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# “The Caucasian Cloak”: Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest

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*The history of Mexican Americans and Jim Crow in the Southwest suggests the danger of allowing state actors or private entities to discriminate on the basis of language or cultural practice. Race in the Southwest was produced through the practices of Jim Crow, which were not based explicitly on race, but rather on language and culture inextricably tied to race. This Article looks at three sets of encounters between Mexican Americans and the state in mid-twentieth-century Texas and California—trials involving miscegenation, school desegregation, and jury exclusion—to see the way in which state actors used Mexican Americans’ nominal white identity under the law to create and protect Jim Crow practices. First, it argues that whiteness operated primarily as a “Caucasian cloak” to obscure the practices of Jim Crow and to make them appear benign, whether in the jury or school context. If Mexican Americans were white, then they were represented so long as whites were represented. Second, it demonstrates that Mexican-American civil rights leaders as well as ordinary individuals in the courtroom did not simply identify as white; some showed a more complex understanding of “Mexican” as a mestizo race, and others pointed to the idea of race as a status produced by racist practice. Mexicans were nonwhite if they were treated as nonwhite under Jim Crow. Finally, it argues that, at least in twentieth-century Texas and California, cultural discrimination was racial discrimination, and that continuing discrimination on the basis of language ability and other cultural attributes should be scrutinized carefully under antidiscrimination law.*

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#### INTRODUCTION

“I do not think the Mexicans in this County are intelligent enough and speak English well enough and know enough about the law to make good jurors. Besides, their customs and ways are different to ours and I do not consider them, for that reason, to be well enough qualified as Jurors. . . . The court has never at any time by act or otherwise said or done anything that would indicate he was discrimination [sic] with reference to races . . . .”<sup>1</sup>

“Mexican people . . . are not a separate race but are white people of Spanish descent . . . .”<sup>2</sup>

“[A]bout the only time that so-called Mexicans—many of them Texans for seven generations—are covered with the Caucasian cloak is when the use of that protective mantle serves the ends of those who would shamelessly deny to this large segment of the Texas population the fundamental right to serve as jury commissioners, grand jurors, or petit jurors.”<sup>3</sup>

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1. Statement of Facts at 11, *Ramirez v. State*, 40 S.W.2d 138, 139 (Tex. Crim. App. 1931) (No. 13,789) (testimony of Cecil Walston, Sheriff and Tax Collector, Menard County, Texas) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Texas Court of Criminal Appeals Centralized Court Case Files).

2. *Sanchez v. State*, 243 S.W.2d 700, 701 (Tex. Crim. App. 1951) (holding that the exclusion of Mexican Americans from a jury in a murder prosecution was not race discrimination).

3. Appellant’s Brief at 17, *Hernandez v. Texas*, 251 S.W.2d 531 (Tex. Crim. App. 1952) (No. 24,816) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Texas Court of Criminal Appeals Centralized Court Case Files).

In 1954, two weeks before the U.S. Supreme Court handed down its famous decision in *Brown v. Board of Education*,<sup>4</sup> it decided the case of *Hernandez v. Texas*,<sup>5</sup> striking down Pete Hernandez's murder conviction because Mexican Americans had been systematically excluded from the Texas jury that tried him.<sup>6</sup> The Court held that Mexican Americans, whether or not they were legally white, had been treated as a "separate class in Jackson County, distinct from 'whites.'"<sup>7</sup> Decades later, in the 1991 case of *Hernandez v. New York*,<sup>8</sup> the Supreme Court approved a prosecutor's use of peremptory challenges to strike Latinos from the jury, based on the "race-neutral" explanation that Spanish speakers would not accept the translator's version of the trial testimony.<sup>9</sup> By one view, the story of these two *Hernandez* cases makes perfect sense: the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution prohibits discrimination on the basis of race or national origin but allows discrimination on other rational bases, such as language or culture.

The history of Mexican Americans' exclusion from juries, however—and the history of Mexican Americans and Jim Crow in the Southwest more broadly—demonstrates that state officials have been describing their discriminatory practices in terms of language and culture for most of the twentieth century, even when they were engaging in fairly explicit racial discrimination. Thus, Cecil Walston, the county sheriff quoted above, could, in the same breath, both explain his belief that Mexican Americans were unintelligent and also assert that they were excluded from jury service on the basis of their customs, skills, and language ability rather than their race.<sup>10</sup>

A growing body of commentators defends cultural discrimination and distinguishes it from discrimination on the basis of race.<sup>11</sup> Legal scholar Richard Ford has entered this debate from a left legal perspective, arguing that the law should disaggregate race from culture, allowing employers to draw distinctions based on a broad array of cultural attributes, such as whether a person is Spanish speaking or has a corn-rowed hair style, even if they correlate closely to racial identity.<sup>12</sup> He suggests that applying civil rights protections to "cultural differences" will feed identity politics, "difference discourse," and "rights-to-difference" in a way that reifies the cultures of certain "canonical identity

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4. 347 U.S. 483 (1954).

5. 347 U.S. 475 (1954).

6. *Id.* at 482.

7. *Id.* at 479.

8. 500 U.S. 352 (1991).

9. *Id.* at 372. The Supreme Court did not reach the question of whether "language ability without more" would have sufficed as a "race-neutral" basis for the peremptory strikes. *See id.* at 360. However, later courts have extended *Hernandez* to that situation. *See infra* notes 304–06 and accompanying text.

10. *See supra* note 1.

11. *See, e.g.,* DINESH D'SOUZA, *THE END OF RACISM* 24 (1995) (arguing that "cultural patterns of behavior," and not racial discrimination, are the "main problem[s] facing blacks"); JOHN McWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* 51–81 (2000) (criticizing cultural "separation" as a barrier to the advancement of black culture).

12. *See* RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 125–68 (2004).

categories” and discourages cosmopolitanism.<sup>13</sup> Ford is particularly concerned that applying antidiscrimination law to cultural discrimination may undesirably coerce people into acting out their identities in stereotypic ways, or send a state-sanctioned message that race means that people will conform to particular stereotypes.<sup>14</sup> While aspects of this cosmopolitan project offer an important corrective to identity politics that assume a “different voice” for racial groups (as do some, but not all, “diversity”-based arguments for affirmative action), extending its reach to antidiscrimination law is a mistake. I bring up Ford not to engage every aspect of his compelling argument, but to offer an historical perspective that should make us skeptical about the race neutrality of cultural and language discrimination.

In the twentieth-century Southwest, employers, schools, social institutions, and government actors tied race to culture. As the appellant in *Hernandez v. Texas* argued, these private and state actors used presumed language ability as an excuse for segregation and threw a “Caucasian cloak” over discrimination, arguing that Mexican Americans were white and therefore were represented on juries so long as whites were represented.<sup>15</sup> We should be as concerned about prosecutors’ and employers’ abilities to coerce individuals to perform their identities in particular ways—to conform to white or Anglo standards—as we are about courts’ ability to do so.<sup>16</sup>

Mexican Americans<sup>17</sup> occupy a unique position in the history of race in the United States, shaped heavily by formal, positive law. When Texas and California became part of the United States as a result of the Mexican-American War, thousands of people already living there, who had been Mexican, became U.S. citizens by the terms of the Treaty of Guadalupe Hidalgo. This Treaty guaran-

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13. *Id.* at 23–58 (discussing “difference discourse”); *id.* at 156–68 (discussing “cosmopolitanism”); *id.* at 212 (discussing the conflict between canonical identity groups and cosmopolitanism).

14. *See id.* at 70–78, 93–100.

15. *See* Appellant’s Brief, *supra* note 3, at 17.

16. In arguing against discrimination on the basis of culture or performance of identity, I am building on my own earlier work, Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *YALE L.J.* 109 (1998). In that article, I argued that racial categories in the nineteenth-century South were defined not only by “blood,” but by and through the performance of moral and civic virtues that were then to determine one’s place in the social, political, and economic hierarchy. There are important continuities between this racial ideology and the cultural determinism at work in twentieth-century Texas, which is still alive today. In calling attention to the need for antidiscrimination law to focus on performances of identity, I join a growing group of scholars of contemporary antidiscrimination law. *See generally, e.g.*, KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON CIVIL RIGHTS* (2005); Devon Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259 (2000); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 *N.Y.U. L. REV.* 1134 (2004).

17. A brief word about nomenclature is appropriate here: in this Article, I consistently use the term “Mexican Americans” to refer to the people who are my chief subject. This usage reflects the term most civil rights advocates and litigators chose to use publicly (sometimes “Latin American” as well), and it is useful to distinguish people who made claims on U.S. citizenship from those who identified as Mexican nationals; however, many people in the cases discussed *infra* refer to themselves as “Mexicans,” and that is how most Anglos referred to them as well. To some extent, the term “Mexican American” is itself an artifact of the era and the political strategies I am describing.

teed to them U.S. citizenship as well as rights to property, unless they declared their intent to remain Mexican citizens within the year.<sup>18</sup> Nevertheless, while a small elite of Mexican-American landholders who could prove that they were “Spanish” maintained white status, the majority of “Mexicans” were viewed and treated by Anglos as a separate race.<sup>19</sup> Most “Mexicans” worked first on the railroads and then in agriculture. The mass of agricultural workers, like African Americans in the Southeast, were sharecroppers for white landlords, and they were excluded from schools, political institutions, and public accommodations. As Mexican immigrants flooded into the United States in the early twentieth century, they swelled the ranks of poor agricultural laborers isolated in segregated labor markets. Unlike European immigrants to Northern cities who were able to move up out of urban ghettos through access to education and political patronage, Mexican Americans, like African Americans, faced a more thoroughgoing exclusion from full social and political citizenship.<sup>20</sup>

However, despite the institutional similarities between the forms of discrimination experienced by Mexican Americans and African Americans under Jim Crow, the two groups’ legal statuses were significantly different. State segregation statutes did not specifically target Mexican Americans; much of the discrimination they faced was *de facto*. Yet they were also in a different position from Asian immigrants to the United States in the early twentieth century, whose right to naturalize as formal citizens depended on the 1790 Immigration and Naturalization Act reserving citizenship for “free white person[s].”<sup>21</sup> Because the Treaty of Guadalupe Hidalgo had guaranteed citizenship to Mexicans in Texas in 1848, federal courts interpreted the treaty to require all future Mexican immigrants to be eligible for naturalization.<sup>22</sup> Thus, unlike the Japanese and South Asian Indians who argued before federal courts that they should be citizens because they were white, Mexican Americans were held by federal and state courts to be white because they were citizens—“white by treaty.”<sup>23</sup>

This unique legal status meant that the far reaching exclusion of Mexican Americans from full social and political citizenship had to be justified on cultural, rather than racial grounds. State officials in Texas and California—county attorneys, sheriffs, school board presidents—who clearly viewed Mexi-

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18. Treaty of Guadalupe Hidalgo art. 8, U.S.-Mex., Feb. 2, 1948, 9 Stat. 922.

19. See NEIL FOLEY, *THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE* 19–24 (1997); DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1886*, at 114, 143, 160 (1987).

20. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 7–8, 13, 52 (2004).

21. An Act to establish a uniform Rule of Naturalization, ch. 3, § 1, 1 Stat. 103 (1790) (repealed 1795). After the Civil War this right was extended to Africans. An Act to amend the Naturalization Laws and to punish Crimes against the same, and for other Purposes, ch. 254, § 7, 16 Stat. 254, 256 (1870).

22. See *In re Rodriguez*, 81 F. 337, 354 (W.D. Tex. 1897).

23. See IAN HANEY LÓPEZ, *WHITE BY LAW* (rev. ed. 2006), for a discussion of the naturalization cases involving Asian immigrants’ claims to whiteness.

can Americans as an inferior race and treated them that way, learned over the course of the mid-twentieth century to explain their exclusion of Mexican Americans on the basis of language and culture rather than race.

In the decades before *Hernandez v. Texas* and *Brown v. Board of Education*, Mexican-American as well as African-American civil rights litigators had been attempting to use the Fourteenth Amendment guarantee of equal protection to gain access to full citizenship—and achieving only limited gains. Yet despite Mexican Americans' repeated defeats in the courts, the existence of that formal constitutional prohibition on overt racial discrimination by the state meant that the parties in trials were much more self-conscious and circumspect about what they said regarding race and status. State officials—like Cecil Walston, the Menard County Sheriff—were often extraordinarily un-self-conscious about admitting their beliefs that Mexican Americans were an inferior race, or at the very least, an inferior group of people. But they made certain to couch their bias in cultural terms.

As a result, these twentieth-century trials read quite differently than the nineteenth-century trials “litigating whiteness.”<sup>24</sup> Parties on both sides used arguments about racial identity strategically and instrumentally, and we cannot take their legal strategies as a simple reflection of their actual thoughts and feelings about racial or national identity. These cases provide a different kind of window onto the culture than do the nineteenth-century trials, revealing not the anxieties of about how race should be known, but rather the growth of “cultural racism,” the veiling of racial thinking in cultural terms.

On the other hand, these twentieth-century Americans were struggling just as much as their nineteenth-century counterparts to determine how race would shape citizenship. It may be tempting to imagine that this equation between race and culture—so familiar in our own time to the readers of Dinesh D'Souza and Thomas Sowell—was readily available to the actors in these cases, and that white officials could simply invoke it freely to deny access to a group they perceived as nonwhite. On the contrary, this notion of cultural racism and the ways it might be used to segregate and disenfranchise a group of people were actually being worked out via these very trials and others like them elsewhere in the United States (as well as in the writings of academics, the debates of legislators, and so on). Just as it had taken work to create the antebellum binary system of black and white—not at all obvious in a society that was in fact multiracial and diverse; just as it had taken work to create the Jim Crow system of absolute racial segregation—not at all obvious in a society that was in fact created of a wide variety of interracial relationships; so did it take work to establish this contemporary view of race, in which racial inequality is justified not on the grounds of biology but rather on those of culture. While the trials I explore in this Article may not lay bare the psychology of the participants, they do reveal state officials working out their strategies of cultural racism, even as

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24. See generally Gross, *supra* note 16.

Mexican-American civil rights litigators adjusted their own strategies in response.

Particularly hard to answer is the question of how Mexican Americans viewed themselves. Only perhaps in the miscegenation cases do we see relatively untutored witnesses describing the racial identity of neighbors and struggling to explain what they mean by “Mexican.” In civil rights cases, as well as in letters, petitions, and other forms of advocacy, Mexican Americans used a spectrum of languages to identify their racial and national identity, so that it is difficult to know which statements they “really” meant and which ones were attempts to score points with white lawmakers, judges, or juries. It is also quite possible that individuals who articulated more than one version of self-identification might have themselves moved among different and inconsistent notions of their own identity, depending on the context. It need not be the case that these divergences were all rational and strategically planned.

Groundbreaking new work in the last several years, in particular by historian Neil Foley and legal scholar Ian Haney López, has focused scholarly attention on the question of Mexican Americans’ fraught relation to white identity. Often this new scholarship has indicted civil rights leaders for their “Faustian pact with whiteness.”<sup>25</sup> According to this narrative, mid-twentieth-century Mexican-American organizations and their lawyers claimed whiteness as a political and legal strategy—culminating in *Hernandez v. Texas*—until they finally abandoned it in the 1970 case of *Cisneros v. Corpus Christi Independent School District*.<sup>26</sup> Some scholars portray whiteness claims as primarily strategic, while others see them as a deeper impulse towards assimilation and rejection of other people of color.<sup>27</sup> In either case, the critics have to some extent adopted the

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25. Neil Foley, *Becoming Hispanic: Mexican Americans and The Faustian Pact with Whiteness*, in REFLEXIONES 1997: NEW DIRECTIONS IN MEXICAN AMERICAN STUDIES 53, 63–64 (Victor J. Guerra ed., 1998) [hereinafter Foley, *Becoming Hispanic*]; Neil Foley, *Over The Rainbow: Hernandez v. Texas, Brown v. Board of Education, and Black v. Brown*, 25 CHICANO-LATINO L. REV. 139, 140 (2005) (asserting that “Mexican American commitment to a Caucasian racial identity in the 1930s through the 1950s complicated, and in some ways compromised, what at first appeared to be a promising start to interracial cooperation”). In elaborating on this concept, López inquires:

Why does it matter that Mexican American leaders insisted that they were white? After all, they took pride in their origins, were politically active, and sought to improve their communities’ social, economic, and political standing. We should acknowledge the politically progressive efforts of many Mexican Americans and eschew judgments that do not take into account changed historical circumstances. Nevertheless, we must also be clear that those who claimed a white identity also held a corollary belief that certain categories of persons lived beyond the realm of social concern or responsibility. Those beyond care included non-citizens and non-whites, in particular blacks, but also many Mexicans.

Ian Haney López, *White Latinos*, 6 HARV. LATINO L. REV. 1, 3 (2003).

26. 324 F. Supp. 599 (S.D. Tex. 1970); see *id.* at 608, 612, 615 (finding that Mexican Americans were “an identifiable, ethnic minority” group deserving of Fourteenth Amendment protection and holding that the separation of Mexican-American and black children from Anglo children constituted unlawful segregation).

27. See Foley, *Becoming Hispanic*, *supra* note 25, at 55 (describing whiteness claims as primarily strategic); George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2



perspective of the 1970s Chicano movement, taking the previous generation to task for its lack of racial pride and refusal to join coalitions with African Americans.<sup>28</sup>

This Article seeks to shift the perspective away from apportioning blame to Mexican-American civil rights litigators and political advocates for their strategic choices, and away from the unanswerable question of whether Mexican Americans were or are “really” white. Instead, it focuses on the way state actors used Mexican-American whiteness to create and protect Jim Crow practices. As a strategy, whiteness was used against Mexican Americans far more often than on their behalf.

It would certainly be a mistake, however, to assume that all Mexican Americans identified as white, or even that whiteness was the chief strategy they employed in seeking rights. From the early twentieth century onward, many ordinary Mexican Americans—as well as litigators in their private correspondence—exhibited a more complex understanding of racial identity as produced by racist practice: because we are treated as a race, we are a race.

The notion of *mestizaje*, or racial mixture, also created a sense of the fluidity among groups and reinforced the importance of culture in defining identity: Mexican Americans often saw themselves and their culture as stronger because they were a mixed-race, or *mestizo*, people. Ironically, at the very moment that some Mexican-American advocates on the U.S. side of the border were claiming whiteness strategically, the newly independent government of Mexico was propagating the national mythos of *la raza*—the Mexican race uniquely strengthened by its combination of Spanish and Indian. Miscegenation cases during the first decades of the twentieth century reveal the clash between legal narratives of Mexican whiteness, popular narratives of Mexican racial ambiguity, and evidence of Mexican-black social fluidity.

Beginning in the 1930s, Mexican-American activists began to assert whiteness to government agencies, but often referred to the “Mexican race” and to their whiteness in the same breath; people who would never identify as “Mexican” in English continued to call themselves “mexicano” in Spanish. Texas Mexican plaintiffs brought *racial* discrimination lawsuits throughout the 1930s and 1940s at the same time they sought to be redefined as “white” on the U.S. Census and all state classification forms. While some Mexican-American organi-

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HARV. LATINO L. REV. 321, 338 (1997) (same). *But see* Ian Haney López, *Race and Colorblindness After Hernandez and Brown*, 25 CHICANO-LATINO L. REV. 61, 64–65 (2005) (explaining whiteness claims as an assimilationist impulse); Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1174–75 (1997) (recognizing both the strategic and assimilationist aspects of whiteness claims) [hereinafter López, *Race, Ethnicity, Erasure*].

28. Thomas A. Guglielmo, in a wonderful recent article on the transnational struggle for Mexican and Mexican-American civil rights, acknowledges that many activists eschewed whiteness claims. Nevertheless, he concludes that “the struggle was rooted in and dependent upon a limited and racialized sense of rights, justice, and equality.” Thomas A. Guglielmo, *Fighting for Caucasian Rights: Mexicans, Mexican Americans and the Transnational Struggle for Civil Rights in World War II Texas*, 92 J. AM. HIST. 1212, 1236 (2006).

zations sought to distance themselves from African Americans and from Mexican nationals, others cooperated with African-American activists. During the 1950s and 1960s, civil rights litigators sought to make use of the limited gains they had achieved with a definition of Mexican whiteness before abandoning it for “minority” status. In short, even strategic uses of whiteness were self-conscious and contested among civil rights lawyers and activists. And even in the cases in which Mexican-American advocates most strongly pushed a strategy of whiteness, they also argued, even more strongly, that whether or not Mexican Americans were “really” white, they were treated as a separate race, and therefore in practice, they were a separate race.

By looking at manuscript trial records as well as the public writings and private correspondence of litigators and political advocates, it is possible to gain a deeper understanding of the intersection between law and culture at the ground level.<sup>29</sup> I have chosen to concentrate primarily on the two states with the largest Mexican-American populations, Texas and California, which were also the battlegrounds for the major Mexican-American civil rights struggles and the sites of most of the litigation regarding Mexican-American whiteness in the twentieth century. These states, while by no means monolithic, were dominated by large scale commercial agriculture, which, as Mae Ngai has shown, spurred the “formation of the migratory agricultural workforce [that] was perhaps the central element in the broader process of modern Mexican racial formation in the United States.”<sup>30</sup>

This Article will begin by exploring Mexican-American whiteness before 1930. Part I will discuss the 1897 naturalization case, *In re Rodriguez*, that established Mexican Americans as “white by treaty.” Additionally, Part I will examine miscegenation cases from the early decades of the twentieth century when a massive influx of Mexican immigration and the expansion of Southwestern agriculture transformed race relations in Texas and California. Part II will describe Jim Crow practices in the two states and the efforts of Mexican-American organizations to combat those practices—sometimes through whiteness claims and sometimes through claims of race discrimination. Part III will discuss two forms of litigation in detail—school desegregation lawsuits and jury discrimination cases—during the 1930s and 1940s, showing the way in which whiteness was used against Mexican Americans in court. Part IV will examine the aftermath of *Hernandez v. Texas* in conjunction with the rise of the Chicano Movement and the idea of “la raza cósmica” in the 1960s.

### I. MEXICAN-AMERICAN WHITENESS BEFORE 1930

Before the 1930s, there were no Mexican-American advocacy organizations self-consciously strategizing about the issue of Mexican-American whiteness in

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29. For an elaboration of this approach, see Ariela Gross, Essay, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 643–44 (2001).

30. NGAI, *supra* note 20, at 131.

court. But that does not mean that state officials and even courts did not address the question of whether Mexican Americans were white during this time. Indeed, the era from 1848 to 1930 can be divided into three stages relating to the conceptualization of Mexican-American whiteness: first, during most of the nineteenth century, whether Mexican Americans were white or not was largely a matter of local practice; second, in 1897, *In re Rodriguez* decreed Mexican Americans to be white for the purposes of naturalization; third, during the first decades of the twentieth century a series of miscegenation cases extended this presumption of whiteness to the marriage context. But while Mexican-American identity was established as formally white, it emerged as considerably more ambiguous in courtroom testimony.

#### A. THE NINETEENTH CENTURY

In Spanish Texas and California, whether Mexican Americans were white or a distinct race depended on class and geography.<sup>31</sup> In the debates over the annexation of Texas in the 1840s, Anglo politicians often referred to the inferiority of the “Mexican race,” using metaphors of dirt as well as the epithet “greaser,” which probably derives from the work some Mexicans performed greasing the axles of mule carts.<sup>32</sup> Yet during the years of the Texas Republic, while only white heads of household were allowed to buy land, some Texas Mexicans were able to purchase and hold onto their land by claiming whiteness through pure “Spanish blood.”<sup>33</sup> Anglos who married Mexican women “whitened” their spouses by calling them Spanish, and many of the new immigrants from Mexico in the years between 1890 and 1910 had “learned whiteness and ‘whitening’ . . . before coming to the United States.”<sup>34</sup> In those instances and many others, racial distinctions to some extent tracked class and landholding. In Texas, patterns of Mexican-white segregation map onto the divisions between “ranch counties,” where Mexicans continued to be landholders, and “farm counties,” where commercial farming took over in the first decades of the twentieth century and Mexicans were sharecroppers for white landholders.<sup>35</sup> 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.

Mexican racial identity according to government classification was 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.<sup>36</sup> Before the federal courts considered the matter of Mexican whiteness, U.S.-Mexico border officials made their own racial determinations,

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31. See MONTEJANO, *supra* note 19, at 244–54.

32. FOLEY, *supra* note 19, at 41–42; MONTEJANO, *supra* note 19, at 225–28.

33. FOLEY, *supra* note 19, at 19.

34. *Id.* at 61.

35. See MONTEJANO, *supra* note 19, at 246.

36. Treaty of Guadalupe Hidalgo, *supra* note 18, art. 8; FOLEY, *supra* note 19, at 107.

placing some Mexicans in the category “Spanish race,” and others—usually darker skinned people—in the category “Mexican race.” As Neil Foley explains, “[i]t was understood that ‘Spanish’ was a marker of whiteness and that ‘Mexican’ meant ‘mixed-blood’ or Indian.”<sup>37</sup> It was fifty years before a U.S. court considered whether Mexicans could be eligible for naturalization based on identification as “white” or some other basis.<sup>38</sup>

B. WHITE BY TREATY—*IN RE RODRIGUEZ*

When the District Court for the Western District of Texas finally considered the matter of Mexican-American citizenship in the case of *In re Rodriguez*, it decided to treat Mexican Americans as white, avoiding the issues raised at trial and in the briefs on appeal about Mexicans’ “mixed-blood.”<sup>39</sup>

In 1896, Ricardo Rodriguez filed an application for naturalization papers in San Antonio, Texas.<sup>40</sup> According to the district court’s statement of the case, “[a]s to color, he may be classed with the copper-colored or red men. He has dark eyes, straight black hair, and high cheek bones.” The lawyers at trial tried to elicit testimony from Rodriguez to place him in either a “Spanish”—white—or “Indian” racial category, but Rodriguez resisted this dichotomy. When Rodriguez was asked, “Do you not believe that you belong to the original Aztec race in Mexico?” he answered, “No, sir.” Counsel then asked, “Do you belong to the aborigines or original races of Mexico?” Again Rodriguez answered, “No, sir.” “Where did your race come from? Spain?” asked the lawyer. Answer: “No, sir.” Finally: “Where did your race come from?” Answer: “I do not know where they came from.” Rodriguez insisted that he was a “pure-blooded Mexican” and neither Indian nor Spanish. He resisted the idea that “Spanish” and “Indian” represented two distinct streams of blood in the Mexican’s veins.<sup>41</sup>

Several San Antonio politicians submitted amicus briefs to the court regarding Rodriguez’s racial identity and eligibility for naturalization on the basis of whiteness.<sup>42</sup> One based his discussion on Rodriguez’s “appearance,” as well as on scientific experts who, he claimed, placed the “aborigines of this continent” outside the white race.<sup>43</sup> He concluded that Rodriguez was not white, whether “by the scientific classification” or “in the sense in which these words are commonly used and understood in the every-day life of our people,” and therefore believed that Rodriguez should be denied the right of citizenship.<sup>44</sup>

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37. Neil Foley, *Straddling the Color Line: The Legal Construction of Hispanic Identity in Texas*, in *NOT JUST BLACK AND WHITE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON IMMIGRATION, RACE, AND ETHNICITY IN THE UNITED STATES* 344 (Nancy Foner & George M. Fredrickson eds., 2004).

38. See *In re Rodriguez*, 81 F. 337, 348 (W.D. Tex. 1897).

39. Foley, *supra* note 37, at 343–45.

40. See *Rodriguez*, 81 F. at 337.

41. See *id.* at 337–38.

42. See *id.* at 337.

43. *Id.* at 338, 346.

44. *Id.* at 346.

Another amicus brief also relied on scientific expertise, quoting Dana's American Encyclopedia regarding the population of Mexico, more than half of which it said were "Indians of unmixed blood"; since Rodriguez was obviously one of these, he was neither white nor eligible for citizenship.<sup>45</sup>

Despite the focus in both the trial testimony and briefs on Rodriguez's whiteness, the district court decided the question based primarily on the Treaty of Guadalupe Hidalgo.<sup>46</sup> Although the court agreed with the amicus briefs that Rodriguez was probably not white according to ethnologists, nor perhaps even to laypeople, it concluded that the Treaty required the United States to bestow citizenship on Mexicans regardless of their race.<sup>47</sup> The court avoided reaching a conclusion about whether Mexicans *were* white but treated them legally *as though* they were white. Because naturalization to citizenship was reserved for free white persons and people of African descent, becoming naturalized in effect meant Mexicans received a presumption of whiteness. Whether or not this is what the *Rodriguez* court intended, that is what the precedent came to stand for.

C. SEX ACROSS RACIAL BORDERS: POPULAR AND LEGAL IDEAS OF THE "MEXICAN RACE"

*Rodriguez* provided the backdrop for all future litigation involving Mexican Americans in state courts. Later courts treated the bracketing of Rodriguez's racial identity as a presumption that Mexicans were Spanish—white—unless proven otherwise; in court, this presumption led to an effort to tease out an individual's Spanish and Indian ancestry, an effort most Mexicans stubbornly resisted. In miscegenation cases, state courts began with the presumption that Mexican Americans were white when enforcing statutes criminalizing white-black marriage. This section discusses three cases involving interracial marriage that reached the high courts of the Southwestern states and for which trial transcripts were available. It is likely that many more such cases went to trial but were never appealed; however, the records of the trials discussed here provide a sense of the way popular understandings of Mexican-American racial identity clashed with the legal binary of "Spanish"/"Indian."

In 1910, Francisco Flores was convicted of "unlawfully marrying a negro . . . within the third degree" and sentenced to two years in the penitentiary.<sup>48</sup> According to the appellate court, Flores was "Mexican, or ~~at least~~ of Spanish extraction," whereas his wife, Ellen Dukes, was identified as having "negro blood in her veins," a Mexican mother and a father with "some negro blood."<sup>49</sup>

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45. *Id.* at 346–47.

46. *See id.* at 351–54.

47. *See id.* at 349, 354–55.

48. *Flores v. State*, No. 727, slip op. at 1 (Tex. Crim. App. June 22, 1910) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Texas Court of Criminal Appeals Centralized Court Case Files).

49. *Id.* (strikethrough in original).

Likewise, the testimony at trial revolved around the physical appearance, reputation, and social associations of both husband and wife. For example, the Deputy Constable at Nacogdoches testified that he had warned Flores that he could not marry a negro woman.<sup>50</sup> The constable reported that Flores had denied having “a drop of negro blood in [him]” but explained that Dukes’s mother was Mexican.<sup>51</sup> Flores apparently considered his fiancée to be Mexican because of her mother’s identity.

When the lawyer for the State asked the constable to testify about Dukes’s race, Flores’s lawyer objected: “[u]nless he knows her antecedents, he can’t say unless he qualifies himself.” In other words, Flores’s lawyer argued that the basis for testimony about racial identity had to be either personal knowledge of an individual’s ancestry or scientific expertise. The court, however, ruled that the witness could “describe her physical features.” He answered: “She has the physical appearance of a negro, she is kinky headed and very dark, what we would call a dark yellow color.” The constable was then asked, “Any other physical appearances of a negro?” and answered, “Well just a plain old fat negro woman is all,” which was stricken from the testimony at Flores’s objection.<sup>52</sup> On cross-examination the constable elaborated:

It is not a fact that she favors a Mexican greazer more so than she does a negro; her skin is a different color from that of a black negro; I suppose her skin is more of the color of a Mexican than it is a negro of that peculiar hue or type, it is a copper color, Mexicans most of them have a copper color. . . . I would determine the quantity of negro blood in her by her kinky hair.<sup>53</sup>

Similarly, another state witness judged Dukes “from her personal appearance . . . [as] at least half negro,” but could not say “what extent of negro blood she has in her” because she was “not a negro geologist.”<sup>54</sup>

The State also called as a witness a woman who probably identified as a “negro,”<sup>55</sup> who testified that Dukes “married a Mexican” at her house, and that Dukes stayed over at her house “with negroes” and that “she eat at [her] table.”<sup>56</sup> On cross-examination she admitted: “I don’t know of my own knowledge whether she is a negro or not but she looks like one to me; she is a little brighter color than I is.”<sup>57</sup> The Sheriff of Angelina County testified: “[D]uring the years I have known [Dukes] I have never known her to associate with white

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50. Transcript of Testimony at 1–2, *State v. Flores*, No. 3020 (Dist. Ct. Tex. Dec. 5, 1909).

51. *Id.* at 2.

52. *See id.*

53. *Id.* at 3–4.

54. *Id.* at 14.

55. The witness described herself as darker than Dukes, and talked about Dukes associating with negroes at her house, suggesting that she considered herself “negro.” *See id.* at 9–10.

56. *Id.*

57. *Id.* at 10.

people in a social way, she has always associated with negroes.”<sup>58</sup> Yet on cross-examination he admitted that association with “negroes” did not necessarily mean whiteness, if Mexicans were defined as white, and he said, “Mexicans, such as this defendant here, that we commonly term as greasers generally associate with negroes. I would not undertake to say whether these greasers have any negro blood in them or not, I was not there at the beginning.”<sup>59</sup>

In her own testimony, Dukes not only evinced the fluidity of her own identity but uncertainty about her husband’s as well:

My mother was a Mexican; my father had some negro blood in him; I do not know just how much . . . my father’s color was very bright, he was a great deal brighter color than I am; my father’s hair was not kinky or nappy like the ordinary negro, his hair was not as bad as my hair, it was straighter. . . . Flores always associated with negroes and not with white people . . . . When I was at home I always associated with the Mexicans; since I have been in Angelina or Nacogdoches Counties I have not associated with the white people or white race.<sup>60</sup>

Dukes appeared to consider Mexicans to be white, but considered her own identity to be somewhere in between, associating at times with Mexicans and at times with negroes. Likewise, her husband, who was Mexican, associated only with negro people.

The trial judge charged the jury only about the definitions of “negro” and “white person” under the state miscegenation statute, including the fact that “Mexicans . . . shall be deemed a ‘white person’ within the meaning of this law.”<sup>61</sup> Flores moved for a new trial, arguing that the state had failed to prove both that Flores was white and that Dukes was black.<sup>62</sup> Flores’s motion complained that

at best, the witnesses stated that ‘he (defendant) looked like a mexican,[]’ . . . on the other hand, the testimony disclosed that the defendant associated with and commingled with negroes all the time, and did not associate with the white people at all, which was a circumstance of his being part negro . . . .<sup>63</sup>

Furthermore, Flores argued that “none of the witnesses in this case testified as to knowing of the antecedents [sic] of the women, and knew none of her ancestors [sic], and testified only to ‘her appearances as being of mixed blood

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58. *Id.* at 10–11.

59. *Id.* at 11.

60. *Id.*

61. Charge of the Court, *State v. Flores*, No. 3020 (Dist. Ct. Tex. Nov. 24, 1909).

62. Defendant’s Original Motion for a New Trial, *Flores*, No. 3020 (Dist. Ct. Tex. Nov. 24, 1909).

63. *Id.*

and appearing to have negro blood.”<sup>64</sup> On appeal, the judge accepted this argument, reversing the lower court decision and remanding for a new trial.<sup>65</sup>

*Flores v. State* reveals something about popular and legal understandings of Mexican and “negro” identity in Texas. On the one hand, it was fairly clear from the testimony that some Mexicans and blacks associated with one another socially and that some intermarried. On the other hand, the law defined Mexicans as “white” and proscribed Mexican-black marriage. While the state attempted to demonstrate Dukes’s “negro” identity by her associations, this proved difficult because of the evidence that Mexicans associated at times with both whites and blacks. And although the trial judge allowed, as in most racial identity trials, testimony about appearance, associations, reputation, and performance, the Court of Criminal Appeals accepted the defendant’s argument that the State had not met its burden of proof in establishing the couple’s ancestry.

Another miscegenation case from the same era also suggests the fluidity of popular understandings of Mexican racial identity in confrontation with state efforts to create and police a single racial boundary between black and white. In *Kirby v. Kirby*,<sup>66</sup> 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.”<sup>67</sup>

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.<sup>68</sup> Joe’s lawyer asked, “To what race do you belong?” and Tula answered, “Mexican.” He pressed: “Are you white or have you Indian blood?” She answered, “I have no Indian blood.” On cross-examination, Mayellen’s lawyer asked about Tula’s father, “Was he a Spaniard?” She answered, “Yes, a Mexican.” That was not what the lawyer meant; when he asked whether Tula’s father was born in Spain, Tula said he was born in Sonora. To the question “who was your mother?” Tula answered, “Also in Sonora.” Tula explained that her mother was a Spaniard on her father’s side and Mexican on her mother’s side. Mayellen’s lawyer asked, “What do you mean by Mexican, Indian, a native.” Tula answered, “I don’t know what is meant by Mexican.” The lawyer, still equating “Mexican” with “Indian,” asked, “A native of Mexico?” But Tula, who understood “Mexican” as an identity in itself, answered, “Yes, Sonora, all of us.”<sup>69</sup>

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64. *Id.*

65. *Flores v. State*, No. 727, slip op. at 2–3 (Tex. Crim. App. June 22, 1910) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Texas Court of Criminal Appeals Centralized Court Case Files).

66. 206 P. 405 (Ariz. 1922).

67. Appellant’s Abstract of Record at 1–2, *Kirby*, 206 P. 405 (No. 1970).

68. *See id.* at 12; *see also* Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of “Race” in Twentieth-Century America*, in *SEX, LOVE, RACE* 464, 464–65 (Martha Hodes ed., 1999) (discussing the *Kirby* case).

69. Appellant’s Abstract of Record, *supra* note 67, at 12–14.



The lawyer then asked Tula about each of her grandparents, all of whom she described as “Mexican,” save her father’s father, a Spaniard named Ignacio Quevas.<sup>70</sup> The lawyer then prodded her, “as a matter of fact, you don’t know what your blood is at all?”<sup>71</sup> Tula answered, “I do know that my mother is Mexican and my father is Mexican, half Spaniard.”<sup>72</sup> The lawyer then turned to the issue of her daughter-in-law’s identity, asking Tula what she knew about “Mrs. Kirby’s family.” Tula replied that she “distinguish[ed] her by her color and the hair; that is all [she knew].” The cross-examination ended with this final exchange:

[Mayellen’s lawyer:] And you call yourself white, is that because you are colored too?

[Tula Kirby:] We have no such description as white, we are called Mexicans.<sup>73</sup>

In Tula Kirby’s testimony, we see evidence of a popular counternarrative of Mexican identity that defies racial categorization. While Tula appeared to draw some distinction between “Spaniard” and “Mexican,” it was elusive. When Mayellen’s lawyer tried to pin her down to a non-white identity for “Mexican,” such as “Indian” or “native,” she resisted. Yet neither did she identify herself as white or Caucasian. She apparently considered “Mexican” to be her racial identity, or at least identified strongly as Mexican and considered that to be her primary source of identification, with “race” perhaps less important. Ultimately, she tried to explain, “we have no such description as white.”<sup>74</sup>

When Joe Kirby took the stand, his lawyer asked him the same question he asked Kirby’s mother: “What race do you belong to?”<sup>75</sup> Mayellen’s lawyer objected, “I think, if Your Honor please, that calls for a conclusion.” But the judge disagreed: “Oh, no, it is a matter of pedigree.” In other words, racial identity—pedigree—was always a matter of fact to which witnesses could testify. Joe answered, less than emphatically, “I belong to the white race I suppose.” On cross-examination, Mayellen’s lawyer asked, “Joe, haven’t you repeatedly told Mrs. Kirby that you didn’t claim to be a white man, that you were not a white man, that you were a Mexican?”<sup>76</sup> Joe denied this, and also denied the notion that his father had been raised by Indians, insisting that his father was an Irishman.<sup>77</sup>

At the end of the testimony, Joe’s lawyer claimed to have established Joe’s

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70. *See id.*

71. *Id.* at 14–15.

72. *Id.* at 15.

73. *Id.*

74. *Id.*

75. *Id.* at 16.

76. *Id.*

77. *See id.* at 17–18.

“Caucasian” identity.<sup>78</sup> 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, “hut that does not signify anything.”<sup>79</sup>

During this exchange, the judge elaborated:

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.<sup>80</sup>

Here was a case in which 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. As in the *Flores* case, people who claimed “Mexican” identity were equivocal about what that meant in racial terms, but in *Kirby* the court ended its inquiry with the presumption of whiteness rather than concluding that identity had not been proven.

Twenty years later, the Supreme Court of Arizona again considered a marriage involving a defendant identified as part Mexican, but in this case both husband and wife had some Mexican ancestry.<sup>81</sup> Frank Pass was found guilty of murder in 1941, over his invocation of the spousal privilege to exclude the testimony against him of Ruby Contreras Pass.<sup>82</sup> The lower court overruled his objection on the ground that Frank and Ruby’s marriage violated the state’s miscegenation statute because “a descendant of an Indian may not marry a member of the Caucasian race.”<sup>83</sup> Who was who in this case? Frank testified that his mother was half English and half Paiute Indian; his father was Mexican. The state supreme court therefore concluded that Frank was “a descendant of three races, to wit, Caucasian, Indian and Mexican.”<sup>84</sup> Ruby testified that her father was Spanish “and her mother [was] half French and half Mexican.” She was then asked, “Do you have any Indian blood in you?” and she answered, “Not that I know of.”<sup>85</sup> That was enough for the lower court, as well as the Supreme Court of Arizona, to conclude that Ruby was “Caucasian,” “Spanish

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78. See Pascoe, *supra* note 68, at 465.

79. *Id.* (alterations in original) (quoting Appellant’s Abstract of Record, *supra* note 67, at 19).

80. Appellant’s Abstract of Record, *supra* note 67, at 19.

81. See *State v. Pass*, 121 P.2d 882 (Ariz. 1942).

82. See *id.* at 882.

83. *Id.* (internal quotation marks omitted).

84. *Id.*

85. *Id.*

and French.”<sup>86</sup> Frank’s lawyer tried, without success, to argue that Mexicans were not white: “It is, I believe, common knowledge that the Mexican people have back from some distant relative Indian blood. The Mexican people are derived from some cross between Indian and other races or between an intermixture of people.”<sup>87</sup> The lower court judge, however, refused to “take judicial knowledge of that fact at all”; so long as Ruby testified that she did not have “Indian blood” and no evidence was presented of “Indian blood,” she was presumed white.<sup>88</sup> The supreme court also found that “[i]n her veins nothing but Caucasian blood flowed,” although it urged the legislature to set a more precise blood-quantum into the law so that people of mixed blood would be able to marry somebody.<sup>89</sup>

Thus, in cases involving interracial marriage in which Southwestern courts were drawing the line between black and white, they placed “Mexicans” on the white side of the line, following the *Rodriguez* precedent. Courts presumed that Mexican Americans were white unless there was clear evidence of either Indian or black ancestry. Often, lawyers drew on a dichotomy between “Spanish” Mexicans and “Indian” Mexicans that did not appear to be shared by the people they were questioning. The legal classification as white persisted even when trial testimony revealed a considerable amount of Mexican-black social interaction and distance from other “whites,” as well as the refusal of both “Mexicans” and other “whites” to identify Mexican Americans as white socially. As the next Part will show, by the 1930s and 1940s this social distance was exhibited in every aspect of life in the Southwestern United States. The clash between the varied social realities of Mexican Americans and their legal classification in the courts thus became even more problematic with the spread of Jim Crow practices.

## II. THE POLITICS OF WHITENESS IN THE 1930S AND 1940S

In the 1930s and 1940s, Mexican Americans in the Southwest began to organize in response to the increasing antagonism they experienced from their Anglo neighbors. During this period, exclusionary practices—from deportation to segregation—spread, and Mexican Americans responded through political advocacy. One of the strategies they employed was to claim the rights of white citizens. But this was never the only strategy, and it often coexisted with appeals to race pride and solidarity with other victims of racism.

### A. JIM CROW IN THE SOUTHWEST

We tend to think of segregation as a Southern problem, associating “Jim Crow” with the exclusion of African Americans from private and public institu-

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86. *Id.* at 882, 883.

87. Trial Transcript at 293, *State v. Pass*, No. 16267 (Super. Ct. Ariz. May 22, 1941).

88. *Id.* at 294.

89. *Pass*, 121 P.2d at 883–84.

tions in the Southeastern United States. But segregation was neither limited to African Americans nor to the Southeastern United States. Mexican Americans also suffered under a Jim Crow regime, not only in Texas, but across the entire Southwest.<sup>90</sup> In California, Mexican Americans as well as Asian Americans, Indians, and blacks were excluded from white schools. Additionally, James Loewen has recently chronicled the history of thousands of all-white “sundown” towns and suburbs across the West and North that kept out not only African Americans, but also Asian Americans and Mexican Americans. They were known as “sundown towns” because people of color were warned not to let the sun set on them within the town limits.<sup>91</sup>

In California and Texas, as discussed earlier, discrimination against Mexicans in the second half of the nineteenth century varied according to class and geography. But massive immigration from Mexico, as well as the economic effects of the Great Depression, led to the expansion of Jim Crow beyond the agricultural regions that had been its core in earlier years.

From 1890 to 1930, between one and 1.5 million Mexicans immigrated to the United States, especially in the aftermath of the Mexican Revolution in 1910.<sup>92</sup> In the 1920s alone, the Mexican population of California tripled from 121,000 to 368,000.<sup>93</sup> This massive influx of people fed an enormous expansion of agriculture that transformed the Southwest. In 1880, there were only 7436 miles of railroad track in the Southwest; by 1920, that number had increased nearly fivefold to 36,000.<sup>94</sup> In 1890, there were over 1.5 million acres of irrigated land in California, Nevada, Utah, and Arizona combined; by 1909, there were approximately 14 million irrigated acres in the Southwest. The expansion of railroads and irrigation enabled massive increases in agricultural production.<sup>95</sup>

Despite (and perhaps because of) the dependence of Southwestern agriculture on Mexican workers, there had been little opposition to Mexican immigration before the 1920s. The first national immigration restriction to affect Mexicans was the imposition of a literacy test in 1917. In 1924, the year that Congress passed an immigration act setting quotas limiting immigration from Europe,<sup>96</sup> attention turned to Mexicans, especially the “wetbacks” who crossed the Rio Grande River without documentation.<sup>97</sup> As one congressman from Indiana complained in April 1924, “What is the use of closing the front door to keep out

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90. See generally RICHARD GRISWOLD DEL CASTILLO, *THE LOS ANGELES BARRIO, 1850–1890: A SOCIAL HISTORY* (1979).

91. JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2005).

92. DAVID G. GUTIÉRREZ, *WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY* 40 (1995).

93. Christopher Arriola, Comment, *Knocking on the Schoolhouse Door: Mendez v. Westminster: Equal Protection, Public Education and Mexican Americans in the 1940s*, 8 *LA RAZA* L.J. 166, 170 (1995).

94. GUTIÉRREZ, *supra* note 92, at 41.

95. *Id.*

96. See Immigration Act of 1924, ch. 190, 43 Stat. 153, 153–69 (repealed 1952).

97. NGAI, *supra* note 20, at 50–55.

undesirables from Europe when you permit Mexicans to come in here by the back door by the thousands and thousands?"<sup>98</sup> In response, the Bureau of Immigration established the Border Patrol that year to monitor illegal immigration. Until the Depression, little sustained effort was made to restrict Mexican immigration, but the rising anti-Mexican sentiment expressed itself in a tightening of Jim Crow.<sup>99</sup> Beginning in the 1930s, nearly half of a million Mexican immigrants were repatriated to Mexico, some voluntarily, but the majority against their will. Those who remained found themselves second-class citizens.<sup>100</sup>

In Texas in the 1930s and 1940s, as in much of the Southwest and California, most Mexican-American children attended separate schools; by 1930, ninety percent of South Texas schools were segregated. In agricultural areas, many Mexican Americans lived in "company towns" like Taft Ranch with all separate institutions.<sup>101</sup> Mexican Americans were discriminated against in jury selection and in voting and in many places were shut out of public accommodations like swimming pools, theaters, and restaurants, or segregated into the "colored" section together with African Americans. For example, Manuel C. Gonzales, lawyer for the leading Mexican-American advocacy group in the 1940s, the League of United Latin American Citizens (LULAC),<sup>102</sup> held a "list of segregatory incidents" from 1939 to 1942.<sup>103</sup> These incidents included a real estate covenant in Corpus Christi, Texas, with a clause requiring that "[n]o lot or any part thereof shall be sold to any *Mexican*, Ethiopian, Malayan or Mongolian or any person having an appreciable admixture of *Mexican*, Ethiopian, Malayan or Mongolian blood"; not providing service to Mexicans at the Hitchcock Grill, in Galveston, Texas; "imprisonment of Mexicans with persons belonging to the colored race" in Dallas, Texas; "exclusion of all persons of 'Mexican Indian descent' from serving on grand juries" in Galveston, Texas; and taking "Mexican school children . . . to eat in the dining room for Negro school children" in Kennedy, Texas.<sup>104</sup>

In California, there were similar levels of segregation and discrimination against Mexican Americans. In 1945, Manuel Ruiz, secretary of the Coordinating Council for Latin American Youth, reported to the Los Angeles authorities that a police officer in Watts had been "shouting that he was going to 'kill any son of a bitch Mexican.'"<sup>105</sup> He complained to the Office of War Information

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98. GUTIÉRREZ, *supra* note 92, at 52–53.

99. *Id.* at 69–70.

100. See NGAI, *supra* note 20, at 72–73, 82.

101. See FOLEY, *supra* note 19, at 122–23; MONTEJANO, *supra* note 19, at 160.

102. For more about LULAC, see *infra* text accompanying notes 133–38.

103. See Index to Segregatory Incidents (undated document detailing segregation in various cities in Texas) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, LULAC Archives, Manuel C. Gonzales Collection, Folder 2).

104. *Id.* at 1–5.

105. Letter from Manuel Ruiz, Jr., Sec'y, Coordinating Council for Latin Am. Youth, to Captain Harry Lawrenson (May 9, 1945) (collection of Stanford University Libraries, Palo Alto, Cal., Special

that local newspapers “stirr[ed] up feelings against juvenile delinquency of Mexican extraction.”<sup>106</sup> Ruiz monitored and protested police brutality against Latin-American victims,<sup>107</sup> as well as cases in which the judge discriminated against Latin-American defendants.<sup>108</sup>

Texans who supported segregation of Texas Mexicans reported in a 1950 survey that they viewed Mexicans as a different race.<sup>109</sup> According to the *American-Statesman*, “Most of those who approve segregation make no attempt to cover up their prejudice against Latin-Americans. They say Latin-Americans are ‘a different race,’ ‘socially inferior,’ ‘not clean,’ ‘we don’t believe in mixing races.’”<sup>110</sup> One-third of all Texans favored separate schools based explicitly on the fear of race mixing. Nearly half cited other reasons relating to culture or social performance for preferring separation, including language differences and not “act[ing] like whites.”<sup>111</sup> The Good Neighbor Commission also collected letters expressing virulent racism aimed at Texas Mexicans.<sup>112</sup> One Texan wrote

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Collections & University Archives, Manuscripts Division, Manuel Ruiz Papers, 1931–1986, Box 3, Folder 12).

106. Letter from Manuel Ruiz, Jr., Sec’y, Coordinating Council for Latin Am. Youth, to Office of War Info., Washington, D.C. (July 19, 1944) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Manuel Ruiz Papers, 1931–1986, Box 2, Folder 15).

107. See Letter from Richard Simon, Captain, Commanding Personnel Div., L.A. Police Dep’t, to Manuel Ruiz, Jr., Sec’y, Coordinating Council for Latin Am. Youth (June 18, 1945) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Manuel Ruiz Papers, 1931–1986); Letter from C.B. Horrall, Chief of Police, L.A. Police Dep’t, to Manuel Ruiz, Jr., Coordinating Council for Latin Am. Youth (June 18, 1945) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Manuel Ruiz Papers, 1931–1986); Letter from Carey McWilliams, Law Offices of Hammack, McWilliams & Hammack, to Manuel Ruiz (June 12, 1945) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Manuel Ruiz Papers, 1931–1986); Letter from Coordinating Council for Latin Am. Youth to L.A. Police Comm. (May 11, 1945) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Manuel Ruiz Papers, 1931–1986).

108. See, e.g., Statements of the Court, *In re a Minor*, No. XXXX (Sup. Ct. Cal. Sept. 2, 1969) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives), noted in *In re Chargin*, 471 P.2d 29 (Cal. 1970) (censuring the judge for his comments in court); Transcript of Record, *People v. Whipple*, 279 P. 1008 (Cal. Dist. Ct. App. 1929) (Crim. No. 1805) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Manuel Ruiz Papers, 1931–1986, Box 3, Folder 12); Letter from Judge James Pope to Manuel Ruiz (Sept. 7, 1945) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Manuel Ruiz Papers, 1931–1986).

109. See Joe Belden, *Minority of Texans Favors Separation for Latin Students*, AMERICAN-STATESMAN, June 9, 1950 (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-18).

110. *Id.*

111. *Id.*

112. See, e.g., Letter from J.G. Riser, Sec’y-Treasurer, Nat’l Farm Loan Ass’n of Beeville, to Allan Shivers, Governor of Tex. (Aug. 24, 1953) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-17, Folder 11).

to Governor Shivers in 1953 that most “all white AMERICAN GOD FEARING CITIZENS . . . are strongly in favor of a continuation of racial discrimination in order to protect the sanctity of our homes, safeguard our children . . . keep Texas and the U.S. HOLY, sacred and pure, And keep AMERICA AMERICAN.” He backed up his argument for racism with a theory of polygenesis, that God created “the Negro, the Indian and THE WHITE MAN,” just as he made “deer, antelope, goat and sheep,” and ended with a warning that LULAC and the G.I. Forum “should be *carefully watched*.”<sup>113</sup>

Most segregation of Mexican Americans was de facto rather than de jure, set in place by custom and local administration rather than state statute. In Texas, school segregation was left up to the discretion of local officials, who insisted that all separation was for educational purposes.<sup>114</sup> In California, section 8003 of the state school code provided that separate schools be established for “Indians under certain conditions and children of Chinese, Japanese or Mongolian parentage.”<sup>115</sup> In 1931, a bill was proposed in the California state legislature to add the phrase “whether born in the United States or not” immediately after the words “Indian children” in that statute.<sup>116</sup> As the *New York Times* noted, this addition “could only apply to Mexican children, for there are in California no other youngsters of Indian blood in sufficient numbers to be segregated, and not born in this country.”<sup>117</sup>

Although this effort to enshrine segregation of Mexican Americans in a state statute failed, most California school districts simply interpreted the existing statute to include them already in the category “Indian.”<sup>118</sup> In 1945, Manuel Ruiz “declared that many school districts have used this section to segregate Latin American pupils ‘on the ground that they may have some Indian blood.’”<sup>119</sup> Latin-American groups helped introduce an anti-segregation bill in that year to repeal section 8003 of the school code,<sup>120</sup> but it failed. As leading journalist and sociologist Carey McWilliams explained, the “common practice has been simply to assign all children with Spanish or Mexican names to a separate school. Occasionally, the school authorities inspect the children so that the offspring of

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113. *Id.*

114. See *infra* text accompanying notes 192–93.

115. *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 780 (9th Cir. 1947).

116. *Hegira of Mexicans Bothers California*, N.Y. TIMES, Apr. 19, 1931, at 6E.

117. *Id.*

118. Manuel Ruiz, *Untitled News Report from Los Angeles*, ASSOCIATED PRESS, Apr. 30, 1945 (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Manuel Ruiz Papers, 1931–1986, Box 16, Folder 3).

119. *Id.*; see also Letter from Nat’l Origins Council of Am. to Senator Slater, Chairman, Educ. Comm., Cal. State Senate (May 15, 1945) (“We feel that segregation of children of Mexican extraction, on the theory that many of them may have some Indian blood, and as it has been practiced in many communities of California has been inimicable to the process of intigration [sic] of this segment into the American community.”) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Manuel Ruiz Papers, 1931–1986, Box 16, Folder 3).

120. See Ruiz, *supra* note 118.

a Mexican mother whose name may be O'Shaughnessy will not slip into the wrong school."<sup>121</sup>

Both state and national government agencies explicitly counted Mexican Americans as a separate racial category. The first efforts to count Mexicans in the U.S. Census, in 1930, listed individuals as "Mexicans (Mex)" if they or their parents were born in Mexico and if they were not "definitely White, Negro, Indian, Chinese or Japanese."<sup>122</sup> Thus, whereas the 1930 Census counted 686,260 "people of other races" in Texas, it counted only 3692 "white people born in Mexico."<sup>123</sup> Because of the vigorous opposition to this racialization of "Mexican" by LULAC, as well as by the Mexican government, the Census in 1940 categorized Mexicans as white unless "definitely Indian or some race other than white" (although they did begin asking for the "language spoken at home in earliest childhood").<sup>124</sup> In subsequent decades, 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."<sup>125</sup> Beginning in 1980, the general term "Hispanic" was introduced as an ethnicity category following the "race" question on the Census form.<sup>126</sup>

Yet state officials continued to classify "Mexicans" or "Latin Americans" as a nonwhite race well after 1940. For example, on July 10, 1941, a citizen of San Angelo, Texas complained to LULAC that "the Vital Statistics Department of said city is classifying births of the Latin Americans as of the Mexican race instead of the white race as has been recommended by the Federal Government."<sup>127</sup> As late as 1954, the Texas State Department of Health used forms with the categories "W," "M," and "C," for "White, Mexican and colored," or "AA LA C" for "Anglo American, Latin American, Colored."<sup>128</sup> After LULAC complained, the State Health Officer instructed officials to change the forms, as

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121. Carey McWilliams, *Is Your Name Gonzales?*, THE NATION, Mar. 15, 1947, at 302, 302.

122. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 200 YEARS OF U.S. CENSUS TAKING: POPULATION AND HOUSING QUESTIONS, 1790-1990, at 60 (Heritage Quest 2000) (1989).

123. Univ. of Va., Geospatial & Statistical Data Ctr., Historical Census Browser, State Level Results for 1930, <http://fisher.lib.virginia.edu/collections/stats/histcensus/index.html> (follow "1930" hyperlink; then follow "Ethnicity/Race/Place of Birth" hyperlink; then select both "people of other races" and "white people born in Mexico"; then scroll down and submit query; then check box for "Texas" and click "retrieve county level data") (last visited Dec. 22, 2006).

124. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *supra* note 122, at 65, 69.

125. Margarita B. Melville, *Hispanics: Race, Class, or Ethnicity?*, 16 J. ETHNIC STUD. 67, 70 (1988); see also JULIAN SAMORA & PATRICIA VANDEL SIMON, A HISTORY OF THE MEXICAN-AMERICAN PEOPLE (rev. ed. 1993), available at <http://www.jsri.msu.edu/museum/pubs/MexAmHist/chapter2.html>.

126. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *supra* note 122, at 90.

127. Index to Segregatory Incidents, *supra* note 103, at 9.

128. Tex. State Dep't of Health, Form No. M911, Tuberculosis Record (attached to Letter from Albert Armendariz, Immediate Past Nat'l Pres., League of United Latin Am. Citizens, to Henry Holle, M.D., State Health Officer (Aug. 26, 1954) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-42, Folder marked "LULAC's 1955-56")); Tex. State of Dep't of Health, Form No. M9101, Morbidity-General Medical Record (same).



he “agree[d] that Latin American citizens should be treated as white.”<sup>129</sup>

Thus, in Texas and California, Mexican Americans suffered many of the same Jim Crow practices as African Americans. Not only were they excluded from many public accommodations, like swimming pools, theatres, and restaurants, but more importantly, from the key institutions of public life: schools and political institutions. Like African Americans, they responded to racial injustice by organizing, petitioning, and litigating.<sup>130</sup>

#### B. MEXICAN-AMERICAN ORGANIZATIONS AND POLITICS

In the 1930s and 1940s, Mexican Americans formed organizations to battle Jim Crow. These groups often enlisted claims of whiteness in the battle for civil rights and urged fellow Mexicans towards cultural assimilation and “100% Americanism,” drawing a connection between whiteness and citizenship that would have been familiar to most Americans. Yet at the same time, these organizations also emphasized “racial pride” and Mexican cultural heritage. As Ian Haney López has written, activists “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.”<sup>131</sup> While some have characterized the Mexican-American organizations of the ‘30s and ‘40s as unequivocal promoters of assimilation and white identity,<sup>132</sup> in fact their ambivalence ran deep.

The most important organization advocating on behalf of Mexican Americans was LULAC, formed in 1927 to unite a number of Mexican-American fraternal organizations in Texas.<sup>133</sup> LULAC consciously promoted both racial pride and Americanization.<sup>134</sup> Among the “Objects and Aims of the United Latin American Citizens” were

2. To assume complete responsibility of educating our children in the knowledge of all their duties and rights, language and customs of this country as far

129. Letter from Albert Armendariz, *supra* note 128; Letter from Henry Holle, M.D., State Health Officer, to Albert Armendariz, Immediate Past Nat’l Pres., League of United Latin Am. Citizens (Sept. 3, 1954) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-42, Folder marked “LULAC’s 1955–56”).

130. See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (rev. ed. 2004) (documenting African Americans’ efforts to gain racial equality in America); MARK TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (2d ed. 2005).

131. López, *Race, Ethnicity, Erasure*, *supra* note 27, at 1165.

132. See *id.* at 1164–65.

133. See Alonso S. Perales, *The Unification of the Mexican-Americans*, LA PRENSA, Sept. 4, 1929 (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, LULAC Archives, Oliver Douglas Weeks Collection, 1922–1932, Box 1, Folder 13).

134. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925*, at 234–63 (2d ed. 2002), for a discussion of Americanization of immigrants.

as there is good in them. We declare for once and forever that we will main [sic] a respectful and sincere worship for our racial origin and be proud of it.

3. Secretly and openly, by all right means, we will aid the culture and orientation of Mexican-Americans and we will govern our life as a citizen to protect and defend their life and interests in so far as is necessary.<sup>135</sup>

These aims included pride both in racial and cultural origins as well as in Americanization. Early LULAC leader Alonso Perales described the goals of LULAC in terms of the development among “the members of our race the better, more pure and perfect type of true and loyal citizens of the United States of America,” as well as the attack on all discrimination based on “race, religion, or social position,” and an emphasis on “the acquisition of the English language.”<sup>136</sup> The application for membership asked the applicant, “Are you a native born American citizen? Are you a naturalized American Citizen? If so, when and where were you naturalized? Are you legally qualified to vote in this County and State?”<sup>137</sup> After seven years, LULAC resolved to strike out the hyphen in “Latin-American,” because “the word Latin should be used as descriptive of the legally and technically accurate phrase, American Citizens.”<sup>138</sup>

LULAC officials insisted that Americanism and exclusion of noncitizens was the right policy. Alonso Perales, writing in *La Prensa* to answer the charge that “all persons of Mexican blood ought to be united in a single society,”<sup>139</sup> explained that because LULAC was “Americanistic,” therefore “only American citizens can belong to it, but nevertheless, the League can . . . cooperate with purely Mexican societies in all that tends to the dignification and well being of our race in Texas.”<sup>140</sup> LULAC leaders lent their support as early as 1930 to congressional legislation to restrict immigration from Mexico.<sup>141</sup>

During this period, LULAC officials generally referred to “the Mexican Race, as a Race,” and talked about the need for an organization to promote

135. Objects and Aims of the United Latin American Citizens 6 (1929) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, LULAC Archives, Oliver Douglas Weeks Collection, 1922–1932, Box 1, Folder 5).

136. Perales, *supra* note 133.

137. Application for LULAC Membership (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, LULAC Archives, Oliver Douglas Weeks Collection, 1922–1932, Box 1, Folder 3).

138. LULAC Resolution, On The Question of The Hyphen (adopted June 6, 1936), *reprinted in* LULAC, *50 Years of Serving Hispanics, Golden Anniversary, 1929–1979* (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, LULAC Archives).

139. See Alonso S. Perales, *The Unification of the Mexican American III*, LA PRENSA, Sept. 6, 1929 (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, LULAC Archives, Oliver Douglas Weeks Collection, 1922–1932, Box 1, Folder 13).

140. See Alonso S. Perales, *The Unification of the Mexican-Americans VI*, LA PRENSA, Sept. 10, 1929 (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, LULAC Archives, Oliver Douglas Weeks Collection, 1922–1932, Box 1, Folder 13).

141. See GUTIÉRREZ, *supra* note 92, at 85.

understanding “[w]here two races are brought together under one flag.”<sup>142</sup> At the same time, LULAC used claims of whiteness to push for Mexican-American civil rights: in 1941, 1943, and again in 1945, LULAC pushed unsuccessfully for a bill in the Texas legislature guaranteeing “equal . . . privileges” to “all persons of the Caucasian race.”<sup>143</sup> While the bill never passed, a toothless resolution declaring that “all persons of the Caucasian Race . . . are entitled to the full and equal accommodations, advantages, facilities, and privileges of all public places of business or amusement” did go through the Texas state legislature in 1941; LULAC leaders M.C. Gonzales, George Sánchez, Alonso Perales, and the Mexican government all lobbied for it.<sup>144</sup>

One of the earliest actions of a LULAC chapter took place in 1936, when El Paso city officials began classifying Mexican Americans as “colored” rather than “white” in birth and death registries, which conveniently lowered the “white” infant mortality rate for the city.<sup>145</sup> When the local LULAC chapter filed an injunction against the city, its local leader argued that Mexicans “as a race are red if they are Indians and white if they are not Indians.”<sup>146</sup> Alonso Perales wrote to

congratulate him for his “virile stance” on the classification issue, explained that he never protested the fact that Mexicans had their own category in San Antonio because “we are very proud of our racial origins and we do not wish to give the impression that we are ashamed of being called Mexicans.”<sup>147</sup>

“Nevertheless,” he continued, “we have always resented the inference that we are not whites.”<sup>148</sup>

A few years after World War II, Hector Garcia, a physician and military veteran, founded another important Mexican-American organization, the American G.I. Forum (AGIF).<sup>149</sup> Despite the fact that AGIF, like LULAC, worked to combat discrimination and segregation, in 1954 Garcia insisted that “we are not and have never been a civil rights organization,” presumably to avoid any

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142. *Latin-U.S. Group Form Service Body; Organization's Purpose Is To Gain Equal Rights for All Citizens Here*, BROWNSVILLE HERALD, Sept. 22, 1929 (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, LULAC Archives, Oliver Douglas Weeks Collection, 1922-1932, Box 1, Folder 11).

143. Guglielmo, *supra* note 28, at 1212.

144. *Id.* at 1212, 1221-22.

145. Apparently, a high white infant mortality rate had been an object of public concern, whereas high rates for people of color did not garner the same attention. See Neil Foley, *Partly Colored or Other White: Mexican Americans and Their Problems with the Color Line*, in BEYOND BLACK AND WHITE: RACE, ETHNICITY, AND GENDER IN THE U.S. SOUTH AND SOUTHWEST 130-31 (Stephanie Cole & Alison M. Parker eds., 2004).

146. *Id.* at 131.

147. *Id.*

148. *Id.*

149. See *id.* at 135.

association with black groups.<sup>150</sup> “Making any distinction between Latin Americans and whites, he wrote, was a ‘slur,’ an insult to all Latin Americans of Spanish descent.”<sup>151</sup> AGIF also connected its whiteness claims to aggressively Americanist anti-immigrationism. In 1951, AGIF passed resolutions urging restriction of the “wetback tide,” although by 1954, Operation Wetback had led to such egregious violations of Mexicans’ civil rights that even AGIF and LULAC protested.<sup>152</sup>

Many of the complaints by Mexican Americans to LULAC and other activist organizations relied on a claim of whiteness, in essence diagnosing the problem of discrimination as one of misapprehension: we are being treated as though we are not white, but we are. Citizens also brought their complaints directly to the Good Neighbor Commission of Texas (GNC), a state agency designed to promote good relations between Texas and Mexico. One Mexican-American activist wrote to the GNC in 1945 to request an investigation of “the latest case of racial discrimination of which we have knowledge in our city, with a view to eradicate from the minds of ignorant Texans of Anglo-American descent the erroneous and pernicious idea that we, the Mexicans or descendants of Mexicans, do not belong to the Caucasian race.”<sup>153</sup> Another wrote to the Coordinator of Inter-American Affairs to complain about a “No Mexicans Allowed” sign at the Toasty Tasty Café in San Angelo, Texas, asserting that “such discrimination is un-American and breeds a bad feeling between the people of Mexican blood and others,” and at the same time noting that “[t]he laws of Texas and the United States provide for no segregation of Mexicans and other white Americans.”<sup>154</sup> Such interchangeable discussion of “people of Mexican blood” and Mexicans as white was common.

Some of the letter writers insisted that Mexicans should not be subject to Jim Crow because state law did not sanction the segregation of whites or “Caucasians,” implying that segregation of blacks from whites was acceptable.<sup>155</sup> Others took this argument even further, expressing outright hostility to African Americans: “Let us tell these Negroes,” LULAC member Gregory Salinas urged in 1936, “that we are not going to permit our manhood and womanhood

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150. *Id.* at 136.

151. *Id.*

152. See GUTIÉRREZ, *supra* note 92, at 154, 163–64.

153. Letter from Joe A. Real, Chairman Civic Affairs Comm., Federacion Regional de Sociedades Mexicanas y Latinoamericanas, to Mrs. Pauline Kibee, Executive Sec’y, Good Neighbor Comm’n (Mar. 6, 1945) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-42, folder marked: GI Forum, general, 1945–48).

154. Letter from Jose M. Rodriguez to Coordinator of Inter-Am. Affairs (June 5, 1944) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-42, folder marked: GI Forum, general, 1945–48); see also Letter from John F. Mendez to Manuel Ruiz (Nov. 11, 1943) (regarding exclusions from theaters an “insult to the entire Mexican race”).

155. See Letter from Joe A. Real, *supra* note 153; Letter from Jose M. Rodriguez, *supra* note 154.

to mingle with them on an equal social basis.”<sup>156</sup>

Well into the 1950s and 1960s, activists continued to bring claims based on whiteness to state officials. LULAC monitored the use of state forms that categorized “Mexican” or “Latin” as a race separate from white, as well as the categories in the U.S. Census. In 1950, Hector Garcia of LULAC sent Philip Hauser, the Acting Director of the U.S. Census, a copy of a State of Texas, Department of Public Welfare form, with a “race-nationality” of “Latin”;<sup>157</sup> Hauser responded by reassuring Garcia that “the plans for this Census, like the plans for the Census of 1940, provide for persons of Mexican origin to be included under the race classification of white.”<sup>158</sup> In 1958, a Mexican-American citizen complained to the General Consul of Mexico (who forwarded the complaint to the GNC) that she was refused service by a carhop at Tunie’s Drive Inn, Number 2, in San Antonio. When told that “she was sorry but that the Tunie’s Drive Inns did not cater to negroes or mexicans,” she “showed the waitress her drivers license pointing out that the race of the bearer, hers, is ‘white.’”<sup>159</sup> Similarly, in 1963, LULAC complained to the GNC that a camp in rural Texas advertised “No Latin Americans or Colored People accepted.”<sup>160</sup> The GNC director, wrote to the camp, explaining that

when men of high position in Mexico and in our own State are discriminated against solely because they are of Latin descent, it is hard for them to understand. Unfortunately, it is true that it gives the idea that they are not of the white race, which is untrue. The Latin race is a purely white race.<sup>161</sup>

GNC officials also responded to complaints about Jim Crow practices involving Mexican Americans, as did state officials, prosecutors, and judges, by

156. BENJAMIN HEBER JOHNSON, *REVOLUTION IN TEXAS: HOW A FORGOTTEN REBELLION AND ITS BLOODY SUPPRESSION TURNED MEXICANS INTO AMERICANS* 193 (2003).

157. State of Tex., Dep’t of Pub. Welfare, Notice of Investigation to New Applicant, Corpus Christi, Tex. (certified Mar. 9, 1950) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-18, Discrimination Files, folder marked: Discrimination, correspondence, 1949–50).

158. Letter from Philip M. Hauser, Acting Dir., Bureau of the Census, to Hector Garcia, Chairman, Am. G.I. Forum of Tex. (Feb. 23, 1950) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-18, Discrimination Files, folder marked: Discrimination, correspondence, 1949–50).

159. Letter from Lauro Izaguirre, Consul Gen. of Mex., to Watson Wise, Chairman, Good Neighbor Comm’n of Tex. (Aug. 20, 1958) (collection of Texas State Library and Archives Commission, Austin, Tex.).

160. Letter from William D. Bonilla, State Dir., League of United Latin Am. Citizens for Tex., to Frank H. Kelley, Chairman, Good Neighbor Comm’n (May 1, 1963) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-17 Discrimination Files, folder marked: Discrimination – General File, 1961–1968).

161. Letter from Frank H. Kelley, Chairman, Good Neighbor Comm’n of Tex., to Ritchey’s River Bend Camp (May 23, 1963) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-17 Discrimination Files, folder marked: Discrimination – General File, 1961–1968).

drawing distinctions between state discrimination against Mexicans and “Negro” or “colored” people, insisting that the two were extremely different. For example, the School Superintendent of Monahans, Texas, wrote to the GNC in defense of state segregation practices that “our Mexican friends . . . misinterpret our motives in the arrangements which we make for the education of our Spanish-speaking citizens.”<sup>162</sup> He blamed this on the “furor over segregation of the Negro population,” but warned that

it will do a serious injury to the Mexican-American to confuse his problem with that of the Negro. These are two distinct ethnic groups and their problems, with one or two exceptions, are about as different as they can be. It would be about as sensible to try to lump them together as it would to hitch up a Percheron and a Shetland pony to the same plow with the same harness.<sup>163</sup>

Ironically, despite Mexican-American emphasis on Americanism, one of the most powerful tools that Mexican-American activists had was the advocacy of the Mexican government. The Mexican government maintained a “black list” of towns in Texas that discriminated against Mexican nationals and Mexican Americans, and it wielded the black list to refuse *bracero* (guest worker) labor to towns on the list.<sup>164</sup> Much of the work of the GNC involved mediating between blacklisted towns and businesses on the one hand and the Mexican Consul on the other. Indeed, the very existence of the GNC in Texas was a testament to the U.S. foreign policy interest in good relations with Latin America and its immigrants to the United States.

Yet in spite of the prevalence of whiteness claims, many Mexican-American scholars and activists consistently recognized the problems facing Mexican Americans as problems of racial discrimination, saw the connections between their plight and that of blacks, and drew the contrast between American ideals and racism, which they associated with Nazism. In this way, they turned on its head the equation between Americanism and whiteness, instead claiming Americanism and anti-racism.

In 1937, LULAC supported Texas legislation to withhold government funds from “any school district which fails to provide equal educational facilities to all children of school age residing therein,” including blacks as well as Mexicans.<sup>165</sup> The Mexican-American National Association (MANA), an advocacy

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162. Letter from J. Conrad Dunagan, Comm’r, Good Neighbor Comm’n of Tex., to Glenn E. Garrett, Executive Dir., Good Neighbor Comm’n of Tex. (Feb. 15, 1960) (quoting Letter from Wesley Martin, Sch. Superintendent, Monahans, Tex., to J. Conrad Dunagan) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-16 Discrimination Files, folder marked: Black-list and discrimination, 1958–61).

163. *Id.*

164. *See id.*

165. *Id.*; Benjamin Heber Johnson, *The Cosmic Race in Texas: Intermarriage, White Supremacy, and Civil Rights Politics* 8 (2005) (unpublished manuscript, on file with author).

organization founded in 1949 that did not grow to national prominence, chronicled among its early activities “the first Mexican observance of Negro History Week” in the Maravilla Mexican community of Los Angeles.<sup>166</sup> In its founding document, MANA declared, “We have pledged ourselves to eradicating the force and violence so repeatedly used against Mexican, Negro, and other minority peoples by local police and lynch-minded racists.”<sup>167</sup>

This sentiment was not limited to leaders; AGIF’s *News Bulletin* reported in 1955 the results of a survey showing that “Mexican-Americans Favor Negro School Integration.”<sup>168</sup> The article commented that Mexican-American support for black civil rights could stem from two sources: “because they know what segregation of their own children means or because traditionally people of Mexican and Spanish descent do not share in the so-called doctrines of white supremacy and racial prejudice.”<sup>169</sup> This article, however, provoked an angry letter from AGIF member Manuel Ávila to the Texas AGIF Chairman, complaining:

Anybody reading it can only come to the conclusion [that] we are ready to fight the Negroes’ battles . . . for sooner or later we are going to have to say which side of the fence we’re on, are we white or not. If we are white, why do we ally with the Negro?<sup>170</sup>

Mexican-American activists as well as private individuals also drew the contrast between American ideals of equality and Nazi racism. Manuel Ruiz wrote to the Mayor of Delano, California, that “[w]hen local officials condone community segregation of Latin Americans, our professed victory in Europe against the ideology of a super race, is looked upon with suspicion.”<sup>171</sup>

Josè de la Luz Sáenz was an early Progressive leader in Texas, a school-teacher, and co-author of LULAC’s constitution.<sup>172</sup> Fighting side by side with whites of many ethnicities during World War II made him optimistic about the opportunities for Mexican Americans in the United States, and he emphasized

166. Press Release, Mexican-Am. Nat’l Ass’n, A General Statement on the Founding and Perspectives of the Mexican-American National Association 2 (Mar. 1969) (collection of Bancroft Library, Univ. of Cal., Berkeley, Berkeley, Cal., Carey McWilliams Papers, Carton 21, F. 6).

167. *Id.*

168. See *Mexican-Americans Favor Negro School Integration*, AM. G.I. FORUM, Sept.–Oct. 1955, at 1 (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-42, folder marked: American GI Forum).

169. *Id.*

170. Letter from Manuel Ávila to Ed Idar, State Chairman, Am. G.I. Forum (Feb. 7, 1956), *quoted in* Foley, *supra* note 145, at 137.

171. Letter from Manuel Ruiz, Sec’y, Coordinating Council for Latin Am. Youth, to Jack Busch, Mayor, Delano, Cal. (June 12, 1945) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Manuel Ruiz Papers, 1931–1986, Box 2, Folder 16).

172. For background on J. Luz Saenz, see JOHNSON, *supra* note 156, at 161–62, and Johnson, *supra* note 165, at 7.

that Americanism was opposed to racism. Luz consistently opposed all racial discrimination, denouncing the treatment of blacks in no uncertain terms: "The colored people has been subjected to accept, by brutal force, the mandates of the unfair Jim Crow Law promulgated by snobbish legislators."<sup>173</sup>

In a 1949 speech to education students at Sul Ross State College in Texas entitled "How to Designate People of Mexican Extraction," Luz blamed the problems of Mexican Americans on "a few thoughtless narrowminded persons . . . that insist[] to perpetuate the old historical political, archaic, and insulting European national feud here within the confines of our nation today."<sup>174</sup> He urged the distinction between "Mexican" and "Mexican American":

"Mexican should mean Mexican citizens. . . . Spanish-Americans are American citizens of Spanish descent. Again to be more clear, we will say that Mexican race is the mixture of the Spanish persons and aboriginal people found here in what is now called Mexico. Mexican-Americans, again, are citizens of Mexico, which is a part of America."<sup>175</sup>

Luz insisted that, whatever they were to be called, Mexican Americans suffered discrimination as a race, and he linked their struggle to the world struggle against racism and nativism. In an essay called "I Am an American," he argued against

supporters of the skin deep theory of Americanism, that is, those who base Americanism on the color of the skin.

. . .  
I firmly believe that the nordic element is not an essential factor in "I am an American," and that those who use the nordic skin theory to foster racial discrimination are un-Americans in the first degree.<sup>176</sup>

He signed the essay "J. Luz Saenz, Veteran of foreign wars."<sup>177</sup> He also described himself as "an Aztec" in some of his early writings and referred to Texas Mexicans as "the Indians of Texas."<sup>178</sup>

Americo Paredes, the folklorist and educator who founded the Mexican American Studies Program at the University of Texas, emphasized the cultural aspects of Mexican-American identity in all of his writings. He wrote in 1960,

173. JOHNSON, *supra* note 156, at 194.

174. J. Luz Saenz, Short talk to Teacher-Students at Sul Ross State College: How to Designate People of Mexican Extraction 1 (July 1949) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, LULAC Archives, José de la Luz Sáenz Papers, Box 3, Folder 3).

175. *Id.* at 3.

176. J. Luz Saenz, I am an American (May 1941) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, LULAC Archives, José de la Luz Sáenz Papers, Box 3, Folder 3).

177. *Id.*

178. Johnson, *supra* note 165, at 7.



"In reviewing the causes for conflict between the English-speaking and the Spanish-speaking peoples, it has been my purpose to show the part that was played by differences in culture, rather than differences in origin or race."<sup>179</sup> Paredes called the Texas Mexican "Texas' Third Man," who suffered more than blacks in legal status, health, jobs, and education although "paradoxically he has long ago achieved the more obvious benefits of integration which the Negro is still fighting to attain: official acceptance into restaurants, hotels, bars and even swimming pools."<sup>180</sup> Paredes argued that

prejudice against the Mexican is based on cultural factors, though it is expressed as a question of race. Hitler's classic blond barbarian could register at Austin's Brackenridge Hospital tomorrow, but if he gave his name as Juan Garcia the attendant in charge would put down "Latin American" instead of "white" in the space reserved for race. "Latin American," incidentally, is the local euphemism for "Mexican" which is too denigrating a term to use to a Mexican's face.<sup>181</sup>

By contrast, George I. Sánchez, who was both a leading civil rights advocate as well as an internationally renowned historian and educator who went on to chair the History Department at the University of Texas for a decade, insisted that it was a political and anthropological error to focus on cultural difference rather than on racial oppression. In an article called "'Anglo'-'Latin' Tensions in The Southwest," he wrote, "It is my belief that much time is wasted, and much damage done, when problems or tensions that really arise out of particular and immediate circumstantial factors are attributed to complex, and somewhat

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179. Americo Paredes, *The Mexican Contribution to Our Culture*, TEX. OBSERVER, Aug. 19, 1960, at 6. Paredes also explored Mexican American self-image through the lens of which terms they used to identify themselves:

In recent years anthropologists, sociologists, and even cultural geographers have been interested in the Mexican American's self-image as it is expressed in the names he uses in reference to himself. The results of such studies have been less than satisfactory, mainly because two important variables have either been ignored or not given their due weight. One of these variables is the Mexican American's bilingual/bicultural makeup, which allows (or forces) him to occupy somewhat different viewpoints at different times, depending on the language he happens to be using as an instrument to calibrate his experience. The other is the influence exerted on the Mexican American's (and even the Mexican's) self-awareness by the derogatory ethnic labels discussed above. In Spanish, border Mexicans use terms like *mexicano*, *raza*, and *chicano* in reference to themselves, these being ingroup terms for the most part, to be used only among other *mexicanos*. . . . When speaking in English, he may refer to himself as Latin, Spanish, or perhaps Mexican American. Only rarely will he call himself a Mexican, in English, especially if he is talking to an Anglo.

Americo Paredes, THE PROBLEM OF IDENTITY IN A CHANGING CULTURE: POPULAR EXPRESSIONS OF CULTURE CONFLICT ALONG THE LOWER RIO GRANDE BORDER 84-85 (1978).

180. Americo Paredes, *Texas' Third Man: The Texas-American*, RACE, J. INST. RACE REL., May 1963, at 49, 50-51.

181. *Id.*

mysterious, ‘cultural characteristics.’”<sup>182</sup>

In addition to academics, many other Mexican Americans also rejected whiteness claims. Numerous historians have argued that working-class Mexicans, both immigrants and U.S. born, were far less likely to identify as white or Spanish than the middle-class people who joined organizations like LULAC and AGIF. Neil Foley comments that “[f]or the masses of working-class Mexicans . . . many of them first generation, the idea that they were members of the white race would have struck them as somewhat absurd. Anglos were white; mexicanos were, well, mexicanos—raza, and later, chicanos.”<sup>183</sup> Progressive Mexican-American leaders in Texas “displayed little interest in the whiteness strategy. They did not seem to think of themselves as white, or even to aspire to such a status.”<sup>184</sup> For example, the newspaper *La Cronica* noted that in the United States “the problem of race is a question of color” and referred to Mexicans as a “latin multicolor race.”<sup>185</sup>

There was also a much greater diversity of opinion among Mexicans and Mexican Americans regarding immigration and Americanism. A team of researchers interviewed Mexican residents of the colonia of Hick’s Camp, California. Why hadn’t one immigrant become a citizen after years in the United States?

I’ll tell you why. [Mexicans] feel that Americans don’t trust them and treat them equal. . . . When I go to a show they don’t ask if I’m a citizen or not, but if I’m dark they put me on one side. The same with work. . . . That’s why we don’t want to be citizens.<sup>186</sup>

As early as the 1930s, labor unions organizing Mexican-American and Mexican agricultural workers had taken a more welcoming attitude to Mexican immigrants than that of LULAC and AGIF. These unions included the important United Cannery, Agricultural, Packing & Allied Workers of America (UCA-PAWA) and the Congress of Spanish-Speaking Peoples (El Congreso), founded in 1937 and 1938 respectively, which became the training grounds for a generation of activists, including George Sánchez, Eduardo Quevedo, and Luisa Moreno.<sup>187</sup>

In sum, when making demands of state and national government officials for civil rights, claiming whiteness was only *one* of the strategies drawn on by Mexican-American individuals and organizations. Other strategies—100% Americanism, appeal to the Mexican government and “good neighbor policy,” race

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182. George I. Sánchez, “Anglo”-“Latin” Tensions in the Southwest 4 (undated, unpublished manuscript) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919–1986, Box 70, F. 5).

183. Foley, *supra* note 145, at 138.

184. JOHNSON, *supra* note 156, at 51.

185. *Id.*

186. GUTIÉRREZ, *supra* note 92, at 89 (quoting an anonymous immigrant).

187. *Id.* at 110–11.

pride, solidarity with other oppressed groups, and comparisons of racism to Nazism—some compatible and some contradictory with whiteness, reflect a multifaceted approach to the pursuit of Mexican-American civil rights.

### III. LITIGATING MEXICAN-AMERICAN WHITENESS

Although Mexican-Americans' status as white had been articulated by the *Rodriguez* court in the context of naturalization to citizenship and had been accepted in miscegenation cases in state courts, whiteness claims had never been raised directly in challenges to discrimination in state courts before 1930. Beginning in 1930, LULAC enlisted lawyers to bring suits in Texas state courts against the segregation of Mexican-American children in schools, as well as against the exclusion of Mexican Americans from juries. Throughout the 1930s, these claims were framed in terms of racial discrimination. But in the 1940s, state courts began to dismiss these claims by covering Mexican Americans with the "Caucasian cloak" and to chastise civil rights litigators for presenting their "white" clients as victims of racial discrimination. In response, litigators turned to a more explicit whiteness strategy, arguing that Mexican Americans were white but were treated as nonwhite in Texas and California.

#### A. THE 1930S SCHOOL AND JURY CASES

Although some Mexican-American leaders had begun as early as 1930 to stake claims to whiteness before government agencies, they did not push a whiteness strategy in court. For most of the 1930s, litigating Mexican-American whiteness played little role in either school segregation or jury discrimination cases.

Beginning with *Independent School District v. Salvatierra*,<sup>188</sup> 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," and beyond that, there was no discussion of "Mexican" racial identity.<sup>189</sup> At least initially, Mexican Americans perceived the case to be a victory because the court ruled that school districts could not segregate indiscriminately against "Mexican" children.<sup>190</sup>

Yet in fact, the case was a setback. The court dissolved the temporary injunction against the school district and approved segregation based on lan-

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188. 33 S.W.2d 790 (Tex. Civ. App. 1930). My discussion of these cases draws on my comment, Ariela J. Gross, Comment, *Texas Mexicans and the Politics of Whiteness*, 21 LAW & HIST. REV. 195 (2003).

189. *Salvatierra*, 33 S.W.2d at 794.

190. Del Rio Segregating Case Up to High Court (unmarked news clipping) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, LULAC Archives, Oliver Douglas Weeks Collection, 1922–1932, Box 1, Folder 19).

guage and migrant worker status.<sup>191</sup> 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 *Salvatierra*, 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.”<sup>192</sup> The ascription of different characteristics based on Mexican ancestry did not count as “race”-based differentiation.

On appeal, the school district insisted that “segregation” of children “of Spanish or Mexican descent” from “children of Anglo-Saxon parents . . . had been for educational purposes only.”<sup>193</sup> The Mexican-American plaintiffs insisted that they had shown that their “children . . . belong to and were part of the white race, and do not belong to nor are they Negroes or belong to the colored race.”<sup>194</sup> In their motion for rehearing, the plaintiffs explained:

Segregation not being a discretionary matter, we are simply insisting upon the plain application of CONSTITUTIONAL AND STATUTORY RIGHTS as they now exist. Being white folks, we claim to be immune, and in fact are immune, under their solemn pronouncements, just the same as if we were arraigned before the Court for trial on a charge of Felony without a Jury.<sup>195</sup>

The court’s decision, allowing school officials discretionary authority to segregate for educational purposes, the plaintiffs argued, “operate[d] as a ‘white wash’ for Appellants” and allowed them to racially discriminate “under the guise or subtrafuge [sic]” of “the best educational interest of such children so segregated.”<sup>196</sup>

It is instructive to compare *Salvatierra* to *Ramirez v. State*,<sup>197</sup> 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.”<sup>198</sup> Joe Flack,

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191. *Salvatierra*, 33 S.W.2d at 796.

192. *Id.* at 792.

193. Brief for Appellants at 11, *Salvatierra*, 33 S.W.2d 790 (No. 8515) (collection of Texas State Archives).

194. Appellees’ Motion for Rehearing at 5, *Salvatierra*, 33 S.W.2d 790 (No. 8515) (collection of Texas State Archives).

195. *Id.* at 7.

196. *Id.* at 21.

197. 40 S.W.2d 138 (Tex. Crim. App. 1931).

198. *Id.* at 139.

the County Attorney, testified that Mexicans “in the county [do] not know the English Language well enough and [are] otherwise ignorant,” but averred that there was no “special discrimination against Mexicans as a race.”<sup>199</sup> Cecil Walston, Sheriff and Tax Collector, explained 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 to be well enough qualified to serve as jurors . . . .<sup>200</sup>

While there might be a few Mexicans “who could speak and understand English well enough and who were otherwise well enough qualified to make as good jurors as some of the white jurors that ha[d] been on . . . juries . . . he did not consider those white jurors well qualified.” Nevertheless, Walston and other county officials were adamant 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.<sup>201</sup>

The question of whether or not Mexicans *were* a “race” did not arise before 1946, as 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*,<sup>202</sup> the court found “nothing in the record to indicate that Mexicans were excluded or discriminated against solely because of race” in jury selection, and used “Mexican race” and “Mexican nationality” interchangeably in the opinion.<sup>203</sup> In *Lugo v. State*,<sup>204</sup> the court again found that jury commissioners had excluded members of the “Mexican race” on the basis of language qualifications, without intentional discrimination.<sup>205</sup>

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. Thus, Mexican Americans were effectively excluded from juries on the pretext of language or cultural difference.

Ramirez’s appellate lawyers, on the other hand, believed that the jury commis-

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199. *Id.*

200. *Id.*

201. *See id.*

202. 95 S.W.2d 433 (Tex. Crim. App. 1936).

203. *Id.* at 434.

204. 124 S.W.2d 344 (Tex. Crim. App. 1938).

205. *Id.* at 348.

sioner's statements about Mexicans' intelligence proved racial discrimination. In their motion for rehearing, they argued:

[I]t is not the province of the Jury Commission to pass upon the Mexican race in Menard County as a whole as to their intelligence[;] . . . this Jury Commission also in passing, showed some of the race arrogance and haughtiness that is too common, especially in matters of court procedure that is characteristic probably of all races when dealing with different races, but especially with the white race.<sup>206</sup>

Thus, in both *Salvatierra* and *Ramirez*, the Mexican-American plaintiffs argued that discrimination had taken place on the basis of race; Mexicans were a race because of this racist practice. The courts instead used a narrow notion of racial discrimination to deny that anything was amiss.

#### B. THE 1940S SCHOOL AND JURY CASES

In the 1940s, for the first time, courts began to counter claims of racial discrimination in jury selection by covering Mexican Americans with the "Caucasian cloak." 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 nonwhite 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.<sup>207</sup> Second, the case of *Norris v. Alabama*,<sup>208</sup> decided by the U.S. Supreme Court in 1935, held that racial discrimination in jury selection violated the Fourteenth Amendment.<sup>209</sup> Courts now had an instrumental reason to hold that Mexicans were white, for if Mexicans were a nonwhite race, the new precedent of *Norris v. Alabama* might apply to them in jury selection cases.

In 1944, civil rights litigators challenged jury discrimination in the Texas case *Sanchez v. State*.<sup>210</sup> At trial, there was some discussion about the proper terminology for Mexican Americans.<sup>211</sup> Sanchez's attorney explained to the

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206. Appellant's Motion for Re-Hearing, *Ramirez*, 40 S.W.2d 138 (No. 13789) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Texas Court of Criminal Appeals Centralized Court Case Files). Geronimo Ramirez had been convicted for the castration of Lucio Arevalo, who had slept with his daughter Josephine. See *Ramirez*, 40 S.W.2d at 140. At trial, Arevalo gave a graphic account of the castration, and reported that "[a]fter [Ramirez] hung me up to that post he said that he was going to show me how he treated Mexicans." Trial Transcript at 7, *State v. Ramirez*, No. 932 (Dist. Ct. Tex. Apr. 9, 1930) (collection of Texas State Archives).

207. See *supra* notes 122–24 and accompanying text.

208. 294 U.S. 587 (1935).

209. *Id.* at 589.

210. See 181 S.W.2d 87 (Tex. Crim. App. 1944) (per curiam).

211. See Statement of Facts and Bills of Exception at (Bill of Exception No. 1) 54–55, *State v. Sanchez*, No. 117 (Dist. Ct. Tex. Oct. 25, 1943).

jury: "For the sake of the record. When I refer to the Mexican race I am referring to the Spanish and American descent."<sup>212</sup> The judge then clarified, "People of the Mexican descent."<sup>213</sup> The attorney then asked the witness, "Do you have an opinion as to what the ratio is as between the so-called Spanish-American citizenship of the County and what they call American citizenship?" and the witness replied that "the Spanish-American citizens number about 40 per cent."<sup>214</sup>

There was also testimony about racial discrimination. When asked whether he thought Sanchez could get a fair trial in that county, the same witness answered that "there is a certain amount of prejudice against the Mexican race whether we like it or oppose it or not, the evidence of that is that we do not associate with them nor class them with ourselves."<sup>215</sup> The state's attorney then cross-examined; despite his efforts to dismiss evidence of discrimination, the witness suggested that Mexicans were treated significantly different than white ethnic groups:

Q Do you feel there is any more prejudice against the Mexican race than there is against people of the negro race or Italian race or Greek?

A No sir.

Q What you mean is that people of the so-called American race do not associate socially with the people of the Mexican race?

A Yes sir. That is correct.

Q Do you think that is because we don[']t want to associate with them any more than they don[']t want to associate with us or prefer to associate with those of their own race and their own language?

A No, I don[']t.

Q There has never been any incident so far as you know that has brought up any racial issue between the people of the so-called Mexican race and the American race?

A I know of several instances that came up in the schools . . . .<sup>216</sup>

Despite the efforts of the prosecutor to portray relations among Anglos and Mexican Americans as amicable, with any segregation being self-imposed, the witness consistently answered that there were "racial issues" involving the "Mexican race." And although the prosecutor at times tried to downplay race, he also referred to the defendant and his father as "these Mexicans" in his argument to the jury, which Sanchez's attorney argued on appeal "was calculated to prejudice the minds of the jury against the Defendant" by reminding the jury that "the Defendant was a Mexican, a member of the Mexican race, a person of Mexican descent, and he was charged with and was being tried for the

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212. *Id.* at 54.

213. *Id.* at 55.

214. *Id.*

215. *Id.*

216. *Id.* at 56-57.

killing of one George A. Cox, a member of the American race.”<sup>217</sup>

While the witnesses and lawyers at trial continued to refer to Mexicans as a race and discuss racial discrimination, the Texas Court of Criminal Appeals used Mexican Americans’ nominal status as whites to deny that anything was wrong with all-Anglo juries.<sup>218</sup> On appeal, Sanchez 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.<sup>219</sup> *Norris* did not apply.<sup>220</sup> The judge wrote that “[in] 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 [Fourteenth Amendment],” he would not apply the *Norris* rule to “members of different nationalities.”<sup>221</sup> The judge appeared to adopt the logic of the El Paso District Attorneys’ brief, which contrasted Mexicans to blacks, seeking to minimize discrimination against Mexican Americans:

The differences between the position of negro and the Mexican are multiple. The negro is of an entirely different race to that of the members of the jury commission, to-wit: the black race, whereas, the Mexican is of the white race.

Negroes were formerly in slavery under the white race, the Mexicans were not.

Negroes are practically all citizens of the United States, whereas, the record will disclose that most of the Mexicans are not.

The negroes speak English, whereas most of the Mexicans do not.

There is a feeling in the South about the negro, which is evidenced by our Jim Crow Law, and their exclusion from our Democratic Primary Election, that does not exist toward the Mexican. If any prejudice exists against the Mexican, it is of a different kind.<sup>222</sup>

Ironically, the point of this elevation of “the Mexican” above “the negroes” was to sanction forms of discrimination against Mexican Americans that were now at least formally prohibited against African Americans.

The same thing happened in the next three challenges brought by civil rights litigators to jury exclusion in Texas: *Salazar v. State*<sup>223</sup> in 1946, *Bustillos v. State*<sup>224</sup> in 1948, and *Rogers v. State*<sup>225</sup> in 1951. LULAC lawyer M.C. Gonzales

217. *Id.* at Bill of Exception No. 6.

218. *See Sanchez v. State*, 181 S.W.2d 87, 90–91 (Tex. Crim. App. 1944) (per curiam).

219. *See id.*

220. *See id.*

221. *Id.*

222. Brief for Appellee at 8, *Sanchez*, 181 S.W.2d 87 (No. 22856) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Texas Court of Criminal Appeals Centralized Court Case Files).

223. 193 S.W.2d 211 (Tex. Crim. App. 1946).

224. 213 S.W.2d 837 (Tex. Crim. App. 1948).

225. 236 S.W.2d 141 (Tex. Crim. App. 1951).



was hopeful that *Salazar* might be different, but his hopes were dashed. He wrote to George Sánchez in May 1946:

This is the case that I have selected as the best to use as a test to determine if it is lawful to deny the right to citizens of the United States of Mexican descent [to] sit on juries. Bee County is exceptionally good for this test because at no time during the past 100 years has a Mexican served on the jury on a criminal case and about one third of the population is Latin and we have about one thousand who have paid their poll taxes and about 500 who are able to read and write and speak the English language sufficiently well . . . .<sup>226</sup>

Although the lower court in *Salazar* had “held that Mexicans belong to the same race as that of the jury which tried him, although they are of different nationality,” Gonzales hoped to disprove this through the testimony of Sánchez and another expert.<sup>227</sup> He asked Sánchez to

explain to [the other expert] how important this point is not only to Lulac but to the Latin-American generally and I would like very much to know if you two gentlemen can come to Beeville and help me establish the fact that the Mexicans are not only a different nationality from the Anglos, as the court has held, but that in theory and in practice the Mexicans belong to a different race to such an extent that they are being denied the federal constitutional right to serve on juries.<sup>228</sup>

In 1946, even the lawyer for LULAC was trying to establish in court that Mexican Americans were victims of *racial* discrimination—that whether or not they were “really” white, in *practice* they belonged to a different race.

In the 1951 jury selection case of *Sanchez v. State*,<sup>229</sup> civil rights litigators John Herrera and James DeAnda complained of “discrimination against Mexican-Americans as a race and people of Mexican extraction and ancestry as a class.”<sup>230</sup> In their brief on appeal, they argued that “although a person of Mexican descent is a member of the White race, from a practical standpoint this segment of our population is not so considered in this State.”<sup>231</sup> Citing *Carrasco* and other jury cases and quoting the opinion in *Ramirez*, which drew a contrast between the “Mexican race” and the “white race,” they pointed out that “[t]his

226. Letter from Manuel C. Gonzales, Att’y and Counselor at Law, to Dr. George I. Sanchez, Prof. of Latin-Am. Educ., Univ. of Tex., Austin (May 21, 1946) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919–1986, Box 28, Folder 5).

227. *Id.*

228. *Id.*

229. 243 S.W.2d 700 (Tex. Crim. App. 1951).

230. *Id.* at 701.

231. Brief for Appellant at 8, *Sanchez*, 243 S.W.2d 700 (No. 25496) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Texas Court of Criminal Appeals Centralized Court Case Files).

court has, on numerous occasions, recognized this fact.”<sup>232</sup> In its opinion, the *Sanchez* court berated the two lawyers 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 . . . .”<sup>233</sup>

Local officials appear to have learned the lesson about referring to Mexican Americans as a different nationality rather than race as well. As the Grand Jury Commissioner in *Sanchez* testified:

We did not pick any American citizens of Mexican descent as Grand Jurors. . . . A lot of these Mexicans are not citizens, and we just don’t know them. I wouldn’t say that I don’t know of any Mexicans that were qualified for Grand Jury service. I will say we just didn’t select them.<sup>234</sup>

Upon cross-examination, he elaborated:

I don’t think we put any man on the Grand Jury of French descent. I did not refrain from putting anybody on the Grand jury of French descent . . . . I did not put anybody on the Grand Jury, that I know of, of English descent. Of the men that we put on the Grand Jury, we did not go back to their ancestors to see what country they originally came from.<sup>235</sup>

When pressed again by DeAnda, he insisted that he had “never made any differentiation between people of Mexican descent in this County and all other white Americans.”<sup>236</sup> All of the jury commissioners answered the same way: there was no discrimination against any nationality in jury service, and Mexican Americans were just like any other nationality of the white race.<sup>237</sup>

Meanwhile, Mexican-American leaders were still trying to make headway against continuing school segregation. George Sánchez wrote to M.C. Gonzales in 1945 that “the time has come to go after the segregated school.”<sup>238</sup> He proposed to Gonzales that they bring a test case arguing the illegality of segregation based on three claims: “a) The fundamental law of the states has not specifically condoned the segregation of ‘Mexicans.’ b) The state has not provided for the guarantee-of-equality-of-treatment-under-segregation of ‘Mexicans’ and c) The state has not (and probably could not) specifically delegated

232. *Id.* at 8–9.

233. *Sanchez*, 243 S.W.2d at 701.

234. Defendant’s Motion to Quash and Statement of Facts at 5, *State v. Sanchez*, No. 7103 (Dist. Ct. Tex. June 22, 1951) (collection of Texas State Archives).

235. *Id.* at 6.

236. *Id.* at 7.

237. *See id.* at 5–13.

238. Letter from George I. Sánchez to M.C. Gonzales (Apr. 25, 1945) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919–1986, Box 48, Folder 10).

this function to school boards.”<sup>239</sup> Sánchez explained that he had formulated these arguments in conversation with a “lawyer friend.”<sup>240</sup> Gonzales replied in a more sanguine voice, asking gently whether “the lawyer friend to whom you refer is familiar with the Salvatierra case.”<sup>241</sup> He continued:

The other formidable obstacle that we have to overcome is the leeway which the courts of this State have given the school authorities on that rather elastic situation that in a given community children of the same race and mentality can be segregated for pedagogical reasons up to the third grade, in others up to the sixth and in others higher. If we can break this down so as to at least leave it up to the third grade, like the Supreme Court says, we will have accomplished a great deal.<sup>242</sup>

Gonzales pursued a similar line of argument in the 1948 unreported case *Delgado v. Bastrop Independent School District*.<sup>243</sup> LULAC officials inspected the Bastrop schools and filed detailed reports on the inequality of conditions between the “Latin” and the “Anglo” schools, with regard to building, transportation, lunch room, plumbing, and other accommodations.<sup>244</sup> The plaintiffs argued both that they were being denied equal protection of the laws “solely because of their ancestry,” and that they were deprived of “benefits accorded . . . to other white children.”<sup>245</sup> Citing the recent federal case *Westminster School District of Orange County v. Mendez*<sup>246</sup> as well as *Salazar* for the proposition that Mexicans were “of the white race,” the plaintiffs “conceded . . . that ‘there is no question of race discrimination in this case.’”<sup>247</sup> The

239. *Id.*

240. *Id.*

241. Letter from M.C. Gonzales, Nat’l Executive Sec’y, League of United Latin Am. Citizens, to Dr. George I. Sánchez (Apr. 26, 1945) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919–1986, Box 48, Folder 10).

242. *Id.*

243. See Plaintiffs’ Memorandum in Opposition to Motion to Dismiss of Defendant State Board of Education and Members Thereof, *Delgado v. Bastrop Indep. Sch. Dist.*, No. 388 (W.D. Tex. June 15, 1948) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919–1986, Box 48, Folder 5).

244. See Untitled Report on the Condition of Bastrop Schools (first page missing in original) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919–1986). For example, the report noted that “[i]n Bastrop, the condition of the Latin building is definitely *poor*, and that of the Anglo building is *excellent*.” *Id.*; see also Plaintiffs’ Memorandum in Opposition to Motion to Dismiss of Defendant State Board of Education and Members Thereof, *supra* note 243, at 12 (“The Plaintiffs . . . were deprived of their rights under the Constitution of the United States and the Laws of the United States to be free from discrimination solely because of their ancestry . . . [and were] deprived by said Defendants from securing the educational recreational and health benefits accorded by said Defendants to other white children . . .”).

245. Plaintiffs’ Memorandum in Opposition to Motion to Dismiss of Defendant State Board of Education and Members Thereof, *supra* note 243, at 12.

246. 161 F.2d 774 (9th Cir. 1947).

247. Memorandum of Points and Authorities in Support of Plaintiffs’ Application for Injunction Pendente Lite at 3, *Delgado*, No. 388 (W.D. Tex. June 15, 1948) (collection of University of Texas at

*Delgado* plaintiffs won, as the district court enjoined the school district's use of segregation based on "Mexican or other Latin American descent."<sup>248</sup> The State Superintendent of Public Instruction then issued "Instructions and Regulations To All School Officers of County, City, Town and School Districts" providing that segregation applies only to "persons of Negro ancestry" and not to

members of any other race. . . . There has never been any requirement or authority for segregation of children of Latin American descent, and attempts at segregation of pupils of Mexican or other Latin American ancestry on account of race or descent have been held unconstitutional by the State courts of Texas and by the recent United States District Court decision in the case of *Delgado v. Bastrop* . . . .<sup>249</sup>

The GNC executive secretary also sent letters to thirty segregated schools, "request[ing] that the schools reduce the number of grades in which children are segregated or eliminate segregation altogether."<sup>250</sup>

Yet despite the favorable pronouncements of courts and the Texas State Superintendent of Public Instruction, most school districts continued their traditional practices of segregation. Hector Garcia of AGIF inspected fourteen schools in the late 1940s and reported that "[i]t is the consensus of opinion of the Latin leaders in their community that the school officials and especially the School Boards are not trying to abide by the spirit of the decree given by Judge Ben Rice."<sup>251</sup>

For example, when Mexican-American parents met with the school board to discuss the desegregation of Edcouch-Elsa High School, on Jan. 10, 1949, officials expressed reluctance to move:

*Mr. B. Zamora:* They are not ready. The time is coming that they will come in.  
*Mr. J. Gonzalez:* I know all those tips. If you are willing to do the best, and pass your resolution with the orders of the Superintendent, we can go ahead and work together.

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Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919–1986, Box 48, Folder 5).

248. See Instructions and Regulations from State Superintendent of Public Instruction to All School Officers of County, City, Town and School Districts (undated) (describing the court's decision in *Delgado*) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919–1986).

249. *Id.*

250. *A Monthly Summary of Significant Events Pertaining to Anglo-Latin Relations in Texas*, BORDER TRENDS (Sw. Area Office, Unitarian Serv. Comm., McAllen, Tex.), Apr. 1948 (collection of Bancroft Library, Univ. of Cal., Berkeley, Berkeley, Cal., Carey McWilliams Papers, Carton 21, Folder 4).

251. Hector Garcia, School Inspection Report on Fourteen Schools 1 (undated) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, Records, Texas Good Neighbor Commission, Box 1989/59-16 Discrimination Files, folder marked: Discrimination, General, 1946–51).

*Mr. M. Lomas:* The meaning of all this is to have all the children together in school. The anglos with the latins.

*Mr. P. Jones:* How are you going to do it?

*Mr. M. Lomas:* That's all we ask for.

*Mr. J. Gonzalez:* It's just a question whether or not you're going to do it. Let's not go any farther.

*Mr. Kelly:* The anglos will have to think about that.

*Mr. J. Gonzales:* It's up to the school board.

*Mr. Kelly:* The Americans are not going to like that.

*Mr. E. Garcia:* What do you mean "the Americans are not going to like that"? That's another mistake. If those army barracks are good enough for our children, they are for your children, also.

*Mr. P. Jones:* . . . If you boys can tell me how to raise money; we've been broke every year. Just barely get by.

*Mr. E. Garcia:* And you'll straighten this matter. Can I quote you on that for '49?

*Mr. P. Jones:* I am not saying. I've never told anyone to go where. Besides, there are latins going to the South school.

*Mr. Gutierrez:* Yes, there are, but through what did they have to go in order to enter that school? Have Mr. Zamora stand up before the board and tell us what he had to do to get his girl in that school?

*Mr. P. Jones:* He wrote the state superintendent.

*Mr. J. Gonzalez:* He did not do a thing. I did everything for him, and to think of his attitude now!<sup>252</sup>

Likewise, the Del Rio school district itself had not acted to desegregate the schools in the aftermath of the *Salvatierra* case, and LULAC continued to press for changes. Maria Luisa Camarillo, a Del Rio high school student, complained to State Superintendent L.A. Woods about the continuing segregation of "Latin-Americans."<sup>253</sup> In 1948, a LULAC investigator, C. P. Aldrete, interviewed Del Rio School Board President Wallace, who seemed remarkably complacent about continuing segregation in the wake of litigation:

*Aldrete:* Mr. Wallace, I come to see you on a question concerning our schools; specifically the segregation of "Mexican" [c]hildren in West End and Garfield.

*Wallace:* Nobody has ever complained before . . .—I would think they were satisfied. Is somebody complaining?

*Aldrete:* Do you remember the *Salvatierra* case, or are you acquainted with it?

*Wallace:* Not exactly, but I seem to recall something about it.

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252. Transcript of Meeting with School Board, Edcouch-Elsa High School 2 (Jan. 10, 1949) (collection of Texas State Library and Archives Commission, Austin, Tex., Archives and Information Services Division, General Libraries, Box 1989/59-16, folder marked *Discrim. Gen.* [general file, 1946-51]).

253. Letter from Maria Luisa Camarillo to L.A. Woods, State Superintendent (Feb. 3, 1949) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919-1986, Box 24, Folder 3).

*Aldrete*: Ever since the Salvatierra case the “Mexican” people have been complaining about segregation. . . . I represent a significant number of those parents . . . .

. . . .

*Wallace*: Who is behind you? Who is stirring up all this trouble?

*Aldrete*: . . . .

. . . .

. . . Suppose that I, as a Latin American, bring a Latin American child to Central whom I wish to register there—would you refuse him admittance?

*Wallace*: Yes, we would send him over to West End.

*Aldrete*: Why?

*Wallace*: Oh, custom; that’s our policy—maybe because of language difficulties, I would say . . . .

*Aldrete*: How do you arbitrarily decide that the child has language difficulties? . . . By the Attorney General’s opinion, citing the Salvatierra case, you should give the students a language test to determine their deficiencies . . . .

. . . .

. . . Mr. Wallace, do you think there will be a change of policy any time in the near future?

*Wallace*: As far as I’m concerned, no. That’s the way it has been and that’s the way it’ll be unless we are ordered to change.<sup>254</sup>

In California, Mexican Americans won a major victory in 1947 with the Ninth Circuit case of *Westminster School District v. Mendez*. This class action, on behalf of all students of Mexican descent in Orange County, drew national attention to the segregation of Mexican-American school children and attracted national civil rights organizations to join in the appeal as amici curiae, including the National Association for the Advancement of Colored People (NAACP) and the American Jewish Congress (AJC).<sup>255</sup> The *Mendez* litigation centered on four school districts in Orange County: Westminster, El Modena, Garden Grove, and Santa Ana.<sup>256</sup> Although Mexican-American parental pressure in 1929 had forced the California Attorney General to issue an advisory opinion that California law did not support the segregation of Mexican children, school districts had steadfastly ignored the ruling.<sup>257</sup>

In 1991, Christopher Arriola interviewed Mexican Americans in El Modena who remembered the *Mendez* litigation. Dan Gomez described how segregation took place:

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254. Interviews by C.P. Aldrete with Del Rio School Officials (May–Dec. 1948) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919–1986, Box 24, Folder 3).

255. See *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 775 (9th Cir. 1947).

256. See *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544, 545 (S.D. Cal. 1946), *aff’d*, 161 F.2d 774 (9th Cir. 1947).

257. See Arriola, *supra* note 93, at 182–84; see also Instructions and Regulations, *supra* note 248 (discussing a similar decree in Texas); Garcia, *supra* note 251 (reporting that schools in Corpus Christi were ignoring antidiscrimination rulings).

[Arriola]: How did they decide before the case, who would go, I know they didn't give any tests, did they, did they say you have a Spanish surname, or how did they decide?

[Gomez]: Oh just from appearance.

[Arriola]: I know they had some Mexicans in Roosevelt [the white school] before.

[Gomez]: Yeah I'm sure there must have been some over there. Yeah I'm sure that happened, although we wouldn't really know, because we didn't associate with them.

[Arriola]: I heard the story of two sisters, and one had blue eyes, and was really fair, and the other was dark, but they were Mexican, and they automatically put the light skinned one in Roosevelt and the dark skinned one in Lincoln [the "Mexican" school].

[Gomez]: Yeah that's what I said, I think most of the segregation was done by appearance, if you were dark skinned, the more Hispanic, we didn't really have a lot of races at that time.

[Arriola]: A lot of Indians? Mexican Indians?

[Gomez]: Yeah some of them, had more of the features of Indians, darker skin.<sup>258</sup>

Before desegregation Orange County was a bastion of Jim Crow. In an interview with Arriola, two Anglo residents of El Modena remembered that Mondays were "Mexican day" at the local swimming pool, and that the pool would be drained and refilled on Tuesdays, so that the "white kids" could swim there Wednesday through Sunday.<sup>259</sup> Another Anglo couple recalled holding their noses to avoid the "body odor" of "Mexicans" when they went into the "Mexican school" or other places where Mexican Americans congregated.<sup>260</sup> Mexican Americans had begun to organize in the years leading up to the *Mendez* litigation, participating in citrus labor strikes in 1936, and forming the Latin American Organization in Santa Ana in 1943 to fight school segregation.<sup>261</sup>

At trial, several witnesses referred to themselves as "Mexican" as opposed to "white," but the court reminded them of Mexican whiteness.<sup>262</sup> One young high school student, Carol Torres, was asked "Do you have any neighbors in that same district, in the El Modeno School District, who are children of your own

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258. Interview by Christopher Arriola, Boalt Hall, Sch. of Law, with Dan Gomez, in El Modena, Cal. (July 26, 1991) (Stanford University); *see also* Arriola, *supra* note 93 (discussing *Mendez* litigation).

259. Interview by Christopher Arriola, Boalt Hall, Sch. of Law, with Marge & JD Gobel, in El Modena, Cal. (Aug. 15, 1991) (Stanford University).

260. Interview by Christopher Arriola, Boalt Hall, Sch. of Law, with Esther & Ralph Danker, in El Modena, Cal. (Aug. 29, 1991) (Stanford University).

261. *See* Arriola, *supra* note 93, at 182-83.

262. Trial Transcript at 267, *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946) (No. 4292) (National Archives Pacific Southwest Region).

age that are not of Mexican descent?"<sup>263</sup> She replied, "Yes, there are plenty of white children, Americans, as they say there."<sup>264</sup> When asked to clarify her statement, she said, "Americans, as they say they are. They don't consider us—" and the Court interrupted, "You are pretty white yourself, Carol. You don't mean white people, do you?"<sup>265</sup> Carol was trying to point out that Anglo students claimed whiteness and Americanness for themselves; but the Court insisted on the nominal whiteness of "children of Mexican descent."<sup>266</sup> The plaintiffs' lawyer, however, continued to refer to students as "Mexican" more in line with the way the lay witnesses used the terms.<sup>267</sup>

The school superintendent testified, similarly to the officials in the Del Rio case, that the policy of segregation was a matter of custom that existed before he took his job, that it was in the best interests of Mexican children because of their language deficiencies, and that no tests were administered to determine language ability.<sup>268</sup> He also testified that Mexican children had "lice, impetigo, dirty hands, face, neck, and ears; that they were generally inferior to the white children in personal hygiene."<sup>269</sup>

In their appeal, the petitioners conceded that "this case does not involve any issue of race discrimination—for Mexicans are of the 'white' race," but they nevertheless claimed that "[a]ppellants' acts have clearly fallen into 'the ugly abyss of racism.'"<sup>270</sup> The appeal was argued by an African-American civil rights lawyer from Los Angeles, drawing heavily on rhetoric about the "four freedoms" and the "War for Freedom."<sup>271</sup> Segregating Mexican-American children on the basis of "color and ancestry," he argued, was "utterly inconsistent with our traditions and ideals . . . [and] at variance with the principles for which we are now waging war. . . . To say that any group cannot be assimilated is to admit that the great American experiment has failed . . . ."<sup>272</sup> The district court's opinion was similarly vague on the question of Mexican-American racial identity. As Christopher Arriola contends, the *Mendez* court "never ruled on whether Mexicans are a group, an ethnicity, or a race, merely stating that Mexican American school children had been discriminated against and their Fourteenth Amendment rights had been violated."<sup>273</sup> The opinion emphasized that segregation "foster[ed] antagonisms in the children and suggest[ed] inferior-

263. *Id.*

264. *Id.*

265. *Id.*

266. *E.g., id.* at 267.

267. *See, e.g., id.* at 279, 291, 294.

268. *See id.* at 291–95, 301.

269. McWilliams, *supra* note 121, at 303.

270. Appellee's Reply Brief at 33, *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (No. 11310) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Box 4, Folder 8).

271. Arriola, *supra* note 93, at 193 (quoting Appellee's Reply Brief, *supra* note 270, at 37).

272. Appellee's Reply Brief, *supra* note 270, at 34–35 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 110–11 (1943) (Murphy, J., dissenting)).

273. Arriola, *supra* note 93, at 198.



ity among them where none exists,” and that any separation would have to be based “wholly upon indiscriminate foreign language impediments in the individual child, regardless of his ethnic traits or ancestry.”<sup>274</sup>

The amicus briefs submitted on appeal by the NAACP, AJC, and ACLU were some of the first to brief the argument that separate could never be equal, preceding *Brown v. Board of Education* by six years. The AJC’s brief was particularly forceful in arguing that “[w]hen a ‘dominant’ group segregates an ‘inferior’ group it can never be equal,” and that “any racial distinction is immediately suspect.”<sup>275</sup> The Ninth Circuit, however, declared that “[w]e are not tempted by the siren who calls to us” to confront segregation head on, and instead decided on the narrow grounds that segregation on the basis of “Mexican blood”—segregation “of children within one of the great races”—was not supported by California law.<sup>276</sup>

The aftermath of the *Mendez* victory was, similar to the denouement of Texas school desegregation cases, disappointing. In the fall of 1947, the County Board of Education allowed an all-Anglo section of the El Modena school district to secede from El Modena and transfer into the all-white Tustin School District, costing El Modena nearly \$600,000 in property taxes. In 1953, a number of school districts in Orange County were “unified,” diluting Mexican-American political power, and new schools were built in segregated neighborhoods to ensure continued separation of schoolchildren.<sup>277</sup> Across the state, the practice of segregation continued.<sup>278</sup>

#### IV. AFTER *HERNANDEZ V. TEXAS*: LIFTING THE CAUCASIAN CLOAK

##### A. FROM *HERNANDEZ V. TEXAS* TO *CISNEROS*

In both the jury selection and school desegregation contexts, Mexicans’ status as “white” had won them no particular gains in Texas courts in the 1930s and 1940s. The first case in which Mexican Americans won a clear victory using the “other white” strategy was the *Hernandez v. Texas* jury selection case, decided two weeks before *Brown v. Board of Education*. The litigation team of James DeAnda, Carlos Cadena, and John Herrera had argued on behalf of Pete Hernandez that the exclusion of Mexican Americans violated the Fourteenth Amendment, and the lower court had rejected their Fourteenth Amendment claim, pointing out as it had so many times before that white people sat on the jury. The plaintiffs’ lawyers responded:

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274. *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544, 549–50 (S.D. Cal. 1946).

275. Arriola, *supra* note 93, at 196 (citing Brief for the American Jewish Congress, *Mendez*, 161 F.2d 774 (No. 11310)).

276. *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 780 (9th Cir. 1947).

277. See Arriola, *supra* note 93, at 201.

278. See generally W. Henry Cooke, *The Segregation of Mexican-American School Children in Southern California*, 67 SCH. SOC’Y 417 (1948) (collection of Bancroft Library, Univ. of Cal., Berkeley, Berkeley, Cal., Carey McWilliams Papers, Carton 21, Folder 4).

[F]or all practical purposes, about the only time that so-called Mexicans—many of them Texans for seven generations—are covered with the Caucasian cloak is when the use of that protective mantle serves the ends of those who would shamelessly deny to this large segment of the Texas population the fundamental right to serve as jury commissioners, grand jurors, or petit jurors.<sup>279</sup>

The breakthrough in *Hernandez* was the court's acceptance of Cadena's argument that Mexicans were *treated as* nonwhite by Anglos despite the fact that they were actually white. Particularly poignant was the testimony of John Herrera—as a witness in the case, not an attorney—about the bathrooms in the Jackson County Courthouse, one unmarked and the other with two signs, “Colored Men” and “Hombres Aqui.” With such telling evidence, the litigation team was able to show that “persons of Mexican descent were actually treated as a ‘race,’ class, or group apart from all other persons.”<sup>280</sup>

*Hernandez* should be seen as the beginning and not the culmination of Mexican-American litigators' strategic use of whiteness claims to fight Jim Crow. Although the “other white” argument already sounded old in 1954, it was new as a litigation strategy. Before 1954, Mexican whiteness was a cynical trump used by courts to dismiss discrimination claims. But from that date onward, the litigation team of DeAnda, Cadena, and Herrera went on to invoke successfully Mexican whiteness in a series of school desegregation cases, building on the *Hernandez v. Texas* precedent. For example, in the 1957 case of *Hernandez v. Driscoll Consolidated Independent School District*,<sup>281</sup> DeAnda and several other lawyers prepared a pre-trial memorandum arguing, based on *Mendez* and *Hernandez v. Texas*, that

Mexicans, [were considered] members of the Caucasian or Caucasoid race . . . even before the United States Supreme Court held that segregation of children based on race . . . violated the Fourteenth Amendment.

Thus, the instant cases do not raise the problems present in the Negro cases. There is present in these cases no question of segregation because of *race*.<sup>282</sup>

Mexican-American lawyers also proceeded cautiously with regard to alli-

279. Appellant's Brief, *supra* note 3, at 17.

280. Gustavo Garcia, *An Informal Report to the People, in A COTTON PICKER FINDS JUSTICE!: THE SAGA OF THE HERNANDEZ CASE* (comp. by Ruben Munguia, 1954) (collection of University of Texas of the Permian Basin, J. Conrad Dunagan Library, Archives/Special Collections, John Ben Shepperd Collection), available at <http://www.law.uh.edu/Hernandez50/saga.pdf#search=%22cotton%20pickers%20finds%20justice%22>.

281. [1957] 2 Race Rel. L. Rep. (Vand. U. Sch. Law) (S.D. Tex. Jan. 11, 1957).

282. Plaintiffs' Pre-Trial Memorandum, *Driscoll*, [1957] 2 Race Rel. L. Rep. (Vand. U. Sch. Law) (S.D. Tex. Jan. 11, 1957) (Civ. No. 1384) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 780 n.7 (9th Cir. 1947)) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919–1986, Box 47, Folder 8).

ances with other civil rights organizations. Despite the enormous help they had received from amicus organizations in the *Mendez* case, they were wary of any perceived “common cause.” When Jack Greenberg of the NAACP Legal Defense Fund wrote to Pete Tijerina, a Mexican-American civil rights litigator, in January 1967, offering to “extend its services to Mexican-Americans who are experiencing the same kind of discrimination problems which Negroes have experienced in the South,”<sup>283</sup> Tijerina opted instead to form a parallel organization, which became the Mexican American Legal Defense and Education Fund (MALDEF), the leading legal organization advocating on behalf of Latinos in the United States. George Sánchez commended Tijerina on his “efforts to form a council of Mexican-American lawyers,” but warned that he was “lukewarm” about “contacts with the NAACP Legal Defense Fund.”<sup>284</sup> Sánchez explained:

[T]hough we should make common cause with the Negroes from time to time, we should not blend their issues with ours. Don't misunderstand, I was a pioneer among the champions for Negro rights—and I am still on their side. However, while the effects of discrimination against Negro and “Mexican” are essentially the same, the causes, the history, and the remedies differ broadly. Put bluntly, the Negro is mistreated because he is black and was a slave. The bases for mistreatment of the *Mexicano* are much more varied and very different. Their blanket cases are based on “race,” ours on “class apart” (See the *Mendez*, *Delgado*, *Driscoll*, and *Pete Hernandez* cases—in all of which I had a hand).

The *Pete Hernandez* case was on jury-selection discrimination. We have a unanimous decision in our favor from the Supreme Court (Warren writing) on the “class apart” contention. If argued on “race,” we would have lost—as we lost time and again in Texas (the Court of Criminal Appeals said, “You are white. White men were on the jury. What are you griping about?”) No, Pete, riding the coat tails of the NAACP is bad strategy. Cooperation, yes. . . . Jimmy De Anda thinks this way also. Count on me.<sup>285</sup>

This cautious approach to alliance with African Americans reflected Mexican-American leaders' recognition of the contradictions in the Court's treatment of Mexicans as a “class apart” but not a “race”—the objects of racial discrimination without being the subjects of racial difference. As Ian Haney López has pointed out, “this contradictory approach follows from and highlights the Court's conception of race as something biological and immutable.”<sup>286</sup> Because

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283. Letter from Jack Greenberg, Dir.-Counsel NAACP Legal Def. and Educ. Fund, Inc., to Pete Tijerina, Esq. (Jan. 23, 1967) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919–1986, Box 33, Folder 1).

284. Letter from George I. Sánchez, Chairman, to Pete Tijerina (Feb. 28, 1967) (collection of University of Texas at Austin, Austin, Tex., Benson Latin American Collection, George I. Sánchez Papers, 1919–1986, Box 33, Folder 1).

285. *Id.*

286. Ian Haney López, *Retaining Race: LatCrit Theory and Mexican American Identity in Hernandez v. Texas*, 2 HARV. LATINO L. REV. 279, 287 (1997).

courts saw “race” as a natural category rather than one produced by racist practice, they “could not help but be perplexed by Mexican American identity.”<sup>287</sup>

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 cynically relied on Mexican whiteness to deny their civil rights claims—did the litigators shift their focus, abandoning the “other white” strategy in *Cisneros v. Corpus Christi Independent School District*.<sup>288</sup> In *Cisneros*, Mexican Americans were defined as a disadvantaged minority group, and the court ruled that Corpus Christi was operating a de jure segregated school system by separating Mexican Americans and blacks from Anglos.<sup>289</sup>

Why did Mexican Americans hold on to whiteness for as long as they did? Scholars suggest that the “other white” strategy can be explained by legal pragmatism, as well as by the material and psychological benefits of distancing themselves from African Americans.<sup>290</sup> 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.

#### B. LA RAZA CÓSMICA

Can legal pragmatism explain the second shift, however, from “other white” to “brown”? That transformation came about years after *Brown v. Board of Education*, during a time of cultural revolution in ethnic pride. The new identification of Mexican Americans with other “minority groups” in litigation agendas coincided with the Chicano movement’s evocation of “La Raza”—Chicanos as a nonwhite mestizo race.

A profusion of new Chicano organizations reoriented the discussion of Mexican-American identity. The Centro de Accion Social Autonomo (CASA), founded in 1968, defined “La Raza” as “all people of LA RAZA, north, south, and/or Latin America and Antilles, and those individuals who feel culturally as RAZA.”<sup>291</sup> One young Chicano leader, describing the “program for Chicano political action” of the Mexican American Political Association (MAPA) and La Raza Unida Party, wrote:

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287. *Id.*

288. 324 F. Supp. 599 (S.D. Tex. 1970).

289. *Id.* at 620.

290. See, e.g., Gross, *supra* note 188; Clare Sheridan, “Another White Race”: Mexican Americans and the Paradox of Whiteness in Jury Selection, 21 LAW & HIST. REV. 109 (2003); Steven H. Wilson, *Brown over “Other White”: Mexican Americans’ Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HIST. REV. 145 (2003).

291. La Raza Unida Party, State of California Resolutions 2 (Apr. 8–9, Jul. 1–2, 1972) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Centro de Accion Social Autonomo Papers, 1963–1978, Box 26, Folder 6).

One of the most pressing problems for a person of Mexican descent in the United States is that of identity . . . . [H]ere is a person who is officially classified as white (Spanish surname) by the Census Bureau of this country, yet because the shade of his skin generally is darker than the Anglos', he is effectively designated as a minority [and] discriminated against because of his desire to retain the Spanish language and some of the customs and traditions of Mexico.

. . . .  
Every Mexican-American is a potential Chicano.<sup>292</sup>

The "Plan Espiritual de Aztlan" declared that "We are a Bronze People with a Bronze Culture."<sup>293</sup> Ruben Salazar, the Chicano journalist, asked in the *Los Angeles Times*, "Who Is A Chicano?" and answered, "A Chicano is a Mexican-American with a non-Anglo image of himself."<sup>294</sup>

The new emphasis on "La Raza" and Chicano identity rejected whiteness and affirmed "brown" and "mestizo" racial identity. The *New York Times*, in noting a "new Mexican-American militancy," claimed that while some Mexican Americans identified as Spanish and others as Indians, "the vast majority describe themselves as mestizos."<sup>295</sup> In Del Rio, Texas, the site of the first school desegregation litigation, activists wrote the "Del Rio Mexican-American Manifesto," extolling the spirit of La Raza:

However we define it, La Raza is a treasure house of spiritual decency and sanity. La Raza is the affirmation of the most basic ingredient of our personality, the brownhood of our Aztec and Mayan heritage. . . . As children of La Raza, we are heirs of a spiritual and biological miracle wherein family blood ties unite the darkest and the fairest.<sup>296</sup>

Thus, the public political position of Chicano activists by the late 1960s was of pride in a mestizo identity and rejection of the whiteness strategy. But how did ordinary Mexican Americans in Texas and California perceive and present themselves? There is a considerable sociological literature on changing racial and ethnic identification, and in particular self-identification, among Mexican

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292. Ysidro Ramon Macias, *Evolution of the Mind and A Plan for Political Action* 1, 3 (May 1969) (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Centro de Accion Social Autonomo Papers, 1963-1978, Box 26, Folder 8); George Azcarate Macias, *Mexican, Mexican-American, Chicano* (undated) ("Every Mexican-American is a potential chicano. . . . A chicano is a living representative of the concept of 'La Raza.'") (collection of Stanford University Libraries, Palo Alto, Cal., Special Collections & University Archives, Manuscripts Division, Ernesto Galarza Papers, 1936-1984, Box 54, F. 9).

293. *Additions and Expansions of the Program of El Plan Espiritual de Aztlan* 1 (Mar. 1969) (collection of Bancroft Library, Univ. of Cal., Berkeley, Berkeley, Cal., Carey McWilliams Papers, Carton 21, Folder 9).

294. Ruben Salazar, *Who Is a Chicano? And What Is It the Chicanos Want?*, L.A. TIMES, Feb. 5, 1970 (collection of Stanford University Libraries, Department of Special Collections).

295. Homer Bigart, *A New Mexican-American Militancy*, N.Y. TIMES, Apr. 20, 1969, at 1.

296. *Id.*

Americans and Latinos in the United States more generally. This literature suggests both that Mexican Americans have continued to be divided about claiming a white identity, and that Mexican-American understandings of race are more consciously political and cultural than biological. For example,

[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 [as a] way for ethnic political leaders to draw diverse groups together around a liberal political agenda while avoiding divisive questions of cultural heritage, as well as distancing them from "more confrontational, Chicano politics." "Mexican American" never took hold because its connotations of foreignness were resisted by "New Mexican citizens" whose families' residence predated statehood.<sup>297</sup>

In the 1980 U.S. Census, when "Hispanic" became an ethnic category separate from the question of racial identity, forty percent of Latino respondents checked "other" in response to the "race" question.<sup>298</sup> Ethnographers suggest that they did so because they considered themselves to be nonwhite, based on a definition of whiteness that encompassed both "race" and "culture."<sup>299</sup> This understanding of racial identity likely came about in part in reaction to changes in legal classification, and in part because changing political sensibilities influenced legal transformations. As Neil Foley has argued:

The paradoxical nature of Mexican American identity, as an identifiable minority group and a separate class of whites, derives both from court rulings in the United States and from cultural notions in Mexico, like "mestizaje," in which mestizos comprise both white (Spanish) and nonwhite (primarily Indian) identities. The legal and cultural confusion over Mexican American identity stems in part from the fact that the United States has repudiated the idea of racial hybridity for most of its history and consequently has no

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297. Gross, *supra* note 188, at 203–04; see Laura E. Gomez, *The Birth of the "Hispanic" Generation: Attitudes of Mexican-American Political Elites Toward the Hispanic Label*, *LATIN AM. PERSP.*, Fall 1992, at 45, 55; Phillip B. Gonzales, *The Political Construction of Latino Nomenclatures in Twentieth-Century New Mexico*, 35 *J. SOUTHWEST* 158 (1993); Margarita B. Melville, *Hispanics: Race, Class, and Ethnicity?*, *J. ETHNIC STUD.*, Spring 1988, at 67, 70.

298. Gross, *supra* note 188, at 204; see Clara E. Rodriguez, *Race, Culture, and Latino "Otherness" in the 1980 Census*, 73 *Soc. Sci. Q.*, 930, 930 (1992).

299. Gross, *supra* note 188, at 204; see Rodriguez, *supra* note 298, at 930–31; see also Clara E. Rodriguez et al., *Latino Racial Identity: In the Eye of the Beholder?*, *LATINO STUD. J.*, Sept. 1991, at 33, 33–48 (finding, in interviews with Latinos in New York and the Midwest, that some identified "ethnically" as Puerto Rican-American and "racially" as white; some identified primarily as "Hispanic," with "race secondary to culture"; some had "rainbow identities," identifying with a mestizo racial identity; and others were split between external and internal identities).

cultural or legal context for understanding the racial place of mestizo peoples.<sup>300</sup>

In other words, it is not so much that Latinos believe themselves to be a separate race or not, but that they do not share the Anglo understanding of what “race” means.

Much of the academic debate in the contemporary context has taken place under the assumption that Latinos, or Mexican Americans, do *in fact* have a status as a race or an ethnicity. Most sociologists have treated Latino identity as an ethnicity rather than a race. Other scholars urge us not to ignore the ways in which Latino identity has been racialized.<sup>301</sup> The history of Mexican-American whiteness in law and culture suggests some complexity in the way Mexican whiteness and *mestizaje* have been deployed for strategic ends—but also that calling attention to Mexican Americans’ *cultural* difference has historically been a way to disguise racism in acceptable terms.

#### CONCLUSION

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? It certainly had lasting effects on the ability of Mexican Americans and African Americans to work together to combat Anglo racism, and it did little to undermine the equation of whiteness with moral and civic superiority. But the real tragedy of *Hernandez* and its aftermath has been the consistent refusal of state courts and the Supreme Court to acknowledge its central insight that race is produced by practices of subordination and that racial discrimination can be disguised as discrimination on the basis of culture or language.

The history of the twentieth-century Southwest shows why we cannot prohibit racial discrimination while allowing cultural discrimination. Because racial subordination has historically been based on a blending of racial science with racial performance, racism in the United States has conflated race and culture. Because racism has expressed itself in cultural terms, race and culture cannot be disaggregated without ignoring the way cultural discrimination reinforces racial

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300. Foley, *supra* note 37, at 353.

301. Juan Perea has elaborated on this notion:

The breadth of the concept of ethnicity, which corresponds in large measure to the notion of the social construction of race, encompasses the breadth of varying Latino/a identities and the discrimination consequent. For example, introducing “ethnic traits” into our understanding of race makes Latino/a traits such as shared language, religion, history, color, culture, and accent relevant to discrimination analysis.

Juan Perea, *Five Axioms in Search of Equality*, 2 HARV. LATINO. L. REV. 231, 241 (1997); see also López, *Race, Ethnicity, Erasure*, *supra* note 27 (asserting that Mexican-American identity is racialized); NGAI, *supra* note 20, at 7–8 (arguing that unlike European immigrants, “Mexicans’ ethnic and racial identit[y] remained conjoined” throughout the 1920s).

hierarchy. If employers banned the Spanish language out of concern for ease of communication, it might make sense to distinguish between racial and cultural discrimination as Richard Ford prescribes.<sup>302</sup> But “English only” laws, language tracking in schools, and discrimination against Spanish speakers have been extremely effective mechanisms of racial discrimination against Mexican Americans in the Southwest.

This history should matter to us today not only as a matter of theoretical debate over the relationship of race to culture. In cases like *Hernandez v. New York* and its progeny, contemporary courts have concluded that discrimination against Spanish speakers does not violate laws against racial discrimination. Although the Supreme Court in *Hernandez v. New York* did not reach the question of whether “language ability without more” would have sufficed as a “race-neutral” basis for peremptory strikes,<sup>303</sup> later courts have extended *Hernandez* to the situation in which a prosecutor strikes jurors solely because they speak Spanish, without questioning them at all about their ability to follow or willingness to accept the official court translation. In *Pemberthy v. Beyer*,<sup>304</sup> a New Jersey district court held that language ability was a proxy for race in the prosecutor’s use of peremptory strikes against Latinos;<sup>305</sup> the Third Circuit, in an opinion by then-Judge Samuel Alito, overturned the decision, finding that the prosecutor *could have* been concerned about translation issues in striking Spanish speakers from the jury.<sup>306</sup> Despite an important line of precedent from the 1970s and 1980s holding that “race” should be applied broadly, that Latinos are a cognizable group for equal protection purposes, and that language ability can be a proxy for race, courts are increasingly finding discrimination against Spanish speakers to be permissible, whether in the context of jury exclusion, tracking in school, or English-only policies in the workplace. All of these discriminatory practices have their origins in the Jim Crow regime of the twentieth-century Southwest.

What stands out 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 is the continuing respectability of cultural racism. For as long as we equate race with biology, and racism with the crudest forms of racial pseudo-science, as American courts have done, discrimination on the basis of cultural

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302. See *supra* text accompanying notes 12–14.

303. 500 U.S. 352, 360 (1991).

304. 800 F. Supp. 144 (D.N.J. 1992), *rev'd*, 19 F.3d 857 (3d Cir. 1994).

305. *Pemberthy*, 800 F. Supp. at 168.

306. See *Pemberthy*, 19 F.3d at 872; see also *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993) (upholding English-only policies in the workplace); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980) (same); Christopher David Ruiz Cameron, *How The Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1361–62 (1997); Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 617–19 (1999).



and linguistic difference will appear neutral and respectable and racial hierarchy will continue to flourish.