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Foreshadowing Brown v. Board: The 1946 Case of Mendez v. Westminster

BY JOY C. SHAW

In 1945, a group of Orange County Latino families, led by tenant farmers Gonzalo and Felicitas Mendez, filed suit so they could send their children to nearby all-white schools in Westminster instead of the shabby, distant schools set aside for "Mexicans." The families' victory sparked the end of official segregation in California public schools, seven years before *Brown v. Board of Education.*

It was the "finest achievement" of Los Angeles immigration attorney David Marcus, who represented the Mendez family, said his granddaughter Anne K. McIntyre. "I heard about the case my whole life," McIntyre said. "It was a huge thing for my grandfather." Yet, unlike *Brown*, the most celebrated court decision of the civil rights movement, *Mendez v. Westminster* faded into obscurity, left out of children's history books and rarely mentioned by lawyers and judges.

Mendez was not even cited in *Brown*, despite the fact that Earl Warren and Thurgood Marshall had significant ties to, and were influenced by, the Orange County decision. Marshall argued the *Brown* decision, and Warren wrote it. But today, with Latinos making up one-third of California's thirty-four million people, a growing number of scholars and legal experts are connecting the missing dots between *Mendez* and *Brown*. "Our whole family is so appreciative of this newfound interest," said McIntyre, who is now an attorney herself at Wood, Smith, Henning & Berman in Los Angeles.

Mendez was pushed into the shadows of history, in part by the civil rights movement's focus on the black-white divide in the American South, legal observers say. But strategic decisions that Marcus and his clients made as end runs around racist traditions and statutes in California also fostered the case's relative obscurity. Marcus argued that Latinos were whites and therefore could not be grouped with other races,

including African American and Asian American, that were subject to segregation laws. The case became about national-origin discrimination. While the tactics won the day, they narrowed the case's footprint.

"Had the Westminster school district decided to appeal the Ninth Circuit decision, which went for the Mendez family, we would be celebrating the fifty-seventh anniversary of *Mendez v. Westminster*," said Gilbert Acuna, librarian at the Los Angeles County Law Library. "It's as simple as that."

Mendez v. Westminster was filed on March 2, 1945, after the Mendezes were barred from registering their children in "all-white" public elementary schools in the Westminster, Garden Grove, El Mondeno and Santa Ana City school districts. A year later, United States District Judge Paul J. McCormick in Los Angeles issued a ground-breaking ruling opening all the schools to Mexican American children.

In his decision, McCormick boldly suggested that segregated schools, even if they had the same facilities as white schools, are not equal. "The equal protection of the laws pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, text books and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of their ancestry," McCormick wrote in his ruling on February 18, 1946. "A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage." *Mendez v. Westminster School Dist. of Orange County*, 64 F.Supp. 544, 549 (S.D. Cal. 1946).

Law experts say McCormick was the first federal judge in the nation to find segregated schools inherently unequal. "This paragraph is unbelievable," said

Christopher Arriola, deputy district attorney for Santa Clara County, who went to Esplanade Elementary School, built after the *Mendez* decision, in Orange County in the sixties. "He is saying separate is not equal."

Significantly, however, McCormick did not address the constitutionality of the now-infamous 1896 United States Supreme Court case *Plessy v. Ferguson*, which upheld separate but equal facilities for different races and established racial segregation as the law of the land. Instead, McCormick, in what was probably a ploy to evade *Plessy v. Ferguson*, outlawed segregation by national origin. "What is a district court judge to do to get around *Plessy v. Ferguson*?" Arriola said. "*Plessy v. Ferguson* said you can segregate by race. It doesn't say anything about national origin. This is my perfect case to say segregated schools based on national origin is unconstitutional. If that's approved, that can be a next step to overturning *Plessy*."

Marcus also conceded that facilities in segregated Mexican schools in Orange County were equal to and sometimes better than those in "white" schools – a deliberate evasion to avoid a partial ruling. "We all know that they weren't in most cases," Arriola said. "Why would he do that? Because he did not want some partial ruling from a district court saying separate is okay as long as these districts bring those schools up and make them equal." He also brought in an expert witness, UCLA anthropology department chairman Ralph Deals, to testify that segregated Mexican children suffered from inferiority feelings in relation to Anglo-Saxon children. This was the first time in U.S. history that a social scientist's testimony was used in support of a legal argument, experts said.

Marcus' assertion that Mexican Americans are Caucasians was a way to sidestep two California statutes that provided for racially segregated schools for Native Americans and Asian Americans. California Education Code Section 8003 said, "The government board of any school district may establish separate schools for Indian children, excepting children of Indians who are wards of the United States government and children of all other Indians who are descendants of the original American Indians of the United States, and for children of Chinese, Japanese, or Mongolian parentage." And Section 8004 said, "When separate schools are established for Indian children or children of Chinese, Japanese, or Mongolian parentage, the Indian children or children of Chinese, Japanese, or Mongolian parentage shall not be admitted into any other school."

Marcus tiptoed around both laws. "It should be noted, as all parties agreed below, that no question of race discrimination is involved in this case, since persons of Latin and Mexican extraction are members of the 'white' race," Marcus wrote in his brief before the Ninth Circuit United States Court of Appeal.

Marcus, who with his Mexican American wife had four children, was well aware that Mexican Americans weren't listed in California's official segregation statutes, his granddaughter said. When he filed *Mendez*, he had just used that fact to win a 1944 case for a group of Mexican Americans who wanted equal use of San Bernardino city pools. "It's a legal loophole [that Marcus] can get through to end this awful precedent [in *Plessy v. Ferguson*]," Arriola said. "That's what Marcus put before the court, and McCormick jumped to it. It's brilliant. Our constitution had allowed segregation of Indians, Mongolians, and Asians, but one of the things the *Mendez* case was bringing to the surface was that, if you are going to classify... that people of Mexican descent are Caucasians, as white, how can you segregate them?" said Dr. Carlos Haro, assistant director of UCLA's Chicano Studies Research Center.

The national origin argument later became the sole basis for the Ninth Circuit decision striking down Westminster's segregation as a violation of the Equal Protection Clause of the Fourteenth Amendment. "That the California law does not include the segregation of school children because of their Mexican blood," Judge Albert Lee Stephens of the Ninth Circuit wrote in a unanimous en banc opinion dated April 14, 1947, "is definitely and affirmatively indicated, as the trial judge pointed out, by the fact that legislative action has been taken by the State of California to admit to her schools, children citizens of a foreign country, living across the border. Mexico is the only foreign country on any California boundary." *Mendez v. Westminster School Dist. of Orange County*, 161 F.2d 774, 780 (9th Cir. 1947).

But while they eked out a win, Marcus' arguments about the racial status of Mexican Americans diminished the impact that *Mendez v. Westminster* had on civil rights case law. "What's tricky about the *Mendez* case is that it [uses] such a narrow ground to decide on the basis of California law," said Ariela Gross, law professor at the University of Southern California. "It would be awkward to cite that law when you are trying to get rid of all segregation. What McCormick actually said is this California law allows you to segregate among the great races of mankind, but Mexicans aren't one of them."

There's no question, however, that McCormick's decision helped shape how California Governor Earl Warren and Thurgood Marshall, attorney for the National Association for the Advancement of Colored People, in New York, thought in the *Brown* case. Marshall and his colleague, Robert Carter, at the

NAACP had been looking for local school desegregation cases to build a nationwide movement since 1940, when, under Marshall's leadership, the group founded its Legal Defense and Education Fund, Inc. So when the Westminster school board filed an appeal with the Ninth Circuit, the civil rights group decided to weigh in.

In an amicus brief filed on October 2, 1946, Marshall asked the appeals court to broaden the scope of the *Mendez* case to include all minorities and to strike the "separate but equal" doctrine altogether. "Segregation on a racial basis in the public school system is a type of arbitrary and unreasonable discrimination which should be forbidden under our laws," Marshall wrote. He later used the same argument in his Supreme Court brief.

Other advocacy groups, including the American Jewish Congress, the American Civil Liberties Union, the Japanese American Citizens League, and the Los Angeles chapter of the National Lawyers Guild submitted amicus briefs in support of *Mendez*. "Whenever a group, considered as 'inferior' by the prevailing standards of a community, is segregated by official action from the socially dominant group," American Jewish Congress attorneys Will Maslow and Pauli Murray wrote on October 28, 1946, "the very fact of official segregation, whether or not equal physical facilities are being furnished to both groups, . . . is a humiliating and discriminatory denial of equality to the group considered 'inferior' and a violation of the Constitution of the U.S."

The Ninth Circuit was unwilling to go as far as the civil rights groups wanted, however. "We are not tempted by the siren who calls to us that the sometimes slow and tedious ways of democratic legislation is no longer respected in a progressive society," Stephens wrote. "For reasons presently to be stated, we are of the opinion that the segregation cases do not rule the instant case and that is reason enough for not responding to the argument that we should consider them in the light of the amicus curiae briefs." *Mendez*, 161 F.2d at 780.

The Ninth Circuit's timidity almost certainly reflected a compromise struck to reach a unanimous decision, legal experts say. "We know that in *Brown v. Board*, the chief justice really wanted a unanimous opinion because they'd think, if they go too far out on a limb, nobody would enforce that decision," Gross said. "Certainly in 1947, it's a radical argument to say any time there's segregation, that's discrimination."

But the broader desegregation argument was not lost on Warren. He became governor in January 1943 after four years as attorney general with a mixed reputation on racial issues. In 1942, *Continued on page 12*

A Continuum

BY JAMES E. SHEKOYAN

This is my first newsletter column as president of the California Supreme Court Historical Society. Often, when there is a change in the leadership of an organization, the incoming officers will talk about new beginnings, suggesting that there will be substantial changes in policy and practice from the past. I can assure you that is not the case with this change of leadership. My fellow officers and I stand on the shoulders of those who have led, directed, and nurtured this Society since its beginning. Without taking anything away from those who served before him, I want to give particular credit and thanks to Kent Richland for his leadership during the past five years. He and his fellow officers have served through a period of substantial progress for the Society, both as to its programs and publications, and the development of resources to support them.

I am pleased that Kent is continuing to serve the Society as a member of the Executive Committee so that we can continue to have the benefit of his advice and wise judgment. We hope to build on that progress by continuing to support current programs and projects (e.g., oral history projects and the archiving of the papers of Justice Stanley Mosk), increasing donations to the Society to support those projects, and identifying new programs and projects to support that further the mission of the Society, that being to preserve and promote the rich history of the California Supreme Court and the entire California legal and judicial system.

I want to thank my fellow board members for electing me as president of the Society. I've been a member of the board for over ten years, and have particular memory of my first board meeting, in April, 1994. The meeting was held in San Francisco, and was preceded by a luncheon for the board members. When I arrived from my home in Fresno, I was greeted by Malcolm Lucas, then the Chief Justice. He invited me to join him at his table with four others: two Court of Appeal justices, Supreme Court Justice Stanley Mosk, and the venerable Bernie Witkin, all of whom were then members of the Board of Directors of the Society. I will confess to having felt much trepidation sitting with that group, and more than once silently asked myself, "What am I doing here?" I will say that I am still here because I have a strong belief in the necessity of preserving California's legal and judicial history and making it available to historians and scholars, as well as the general public. I look forward to working collaboratively with the officers with whom I serve – Vice President Ray McDevitt, Secretary David McFadden, and Treasurer Ophelia Basgal *Continued on page 13*

Foreshadowing Brown v. Board

Continued from page 3

he supported the internment of Japanese Americans in war camps – a decision he said he "deeply regretted" later in his life.

By the time McCormick ruled in February 1946, many Americans had begun questioning the disparity between the ideals of equality and democracy that Americans trumpeted during wartime and the nation's practices at home. "There had been a lot of discussion and raised awareness of American values of democracy," Gross said. "We didn't want to be like the Germans and separate people arbitrarily by groups. A lot of the rhetoric in the case was that this kind of segregation [in Orange County public schools] creates that feeling."

As a media-savvy governor, Warren must have been aware of the debate surrounding the *Mendez* case, which made headlines in major newspapers throughout the state. As a lawyer, he closely followed McCormick's February 1946 decision, legal experts now say. His close ally, California Attorney General Robert Kenney, submitted an amicus brief to the Ninth Circuit, chastising the Westminster school board's practice of segregation.

Almost immediately after McCormick's decision, Warren worked to repeal California's two segregation statues. The legislative repeal, known as the Anderson Bill, was sent to the state Assembly in January 1947 and approved by lawmakers in June 1947, less than two months after the appellate court upheld the *Mendez* ruling.

Although *Mendez* was not formally cited in *Brown*, it nevertheless had a far-reaching effect on the case. David Marcus turned down an invitation from Marshall to participate in the *Brown* case because of his solo practice in Los Angeles, his granddaughter said. But he sent the NAACP all his files, she said.

Orange County Superior Court Judge Frederick Aguirre said Warren's opinion in *Brown* closely mirrored many key passages in McCormick's *Mendez* decision. Both rulings hold that children's education is hampered by segregation, that segregated facilities are necessarily unequal, and that children must have equal opportunity in education.

But the lasting legacy of *Mendez v. Westminster* is not just its impact on *Brown v. Board of Education*. It illustrates how a group of socially conscious lawyers, judges, and politicians could band together to overturn bad law and bring about social justice, legal experts said.

Observers speculate, however, on whether, with some adjustments, *Mendez* could have been the vehicle to abolish de jure segregation nationwide seven years before *Brown* put it away for good. "The question always is, would this have been the opportunity for the court to overturn *Plessy*?" Arriola said. "Earl Warren wasn't in the [U.S. Supreme] Court yet, so maybe not. Maybe it's a bit too soon. But the bottom line is we will never know."

Joy C. Shaw is a staff writer for the Los Angeles Daily Journal. *This article appeared in the* Daily Journal *on May 11, 2004, and is reprinted with permission.*

KOCE, Orange County's PBS station, has produced an award-winning documentary on the Mendez *case, entitled* Mendez v. Westminster: For All the Children/Para Todos Los Ninos, *by Sandra Robbie. To order a copy of the documentary, available in VHS or DVD format, contact KOCE at* www.koce.org *or (888) 246-4585. The cost for either format is $19.95, plus $6.45 for shipping.*

The CSCHS thanks Anne McIntyre for providing the photograph of her grandfather, David Marcus, for use with this article.

A Twist, a Turn

Continued from page 4

Donna became Director of Programs and Publications. This arrangement has allowed Donna to use her skills as a lawyer, scholar, and editor, while I focus on the daily operations of the CSCHS and make use of my background in executive management and nonprofits. Because I was already in the thick of it, we've had a smooth transition. Donna will tell you that the reorganization has allowed her to sleep at night once again. Now I am the one waking up at 2:00 a.m., wondering if every "i" has been dotted and "t" crossed!

The Society has received over fifteen thousand donations via the fee statement. The addition of these funds has allowed the CSCHS to grow from a small group that banded together in 1989 into an organization that has become the largest court-based historical society in the United States. Without the CSCHS, much of the history of California's legal and judicial systems would be lost to future generations. As a nonprofit professional, I well understand the limits of government and the private sector to preserve and promote this history, and I am proud to be a part of the Society's crucial mission.

So now my days of getting calls from *Bon Appetit* for food and wine pairings have been replaced with calls from lawyers, judges, and the public inquiring about the CSCHS. And I love it!

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