

**Over the Rainbow: *Hernandez v. Texas*, *Brown v. Board*, and *Black v. Brown***

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*Hernandez v. Texas* at Fifty

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In the aftermath of the recent presidential election, many pundits are trying to explain why 44 percent of the Hispanic population voted for Bush, compared to only 12 percent of African Americans who voted. The notion persists that minorities, like African Americans and Latinos, often share similar political views that reflect a similar history of racial discrimination and civil rights struggles against Jim Crow practices. The picture is much more complicated than that, of course, and always has been.

Some of the differences that divide many blacks and Latinos today, such as the dominance of African Americans on school boards and city councils in districts and cities where Latinos greatly outnumber blacks, stand in contrast to the efforts of both groups to find common ground in their earliest civil rights struggles, especially school desegregation cases in California and Texas. In the 1946 Mexican school desegregation case in Orange County, California, *Mendez v. Westminster*, Thurgood Marshall and the NAACP submitted an amicus curiae brief that many legal scholars acknowledge was a dry run for *Brown v. Board of Education*. And in Corpus Christi in the late 1960s, parents of African American and Mexican American school children brought suit against the school district for busing ethnic Mexicans to predominantly black schools and African Americans to predominantly Mexican schools, while leaving predominantly Anglo schools alone.<sup>1</sup> These black-brown collaborations in lawsuits represent high water marks in the relations between African American and Mexican Americans.

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<sup>1</sup> *Mendez v. Westminster* and *Cisneros v. Corpus Christi Independent School District*

But Mexican American commitment to a Caucasian racial classification in the 1940s and 1950s complicated, and in some ways compromised, what at first appeared to be a promising start to interracial cooperation. African Americans were often not pleased by a civil rights strategy based on the premise that Mexican Americans were Caucasians, and that segregation statutes applied to blacks and not to Mexicans. Of signal importance was the finding of the 1930 US census that for the first time, persons of Mexican descent born in the U.S. outnumbered Mexican immigrants. Second generation Mexican Americans, the so-called Mexican American generation, thought of themselves as "Americans" and stressed their American citizenship as the basis for being treated with equality under the law. The Mexican American generation was quick to learn a fundamental lesson of American life: being white was not just a racial identity; it was a property right that conferred concrete privileges and rights denied to those, like African and Asian Americans, who could not claim a white identity.

The first Mexican American civil rights organizations, both founded in Texas, LULAC and the American GI Forum, argued to anyone who would listen that Mexican Americans were white and citizens of the U.S.. The word "Mexican" does not even appear in the name of these organizations. "Latin American" in the 1940s and 1950s was the politically correct way to refer to Mexican Americans, and was intended to stress their affiliation with other Caucasians, principally Anglo Americans. The word "Mexican," civil rights leaders decided, too often was conflated with Mexican nationality and carried the stigma of racial mixture. LULAC and American GI Forum leaders joined forces with nativist whites to end the *bracero* program, often referring to Mexican

farmworkers in the U.S. as "wetbacks" who competed with Americans for jobs and lowered wages in agricultural work.

The Mexican American generation had many years of success in litigating against segregation in the courts before 1954, and in all these cases the courts acknowledged, whether implicitly or explicitly, the membership of Mexicans in the Caucasian race. In response to pressure from LULAC to end discrimination against Mexican Americans in Texas and the Mexican government's deep concern over the mistreatment of *braceros*, the Texas state legislature passed the Caucasian Race Resolution in 1943, declaring that "all persons of the Caucasian Race" are entitled to "equal accommodations" and that "whoever denies to any [Caucasian] person" these equal accommodations "shall be considered in violating the good neighbor policy of this state."<sup>2</sup> While a concurrent resolution did not have the force of law, which would have levied fines for discrimination against Mexicans, the resolution did reflect the urgency of reaching an accommodation with the Mexican government to import *braceros* at a critical moment for the U.S. involvement in World War II. LULAC took advantage of this emergency farm worker program to press its case for official recognition of their status as Caucasians, much as the courts and the census, with the exception of 1930, had been doing for decades.

With this brief history in mind, African Americans can be forgiven for not recognizing Mexican Americans as people of color. That is not to imply, however, that blacks were unmindful of discrimination against Mexican Americans, particularly in states like Texas and California where segregation included other groups besides African Americans. Rather, African Americans had to contend with a Supreme Court decision,

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<sup>2</sup> Neil Foley, *The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture* (Berkeley: University of California Press, 1997), p. 206.

Plessy v. Ferguson, that allowed states to enforce segregated accommodations on public transportation, which became the basis for the separate but equal doctrine in education. Because of Plessy, African Americans and the NAACP sought to use the courts to force school districts to provide the same educational facilities, teacher salaries, and per student expenditures for blacks as they did for whites. While Mexican Americans were challenging school segregation in the West during the 1930s and 40s, African Americans, usually under the leadership of Thurgood Marshall and the NAACP, were challenging separate and unequal schooling for black children throughout the South. Mexican Americans, however, were segregated by custom rather than law, and they therefore challenged segregation head-on, no matter how equal the facilities, as unlawful violation of the Fourteenth Amendment. They were white, and whites cannot segregate "other whites."

This strategy could not have worked for blacks, obviously, but when the NAACP decided to attack Plessy head-on in the 1940s, to argue that separate was inherently unequal, African American litigators began taking a closer look at challenges to segregation made by other groups. And it was to the Mexican American school segregation cases that they turned, just as Gus Garcia and Carlos Cadena turned to black challenges to jury exclusion in arguing the Hernandez case.

Let's briefly look at three Mexican American school desegregation cases for what information and ideas may have been useful to the NAACP in their uphill battle to overturn Plessy. The first thing they would have noticed was the relative ease with which the courts ended segregation in school districts where it appeared that Mexicans were being segregated on account of race. Imagine that. Thurgood Marshall wanted to

challenge Plessy on precisely that ground, that segregation based on race was inherently unequal and had damaging effects on those being segregated. It was therefore indeed a violation of the Fourteenth Amendment. Mexican Americans, on the other hand, sought in the Hernandez case to broaden the meaning of the Fourteenth Amendment to include all kinds of discrimination, not just between black and white, the so-called "two class theory" of the Fourteenth Amendment. At least in legal matters, African Americans and Mexican Americans had much to learn from each other.

We begin in 1930 when Mexican American parents in Del Rio, Texas, brought the first desegregation suit in Texas, *Independent School District v. Salvatierra*. They charged school officials with enacting policies designed to accomplish "the complete segregation of the school children of Mexican and Spanish descent...from the school children of all other white races in the same grade." The parents did not question the quality of the instruction or the condition of the separate school house; their suit was aimed exclusively at the school district's policy of separating Mexican American children from Anglo children. The District Superintendent argued that the district had a "peculiar situation as regards people of Spanish or Mexican extraction here," which involved their English language deficiency and the fact that they miss a lot of school because most follow the cotton crop during the fall and are therefore "more greatly retarded" than Anglo pupils. He assured the court that separate schooling "was not actuated by any motive of segregation by reason of race or color...." In fact, he continued, Mexican children had teachers specialized in "the matter of teaching them English and American citizenship," revealing that citizenship was something even U.S.-born Mexicans needed to learn. He also told the segregated Parent Teachers Association of the Latin American

Association that "Spanish speaking children are unusually gifted in music" and possessed "special facilities" for art and handicrafts, talents he hoped to develop with the hiring of new teachers.<sup>3</sup> Never did the Superintendent mention the word race and was careful to refer to Mexican children as "Latin Americans" or "children of Spanish or Mexican descent."

The Texas Court of Appeals did not take the bait; instead it upheld the lower court ruling, stating that "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, merely or solely because they are Mexicans." The arbitrary exclusion of Mexican American children from "other whites," the court ruled, constituted "unlawful racial discrimination." Segregation, in other words, was unlawful when Anglo whites treated Mexican whites as a separate racial group. The Texas Court of Appeals recognized that Mexicans constituted a distinct "race" distinguished "from all other white races." Almost 25 years later, the Supreme Court ruled in *Hernandez* that Mexicans constituted a "distinct class" that had been discriminated against in jury selection. While the *Hernandez* case avoided references to Mexicans as a race, the wording of the *Salvatierra* ruling could have easily been adapted to *Hernandez*: That is, jury commissioners "have no power to exclude" Mexicans from juries, "merely or solely because they are Mexicans." Where cases involving jury exclusion are concerned, one could substitute the word Italian or German or even Negro for Mexicans.

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<sup>3</sup> *Independent School District v. Salvatierra*, 33 S.W. 2d 790.

The understanding that Mexicans could not be arbitrarily segregated as a separate race from whites, like Blacks in the South or Chinese and Native Americans in California, was affirmed in 1947 when the U.S. Ninth Circuit Court of Appeals ruled in *Méndez v. Westminster School District* that segregation of Mexican-descent children, in the absence of state law mandating segregation of Mexicans, deprived them of “liberty and property without due process” and “denied them the equal protection of the laws.”<sup>4</sup> Judge Stevens noted that California law authorized segregation of children belonging “to one of or another of the great races of mankind,” which Stevens identified as Caucasoid, Mongoloid, and Negro. Stevens further noted that California law permitted segregation of Indians and “Asiatics” (as well as blacks), but that no state law authorized the segregation of children “within one of the great races.”<sup>5</sup> Although European Americans, or Anglos, rarely regarded Mexican Americans as “within” the white race, in the eyes of the law Mexican Americans were “Caucasoid” who could not be arbitrarily segregated from “other whites.” In other words, the Court of Appeals for the Ninth Circuit ruled in favor of the Mexican American children on the ground not that the separate-but-equal provision of *Plessy* was invalid, but that there was no California statute that mandated the segregation of Mexican Americans.

While the Ninth Circuit narrowly tailored its ruling to the legality of segregation of Mexicans in the absence of state law, the lower district court ruling attacked segregation on much broader grounds. Judge McCormick cited the 1943 Supreme Court decision *Kioshi Harabayashi v. United States* which held that singling out citizens of

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<sup>4</sup> *Méndez v. Westminster School District*, 64 F. Supp. 544 (S.D. Cal. 1946), 161F. 2d 774 (9<sup>th</sup> Cir. 1947).

<sup>5</sup> *Méndez v. Westminster School District*, 64 F. Supp. 544 (S.D. Cal. 1946), 161F. 2d 774 (1947). Emphasis added.

Japanese descent for restriction of movement during curfew hours was constitutional in time of warfare, it nevertheless acknowledged the racial basis of its ruling in these words: "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."<sup>6</sup> McCormick then stated that "equal protection" of the law pertaining to California public schools "is not provided by furnishing in separate schools the same technical facilities, text books and courses of instruction to children of Mexican ancestry....A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage."<sup>7</sup> In other words, a California district court had just ruled that separate but equal was unconstitutional.

Here the trajectories of Mexican American civil rights intersected with those of African Americans. During the 1940s, after a decade of litigation, the NAACP shifted its strategy of forcing school districts to provide equal facilities for black children to attacking the separate-but-equal doctrine of *Plessy* head on. In the *Mendez* decision they had found a court willing to rule that segregation based on race was unconstitutional. Thurgood Marshall seized on the language of the Mendez lower court ruling to argue in his brief that "separation itself [is] violative of the equal protection of the laws...on the grounds that equality cannot be effected under a dual system of education." In that brief Marshall skillfully combined the goals of both African Americans and Latinos, namely, "equality at home" as well as the "equality which we profess to accord Mexico and Latin

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<sup>6</sup> *Kioshi Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>7</sup> *Mendez et al. v. Westminster School District of Orange County*, 64 F. Supp. 544 (1946).

American nationals in our international relations."<sup>8</sup> For added measure, Marshall reminded the Ninth Circuit Court that the United States ratified and adopted the Charter of the United Nations in 1945, which states that our government is obligated to promote "uniform respect for...human rights and fundamental freedoms for all without distinction as to race...." Seven years later, in *Brown v. Board of Education*, Marshall would hammer home the idea, using social science literature, that segregation was inherently unequal because of the damaging effects of discrimination on black children.

Unfortunately, the Ninth Circuit dismissed Marshall's argument that segregation was unconstitutional. Some of the briefs alluded to the "recent world stirring"--World War II--in the hope that the court would "strike out independently on the whole question of segregation" and to re-examine "concepts considered fixed." Instead Judge Stevens wrote, almost disdainfully, "We are not tempted by the siren who calls to us that the sometimes slow and tedious ways of democratic legislation is [sic] no longer respected in a progressive society."<sup>9</sup> While the Ninth Circuit decision in *Mendez* gave Mexican Americans what they wanted, an end to segregated schooling, it gave African Americans nothing to hope for, since it was not likely that state houses throughout the South would enact democratic legislation to end Jim Crow in anybody's life time. The remedy to racial segregation would have to come from the courts, if it was to come at all. The district court in the *Mendez* case offered African Americans at least a glimmer of hope: American public education, it held, "must be open to all children...regardless of lineage,"

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<sup>8</sup> Thurgood Marshall et al., Motion and Brief for the National Association for the Advancement of Colored People, *Westminster School District v. Gonzalo Mendez, et al.*, United States Circuit Court of Appeals, Ninth Circuit, 1946, p. 9.

<sup>9</sup> *Westminster School District of Orange County v. Mendez* 161 F.2d 774 (1947).

an unambiguous repudiation of *Plessy v. Ferguson*.<sup>10</sup> And judging from the roster of civil rights groups presenting briefs in the case--the American Jewish Congress, the Japanese American Citizenship League, the American Civil Liberties Union, the NAACP, and the Attorney General of California--the *Mendez* case illustrates the possibilities for cooperation and coalition building, particularly between Mexican Americans and African Americans.

A few years after the *Mendez* case, attorneys Gus Garcia and Carlos Cadena chose to challenge the court conviction of Pete Hernandez on the grounds that Mexican Americans had been systematically excluded from jury service in Jackson County, Texas. The details of the case are too well known to bear repetition here. What is important here is that Garcia and Cadena relied heavily on numerous jury discrimination cases brought by African Americans who had won their cases by demonstrating that blacks had been systematically excluded from jury service. So why were Texas courts ignoring these cases (particularly *Norris v. Alabama*) in ruling against Garcia and Cadena? Because the Texas courts understood the Fourteenth Amendment to apply to blacks and whites in discrimination cases, and since Mexican Americans had for two decades argued that they were Caucasians, they could not claim discrimination. In their brief García and Cadena strenuously objected to the appeal court judge's ruling in these words: "If, then, this Court holds that, while such statutes forbid exclusion of Negroes [from jury service], they allow exclusion of persons of Mexican descent because the latter are members of the white race, the Court is in effect saying that the statutes protect only colored men, and

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<sup>10</sup> *Mendez et al. v. Westminster School District of Orange County*, 64 F. Supp. 544 (1946).

allow discrimination against white men.”<sup>11</sup> The attorneys concluded their brief in these words: “All of the talk about ‘two classes’; all of the verbal pointing with alarm at a ‘special class’ which seeks ‘special privileges’ cannot obscure one very simple fact which stands out in bold relief: the Texas law points in one direction for persons of Mexican descent...and in another for Negroes.”<sup>12</sup> Mexican Americans wanted to be accorded the same treatment as African Americans, at least where the law and the Fourteenth Amendment were concerned.

Two weeks after the *Hernandez* ruling, African Americans won their case in *Brown v. Board of Education*. Mexican Americans wondered if the law applied to them, or if the courts might rule, as the lower courts in Texas had ruled in the *Hernandez* case, that desegregation applied only to black and white schools. Mexican Americans sought the answer twelve years later when busing appeared to be the way to integrate schools. In 1968 African Americans and Mexican Americans in Corpus Christi joined together in a suit against the practice of busing Mexican children to predominantly black schools to achieve integration, while leaving predominantly white schools alone. School officials used the "other white" argument to justify grouping black and Hispanic children to achieve integration. But the judge in the case ruled otherwise: As "an identifiable, ethnic-minority group... *Brown* can apply to Mexican-American students in public schools."<sup>13</sup>

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<sup>11</sup> Appellant’s Brief, *Pete Hernandez v. State of Texas*, Court of Criminal Appeals, No. 25,816, 16.

<sup>12</sup> Brief for Petitioner, U.S. Supreme Court, *Hernandez v. State*, 30.

<sup>13</sup> *Jose Cisneros et al. v. Corpus Christi Independent School District*, 324 F. Supp. 599 (1970).

So what became of the promise of black-brown cooperation and collaboration in the years after World War II when Mexican and African Americans borrowed from each other's case law to end segregation and jury discrimination? Why do African Americans and Mexican Americans often support different political candidates for local and national elections? It's no secret that many African Americans resent the "minority" status of Mexican Americans who, they believe, have not suffered the degree of discrimination and exclusion they have. Perhaps some African Americans remember the days when Mexican Americans insisted on their status as whites in the days before affirmative action. Mexican Americans in California were also not too pleased in 1994 when more than half of all African Americans voted for Proposition 187 to deny undocumented Mexican immigrants basic public services, including education and health care. African Americans and Mexican Americans find themselves in a state of mutual suspicion in many cities over competition for municipal employment and private sector jobs, representation on school boards and in city councils, and in their competition for supporting candidates for political office, especially when one of their own is running. Recent conflicts include the mayoral election in Los Angeles in 2001 when African Americans joined ranks with Anglos to elect James Hahn over Antonio Villaraigosa, the former speaker of the California state assembly, thus denying Latinos the opportunity to have a Mexican American mayor for the first time since the 19th century. It was an especially bitter loss because Latinos constitute 45 percent of the population compared to 11 percent for African Americans.

The 2001 mayoral election in Houston was also a source of conflict when the incumbent African American mayor, Lee Brown, was challenged by a Cuban American

Republican, Orlando Sánchez. Of those who voted, 72 percent of Latinos voted for Sánchez, while 90 percent of African Americans voters supported Lee, who won by a few percentage points. Voting for one's own, regardless of party affiliation or political beliefs, may merely be an expression of ethnic or racial pride, but the suspicion nevertheless remains that Latinos don't trust African American politicians to look after their interests any more than African Americans trust Latinos who are in office. Ask any African American or Haitian resident of Miami. Looking back on early black and brown civil rights struggles in Texas, we have to wonder if African Americans and Mexican Americans can find common ground again.