

Review Essay—The Arc of Triumph and the Agony of Defeat: Mexican Americans and the Law

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Richard R. Valencia, *Chicano Students and the Courts: The Mexican American Legal Struggle for Educational Equality*, New York: NYU Press, 2008, pp. 480, \$25.00.

Philippa Strum, *Mendez v. Westminster: School Desegregation and Mexican-American Rights*, Lawrence: University Press of Kansas, 2010, pp. 192, cloth \$34.95, paper \$16.95.

Ignacio M. Garcia, *White But Not Equal: Mexican Americans, Jury Discrimination, and the Supreme Court*, Tucson: University of Arizona Press, 2008, pp. 248, cloth \$55.00, paper \$24.95.

Cynthia E. Orozco, *No Mexicans, Women, or Dogs Allowed: The Rise of the Mexican American Civil Rights Movement*, Austin: University of Texas Press, 2009, pp. 330, \$24.95.

These are salad days for Mexican American scholarship, both by Mexican Americans and by other scholars. The small numbers but persistent growth of Mexican American researchers, combined with improved access to important archival materials and increased collaborative projects, and the rich territory yet-to-be-explored have led to these and other important books about an understudied and fascinating topic: the litigation for Mexican American educational and civil rights following WWI and WWII. Indeed, some of the work has reached back even farther, discovering obscure cases and small case studies, all of which give lie to the suggestion that persons of Mexican origin are fatalistic, unambitious, and docile. As one of many examples, consider the

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work of the late Harvard political scientist Samuel P. Huntington, who wrote in 2004:

[Author Jorge] Castaneda cited differences in social and economic equality, the unpredictability of events, concepts of time epitomized in the *mañana* syndrome, the ability to achieve results quickly, and attitudes toward history, expressed in the “cliche that Mexicans are obsessed with history, Americans with the future.” [Author Lionel] Sosa identifies several Hispanic traits (very different from Anglo-Protestant ones) that “hold us Latinos back”: mistrust of people outside the family; lack of initiative, self-reliance, and ambition; little use for education; and acceptance of poverty as a virtue necessary for entrance into heaven. Author Robert Kaplan quotes Alex Villa, a third-generation Mexican American in Tucson, Arizona, as saying that he knows almost no one in the Mexican community of South Tucson who believes in “education and hard work” as the way to material prosperity and is thus willing to “buy into America.” Profound cultural differences clearly separate Mexicans and Americans, and the high level of immigration from Mexico sustains and reinforces the prevalence of Mexican values among Mexican Americans.¹

In this article in *Foreign Policy*, as well as his nativist 2004 book, *Who Are We? The Challenges to America’s National Identity*,² Huntington is crudely reductionist and misinformed about virtually all the negative traits with which he paints Mexicans, and he is particularly uninformed about the docility and passiveness of Mexican Americans. Extraordinarily, for a scholar of his stature, he cited secondhand remarks and a self-help book by an advertising executive to prove his thesis. Had he read further and delved deeper into the history of Mexicans and Mexican Americans, he surely would have discovered the long history of resistance and struggle against their lot in life, especially in employing unyielding courts to press their case against racist oppression. Even when the courts were hostile and when the state went to great lengths to disenfranchise them, Mexican American plaintiffs and their lawyers have a substantial record of aggressively—and successfully—pressing claims and looking to the legal system for redress. Indeed, even if it had been true that Mexicans were a passive lot, it is an odd and cruel turn to accuse persons so substantially marginalized by the advantaged in U.S. society that they cannot be assimilated or accommodated because they had somehow failed to resist that very oppression.

Huntington died in 2008, apparently not having drunk in the deep water of Chicano and Chicana scholarship already published. But more recent works, including these four under review and others, should definitively put to rest the allegation that persons in *Mexico afuera*—Mexican origin persons in the

1. Samuel P. Huntington, The Hispanic Challenge, *Foreign Pol'y*, Mar.-Apr. 2004, available at cyber.law.harvard.edu/blogs/gems/culturalagency1/SamuelHuntingtonTheHispanicC.pdf (last visited Aug. 5, 2010).

2. Samuel P. Huntington, *Who Are We? The Challenges to America’s National Identity* (Simon & Schuster 2004).

United States—have simply accepted their fate.³ Although each of these texts examines different corners of the larger tapestry and uses different yarn to stitch, they reveal a stunning portrait of resistance and opposition, particularly in the areas of education, criminal justice, and civil rights. While the works of Valencia, Garcia, Orozco, and Strum draw upon different historical sources and examine different domains, they share an overarching theme: although not well-known or documented in the larger literatures, Mexican Americans following WWI and especially after WWII were better organized and, occasionally, more successful in resisting social marginalization and racial oppression than is generally appreciated. In addition, this history is not featured in the general scholarly discourse of our nation, forming an eerily-evident parallel with the present, when nativism and restrictionist discourse have reached dangerous levels and when white Long Island, NY thugs go “beaner-hunting.”⁴

3. There is a veritable library of recent works on the subject. Some of the better full-length works include those by Arnoldo De Leon, *The Tejano Community, 1836-1900* (Univ. of New Mexico Press 1982); Carl Allsup, *The American GI Forum: Origins and Evolution* (Monograph 6, University of Texas Center for Mexican American Studies 1982); Arnoldo De Leon, *They Called Them Greasers* (Univ. Of Texas Press 1983); David Montejano, *Anglos and Mexicans in the Making of Texas, 1836-1986* (Univ. of Texas Press 1987); Mario T. Garcia, *Mexican Americans: Leadership, Ideology, and Identity* (Yale Univ. Press 1989); Gilbert Gonzalez, *Chicano Education in the Era of Segregation* (Companion Press 1990); Benjamin Marquez, *LULAC: The Evolution of a Mexican American Political Organization* (Univ. of Texas Press 1993); George J. Sanchez, *Becoming Mexican American: Ethnicity, Culture and Identity in Chicano Los Angeles, 1900-1945* (Oxford Univ. Press 1993); Guadalupe San Miguel, Jr., *Let All of Them Take Heed: Mexican Americans and the Campaign for Educational Equality in Texas, 1910-1981* (Univ. of Texas Press 1987); Angela Valenzuela, *Subtractive Schooling: U.S.-Mexican Youth and the Politics of Caring* (SUNY Press 1999); Guadalupe San Miguel, Jr., *Brown, Not White: School Integration and the Chicano Movement in Houston* (Texas A&M Univ. Press 2001); Maggie Rivas-Rodriguez (ed.), *Mexican Americans and World War II* (Univ. of Texas Press 2005); Marcos Pizarro, *Chicanas and Chicanos in School: Racial Profiling, Identity Battles, and Empowerment* (Univ. of Texas Press 2005); Laura E. Gomez, *Manifest Destinies: The Making of the Mexican American Race* (NYU Press 2007); Richard Griswold del Castillo (ed.), *World War II and Mexican American Civil Rights* (Univ. of Texas Press 2008); Joseph P. Sánchez, *Between Two Rivers: The Atrisco Land Grant in Albuquerque History, 1692-1968* (Univ. of Oklahoma Press 2008); Jose A. Ramirez, *To the Line of Fire: Mexican Texans and World War I* (Texas A & M Univ. Press 2009); Emilio Zamora, *Claiming Rights and Righting Wrongs in Texas: Mexican Workers and Job Politics during World War II* (Texas A & M Univ. Press 2009). These books are specifically about the Mexican-origin experience in the United States, particularly in the Southwest, and many are more particularly grounded in Texas. Far less has been written of the educational history of Puerto Ricans in the fifty states and D.C. and of other Latino groups in the U.S. For authoritative scholarship on Puerto Rico itself, see Jose Cabranes, *Citizenship and the American Empire* (Yale Univ. Press 1979); Ediberto Roman, *The Other American Colonies: An International and Constitutional Examination of the United States' Overseas Conquests* (Carolina Academic Press 2006).
4. See, e.g., Michael A. Olivas, *Immigration-Related State Statutes and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, *U. Chi. Legal F.* 27 (2007). As evidence of racial violence aimed at persons perceived to be undocumented Mexicans,

Given the clearly-documented and lamentable educational achievement of Mexican Americans in 2010, and the longstanding roots of this phenomenon, this long history of resistance will likely come as a surprise to many readers of educational psychologist Richard R. Valencia's *Chicano Students and the Courts: The Mexican American Legal Struggle for Educational Equality*. In a revealing table listing Mexican American school desegregation cases, he counts thirty five such cases between 1925 and 1985, beginning with *Romo v. Laird*,⁵ in which a Mexican American family sought the right for their four children to attend a comprehensive "white" school in Tempe, Arizona rather than the "Spanish-Mexican" school these children were assigned, which served as the laboratory school for the nearby Tempe State Teachers' College (later Arizona State University). While the Romo family won this battle for a single school term, they lost the war, as the school officials began to assign Mexican-origin children exclusively to "Mexican Schools," on the asserted pedagogical assumption that Spanish-speaking children would only learn when instructed in Spanish. As will be seen throughout all these books, the widely-employed means of segregating Mexican American children—even those who were English speakers—was to aver that their linguistic needs were best met by separating them, despite the flawed premise and segregative effect that this instructional choice had upon the children. Valencia labeled this tactic a "practice, used over and over, [that] was, at its core, racialized segregation" (15).

When used with the other common ascription, that migrant worker children required separate schools so that their farm labors would not disrupt the flow of instruction, their fates were sealed, notwithstanding the failure of school districts to assess the language capacity of the children or to account for the small number of children actually involved in migratory labor. This reasoning was particularly widespread in Texas, such as in *Independent School*

see, e.g., Manny Fernandez, L.I. Teenagers Hunted Latinos for "Sport," Prosecutor Says, N.Y. Times, Mar. 19, 2010, at A18 (describing the killing of Ecuadorian permanent resident); Manny Fernandez, Verdict Is Manslaughter in L.I. Hate Crime Trial, N.Y. Times, Apr. 20, 2010, at A1.

5. Romo v. Laird, et al., No. 21617, Maricopa County Superior Court (1925). This case was unpublished, but all the proceedings are reprinted in Laura K. Muñoz, Separate But Equal? A Case Study of Romo v. Laird and Mexican American Education, 15 OAH Magazine of History 28 (2001), available at www.oah.org/pubs/magazine/deseg/munoz.html (last visited Aug. 10, 2010). While the Valencia list ended in 1985, a number of the cases listed are still ongoing decades later. For example, United States v. Texas was reopened in 2006 after many years of failure to implement. The various documents of this Jarndyce-like case are available at http://maldef.org/education/litigation/us_v_texas/ (last visited Aug. 19, 2010).

District v. Salvatierra,⁶ a 1931 case set in Del Rio. As legal scholar George A. Martinez has noted of the case, which he situates as the first Mexican American desegregation case:

This case is highly significant because it provided two justifications for segregating Mexican-American children. Specifically, the district could segregate children because of linguistic difficulties or because they were migrant farm workers. This case also presents us with another example of legal indeterminacy. The *Salvatierra* court acknowledged that no other Texas court had yet addressed the legality of segregating Mexican-Americans from other white races. Given this vacuum, the court's decision disallowing race-based segregation for Mexican-Americans was not compelled. The court could have followed other jurisdictions that allowed school boards to segregate children on the basis of race, even without statutory authorization. Similarly, the court's conclusion that Mexican-Americans could be segregated for "benign reasons" was not logically compelled. Because only Mexican-Americans were segregated for linguistic difficulties and migrant farm-working patterns, the court might have found that, in effect, such segregation was race-based and therefore illegal. Alternatively, the court might have followed the reasoning of courts in other jurisdictions which had held that, in the absence of express legislation, segregation was illegal. As no legislation expressly authorized the specific segregation at issue in *Salvatierra*, the court could have held that segregation—even for linguistic or migrant farm worker reasons—was illegal.

Moreover, the court allowed the segregation to stand despite clear evidence that the district practiced arbitrary segregation. For example, white children who started school late were not placed in the Mexican school. Thus, the school board's assertion that it segregated children in the Mexican school because they started school late was a mere pretext. In addition, there were no tests demonstrating that the Mexican-American children were less proficient in English, the other alleged justification for the segregation. In any event, the court did not consider the possibility that bilingual education might address any language problems better than segregation.⁷

During the early 1930s, when there were few Mexican American scholars, George I. Sanchez had already taken aim at the misuse of psychometric instruments and the failure to assess the linguistic characteristics of Spanish-speaking children. Similarly, Texas writer Jovita Gonzalez had begun her careful folklore studies.⁸ Valencia comprehensively reviews these efforts at

6. 33 S.W.2d 790 (Tex. Civ. App. 1930), cert. denied, 284 U.S. 580 (1931).
7. George A. Martinez, Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980, 27 U.C. Davis L. Rev. 555, 576-77 (1994). Guadalupe San Miguel, Jr. examined all the original documents and came to the same conclusions in his authoritative study, "Let All of Them Take Heed": Mexican Americans and the Campaign for Educational Equality in Texas, 1910-1981, 74-86 (Univ. of Texas Press 1987).
8. George I. Sanchez, Scores of Spanish-Speaking Children on Repeated Tests, 40 J. Genetic Psychol. 223 (1932); George I. Sanchez, The Implications of a Basal Vocabulary to the Measurement of the Abilities of Bilingual Children, 5 J. Soc. Psychol. 395 (1934). Jovita

litigation and scholarship, both with an overarching theoretical section and through single chapters on the various subjects of educational litigation including school segregation, school financing, special education, bilingual education, undocumented students, higher education financing, and high stakes testing. His novel contribution is his synthetic treatment of the elements of Mexican American activism that have historically fed the struggle for educational opportunity: “advocacy organizations, individual activists, political demonstrations, legislation, and the subject of this book—litigation. In order for the Mexican American people to optimize their campaign for equality in education, they must draw from all five forms of struggle. Each one in itself is important, but all five streams flowing simultaneously and eventually becoming one fast-moving river have the potential to create a powerful confluence for systemic change in education” (319).

One of the important cases Valencia discusses is *Delgado v. Bastrop*,⁹ a federal district court opinion from June 1948, which struck down the segregative practices in this central Texas community of Bastrop, a small town near Austin, the state capital. Because the case was never reported, and not appealed to the Fifth Circuit, it has not been widely known, even though it was in proximity to 1954’s *Brown v. Board of Education*¹⁰ and followed *Mendez v. Westminster*,¹¹ the April 1947 Ninth Circuit decision successfully brought by Mexican American plaintiffs against California schools. The *Delgado* decision angered local officials who did not want the ruling upheld or widened to other districts. At the time, before it was split into the Fifth and Eleventh Circuits, the Fifth Circuit extended all the way from Texas to Florida, and a decision by the Circuit likely upholding *Delgado* would have had bearing upon the Southern judges and the region’s Jim Crow schools and social practices. Valencia carefully details the many instances of “intransigence and subterfuge” (52) by disgruntled school officials, and brings light to this most obscure steppingstone to *Brown*. He also usefully points out the intersections connecting the lawyers of *Mendez*, *Delgado*, and *Brown*, who corresponded and interacted behind the scenes. (Although he does not make the connection clearly here, he might have added *Hernandez v. Texas*¹² lawyers to the mix as well, some of whom participated in *Delgado v.*

Gonzalez Mireles served as the president of the Texas Folklore Society in 1930–1932, and is credited with being the first Mexican American woman scholar in Texas. See generally José E. Limón, *Dancing with the Devil: Society and Cultural Poetics in Mexican American South Texas 60–74* (Univ. of Wisconsin Press 1994); Emilio Zamora, Cynthia Orozco & Rodolfo Rocha (eds.), *Mexican Americans in Texas History, Selected Essays* (Texas A & M Univ. Press 2000). Her papers and those of her activist husband Edmundo E. Mireles are archived at the Texas State University, San Marcos library at <http://alkek.library.txstate.edu/swwc/archives/writers/jovita.html> (last visited Aug. 10, 2010).

9. Civ. No. 388 (W.D. Tex. June 15, 1948) (unpublished opinion).

10. 347 U.S. 483 (1954).

11. 161 F.2d 774 (9th Cir. 1947).

12. 347 U.S. 475 (1954).

Bastrop and the criminal defense/murder trial that figures in *Hernandez*.¹³ Readers familiar with the fascinating and extensive treatments of *Brown* by Kluger, Tushnet, and others would do well to re-read the case through the lens of Valencia, Martinez, and others who have filled in the parallel tracks.¹⁴

In *Mendez v. Westminster: School Desegregation and Mexican-American Rights*, Philippa Strum has written the first full-length book on this Ninth Circuit case, as part of the University Press of Kansas Landmark Law Cases & American Society series, usually reserved for important cases that reached the U.S. Supreme Court. Strum earlier wrote an authoritative 2002 treatment in the same series on *United States v. Virginia*,¹⁵ the Supreme Court case that required Virginia Military Institute to admit women. For the same reasons that *Delgado* is important on the road to *Brown*, so is *Mendez*. Strum is a careful and fluid writer, with a storyteller's facility for explaining the many strands that led to the case, including previous litigation (there were few California cases on point, but enough to suggest how to proceed), how the plaintiffs came to their grievance (their children were not admitted into the better school in the Westminster system, outside Los Angeles, due to their alleged lack of fluency in English), how they picked their lawyer (he had litigated a public accommodations case that led to integration of the San Bernardino public swimming pools and parks), how he strategized with other civil rights lawyers and organizations, and what came of the holding after the State of California lost (the state passed an anti-segregation statute in June 1947, signed into law by Gov. Earl Warren).

I have read this case many times over the years, along with many of the law reviews and the historical literature about the case. I thought I knew the details, but I learned much from Strum's book. The texture she reveals is an excellent example of why the backstories to important cases are so essential to understanding the full context. Strum is particularly accomplished at the telling detail; for instance, her account of how the Mendez family took up the

^{13.} Michael A. Olivas (ed.), "Colored Men" and "Hombres Aquí": *Hernandez v. Texas and the Emergence of Mexican-American Lawyering* (Arte Público Press 2006).

^{14.} See, e.g., Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (Vintage 2004) (1976); Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* (NYU Press 1984); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 *Geo. L. J.* 1 (1986); Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925–1950* (Univ. of North Carolina Press 1987); Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1956–1961* (Oxford University Press 1994); Mark V. Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961–1991* (Oxford Univ. Press 1997); Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 *Colum. L. Rev.* 1867 (1991); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 *Yale L. J.* 256 (2005).

^{15.} Philippa Strum, *Women in the Barracks: The VMI Case and Equal Rights* (University Press of Kansas 2002). See *United States v. Virginia*, 518 U.S. 515 (1996). See also Rosemary C. Salomone, *The Story of Virginia Military Institution: Negotiating Sameness and Difference, in Education Law Stories* 159 (Michael A. Olivas & Ronna Greff Schneider eds., Foundation Press 2006).

cause, especially with a Mexican American father and Puerto Rican mother, and at some risk to their social standing, is particularly compelling. Their daughter Sylvia, alive in 2010, has become like Linda Brown or Elena Holly, the active custodian of her family's tale and private keeper of the public faith. By recounting many details from the fugitive press accounts, personal histories, and written records, Strum has performed a genuine service in drawing such significant attention to the case.

However, she is not as sure in her grasp of the post-*Mendez* matters. She mistakenly places the four school districts in the *Delgado v. Bastrop* case as being in "south Texas" (149), when any political and topographical map would locate the three counties and four school districts in central Texas, including Travis County, where the case was tried in Austin federal court. The actual geography matters less than the considerable political cartography between Anglo Texas and the predominantly-Mexican American south Texas and border areas. She does not dwell upon *Delgado*, although in many respects it was as crucial to the NAACP Legal Defense Fund's strategy as was *Mendez*, and was tried in the same courts as *Sweatt v. Painter*,¹⁶ already begun against the University of Texas. I had not put two and two together to connect the appearance of A. L. Wirin, who served as co-counsel in both *Mendez* and *Delgado*; for that matter, I had not known he had been involved in litigation following the earlier Sleepy Lagoon violence against Mexican Americans,¹⁷ or that afterward, he had gone on to do the Lord's work in Arizona,¹⁸ or that he had later argued before the U.S. Supreme Court.¹⁹ (Valencia also missed this connection in his discussion of *Gonzales v. Sheely*, the 1951 Maricopa County, Arizona desegregation case [53–55].) Through its journey to the Ninth Circuit,

16. 339 U.S. 629 (1950). See Amilcar Shabazz, *Advancing Democracy: African Americans and the Struggle for Access and Equity in Higher Education in Texas* (Univ. of North Carolina Press 2004).
17. For detailed treatments of the racial violence visited upon Mexican Americans in Los Angeles in 1943, see Richard Steele, *Violence in Los Angeles: Sleepy Lagoon, the Zoot Suit Riots, and the Liberal Response*, in Richard Griswold del Castillo, *supra* note 3, at 34–48; Mauricio Mazon, *The Zoot-Suit Riots: The Psychology of Symbolic Annihilation* (Univ. of Texas Press 1988).
18. He tried *Gonzales v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951). Professor Martinez mistakenly lists the case throughout as *Gonzalez*. See Martinez, *supra* note 7, at 555, 578.
19. *Rochin v. California*, 342 U.S. 165 (1952). Rochin was a search and seizure case, and at the trial court and state appellate levels, it was argued by David Marcus, who handed it off to Wirin and another lawyer for the U.S. Supreme Court argument. Wirin argued the case with co-counsel Dolly Lee Butler, who is listed in a website of early successful women lawyers from Tennessee: 50 Years of Pioneers: Early Women in the Law, <http://www.tba.org/pioneers.html> (last visited July 16, 2010). Although the petitioner Rochin was Latino, the case was not about race and ethnicity, but drugs seized by a coerced stomach-pumping. Rochin prevailed in the Supreme Court. Marcus also represented Mexican American homeowners sued by white homeowners who invoked racial housing covenants in 1943 Fullerton, California in *Doss v. Bernal*. See Gustavo Arellano, *Mi Casa Es Mi Casa*, *Orange County Weekly*, May 6, 2010, available at <http://www.ocweekly.com/2010-05-06/news/alex-bernal-housing-discrimination> (last visited Aug. 19, 2010).

Mendez drew upon white, Jewish, Asian, and African American lawyers, but not a single Latino or Mexican American attorney.

I do not think that her rendition of the founding of the Mexican American Legal Defense & Educational Fund squares with all the available facts, or that the organization “contacted Pete Tijerina to use some of...[its Ford Foundation] money to help Mexican-American lawyers in Texas with litigation” (154–55). Remarkably, there has never been a full-length book on MALDEF or its founding, so the accurate version is still to be told. I also do not believe that it would be correct to characterize the funds that University of Texas Professor George I. Sanchez had at his disposal as “LULAC” funds, the way she describes them (149). These may seem quibbles, but her telling of these details is not nearly as sure-handed as her account of the *Mendez* case. One last haunting connection among these books involves the demise of David Marcus, the lead *Mendez* lawyer, for reasons that will be apparent in the review of Ignacio M. Garcia’s book. These small details aside, I am grateful that the Kansas series apparently made an exception for this case, which did not reach the U.S. Supreme Court or achieve the iconic status of those in its other books, and grateful that Strum decided to write about it.

Ignacio M. Garcia’s book on *Hernandez v. Texas* is a work long in the making, even drawing an unusual shout-out in a *New York Times* editorial years before it appeared in print.²⁰ The decision, which appears in the 1954 *U.S. Supreme Court Reporter* just before *Brown*, involves a Mexican American defendant convicted of murder in a 1951 cantina shooting by an all-white jury in Edna, Texas. That verdict was subsequently overturned on the grounds that he was not tried by a jury of his peers; Texas prosecutors had argued that since state law considered Mexican Americans to be “white,” he had indeed been tried by a jury of his peers.²¹

However, in a unanimous opinion by Justice Warren, the Court ordered the defendant be given a new trial:

The petitioner’s initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from “whites.” One method by which this may be demonstrated is by showing the attitude of the community. Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between “white” and “Mexican.” The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a

20. A Quiet Victory for Civil Rights, N.Y. Times, May 15, 2004, at A16 (“Ignacio Garcia, a history professor at Brigham Young University who is writing a book about the Hernandez case, said that it marked the first time Hispanic lawyers had argued before the Supreme Court.”).
21. *Hernandez v. Texas*, 252 S.W.2d 531 (1952).

sign announcing “No Mexicans Served.” On the courthouse grounds at the time of the hearing, there were two men’s toilets, one unmarked, and the other marked “Colored Men” and “Hombres Aquí” (“Men Here”). No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof.²²

As the author and editor of the first book on the case to appear in print, I was pleased to welcome this new work and to have the perspective of a senior Chicano historian on the case that had come to mean so much to me.²³ Garcia’s use of journalism sources and his interviews with a number of observers and their families helps bring to life the alcohol-fuelled bar fight of more than half a century ago. (Inexplicably, the cover to his book mistakenly indicates the shooting was in 1952, when it actually occurred in 1951.) He also has ably explored the social dynamics of the case, explaining why many community members rallied behind defendant Pedro Hernandez despite the fact that he had killed another Mexican American, Joe Espinoza, who was unarmed. He is particularly helpful in sorting out some of the incongruous aspects of the case, such as why “outsider” lawyers from Houston and San Antonio took

22. Hernandez v. Texas, 347 U.S. 475, 479–80 (1954) (quotation marks and citations omitted). See also Ian Haney Lopez & Michael A. Olivas, Hernandez v. Texas: Jim Crow, Mexican Americans, and the Anti-Subordination Constitution, in Rachel Moran & Devon Carbado, Race Law Stories 269 (Foundation Press 2008). This “whiteness thesis” is, as could be expected, a quite contested issue. See, e.g., Neil Foley, The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture (Univ. of California Press 1998); Ian Haney Lopez, White by Law: The Legal Construction of Race (Rev. ed., NYU Press 2006) (1996); John Tehranian, Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America, 109 Yale L.J. 817 (2000); Ian Haney Lopez, Racism on Trial, The Chicano Fight for Justice (Belknap Press 2004); Ariela Gross, Texas Mexicans and the Politics of Whiteness, 21 L. & Hist. Rev. 195 (2003); Steven H. Wilson, Brown Over “Other White”: Mexican Americans’ Legal Arguments and Litigation Strategy in School Desegregation, 21 L. & Hist. Rev. 145 (2003); Marta Tienda & Faith Mitchell (eds.), Multiple Origins, Uncertain Destinies: Hispanics and the American Future (National Academies Press 2006). Many scholars and observers have speculated upon the “bonus of whiteness,” ranging from Toni Morrison to Derrick Bell, not always with much historical nuance or knowledge. See, e.g., Toni Morrison, On the Backs of Blacks, TIME, Dec. 2, 1993, at 57 (noting what she characterizes as newcomers’ antipathy towards African Americans); Derrick Bell, The Permanence of Racism, 22 Sw. U. L. Rev. 1103, 1109 (1993) (“If immigrants from Europe who are, after all, white, have seen the need to bolster their self-esteem by denigrating blacks, then what of the immigrants who are not European: those from Asia and those from Spanish-speaking nations? Can blacks expect those groups to reject the blandishments of quasi-white status and join in coalitions with blacks to fight the economic and social rejection suffered by both?”). Among the more thoughtful writers on this complex subject are Tanya Katerí Hernández, Latino Inter-Ethnic Employment Discrimination and the “Diversity” Defense, 42 Harv. C.R.-C.L. L. Rev. 259 (2007); Gomez, *supra* note 3, at 149–61; Anna Williams Shavers, The Invisible Others and Immigrant Rights: A Commentary, 45 Hous. L. Rev. 99 (2008). The Hernandez v. Texas case, if anything, revealed the extensive similarities between these two marginalized communities in cotton country, “Jaime-Crow” Texas in the 1950s. The putative “whiteness bonus” penalized Mexicans by keeping them off petit and grand juries, even in jurisdictions such as Jackson County, where their share of the population would have suggested at least one Mexican on each seven-person jury.

23. Olivas, *supra* note 13.

the *Hernandez* case in the first place, since the Espinozas were a relatively well-established family in Edna, Texas, and doing so was not entirely popular among other Mexican Americans in the small “Jaime Crow” cotton-culture town.

Gustavo Garcia, one of the four lawyers on the team, was a tragic figure; Ignacio Garcia captures his cockiness and bravado in both broad and small strokes. Nowhere is he better than in his depiction of the Chicano lawyers barred from staying the night in the town’s only hotel, and of Gus drunkenly singing in the hotel parking lot in order to irritate the hoteliers (34–35). Indeed, the book is filled with references to Gus Garcia’s drinking, so much so that the author strays from his usual care to describe Gus as drunk the night before his crucial Supreme Court argument, and of the legal team’s effort to sober him up by pouring coffee down his throat. Gus Garcia then went on to deliver a brilliant argument, famously extended as the Justices gave him more time to answer their questions (140–48). The author explains that he heard this story from an Anglo historian who was a friend of John Herrera, the lead lawyer in the case (220, n.47). Because John Herrera never wrote about the case and his archived papers do not mention this incident, and because the U.S. Supreme Court did not begin to record oral arguments until the following term, we will never know what actually happened. All the lawyers have now passed, but the last living lawyer of the four-person team, James DeAnda, who became a federal judge and a co-founder of MALDEF in 1967–68, insisted to me that this never happened.²⁴ It was plausible that Gus was drunk, as he was an alcoholic and died ignominiously at the age of forty-eight, having been disbarred, hounded by creditors, and in and out of hospitals and treatment facilities for his drinking.²⁵ But this story requires more careful documentation than is evident here.

24. DeAnda’s version, supported by the original case filing documents, was that Herrera and he took the case and elaborated upon their earlier involvement in a similar case, *Sanchez v. Texas*, 243 S.W.2d 700 (1951). James DeAnda, *Hernandez at Fifty: A Personal History*, in Olivas, *supra* note 13, at 202. The filmmaker Carlos Sandoval, who directed the 2009 PBS film (“A Class Apart”) based upon the Hernandez case, also paints Gus as the architect and primary lawyer. He cites the Cotton Picker pamphlet published by Garcia, and interviews John Herrera’s son on camera, who avers the version of the hungover Garcia arguing the case before the U.S. Supreme Court.
25. The John J. Herrera papers at the Houston Metropolitan Research Center contain many heartbreaking exchanges among the various parties, with considerable evidence of Gus Garcia’s drinking, including letters from his former wife. Olivas, *supra* note 13, at 220 n.64. His obituary appeared in the San Antonio Evening News, June 14, 1964, at 2A. A San Antonio reporter filed what I believe to be the only news story filed by a reporter who was actually present at the Supreme Court when the case was argued by Cadena and Garcia, and she gives no hint of his demeanor, except in a more positive light: “Garcia termed [Sam] Houston ‘that wetback from Tennessee.’...[O]bservers here think the court will rule in favor of the Latin-Americans. [sic] Anyway, to have reached this far on a typewritten petition and small contributions from many Texas Latin-Americans, the little group of San Antonio, Del Rio and Houston Latin-Americans could hold their heads high as they emerged from the court.” Sarah McClendon, Jury Bias Put to High Court, San Antonio Light, Jan. 12, 1954, at 1, available at www.law.uh.edu/hernandez50/mcclendon.pdf (last visited Aug. 10, 2010).

Historian Cynthia E. Orozco has published *No Mexicans, Women, or Dogs Allowed: The Rise of the Mexican American Civil Rights Movement*, a towering work, and a volume of significance that transcends its actual scope—early 20th century Mexican American political development in Texas. The book builds on her Ph.D dissertation, “The Origins of the League of United Latin American Citizens and the Mexican American Civil Rights Movement in Texas, 1910–1929.” Among the materials she reviewed were the unpublished papers of Alonso Perales, who graduated from George Washington University School of Law in 1926, making him the third Mexican American lawyer to practice in Texas (111–114), following J.T. Canales, a lawyer-politician who graduated from the University of Michigan Law School in 1899 (94–96), and Manuel C. Gonzales, who attended the law school at St. Louis University and graduated from the University of Texas Law School in 1924 (104–107).²⁶ Perales not only had a successful practice, but helped found LULAC and was a prolific writer. The University of Houston acquired his papers and archives in 2009, and they are ripe pickings for scholars.

Orozco has carefully looked at the early Mexican American social and political organizations, especially LULAC and Order Sons of America (OSA), and through her careful work advances the thesis that Mexican American organizing politics and social consciousness arose much earlier than has been generally credited in the work of prior historians, political scientists, and other scholars. Whereas most other scholars place these origins in the late 1920s, especially with the events leading up to the 1929 founding of LULAC, in Corpus Christi, Texas, she more thoroughly traces its roots to predecessor groups and to events from the 1910 Mexican Revolution, the end of the *Porfiriato*, and the early 1920s. She also has done rather remarkable archival work with Perales’s private papers, and with the collection of another early activist and feminist, Adela Sloss-Vento, also previously unavailable. These family-held papers fill out the record on the structured role of women in these mutual societies and civic organizations, as well as the behind-the-scenes role of lawyers—in this instance, not as litigators, but as civic leaders and elected officials.

Ironically, the case most often considered to be an early “Mexican American” case, *Mendez*, involved no Mexican American lawyers, and because it was a California case rather than a Texas case, had no significant involvement from Mexican American political organizations or the social-cultural community. However, it did segue into and, through the connections noted here, influence *Delgado*, *Hernandez*, and the cases that flowed eventually into the MALDEF “river” Richard Valencia has evocatively described.²⁷ In 1982, MALDEF won

26. He published a short pamphlet, *A Cotton Picker Finds Justice! The Saga of the Hernandez Case*, which is included in its entirety in Olivas, *supra* note 13, at 356–72. He suggests that he was the original lawyer (“I could not resist the tearful pleadings of the defendant’s mother.”), who brought in Herrera and DeAnda (“I decided to contact the only man I knew who could possibly help me.”). *Id.* at 361.

27. Richard R. Valencia, *Chicano Students and the Courts: The Mexican American Legal Struggle for Educational Equality* 319 (NYU Press 2008). These connections are also

Plyler v. Doe, concerning undocumented children, its most important U.S. Supreme Court victory to that point.²⁸ In 2006, MALDEF lawyers won in *LULAC v. Perry*,²⁹ a voting rights case that, for the first time, had Latinos and Latinas on both sides of a Supreme Court case, and because of the majority's complex decision, allowed Nina Perales for MALDEF and Teodoro Cruz, the Texas Solicitor General, to each claim victory. James DeAnda lived to see that case, and four years later, Sonia Sotomayor was confirmed to the Court. While these books and others show that much work has been done, events continue to show how much scholarly and other work remains.

Many rich nuggets are still to be mined from this period's river. As part of my ongoing research on *Hernandez*, I have identified earlier trials where Mexican American defendants had claimed all-Anglo jury trials were not representative and came across the Dallas trial of Gregorio Cortez, among others.³⁰ Literary scholars have begun to look at Lorenzo de Zavala,³¹ cultural and printing scholars at Padre Antonio Martinez,³² and legal historians at the racialization of juries in the Southwest.³³ These projects examine the "first

examined in Jorge C. Rangel & Carlos M. Alcala, *De Jure Segregation of Chicanos in Texas Schools*, 7 Harv. C.R.-C.L. L. Rev. 307 (1972); Guadalupe Salinas, Mexican-Americans and the Desegregation of Schools in the Southwest, 8 Hous. L. Rev. 929 (1971); Richard Delgado & Victoria Palacios, Mexican-Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause, 50 Notre Dame L. Rev. 393 (1975); Gary A. Greenfield & Don B. Kates, Jr., Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866, 63 Cal. L. Rev. 662 (1975); Lupe S. Salinas, Gus Garcia and Thurgood Marshall: Two Legal Giants Fighting for Justice, 28 T. Marshall. L. Rev. 145 (2002-2003); Haney Lopez & Olivas, *supra* note 22, at 273.

- 28. *Plyler v. Doe*, 457 U.S. 202 (1982). See Michael A. Olivas, *Plyler v. Doe, the Education of Undocumented Children, and the Polity*, in *Immigration Stories* 197 (David A. Martin & Peter H. Schuck eds., Foundation Press 2005).
- 29. *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).
- 30. For the authoritative history and folklore concerning this case and the early 1900s trial, which I calculate to be the first challenge by a Mexican American to jury composition, see Américo Paredes, *With His Pistol in His Hand: A Border Ballad and Its Hero* (Univ. of Texas Press 1958). See also Richard J. Mertz, "No One Can Arrest Me," *The Story of Gregorio Cortez*, 1 J. of South Tex. 1 (1974). The Dallas news story notes: "There is perfect quiet here and everybody seems to be of the opinion that he can have a fair trial in this county." Olivas, *supra* note 13, at Appendix IX, 373.
- 31. Lorenzo de Zavala, *Journey to The United States of America/Viaje a Los Estados Unidos del Norte de America* (John-Michael Rivera ed., Wallace Woolsey trans., Arté Público Press 2005); John-Michael Rivera, *The Emergence of Mexican America: Recovering Stories of Mexican Peoplehood in U.S. Culture* 24-50 (NYU Press 2006) [hereinafter, *The Emergence of Mexican America*].
- 32. A. Gabriel Meléndez, *So All Is Not Lost: The Poetics of Print in Nuevomexicano Communities, 1834-1958* (Univ. of New Mexico Press 1997); A. Gabriel Meléndez, *Spanish-Language Newspapers in New Mexico, 1834-1958* (Univ. of Arizona Press 2005). See also Michael A. Olivas, *Reflections Upon Old Books, Reading Rooms, and Making History*, 76 UMKC L. Rev. 811 (2008).
- 33. See, e.g., Laura E. Gomez, *Race, Colonialism and Criminal Law: Mexicans and the American Justice System in Territorial New Mexico*, 34 L. & Soc. Rev. 1129 (2000); Laura E. Gomez,

important mediating figures of U.S.-Mexican democratic cultural relations and [reveal] much about the early expansionist ideologies that would affect U.S.-Mexico relations and Mexican American peoplehood in the United States for the next century.”³⁴ The literary scholar who wrote this was referring to the “next century” as the 20th, but he could just as easily have referred to the future of the 21st century.

I end as I began this review-essay, as a riposte to Samuel P. Huntington, who was unaware that Mexican-origin and native peoples populated what is now the United States long before the Pilgrims arrived. If there truly were a Mexican “obsession” with history, it likely exists because those who continue to ignore the history of Mexicans in the U.S. or paint them as inferior are ignorant of these stories, and willfully so. How could anyone who knew this history assert that we have “little use for education”? In the movie 1988 *Stand and Deliver*,³⁵ math teacher Jaime Escalante, exasperated at his high school students, shouts at them, “You *burros* have math in your blood!” The rise of this developing field of legal history gives evidence that we *burros* also have history—and law—in our blood.

Manifest Destinies: The Making of the Mexican American Race 88–89 (NYU Press 2007) (NM juries); Raul A. Ramos, *Beyond the Alamo: Forging Mexican Ethnicity in San Antonio, 1821–1861 192–194* (Univ. of North Carolina Press 2008) (San Antonio, TX juries).

34. Rivera, *The Emergence of Mexican America*, *supra* note 31, at 21.

35. *Stand and Deliver* (Warner Bros. 1988).