. In a path-breaking suit against the large urban Corpus Christi Independent School District (CCISD) he formally contended that the Brown rationale should apply to—and condemn as a clear denial of equal protection—the widespread segregation of Mexican Americans. 115

Accepting the Brown Rationale

Corpus Christi steelworker Jose Cisneros’s children attended such Mexican American–majority schools and they complained to him regarding the dilapidated and dirty conditions of their schools. Cisneros tried to persuade CCISD administrators to repair and improve facilities. He met repeatedly with teachers, principals, and school board members over two years, but saw no changes. Moreover, during his investigations, Cisneros discovered inequities in the curriculum and resources available to his children as compared to the courses and programs offered to students in the Anglo-majority schools. Cisneros informed other parents and community leaders of his findings. At the urging of Civil Rights Commissioner Garcia, who still lived in Corpus Christi, HEW studied conditions at CCISD for a year, beginning in September 1967. They found that eighty-three percent of the Mexican


American and African American children attended schools that were identifiable as minority-majority schools. 116

The CCISD board refused to institute the HEW's suggested improvements or to heed the parents' complaints. Cisneros was a member of the U.S. Steel Workers Union, and he turned to the leadership of the local 5022 in Corpus Christi. The local convinced the national union to pay for a lawsuit against the CCISD for maintaining a dual school system. 117 It apparently was the first, and perhaps the only, public school desegregation lawsuit to be financed by a labor union. 118 Cisneros and more than two dozen fellow unionists, African Americans as well as Mexican Americans, retained DeAnda who, in late 1968 formally initiated the litigation by paying the $15 filing fee. 119 Several co-counselors helped DeAnda gather documentary evidence, depose witnesses, and develop his new strategy. 120

116. In late 1968, the HEW examiners advised the CCISD superintendent that the school board should redraw the attendance boundaries to break up the segregated schools. HEW also suggested that the CCISD school board allow "majority-to-minority" transfers to enable students who were in the majority at a minority school voluntarily to shift to another school. Such students would be in the minority at the new school, but they would be taught in a desegregated environment. See Texas Advisory Committee to the U.S. Commission on Civil Rights, School Desegregation in Corpus Christi, Texas (Washington, D.C.: U.S. Government Printing Office, 1977), 42. For majority-to-minority transfer rules, see Swann, 402 U.S. 1 (1971), 26–27.


120. Although DeAnda probably had the most experience in school desegregation litigation in Corpus Christi, the suit against the large, urban CCISD was more ambitious than any he had pursued against the Driscoll and Odem school districts. He recruited other reform-minded attorneys to assist him, among them Houston's Chris Dixie. Dixie was representing the plaintiffs in a federal civil rights suit related to their abortive attempt to organize a farm workers' union in Texas. See Francisco Medrano et al. v. A.Y. Allee et al., 347 F.Supp. 605 (S.D.Tex., 1972) [Brownsville Division; Civ. No. 67–B-36], and Richard Bailey, "The Starr County Strike," Red River Valley Historical Review 4 (1979): 47–48. The intersection of the goals of organized labor with the cause of Mexican American civil rights was a recurrent theme during the 1960s. The brief domination by Mexican Americans of the Crystal City
Although he hedged his bets by referring occasionally to the “other white” strategy, DeAnda focused his CCISD complaint on the novel contention that the *Brown* rationale should apply to, and condemn, segregation of Mexican Americans. He marshaled evidence from history, sociology, and demography to demonstrate that despite being “white,” Mexican American Texans suffered widespread discrimination at the hands of Anglo Texans. The court hearings commenced in mid-May 1970. A significant portion of the plaintiffs’ evidence came from the CCISD’s records. DeAnda described the percentages of each of the three major ethnic groups (Anglo American, Mexican American, and African American) that made up the district’s student population and revealed the number, ethnic heritage, and assignment of each teacher in each school. DeAnda illustrated the location of the past and present attendance boundaries, the location, date of construction, and cost of newer schools and of renovating older schools. Finally, he described the school children that the CCISD had bused “in the past and in the present, and who they were, and who they are.”

Throughout, DeAnda sought to draw a picture of the CCISD as a “dual” school system that segregated its Anglos on a few campuses and placed non-Anglos, blacks, and Mexican Americans on the others. He offered the following breakdown for the 1969–1970 school year: 43 percent of the elementary students enrolled in CCISD schools were Anglo, 51 percent were Mexican American; in the junior high schools, 48 percent of the students were Anglo, 47 percent were Mexican American; and, in the senior high schools, 56 percent of the students were Anglo, 39 percent were Mexican American. Furthermore, fifteen percent of the total high school enrollment of 9,800 students, 1,300 Mexican Americans and 200 African Americans, attended schools with greater than 90 percent non-Anglo enrollment. And another 16 percent, 1,600 Mexican Americans but fewer than thirty blacks, attended schools with a 70 to 80 percent non-Anglo student body. Thirty-two percent of the Anglo students attended high schools with a 20 to 30 percent non-Anglo population (with fewer than 1,000 Mexican Americans enrolled on those campuses). Twenty percent of the Anglo high school population attended schools with a less than 10 percent non-Anglo enrollment. DeAnda argued that if the CCISD were integrated, then the municipal council in the early 1960s was another example. The campaign was led by the Political Association of Spanish Speaking Organizations (PASSO, or PASO), but the group received key support from the Teamsters. David Montejano, *Anglos and Mexicans in the Making of Texas*, 282–84; and Navarro, *The Cristal Experiment*, 17–51.

123. In the junior highs, one-third of the Mexican American and black students attended
percentage of each ethnic group in each school at each grade level would approximate each group’s percentage of the total student population. Instead, the enrollment figures showed a substantial ethnic imbalance.\footnote{124}

DeAnda made a simple but compelling case with these numbers. In the CCISD, Mexican Americans were lumped with African Americans minority much more often than they were paired with the Anglo majority. But DeAnda had to prove that this statistical “imbalance” reflected the Mexican Americans’ minority status within an Anglo-dominated, segregated system. To that end, he called Thomas P. Carter, a professor of education and sociology at the University of Texas at El Paso, to testify. Carter began by stating that blatant discrimination against the Mexican Americans, such as the formerly common signs that proclaimed “Mexicans and Dogs Not Allowed . . . ,” were “rapidly disappearing” from Texas, but “[w]e are moving into a period of very subtle kinds of discrimination.”\footnote{125} Seals asked Carter whether, in the context of the issues raised in the present lawsuit, Mexican Americans should be considered “an identifiable group.” Carter answered that he “[found] that a very peculiar question,” because the federal census bureau, and the state of Texas, regarded them as a distinct minority. Moreover, Carter declared:

\begin{quote}
[E]veryone considers [them] an ethic minority or a cultural minority. In social science, a minority is a group of people who may be a physical majority, but . . . [also] a group of people who are not full participants in the dominant society. In other words, there is discrimination. They don’t fill their proportional number of doctors, lawyer, merchant, and chief kind of slot in the society. . . . [P]articularly in Texas, it has been established that many laws were discriminatory against Mexican-Americans. So both from a legal point of view, a Government point of view, and a social-science point of view, they are a minority.\footnote{126}
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“So,” Carter concluded, “no matter how you cut it, [they] are going to come
out as a minority... from social science and from the legal... from the
cultural... and the racial point of view.”

DeAnda needed to connect the enrollment imbalances at CCISD schools
to the widespread discrimination against Mexican Americans. He intro-
duced into evidence a map of the locations of various Corpus Christi res-
idential subdivisions that originally featured deed restrictions limiting the
right of lot ownership to members of the “white” race. The restricted neigh-
borhoods were clustered along the southern and northern rims of the city.
DeAnda demonstrated statistically that very few Mexican Americans lived
in the white enclaves. The location of the deed-restricted areas around the
edges of downtown left an unrestricted zone in the center where very few
Anglos lived, an area that DeAnda referred to as the “corridor.” In the
sharply defined Corpus Christi residential segregation, neighborhood
schooling plans would impede integration. DeAnda suggested that the
perpetual segregation of Anglo American, African American, and Mexican
American students was such an obvious effect of the neighborhood schools
concept, that it might have been instituted expressly to defeat efforts to
integrate the schools.

This was the crux of DeAnda’s case. When the CCISD board drew at-
tendance zones to match well-known segregated residential patterns, its
members acted in their official capacity to perpetuate discrimination against
the minority groups. Therefore, DeAnda submitted, they had transmuted
de facto segregation into de jure segregation. Since the Supreme Court had
condemned de jure discrimination, Judge Seals had the authority and the
duty to apply the equal protection rationale of the Brown decision to Mex-
ican Americans. Over the course of five days, DeAnda went to great
lengths to prove that Mexican Americans were a de jure minority who
deserved, but were denied, equal protection of the laws. But, at the last
moment, he resorted to the lawyer’s ancient practice of arguing in the al-
ternative. DeAnda reminded the judge of the Odem and Driscoll cases, that
is, his “other white” due process victories. Seals took judicial notice of
them, and so DeAnda rested his case.

Confronted with an argument that had converged with African Ameri-
can arguments, the CCISD’s legal team fell back on strategies that many
southern districts had used to foil black lawyers. The district’s lead attor-

127. Ibid.
128. Ibid., 602, n. 11, 616–17, n. 49.
129. Ibid., 606.
130. Docket Sheet, p. 3; Cisneros v. CCISD. NARA-SWA: Civil cases, Fifth Circuit, RG
276, Box 6104, Folder for Case No. 71–2397, “... 1 of 2.”
ney, Richard Hall, did not dispute the statistics DeAnda had offered. He could not argue against the evidence of the unbalanced CCISD enrollments or debate the effects of the “corridor” on the residential patterns in Corpus Christi. Instead, Hall attempted to convince the judge that there were different interpretations, implications, and conclusions to be drawn from the facts and that the benefits of neighborhood schooling outweighed the benefits of integration alleged by Carter. Hall called Lawrence D. Haskew, a professor of education and administration at U. T. Austin, to testify. Haskew stated that neighborhood schools could eliminate ethnic and racial barriers even when residential segregation caused children to attend segregated schools. The quality of education, not the place where it was offered, was the important consideration. If the education in segregated neighborhood schools gave the students social mobility, motivated students would be able to escape from their disadvantaged environment. Little benefit resulted from transporting students from one area of the city to another, simply to place them in an integrated environment for a mere eight hours each day. Rather than busing students, Haskew declared “education conducted for people in ghettos is the best route.”

The Decision against the Corpus Christi School Board

Seals quickly prepared and delivered his decision. He foreshadowed its content by announcing that he had concluded that Cisneros and his fellow steel workers had properly filed their case as a class action. Although Congress recently had relaxed requirements for filing class actions, by amending the Federal Rules of Civil Procedure in 1966, this was a significant victory for the Mexican American and black plaintiffs. Even under liberalized procedural rules, the Supreme Court regarded some labels to be inadequate for class actions. In 1969, for example, in a case from New Mexico, the Court had rejected as overbroad a proposed plaintiffs’ class consisting of “Indo-Hispanos, also called Mexican-American and Spanish-American.”


132. Cisneros v. Corpus Christi ISD, 324 F.Supp. 599 (S.D.Tex., 1970), 600–601. See also Docket Sheet, p. 4; Cisneros v. CCISD. NARA-SWA: Civil cases, Fifth Circuit, RG 276, Box 6104, Folder for Case No. 71–2397, “... 1 of 2.”


Seals then proceeded to examine what he called the “ultimate issues” of the case. He had reduced them to five questions. First, the judge asked, could *Brown* and its progeny cases be applied to Mexican Americans, or, was *Brown* to be limited to African Americans? Second, if *Brown* could be applied to Mexican Americans in principle, did *Brown* apply to the specific facts in the present lawsuit against the CCISD’s alleged dual school system? Third, with regard to the African American students, was the CCISD a dual or unitary school district? Fourth, if the CCISD did maintain a dual school system, as defined by the Fifth Circuit cases, was it a *de jure* or a *de facto* segregated system? Finally, Seals asked, if the CCISD was a dual system, how should he, sitting as a judge in equity, remedy the situation? That is, “under what plans and programs” could he “disestablish a dual school system and establish and maintain a unitary school system?”

On the question of whether *Brown* could be applied to Mexican Americans, Seals observed that *Brown* condemned segregation, “even though the physical facilities and other tangible factors may be equal,” because it deprived all children of the guarantees of the Fourteenth Amendment. The *Brown* cases had been specifically concerned with the segregation of blacks and whites, but “it is clear . . . that these cases are not limited to race and color alone.” Judge Seals rejected outright as “patently unsound” any interpretation of the *Brown* decision, or of the Fourteenth Amendment’s equal protection clause, that claimed that “[a]ny other group which is similarly or perhaps equally, disadvantaged politically and economically, and which has been substantially segregated in public schools,” should receive less effective constitutional protection than African Americans.

Judge Seals therefore declared that for the purposes of desegregating the public schools in Corpus Christi, Mexican Americans formed an identifiable ethnic minority that deserved but had been denied equal protection of the
laws. He accepted that the evidence indicated that, in the CCISD, “no less protection should be fashioned for the district’s Mexican-Americans than for its Negroes,” because Mexican Americans “[had] experienced deprivations and discriminations similar to those suffered” by the blacks in the district. The “proof shows,” he declared, that Mexican American students in the CCISD “have been segregated and discriminated against in the schools in the manner that Brown prohibits,” and that because of that segregation and discrimination, they were “certainly entitled to all the protection announced in Brown.”

Although the judge had fully accepted the plaintiffs’ claims that the Mexican Americans were a minority worthy of Fourteenth Amendment protection, he realized that this was a novel contention. Seals therefore took great pains to argue against the conventional wisdom that they were “white.” Nonetheless, he demonstrated that he was also still grappling with the notion. “It is clear to this court,” Seals announced in a rambling judicial aside, that:

Mexican-Americans, or Americans with Spanish surnames, or whatever they are called, or whatever they would like to be called, Latin-Americans, or several other new names of identification—and parenthetically the court will take notice that this naming ... phenomena is similar to that experienced in the Negro groups: black, Negro, colored, and now black again, with an occasional insulting epithet that is used less and less by white people in the South, fortunately. Occasionally you hear the word “Mexican” still spoken in a derogatory way in the Southwest—it is clear to this court that these people for whom we have used the word Mexican-Americans to describe their class, group, or segment of our population, are an identifiable ethnic minority in the United States, and especially so in the Southwest, in Texas and in Corpus Christi.

In addition, he said that he had taken judicial notice of “congressional enactments, governmental studies and commissions,” and court opinions that

140. Ibid., 606–7.
141. Ibid., 607. Seals noted that the myriad Mexican American organizations, “such as LULAC and the G.I. Forum, and now MAYO, were called into being in response to this problem,” and that “young Mexican-Americans have recently begun to call themselves Chicanoes [sic], and their movement, La Roza [sic]. During the pendency of this suit, these Chicanos [sic] have been trying to get La Roza [sic] on the Texas ballot as La Roza [sic] Unida Party.” Cisneros v. Corpus Christi ISD, 324 F.Supp. 599 (S.D.Tex., 1970), 615, esp. n. 39. For the creation of the La Raza Unida Party, see Gómez-Quiñones, Chicano Politics: Reality and Promise, 158–59.
seemed either explicitly or implicitly to accept that Mexican Americans endured discrimination.\textsuperscript{142}

Seals found that “the objective manifestations” of ethnic discrimination were “gradually disappearing from our society.” Nevertheless, he declared, the “historical pattern of discrimination has contributed to the present substantial segregation of Mexican-Americans in our schools.” The result was a segregated dual school system. Then the judge announced that he had concluded that the African American students in the CCISD were “also segregated to a degree prohibited by law which causes this to be a dual rather than a unitary school system.” Moreover, “based primarily upon the undisputed statistical evidence,” Seals ruled that the segregated conditions also were manifested in the CCISD faculty assignments.\textsuperscript{143}

On the question of whether CCISD segregation was \textit{de facto} or \textit{de jure}, Seals decided that the evidence was mixed. He noted that “some of the segregation was of a \textit{de facto} nature,” the result of social and economic factors in Corpus Christi that caused the city’s blacks and Mexican Americans to continue to live in the “corridor.” But the judge also declared that the segregated dual district in Corpus Christi had “its real roots in the minds of men; that is, the failure of the school system to anticipate and correct the imbalancing that was developing. . . .” And it was obvious, he said, that “placing Negroes and Mexican-Americans in the same school does not achieve a unitary system as contemplated by the law.” The unitary district could only be achieved “by substantial integration of the Negroes and Mexican-Americans with the remaining student population of the district.”\textsuperscript{144}

Seals believed, in sum, that through a host of administrative decisions, the CCISD board had created and perpetuated a dual system. Among the board’s faulty decisions were “drawing boundaries, locating new schools, building new schools[,] and renovating old schools” in the predominantly black and Mexican Americans parts of town. The CCISD board also provided “elastic and flexible subjective” transfer rules that allowed some Anglo children to avoid schools in the “ghetto, or ‘corridor,’” but had not allowed the Mexican American or black students to transfer into the Anglo schools. He declared that “regardless of all explanations and regardless of expressions of good intentions,” these were official decisions that were “calculated to, and did, maintain and promote a dual school system.”\textsuperscript{145}

\begin{footnotesize}
\begin{itemize}
\item[142.] Ibid., 608, n. 34. Judge Seals took “judicial notice” of the 1960 U.S. Census of Population and a special study by the Bureau of the Census, entitled “Persons of Spanish Surname,” which was based on the 1960 Census. See Cisneros v. Corpus Christi ISD, 608, nn. 31, 33.
\item[144.] Ibid., 616–17, esp. n. 48.
\item[145.] Ibid., 617–20, see esp. nn. 50–57. For this “calculated” segregation, see also Rangel and Alcala, “Project Report: De Jure Segregation of Chicanos in Texas Schools,” 326.
\end{itemize}
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Therefore, he ruled that “as a matter of fact and law,” the CCISD was “a de jure segregated school system . . . wholly so with respect to the district’s Mexican Americans and predominantly so with respect to the district’s Negroes.” Moreover, Seals ruled,

[the de jure nature of the existing patterns of segregation within [CCISD] has as its base state action of a non-statutory variety, that is, the school board’s active pursuit of policies that not only do nothing to counteract the effects of the existing patterns of residential segregation in view of viable alternatives of significant integrative value, but, in fact, increase and exacerbate the district’s racial and ethnic imbalance. There has been a history of official school board acts which have had such a segregative effect.]

In light of this history of “official school board acts,” Seals ruled in favor of the plaintiffs and announced that he would grant them injunctive relief against the CCISD’s dual school system.

Yet Judge Seals’s rulings on the question of Mexican Americans’ status within a multi-ethnic setting did not herald the end of the school desegregation controversy. The next battle in Texas came in Houston, where the federal district judge who had for fifteen years overseen the desegregation cases strongly resisted an innovation that would upset his carefully balanced—although basically failed—desegregation plans. The Fifth Circuit delayed hearing an appeal but ultimately upheld the substance of Seals’s novel declarations regarding the minority status of Mexican Americans in Texas. In 1973, the Supreme Court chose not to review Cisneros. Instead, the justices took up equivalent questions in a case originally filed in Denver, Colorado. The Court declared in the Denver case that, despite the variations of local customs and statutes, African Americans and Mexican Americans could in some cases suffer “identical discrimination.” They ought therefore to have access to the same remedies.

This victory did not mean that either group could expect a quick end to discrimination; instead, the judicial rulings meant only that Mexican Americans would formally join African Americans in their frustrating wait for a resolution of the issue. More lawsuits, marches, and compromises followed before federal trial and appellate judges could devise a workable “tri-ethnic” remedy that promised to integrate the white, black, and brown student bodies. The search for remedies in Texas took place in and out of court and would consume another decade.

147. Ibid., 627.
149. This story is taken up in Guadalupe San Miguel, Jr., Brown, Not White: School Inte-
The Legacy of Brown and the Pragmatism of the Lawyers

James Patterson reminds readers of his recent reexamination of Brown v. Board of Education that, from the moment that Chief Justice Warren read the unanimous ruling, many contested its legitimacy. But early criticism contributed less to the case's "troubled legacy," as Patterson describes it, than the fact that, fifty years after Brown, scholars continued to debate not only the legitimacy, but the social, political, educational, and legal meaning of this controversial "milestone." Legal scholar Derrick Bell was more convinced of the decision's basic meaning. In his estimation Brown "triggered a revolution in civil rights law," because it increased African American plaintiffs' "leverage" in the nation's courtrooms. The decision ended the constitutional support of state-supported segregation—which existed across the nation but was most notorious in the southern Jim Crow regime—and raised blacks' expectations that federal judges would at long last begin to enforce their rights under the Fourteenth Amendment. Real progress toward formal equality for blacks, of course, required the enactment of civil rights legislation and, of course, local litigation to enforce the new laws through judicial decisions. Significant political and social change came slowly and only with boycotts, marches, and martyrdom. Nevertheless, African Americans justifiably celebrate the Brown decision as a turning point in their history.

The legacy of Brown is more troubled for Mexican Americans. In the years immediately following the decision, it was reasonable for Mexican American lawyers to regard the decision as applicable only to the sort of discrimination suffered by African Americans. Because popular racism as well as some official biracial classifications survived Brown, it was also reasonable for them to rely on tried and true approaches. The legal profession is naturally conservative—not in terms of political ideology, but in terms of respecting and recognizing settled and preferably favorable precedent. The changes in African Americans' political and social positions that had developed during the decade after Brown did not mean that similarly conservative federal judges would—if asked to do so—agree to over-

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look a well-established jurisprudence, recognize Mexican Americans as a *de jure* minority, and grant equitable relief under *Brown*.

Why did Mexican Americans lawyers finally seek to appropriate the “revolutionary” decision *Brown* and so stake a claim to the judicially administered equitable remedies available through the equal protection clause? Critics of the legal profession as well as critics of remedial civil rights programs such as affirmative action would likely argue that the Mexican American lawyers were opportunistic and cynical—that they sought certain legislatively derived benefits and finally hit upon the proper formula for obtaining them. Why else, critics (themselves cynics) might ask, would legal representatives of an ethnic group proud of its historically mainstream identity suddenly seek to obtain judicial recognition that their clients were in fact members of a minority that as a class had been subjected to discrimination by a dominant majority? Part of the answer, I believe, is that lawyers like DeAnda were pragmatic realists, not cynical opportunists. They adopted an “other white” identity because judicial precedents prior to *Brown* dictated that approach as the best for achieving their goals. They did not attack the constitutional foundations of Jim Crow because such an approach would not serve their clients’ immediate needs and, in all likelihood, would fail completely. African American lawyers, by contrast, planned and executed a constitutional revolution because they needed one. By the 1960s, frustrated by a general lack of social progress, Mexican American lawyers needed a revolution as well, and they at long last abandoned a dead-end strategy.

Such were the external legal considerations that contributed to a paradigm shift on “other whiteness.” But another important impetus for the novel premises of the *Cisneros* suit emerged from social and political pressures that were internal to Mexican American politics (albeit also characteristic of the 1960s). A younger generation of activists began to stake out a new identity as a mystical “bronze race”—the Chicano movement’s *La Raza*—that explicitly repudiated the older generations’ painstakingly constructed whiteness. The need to combine the internal and external forces was revealed when Chicano students protested the Anglos’ cultural hegemony by walking out of classrooms in the late 1960s. Two-thirds of Mexican American students attended Mexican American majority schools. Forty percent were enrolled at schools where the student body was at least 80 percent Mexican American. Twenty percent attended schools that were at least 95 percent Mexican American.153 Such imbalance was maintained by the reliance by school boards on neighborhood schooling plans for deseg-

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regation. No litigation that attacked testing or tracking would have changed this ethnic concentration. The use of the existing biracial (black-white) formulas, moreover—under which administrators transferred African American students into predominantly Mexican American schools and called the schools “desegregated”—promised to isolate both populations even more instead of ending a separation that was, according to Brown, inherently unequal. In this way, perhaps, school administrators themselves revealed to Mexican American lawyers the bankruptcy of “other white” arguments and the utility of Brown.

The contemporaneous creation of MALDEF had less to do with the shift in thinking than might be expected. The upheavals brought by the black civil rights struggle, the farm workers’ movement, and antiwar protests inspired many disaffected Mexican-descended youths to adopt similar goals and direct action tactics—such as walkouts and other disruptive demonstrations—in order to combat the inequities they encountered. As a result, however, activists frequently found themselves sanctioned by school administrators or even law enforcement agencies. Instead of suing schools to change the rules of desegregation, therefore, MALDEF undertook a number of cases that established the new organization as something of an unofficial civil liberties bureau for militant Chicano students. Significantly, in these cases, MALDEF’s attorneys did not argue—and in civil liberties cases had no reason to claim—that Mexican Americans were and ought to be considered a group distinct from Anglos. Nevertheless, MALDEF’s early victories in this field helped to reestablish litigation as a tool for vindicating Mexican Americans’ civil rights.

The recognition that formerly favorable precedents had become counterproductive, combined with the challenges to the conventional wisdom posed by the Chicano movement, led some lawyers to rethink the basis of Mexican Americans’ civil rights litigation. The plaintiffs and their lawyers in Corpus Christi opened an important new front in the civil rights strug-


155. Ibid., 157–58. In its early years, MALDEF also accepted minor claims of the “legal aid” variety, concerning minor disputes, which did not actually require legal counsel. O’Connor and Epstein suggest that, despite some victories, MALDEF was not an effective constitutional litigator until at least 1973; moreover, even then, it lost more often than it won. O’Connor and Epstein, “A Legal Voice for the Chicano Community,” 285.
gle by abandoning the dubious benefits of whiteness—thus adopting the heart of the Chicano argument, if not the whole body—and choosing to make fresh claims under *Brown*. The favorable decision in the *Cisneros* litigation established a new precedent that allowed Mexican Americans finally to commence in earnest what Rubén Donato has called the “other struggle for equal schools.”

The Mexican Americans’ newly reinvigorated legal efforts would continue to evolve in response to changing social, political, and legal conditions. The unfortunate truth, of course, is that Mexican Americans had not missed much actual school desegregation during the fifteen years that they sat on the sidelines—African Americans had in fact made little progress during that first decade and a half after *Brown* was decided. But Mexican Americans nevertheless saw evidence that some slow progress was being made. In 1979, for example, James DeAnda was appointed to a new judicial seat in the Southern District of Texas and so became the nation’s second Mexican American federal district judge. He was sworn in by the first, Reynaldo Garza, who since 1961 had risen by dint of seniority to become the chief judge in the district.


157. The next year, President Jimmy Carter elevated Garza—after Garza declined an offer to become U.S. attorney general—to the Fifth Circuit, where he became the first Mexican American on *that* influential appellate court. Judge Garza had been chief judge of the Southern District since 1975. See Fisch, *All Rise*, 151–52. Mexican Americans were lobbying for more judges that represented their minority group. See “5 Groups Demanding 2 Spanish-named Judges in West Texas District,” *Houston Post*, 19 July 1979, 7A. Judge Garza’s replacement was Filemon B. Vela, the third Mexican American to serve in the Southern District. Vela was born 1 May 1935 in Harlingen, Texas. After serving as a U.S. Army private from 1957 to 1959, he attended law school at St. Mary’s University in San Antonio, where he earned his J.D. in 1962. He briefly entered private practice in Harlingen, then moved to Brownsville in 1963. Vela served there as a city commissioner in the early 1970s. In 1975 he became a state judge for Cameron and Willacy Counties, in the 107th District. He was still there when the president appointed him to Garza’s old seat in Brownsville, which he assumed on 18 June 1980. “Vela,” in *Judges of the United States*. 

Texas Mexicans and the Politics of Whiteness

ARIELA J. GROSS

These two fascinating articles seek to fill an important lacuna in the burgeoning literature on the legal construction of whiteness. While LatCrit theorists in the legal academy have urged civil rights scholars and race critics to transcend the "black-white paradigm" of U.S. race studies, the majority of legal histories of whiteness have focused on two sets of cases: trials in the southeastern United States in which local courts tried to draw the line between "white" and "negro"; and cases about immigration and naturalization in which Federal courts determined whether particular foreign immigrants were suitably "white" for citizenship. Likewise, although there have been several important social and cultural histories of Texas Mexicans and whiteness in the last fifteen years, they have not considered the legal realm. The time is ripe for attention to the legal history of Mexican Americans' civil rights struggles in Texas, especially as they illuminate the shifting racial identity of Mexican Americans in the Southwest.

Steven Wilson’s excellent study of the series of challenges to school segregation brought by Mexican American advocates in the mid-twentieth


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The century is most importantly a contribution to civil rights litigation history. But taken together with Clare Sheridan’s close reading of the Hernandez jury selection case, it offers an opportunity to consider the meaning of Mexican Americans’ “other white” status in litigation strategy, in judicial rhetoric, and in the broader culture. The first two of these three arenas are the more straightforward. Wilson’s rigorous archival research sheds light on the ways litigators sought to make use of the limited gains they had achieved under the “other white” standard before abandoning it for the Brown precedent. Courts, on the other hand, as Wilson and Sheridan both demonstrate, used Mexican Americans’ nominal whiteness primarily to deny them relief from Jim Crow practices. Then what did it mean at all that Mexicans were white by law?

One of the most challenging questions for all of these studies of law and race is the relationship of legal and cultural norms of racial meaning. When courts asked juries to decide an individual’s racial status, was the law simply reflecting cultural norms of identity? Or, when the judge instructed the jury about the statutory definition of “mulatto” or “mestizo” in fractions of “blood,” were legal definitions themselves creating culturally influential conceptions of race? In the Texas Mexican context, when courts used the terms “Mexican race” or “Mexican nationality,” were they creating or reflecting the meaning of Mexican identity? And how can we tell? Based on the evidence before us in these two articles, it is hard to do more than speculate, because both draw mainly on legal materials. Wilson’s extensive research into the papers of Mexican American lawyers and the briefs and trial records of cases makes it possible to gain insight into litigation strategies. But it does not address directly the broader relationship of law to identity, which requires immersion in other intellectual and cultural discourses before patterns emerge.

In her study of the jury cases, Sheridan, like legal scholar George Martinez, suggests that Mexicans were legally white but socially non-white. Thus the law made little difference because it only established empty formal categories, filled in by discriminatory practice.4 According to this reading, there was a gap or a lag between legal and social meanings. This characterization has merit, yet it seems to fall a little short of the full picture. If law was so irrelevant, why study it at all? And why did rights-seekers make any claims on it at all? Perhaps many Anglos continued to see Mexican Americans as an inferior race, but what about Mexican Americans’ self-identification? What was the interaction between self-identification and

litigation strategy? How should we understand, for example, League of
United Latin American Citizens (LULAC) lawyers arguing racial discrimi-
nation against Mexican Americans in jury selection cases in the 1930s, at
the same time that they were trying to have Mexican Americans’ census
classification changed to “white” and striving in other ways to distance
themselves from “people of color” and Jim Crow practices?

To put the question in its most basic form: Were Mexican Americans
white in mid-twentieth century Texas? Were they white in some realms and
not others, to some observers and not others, or in some regions and not
others? David Montejano has argued that “the identification of Mexicans
as a distinct ‘race’ became, like the question of political representation and
civil rights, an important issue to be settled locally.”

Montejano’s and Neil Foley’s social histories of Texas suggest that
Mexican Americans’ relationship to whiteness has always been ambivalent.
During the years of the Texas Republic, some Texas Mexicans were able
to purchase and hold onto their land by claiming whiteness through pure
“Spanish blood.” Already, in the debates over the annexation of Texas in
the 1840s, Anglo politicians referred often to the inferiority of the “Mex-
ican race,” using metaphors of dirt, including the “greaser” epithet. Yet
Anglo-Texans who married Mexican women “whitened” their spouses by
calling them Spanish. And many of the flood of new immigrants from
Mexico in the years between 1890 and 1910 had “learned whiteness and
‘whitening’ before coming to the United States.” In those instances and
many others, racial distinctions to some extent tracked class and landhold-
ing. Montejano has convincingly shown that patterns of Mexican-white
segregation map onto the divisions between “ranch counties,” where Mex-
icans continued to be landholders, and “farm counties” in which commer-
cial farming took over in the first decades of the twentieth century, and
Mexicans were sharecroppers for white landholders. Simply put, where
Mexicans held land, they were far less likely to be excluded from schools
and other public accommodations, and “Mexican” was less likely to be a
racialized identity.

By the 1930s and 1940s, when Mexican American lawyers began liti-
gating in earnest to break down the barriers of Jim Crow that had been
erected in the previous several decades, “Texas Mexicans increasingly
began to call themselves white.” The claim of whiteness seemed to be
Mexican Americans’ best way to “overcome the worst features of Jim Crow

5. Montejano, Anglos and Mexicans, 252.
segregation,” despite the fact that most Anglos saw “Mexican” as a designation of race rather than nationality. Yet, as Ian Haney López points out, even LULAC, which stressed assimilation and “often emphasized that Mexican Americans were White,” also “stressed . . . cultural pride,” and this emphasis on ethnic pride “often led LULAC to identify Mexican Americans as a distinct race.” According to Haney López, LULAC “resolved the tension between seeking both difference and sameness by pursuing these on distinct planes: difference in terms of culture and heritage, but sameness regarding civil rights and civic participation.” 9 While both Wilson and Sheridan characterize LULAC and other Mexican American activists as unequivocal promoters of assimilation and white identity, the picture that emerges from their research suggests that ambivalence ran deep.

Mexicans’ racial identity according to government classification has been almost equally ambiguous. The 1848 Treaty of Guadalupe Hidalgo guaranteed U.S. citizenship to all Mexican citizens in the Mexican Cession without reference to racial identity. In 1897, the Rodriguez case held that although Mexicans were probably not white according to anthropology, the proper reading of the 1848 treaty gave Mexicans broad citizenship rights, hence eligibility for naturalization. Yet the first efforts to count Mexicans, in the 1930 U.S. Census, counted them among “people of other races,” with “Mexican” being one of the other races. Whereas the 1930 Census counted 686,260 “people of other races” in Texas, it counted only 3,692 “white people born in Mexico.” Because of the vigorous opposition to this racialization of “Mexican” by LULAC as well as by the Mexican government, the 1940 Census categorized Mexicans as white unless “definitely Indian or of other non-white race.” 10

How can we make sense of what was happening in Texas courts during the 1930s and 1940s at the very time Mexicans were in the midst of these changing cultural and census classifications? Beginning with the Del Rio ISD v. Salvatierra case in 1930, M. C. Gonzales, attorney for LULAC, inaugurated efforts to integrate racially segregated school systems, arguing racial discrimination against Texas Mexicans. The court in that case explained that the plaintiffs were “designated, for convenience of expression in the opinion, as the Mexican race, as distinguished from . . . all other white races.” 11 As Wilson explains, the decision appeared on its face to be

10. During the 1950s, 1960s, and 1970s, the census used a variety of methods to count people of Mexican origin in the five southwestern states, including lists of Spanish surnames and the categories “Spanish Mother Tongue,” “Spanish Language,” “Spanish Heritage,” and “Spanish Origin.” Beginning in 1980, the general term “Hispanic” was introduced as an ethnicity category following the “race” question on the census form.
11. ISD v. Salvatierra, 33 S.W. 2d 790, 792–93.
a victory for LULAC, because the court ruled that school districts could not segregate indiscriminately against Mexican children.

Yet in fact the case was a setback. The court dissolved the temporary injunction against the school district and approved segregation based on language and migrant worker status. This “cultural discrimination” became the template for future state-sanctioned racial inequities. In that sense, Salvatierra was a harbinger of modern racial discrimination cases, in which courts recognize only facial race-based classifications, or individual intentional bias, as true discrimination, whereas classifications based on supposed cultural or linguistic differences, even those highly correlated with race, are given little scrutiny. In that case, the court accepted the testimony of the school superintendent that “people of Spanish or Mexican extraction” or “descent” had different talents from those of “Anglo Saxon parentage,” including abilities in math, music, and handicrafts, yet denied any “motive of segregation by reason of race or color.” The ascription of different characteristics based on Mexican ancestry did not count as “race”-based differentiation.

It is instructive to compare Salvatierra to Ramirez v. State, the Texas jury discrimination case of the following year. In Ramirez, the appellant (represented by an Anglo attorney) “charged that there had been an unjust discrimination against the Mexican race” because the jury that convicted him contained no one “of the Mexican race and Mexican descent known as Mexican.” County officials testified that they did not consider that “Mexicans of Menard County were intelligent enough,” educated enough, or spoke English well enough to sit on juries, and that Mexicans’ “customs and ways are different,” but that there was “no discrimination on the basis of race or color” in jury selection. The court simply reported this testimony in its opinion and accepted it without discussion, apparently finding it self-evidently sound.12 Thus, efforts by Texas Mexican plaintiffs in the 1930s to raise claims of race discrimination, whether in the jury context or the school context, fell victim to courts’ willingness to accept almost any justification for exclusion or differentiation that did not explicitly refer to “race or color.” In other words, for the purposes of antidiscrimination law, “race” meant “skin color,” and only discrimination based explicitly and intentionally on color counted as racial discrimination.

The question of whether or not Mexicans were a “race” did not arise before 1946 because there was not yet any credible basis for a civil rights claim in Texas in either case—as a “race” or as a “nationality.” Again, in Carrasco v. State (1936), the court found “no evidence of discrimination solely because of race” in jury selection, using “Mexican race” and “Mexican nationality” interchangeably in the opinion.13

the court again found that jury commissioners had excluded members of the “Mexican race” on the basis of language qualifications, without intentional discrimination.14

What changed in the 1940s? Why did the racial identity of Mexicans become an issue in court? A few explanations are possible. First, the 1940 Census reclassified Mexicans as white unless clearly a member of an Indian nation or other non-white group. This made available to the courts the argument that Mexicans were in fact white, rather than one of the “other races,” as they had been classified in the 1930 Census. Second, courts now had an instrumental reason to hold that Mexicans were white, for if Mexicans were a non-white race, the new precedent of Norris v. Alabama might apply to them in jury selection cases. Thus, in the 1944 Sanchez jury selection case, the appellant once again argued discrimination against the Mexican race, but this time the Texas Court of Criminal Appeals held that “Mexican” was a nationality, not a race; hence, Mexicans were not discriminated against because whites were on the jury. Norris did not apply. The same thing happened in the 1946 Salazar, 1948 Bustillos, and 1951 Rogers jury selection cases. In the 1951 jury selection case of Sanchez v. State, attorneys Herrera and DeAnda complained of “discrimination against Mexican-Americans as a race and people of Mexican extraction and ancestry as a class.” The court berated them for their “exhaustive brief... citing cases which, either intentionally or loosely, refer to Mexican people as a different race. They are not a separate race, but are white people of Spanish descent.”15

Meanwhile, in the school desegregation cases, the courts were confirming their condemnation of “arbitrary and discriminatory” language discrimination, in the unreported Delgado v. Bastrop ISD case. Yet despite the high-minded pronouncements of courts and the Texas State Superintendent of Public Instruction, most school districts continued their traditional practices of segregation. Thus, in both the jury selection and school desegregation contexts, Mexicans’ status as “white” won them no particular gains in Texas courts in the 1940s and early 1950s.

The first case in which Mexican Americans won a clear victory using the “other white” strategy was the In re Hernandez jury selection case, decided two weeks before Brown v. Board of Education. Thus, Hernandez should be seen as the beginning and not the culmination of Mexican American litigators’ strategic use of whiteness claims to fight Jim Crow. Read-

15. Sanchez v. State, 181 S.W. 2d 87 (1944); Salazar v. State, 193 S.W. 2d 211 (1946);
    Bustillos v. State, 213 S.W. 2d 837 (1948); Rogers v. State, 236 S.W. 2d 141 (1951); Sanchez v. State, 243 S.W. 2d 700, 701 (1951).
ing the two articles together, it becomes clear that the "other white" argument was very new in 1954, although it came to seem surprisingly old. Before that date, Mexican whiteness was a cynical trump used by courts to dismiss discrimination claims. The breakthrough in Hernandez was the court’s acceptance of Cadena’s argument that Mexicans were treated as non-white by Anglos despite the fact that they were actually white. From there, the litigation team of DeAnda, Herrera, and Cadena went on to successfully invoke Mexican whiteness in a series of school desegregation cases, building on the Hernandez precedent. Only in the aftermath of the 1964 Civil Rights Act, when schools began to use Mexicans’ "other white" status cynically to “desegregate” black schools using Mexicans—much as courts in the 1940s had relied on Mexican whiteness to deny their civil rights claims—did the litigators shift their focus, abandoning the “other white” strategy in the Corpus Christi school litigation.

Why did Mexican Americans hold on to whiteness for as long as they did? Wilson suggests that the “other white” strategy can be explained by legal pragmatism. Sheridan argues that whiteness was both useful to gain legal advantage and material benefits, as well as psychologically important to distance Mexican Americans from African Americans. Neither presents evidence of whether Mexican Americans thought of themselves as white outside the courtroom, although Wilson does suggest that Anglos viewed them as white, but socially inferior. Sheridan gives some anecdotal evidence that some Mexican American leaders understood their identity as that of an ethnic group striving for assimilation, and certainly that was LULAC’s political strategy. It is difficult to disentangle legal strategy from cultural trend, yet the fact that the “other white” strategy was itself relatively new in 1954 does suggest a more instrumental interpretation, rather than a deep psychological need to identify as white.

Can legal pragmatism explain the second shift, however, from “other white” to “brown”? Was that transformation a product of the cultural revolution in ethnic pride? Was it Brown that made such a difference, or was it The Movement? When Wilson arrives at the late 1960s shift in legal strategy from “other white” to “brown,” he suggests that the shift reflects both sound strategy and larger cultural discourse. Again, it would be interesting to investigate further the interplay between the new identification of Mexican Americans with other “minority groups” in litigation agendas and the Chicano movement’s evocation of “La Raza”—Chicanos as a non-white mestizo race.

To get a firmer grip on Mexican Americans’ shifting racial identity, we need to learn more about the way Mexican Americans in Texas perceived themselves, presented themselves, and were viewed by others. Wilson mentions changing census categories and a burst of ethnic pride in “La
Raza.” But these are incidental to Wilson’s main focus, an untold constitutional history similar to Mark Tushnet’s excellent work on NAACP strategies. What about outside the courtroom? Did this legal definition have any influence outside the courtroom? For example, how were the children of Mexicans and Anglos defined? If there were legal cases involving such children, they might allow one to get at the question of Mexican racial definition better. Attention to local trials might yield evidence of the interaction between legal definitions of Mexican whiteness and popular understandings of the “Mexican race.”

For example, *Kirby v. Kirby* was a 1921 Arizona case, in which Joe Kirby sued his wife Mayellen for an annulment rather than a divorce, on the ground that their marriage had violated the state’s antimiscegenation law because he was “a person of Caucasian blood” whereas she was “a person of negro blood.” As historian Peggy Pascoe chronicles, the trial immediately ran into complications regarding Joe Kirby’s white status when his mother, Tula Kirby, took the witness stand, testifying in Spanish with an interpreter:

Joe’s lawyer: To what race do you belong?
Tula Kirby: Mexican.
Joe’s lawyer: Are you white or have you Indian blood?
Tula Kirby: I have no Indian blood.
On cross-examination:
Mayellen’s lawyer: Who was your father?
Kirby: Jose Romero.
Mayellen’s lawyer: Was he a Spaniard?
Kirby: Yes, a Mexican.
Mayellen’s lawyer: Was he born in Spain?
Kirby: No, he was born in Sonora.
Mayellen’s lawyer: And who was your mother?
Kirby: Also in Sonora.
Mayellen’s lawyer: Was she a Spaniard?
Kirby: She was on her father’s side.
Mayellen’s lawyer: And what on her mother’s side?
Kirby: Mexican.
Mayellen’s lawyer: What do you mean by Mexican, Indian a native [?]
Kirby: I don’t know what is meant by Mexican.
Mayellen’s lawyer: A native of Mexico?
Kirby: Yes, Sonora, all of us.16

In Tula Kirby’s testimony, we see evidence of a popular counter-narrative of Mexican identity that defies racial categorization. While Kirby appears to draw some distinction between “Spaniard” and “Mexican,” it is elusive. When Mayellen’s lawyer tries to pin her down to a non-white identity for “Mexican,” such as “Indian” or “native,” she resists. Yet neither does she identify herself as white or Caucasian. She apparently considers “Mexican” to be her racial identity, or at least identifies strongly as Mexican and considers that to be her primary source of identification, with “race” perhaps less important. At the end of the testimony, Joe’s lawyer claimed to have established Joe’s “Caucasian” identity. Mayellen’s lawyer “scoffed, claiming that Joe had ‘failed utterly to prove his case’ and arguing that ‘[Joe’s] mother has admitted that. She has [testified] that she only claims a quarter Spanish blood; the rest of it is native blood.’ At this point the court intervened. ‘I know,’ said the judge, ‘but that does not signify anything.’”

In ruling for Joe, the judge’s opinion explained that “Mexicans are classed as of the Caucasian Race. They are descendants, supposed to be, at least of the Spanish conquerors of that country, and unless it can be shown that they are mixed up with some other races, why the presumption is that they are descendants of the Caucasian race.”

Here was a case where a popular narrative of Mexican racial identity clashed with the legal presumption of Mexican whiteness, in this case to the disadvantage of Joe Kirby’s “negro” wife, whose racial identity was seen as literally facially self-evident. Looking at trials involving the racial identity of Texas Mexicans might help us to answer the vexed question, Were Mexican Americans white? Local trials might also yield surprising results. Laura Gomez’s recent research on Mexican Americans and outcomes in criminal courts in New Mexico suggests that the native Mexican population participated substantially in the criminal justice system in New Mexico, even sitting in judgment on European-American males.

There is a considerable sociological literature on changing racial and ethnic identification, and in particular self-identification, among Mexican Americans and Latinos in the U.S. more generally. In New Mexico, where Spanish identification has been higher among Latinos than elsewhere in the United States, identification as “Spanish American” or “Hispano” in the first decades of the twentieth century gave way to “Chicano” in the 1960s as part of a radical political mobilization. “Hispanic” became popular in the late 1970s and 1980s. In part this was a way for ethnic political lead-

18. Ibid., 468.  
ers to draw diverse groups together around a liberal political agenda while avoiding divisive questions of cultural heritage, as well as distancing themselves from “more confrontational, Chicano politics.”20 “Mexican American” never took hold because its connotations of foreign-ness were resisted by “New Mexican citizens” whose families’ residence predated statehood.21 In the 1980 U.S. Census, when “Hispanic” became an ethnic category separate from the question of racial identity, 40 percent of Latino respondents checked “other” in response to the “race” question. Clara Rodríguez suggests that they did so because they considered themselves to be non-white, based on a definition of whiteness that encompassed both “race” and “culture.”22 If Texas Mexicans followed a similar path, did they do so in reaction to changes in legal classification, or did their changing political sensibilities influence legal transformations?

Sociologists and legal scholars have also debated at length whether “Latinos” are, in fact, a race or an ethnicity in the contemporary context. Most sociologists have treated Latino identity as an ethnicity rather than a race. Following that pattern, legal scholar Juan Perea argues that a racial paradigm has failed Latinos and that an ethnic paradigm better captures the Latino experience. By contrast, Ian Haney López argues that scholars should understand Latino identity in terms of both race and ethnicity and that it would be a mistake to ignore the ways in which Latino identity has been racialized. The legal history chronicled here seems to support Haney López’s caution that “Mexican” identity in the U.S. has been racialized.

If, in fact, Mexicans’ legal whiteness was used instrumentally by both advocates and judges (for different ends), did the legal regime of whiteness have any larger cultural significance? Steven Wilson avoids this judgment entirely. While he seems to suggest that legal strategies were influenced somewhat by larger cultural trends, like ethnic pride, his main conclusion about the impact of the strategies has to do with their success in winning new rights and representation for Mexican Americans in Texas. Clare Sheridan, however, wants to make broader claims about the impact of legal ideology. She puts forward two arguments on this point: First, she claims that the jury selection cases, and the composition of Texas ju-

ries itself, reveal the “congruence of whiteness with American identity”; second, she argues that the “other white” strategy pursued by the Mexican American lawyers in Hernandez “upheld the power of whiteness, while partially challenging America’s racialized self-understanding.”

The first of these claims is an argument about race as a practice of the production of hierarchy: by effectively reserving jury service, an essential component of citizenship, for whites, Texans made whiteness congruent with American-ness. The reasoning is slightly circular, however; if what was at work was primarily nativism rather than racism, one might say that American-ness was congruent with American-ness. What was it about the de facto exclusion of Mexican Americans from juries that made the denial of citizenship racial? It would be interesting to broaden Sheridan’s discussion of race and citizenship by thinking more deeply about the relationship between “race” and “nationality.” As several theorists have argued, the very idea of the nation, historically, has depended upon the discourse of race; “race” and “nation” are both artifacts of the Enlightenment.23 Can we distinguish nationalism from racialism and is the distinction a useful one?

Sheridan’s second claim, about the Mexican American litigants both challenging and upholding the power of whiteness, echoes scholars’ readings of many different subjects’ acts of “passing”—“kinda subversive, kinda hegemonic,” as Eve Kosofsky Sedgwick once memorably wrote.24 Outsiders’ claims for inclusion in regulatory state regimes, from racial hierarchy to marriage, always risk that double-edged sword. By focusing on the inspirational stories of individuals, Wilson avoids reaching this more bitter-sweet conclusion about the lawyers he has studied.

In conclusion, what struck me most about the depressing series of pronouncements from Texas courts justifying the second-class treatment of Mexican American schoolchildren and criminal defendants based on a litany of unsubstantiated stereotypes was the continuing respectability of what Etienne Balibar has called “cultural racism.”25 For as long as we equate race with biology and racism with the crudest forms of racial scientism, as American courts have done, discrimination on the basis of cultural and linguistic difference will appear neutral and respectable, and racial hierarchy will continue to flourish.


Ariela Gross offers a thorough summary of points made in the two articles in this Forum, and integrates the articles well. As she notes, taken together, they provide an examination of the “other white” litigation strategy employed by Mexican American civil rights lawyers.\footnote{See Ariela J. Gross, “Texas Mexicans and the Politics of Whiteness,” \textit{Law and History Review} 21 (2003): 195–205.}

In her comments on the articles, Gross asks two main questions of me. First, did changes in legal strategy create or reflect Mexican identity? How did this affect Mexican Americans’ self-identification? Second, can we distinguish nativism from racism? To a certain extent, the question of causation cannot be answered. The study of court cases tends to be a study of elite beliefs. While informed by popular logic, the text (decisions, arguments, and so forth) is filtered through an elite lens. The direct testimony of plaintiffs often is unavailable (particularly in lower court cases). Instead it is interpreted by the lawyers and judges involved. Moreover, it is these interpretations that set the parameters within which the plaintiffs must maneuver. It is this maneuvering that is so interesting. How did lawyers make sense of the world around them within the strictures of settled, legal meaning? How did they tweak accepted legal arguments to their advantage? How did they “spin” popular understandings to create new meaning? The legal arena is merely one aspect of a broader cultural milieu, but it is crucial for the struggle over meaning. As we see in the Hernandez case, the same racial “reality” can be assigned different meanings. Lawyers were both creating a new interpretation within the parameters of the law and reflecting current common knowledge. They were successful because they managed to reflect the dominant paradigm and simultaneously harness it to create a new interpretation.

Gross asks a related question regarding Mexican Americans’ self-identification. This question is interesting, but beyond the scope of my article, which offers a close reading of a particular case. However, as I note in the
article, I did find hints of the answer in a monograph discussing the case, published by Hernandez’s lawyers evidently responding to complaints that their arguments placed their community perilously close to being identified as non-white. Also there were clues in Paul Taylor’s interviews with Mexican-ancestry laborers in which they clearly socially distanced themselves from black laborers, while asserting that it was acceptable for “Mexicans” and whites to “mix.” As Gross suggests, one must find sources beyond legal cases to understand broader, societal interpretations.

Perhaps in a more rhetorical vein, Gross asks of me why one would study the law at all if it has so little relation to how people “actually” identified. Here, my answer is straightforward. The courts remained the arena for hope. As citizens, Mexican Americans had access to the courts, an advantage “other non-whites” did not have. The courts provided the stage for Mexican Americans’ ability to make citizenship claims, and they provided a pulpit from which Mexican Americans posed an alternative view of their identity to a wider audience. Gross makes the excellent suggestion that further research on local cases may shed light on Mexican Americans’ ways of conceiving their place in the racial and cultural orders. Mexican Americans deserve further research precisely because their ambiguous location in the racial order challenges its boundaries and complicates our notions of race.

Gross’s second main question—whether we can distinguish nativism from racism, and what made the exclusion of Mexican Americans from juries racial—goes to the heart of these cases. The insidiousness of the denial of Mexican Americans’ citizenship rights lies in the way in which they were racialized. Elsewhere, I have called Mexican Americans a “racialized ethnic group.” Evidence of their “foreignness,” such as speaking another language (whether or not they actually do speak Spanish) is used as proof of their lack of fitness for citizenship. Language ability becomes a racially marked cultural practice. In the Progressive Era, Anglos accused “Mexicans” in Texas of being unfit for citizenship because of their supposed inability to independently exercise their right to vote. They were seen as biologically incapable of participating in the democratic system because of their history and cultural characteristics. That is, cultural markers were raced. In a recent article,2 I describe the debates in the 1920s about Mexican immigration in which both pro-immigration and anti-immigration advocates posited that Mexicans were or were not a threat to American citizenship based on their inherent biological characteristics. In all of these examples, the distinction between race and nationality collapses and na-

Cultural Racism and the Construction of Identity

Nationality (or, what we now think of as ethnicity) is racialized. Because of this, and because the whiteness of “American” was obscured by its normativity, we can not distinguish nativism from racialism in this context. This is precisely what Balibar means when he talks about cultural racism.³ In the Hernandez case, the language of nationality displaced the language of race, but it encompassed the same set of biases and assumptions. Recent claims for “cultural citizenship” are a response to this racialization of culture and are a demand for recognition of belonging; they are a demand to decouple whiteness, Anglo-European culture, and Americanness.⁴

I agree with Gross that unless we arrive at a broader definition of race and racism, we will continue to impute racial meaning into cultural practices. Yet in today’s rapidly changing racial milieu, there are great opportunities to disrupt our conception of racism as individual prejudice based on unchanging, biological markers. That is why the study of such “in-between peoples” as Mexican Americans and mixed-race individuals is so vital. Beyond the black-white dichotomy, there’s a world of cultural racism to uncover and destabilize.

Ariela J. Gross is generous in praising research accomplished and helpful in suggesting routes for future investigation. In response to such a model of constructive criticism, I can only plead no contest to the main charge that, while examining changes in legal strategy and judicial rhetoric in school segregation litigation, I neglected to explore important aspects of Mexican Americans’ own understanding and actual experiences of “other whiteness.” As a result, the “ordinary” people in my tale seem to lack agency even in their own cases. This is an unfortunate but frequent limitation of historical studies of litigation, not least because—despite the presence in the courtroom of a plaintiff or defendant—trial records most clearly reveal the professional concerns of lawyers and judges. Even transcribed testimony (which is not always available) may tell us more about the lawyer’s strategy and the judge’s mood than a witness’s reality. Gross rightly asks the question directly that I (admittedly) avoided entirely: “did the legal regime of whiteness have any larger cultural significance?” Put another way, I understand this question to be: did the fine legal distinctions hammered out by Mexican American attorneys and Anglo American judges matter at all to the ordinary people—parents, workers, and defendants—whether Mexican or Anglo? I think that the answer is yes, gradations of whiteness mattered even to the lay public. Yet, it seems clear as well that whiteness was experienced differently by members of various economic and social classes of Mexican Texans.

As Gross notes, the authors of two recent histories of Texas discuss the phenomenon of Mexican whiteness, but neither describes the important role that laws and courts played in constructing and policing the inferior “other” whiteness. Both examine the role that class played in Texas culture, however, and they suggest how racial constructs were filtered through the lens of class. David Montejano, for example, argues that “elements of race

and class were inextricably interwoven in the minds of Anglo residents [of Texas]."² Neil Foley suggests that these were similarly wedded in the minds of Mexican Texans, since, well before they encountered Jim Crow’s “black-white binary” in Texas, class-conscious Mexicans sought rhetorically to “whiten” themselves, in order to maintain or claim privileged status in a highly stratified society.³ Yet, no matter how interwoven, race and class were not interchangeable—because the legal regime mattered. The race distinctions in Texas were both immutable and enshrined in law, while class distinctions were neither.

Where Mexican Texans held property, ran businesses, and entered politics (if they joined the Democratic Party machine), they enjoyed local influence as well, and their children were far less likely to be excluded from Anglo schools and public accommodations. Middle-class Mexican Texans like James DeAnda were able to attend the best public law school in Texas years before it was “desegregated.” The “other white” distinction provided a framework enabling Anglo Texans to justify (stressing “other”), and Mexican Texans to resist (emphasizing “white”), discriminatory behavior and attitudes that were based more in class rules than in racism. Even though the lawyers and judges had established that Texans of non-African, Hispanic descent were “white by law,” ordinary Anglo Texans sought to differentiate themselves from poor Mexicans by references to the latter’s use of an alien language, undesirable migrant worker status (later, illegal immigrant status), or even lack of hygiene. In Texas, these prejudices justified discriminatory results all but indistinguishable from the effects of “racism,” yet they track class biases more closely than they do racial animus. Moreover, although “Mexican” was less a racialized identity for them than a cultural inheritance, even middle-class Mexican Americans nonetheless felt the sting of Anglo prejudices. Unlike the legally established and enforced racial apartheid of African Americans (regardless of their property or business holdings), biases against Mexicans concerned characteristics that could in theory be erased over time—which is why the founders of LULAC encouraged education, English usage, and early assimilation.

When the brunt of “unauthorized” discrimination affected low status Mexican Texans, why did the business class care enough to sue on the behalf of the working class? I believe that the lawyers and their business men sponsors stubbornly fought discrimination, especially in schools, because discrimination in education had the effect of transforming a low economic and social position from a temporary, externally imposed status

into a permanent, apparently inherited characteristic. If left unchallenged, discrimination invited the Anglo public’s identification of the Mexican “race” with the permanently and legally outcast black race—an identification that would harm the status even of middle-class Mexican Americans. Their challenges to the discrimination often took the form of LULAC- or AGIF-sponsored lawsuits, the analysis of which forms the core of my article. But why stress the legal technicality of “other white”? The lawyers and business leaders policed rather than attacked the black-white line out of pragmatic acceptance of racial distinctions that were perfectly legal and seemed unimpeachable. I argued that, as a legal strategy, this proved self-defeating once Jim Crow came under heavier fire in the aftermath of the Brown decision.

Gross asks whether these individuals privately self-identified as white during these years. I believe that they did, so long as whiteness mapped onto status. Also, I think it unlikely that during the heyday of Jim Crow they self-identified as “other colored.” These were the only choices available so long as there was a “black-white binary.” The shift away from “other whiteness,” which demanded discounting the Brown v. Board of Education ruling, toward an embrace of both that ruling and a new “Brown” identity can be understood as an ethnic awakening among the professional class. But it was also a clear case of continued legal pragmatism. The lawyers’ enlightenment finally came only when they realized that the old strategy had reached the point of diminishing returns. Perhaps it was only an accident of history that the Chicano movement emerged around the same time, but it is nevertheless significant that the younger generation of Mexican Americans repudiated both whiteness and middle-class values. For Chicanos—some from the working class, but many privileged with education and professional prospects—being white was no more attractive than being part of the old establishment. As before, race and class were interwoven, but the movement had turned the old arrangement on its head. This gave the new generation—and a few of the older lawyers willing to hear it—a new legal and cultural vocabulary.