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MALDEF and the Legal Investment in a Multi-Colored America

Tom I. Romero, II, J.D., Ph.D.*

Nearly twenty years after Brown v. Board of Education declared separate classrooms were inherently unequal, the Supreme Court in Keyes v. [Denver] School District No. One made its first definitive statement about the role of Mexican American students in school desegregation litigation. Of fundamental importance was the Court's recognition that Mexican American students received educational opportunities dramatically inferior to those received by White students. For this reason, the Court declared that Mexican Americans were non-White and thus, aggregated them with other non-White groups.

As others, both in the collection of Western History Association essays in this volume and as historical and legal scholarship have shown, Mexican Americans had long aspired to Whiteness in social identity and legal categorization.

* Associate Professor of Law and History, Hamline University School of Law. I wish to thank my fellow co-panelists who contributed to such a lively discussion on the meaning of Mexican American Citizenship at the Annual Meetings of the Western History Association in 2006. I also want to thank Martin Sul and the editors of the Berkeley La Raza Law Journal for their close and critical reading of this essay.

1. 413 U.S. 189 (1973). Due to the fact that the school district in question had an “overall racial and ethnic composition of ... 66% Anglo, 14% Negro, and 20% Hispano,” the Court had to answer a fundamental question of whether “Negroes and Hispanos should not be placed in the same category to establish the segregated character of a school?” Id. at 195-96. As I have demonstrated elsewhere, this was not an easy question to answer and one that required the courts to explore the racial construction and positioning of Mexican Americans in American culture and life. See Tom I. Romero, II, La Raza Latino?: Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the 20th Century, 37 N.M. L. REV. 245 (2007); Tom I. Romero, II, Our Selma is Here: The Political and Legal Struggle for Educational Equity in Denver, Colorado and Multiracial Conundrums in American Jurisprudence, 3 SEATTLE J. OF SOC. JUST. 73, 114 (2004).

2. Keyes, 413 U.S. at 197-98.

3. Id.

some Mexican Americans attained many if not all of the benefits of Whiteness in American culture and life, it was evident that many did not receive these benefits. Legal rules, jurisprudence, and legislation that inconsistently placed Mexican Americans on either side of the nation’s Black-White color divide substantively reflect the consequences of this tension. Beginning with the passage of the Civil Rights Act in 1964, the nation’s deployment of resources in its War on Poverty that same year, and the Bilingual Education Act of 1968, policy makers showed through national law and policy an increasing realization that Mexican Americans and other Latino/as could and should not receive the same treatment as Whites. Thus, the Supreme Court’s explicit declaration of Mexican Americans as non-White in Keyes became the contemporary constitutional discourse about the color status of Mexican Americans.

I have argued elsewhere that such shifts in federal policy and legislation gave Mexican Americans a highly circumscribed and contained, but nonetheless meaningful, possessive investment in color. Indeed, Keyes promised to make this investment not only more secure, but potentially more valuable, as many Mexican American and Chicano activists and organizations described by others in this volume sought to protect and extend their rights as non-White in constitutional litigation. The Mexican American Legal Defense and Education Fund (“MALDEF”) played a central and defining role in this regard. Founded in 1967 by San Antonio attorney Pete Tijerina, the organization explicitly modeled the National Association for the Advancement of Colored People’s (“NAACP”) Legal Defense Fund. For this reason, it is no surprise that color consciousness played a central

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role in MALDEF’s understanding of law and jurisprudence. Accordingly, the
remainder of my essay briefly explores the manner by which MALDEF began to
conceptualize the non-Whiteness of Mexican Americans as a matter of law. My
analysis is therefore suggestive of not only an important transformation in the color
consciousness for many in the Mexican American community, but of an emerging
critique of the Black-White paradigm in American law. Indeed, as numerous
Mexican Americans legally invested themselves in their non-White color status,
largely but not exclusively as Chicana/os, the legal strategy pursued by MALDEF at
this foundational moment reflected the extent that many in the community remained
similarly committed to a categorization that recognized Chicana/os’ distinctive status
as a non-White and non-Black group.

NO SOTROS TOPEKA ESTA AQUI/OUR TOPEKA IS HERE

In 2004, I wrote an article entitled Our Selma is Here about Keyes and the
Chicano battle to desegregate Denver’s public schools. The title for my article
came directly from placards made by Chicano activists in the wake of a violent
confrontation between Chicano high school students and the police. Similarly, the
legal and political struggle to integrate the multiracial urban American Southwest
represented for Mexican Americans an unprecedented opportunity to achieve racial
justice along the symbolic lines represented by Brown v. Board of Education.

Yet, the very nature of the legal claim required Mexican American litigants
and the courts to reevaluate the long-standing Whiteness of Mexican Americans.
As Stephen Harmon Wilson’s scholarship details, “in order to delay the court-
ordered desegregation, while at the same time obscuring its slow pace, district
officials frequently assigned African and Mexican Americans to the same schools,
rather than to White schools, a practice often facilitated by the close proximity of the
ghettoes to the barrios.” In the Houston Independent School District case litigated in
Ross v. Eckels, for instance, Judge Charles Clark in the Fifth Circuit Court of
Appeals pointedly criticized this practice as a “mockery of justice.” According to
Judge Clark,

[O]n this kind of theory, we could end our problems by the simple
expedient of requiring that in compiling statistics every student in
every school be alternately labeled white and Negro! Then... everything would come out 50-50 and could get our seal of

INTERDISCIPLINARY ANTHOLOGY 281 (Rodolfo O. de la Garza et al. eds., 1985).
11. See Romero, Our Selma is Here, supra note 1.
questioned Brown’s actual impact. Nevertheless, the decision symbolized a flashpoint around racial
justice in the American constitutional order. See, e.g., ROBERT J. COTTROL, RAYMOND T. DIAMOND, &
LELAND B. WARE, BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION 210-33
(2003); MARY Dudziak, Cold War Civil Rights: Race and the Image of American Democracy
79-151 (2000); Derrick Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93
Harv. L. Rev. 518 (1980).
13. See generally, supra note 4.
14. Wilson, Some Are Born White, supra note 4, at 132. Steven Harmon Wilson, Brown Over
"Other White": Mexican Americans’ Legal Arguments and Litigation Strategy in School Desegregation
15. 435 F.2d 1140, 1150 (5th Cir. 1970).
approval once and for all.\textsuperscript{16}

Other courts mirrored Judge Clark’s skepticism about the Whiteness of Mexican Americans, and as a result, a robust and inconsistent examination about the group’s racial construction continued in jurisprudence until 1973 when \textit{Keyes} seemed to settle the issue.\textsuperscript{17}

Notably absent from much of this discourse was the voice of MALDEF in each of the court’s deliberations. Although, the question of why exactly this was needs more research,\textsuperscript{18} it is clear that MALDEF was keeping close tabs on these developments as the organization began to conceptualize what would emerge as a distinctly Chicano litigation strategy. From its inception, the organization encountered a world that defined Mexican Americans in relation to White power and privilege. In one MALDEF field report, a Mexican American resident of Plainview, Texas “complained bitterly at how the ‘Anglos run all our lives here, why I know who is going to be fined, how much, and when even before a jury is selected.’”\textsuperscript{19} Another Mexican American couple left the city because “Anglos mistreated them.”\textsuperscript{20}

Equally noticeable in these initial stages, moreover, was a consistent and conscious effort to describe Mexican American segregation and mistreatment as similar in degree if not equivalent to the experience of Blacks. In the same report, MALDEF’s investigator, Jose Angel Gutierrez, noted that although Mexican Americans and African Americans of Plainview constituted a majority of the town’s residents, members from both communities held the lowest paying and most insecure jobs.\textsuperscript{21} They also went to segregated schools that were dilapidated and underachieving and encountered racist and discriminatory attitudes in private and public settings on a consistent basis.\textsuperscript{22} The situation led Gutierrez to conclude:

\begin{quotation}
While \textit{Keyes} and \textit{Cisneros} highlighted the racial repositioning of Latina/os as coterminous with Blackness in American constitutional law, \textit{Lopez-Tijerina} and \textit{Eckels} indicated the continued legal association of the group with Whiteness. What is most clear in these late 1960s and early 1970s school desegregation cases, however, is that a potentially more sophisticated language of racial discrimination and the operation of the color line appeared in the legal discourse.
\end{quotation}

\begin{enumerate}
\item[16.] Id. at 1150-51.
\item[17.] As my own work has shown, these cases demonstrated how Mexican Americans were situated squarely in-between conceptions of Whiteness and Blackness in the American racial order. In addition to \textit{Keyes}, federal courts throughout the Southwest in \textit{Lopez-Tijerina v. Henry}, 48 F.R.D. 274 (D.N.M. 1969); \textit{Cisneros v. Corpus Christi Independent School District}, 324. F. Supp. 599 (S.D. Tex. 1970); and \textit{Ross v. Eckels}, 317 F. Supp. 512, 513 (S.D. Tex. 1970) applied inconsistent understandings about the racialization of Mexican Americans. I specifically argue that
\begin{quote}
While \textit{Keyes} and \textit{Cisneros} highlighted the racial repositioning of Latina/os as coterminous with Blackness in American constitutional law, \textit{Lopez-Tijerina} and \textit{Eckels} indicated the continued legal association of the group with Whiteness. What is most clear in these late 1960s and early 1970s school desegregation cases, however, is that a potentially more sophisticated language of racial discrimination and the operation of the color line appeared in the legal discourse.
\end{quote}
\item[18.] We do know that in 1971, MALDEF attempted to intervene in \textit{Ross v. Eckels}. Judge Ben Connally, however, was openly antagonistic to MALDEF’s claim that neither White nor Black litigants in the case could effectively represent Mexican American students. Wilson, \textit{Some Are Born White}, supra note 4, at 134. In rejecting their motion, Judge Connally declared that the Houston school district has “always treated Latin-Americans as part of the Anglo or White race.” Id. at 349 (quoting Rangel and Alcala).
\item[19.] Memo from Jose Angel Gutierrez to Pete Tijerina and Mario Obledo, Re: West Texas Trip to Investigate the Tahoka School Situation and the Police Brutality in Plainview, Texas, Sept. 16, 1968, Mexican American Legal Defense and Education Fund Collection, Special Collections, Stanford University [hereafter MALDEF Collection], RG 2, Box 5, Fol. 1, at 1.
\item[20.] Id.
\item[21.] Id. at 10-16.
\item[22.] Id.
\end{enumerate}
The Mexicanos and the Black people usually are the ones in poverty although not exclusively. I got the impression that this entire area was one huge plantation. The three-day stay in this area made me feel as if I were a slave to the Anglo power structure because my brothers were, for all practical purposes, in bondage.

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Centrally important in this description is MALDEF’s conscious effort to insert Mexican Americans into a racial and color paradigm. Though color had long animated the experiences of Mexican Americans in Texas, it was often the case that Mexican Americans distinguished themselves as another White as opposed to another Black group. The observations made by MALDEF investigators in its early years began to reject such categorization. Similar to other organizations that were coming to understand that their inconsistently racialized communities were a “racialized bloc subject to the same [consequence of] racism that afflicted Blacks,” MALDEF recognized and embraced the role of Blackness in the community’s identity formation.

Yet, for MALDEF to assert that Mexican Americans shared “bondage” with Blacks in an American racial and color paradigm was not to say that the organization believed that Mexican Americans and their experiences were no different from Blacks. As MALDEF discovered particularly when it came to the subject of desegregating the nation’s schools, the interests of Mexican American and Black students were not and could not always be the same. Whereas many (but by no means all) African Americans had committed themselves to the goal of creating schools with roughly an equal number of White and non-White students, Mexican

23. Id. at 17-18 (emphasis added).
26. There was of course not unanimity in the African American community about how best to achieve school desegregation. Yet, the sheer number of legal attempts to implement Brown highlighted the extent that its remedy of racial balance became a significant goal. Of course, White resistance to Brown in the United States called into question, particularly among Black nationalists, whether this was a worthy goal to achieve. See, e.g., COTTROL ET AL., CASTE, CULTURE, AND THE CONSTITUTION, supra note 12, at 203-07; JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 118-46 (2001); ALDON MORRIS, THE ORIGINS OF THE CIVIL RIGHTS
American students, parents, and activists increasingly made evident that integration needed to be measured by a school's commitment to bilingual and multicultural education. In other words, many Mexican Americans wanted to desegregate the curriculum, not necessarily the racial balance of individual schools. This commitment proved remarkably consistent across class and ideological differences in the Mexican American community. Partially because of this distinction, MALDEF found it necessary to detail and describe more fully, in legal terms, Mexican Americans as a distinct non-White race.

**EMBEDDING LA RAZA INTO THE AMERICAN CONSTITUTION**

In the preamble to their creation of the National Institute for Law and Justice, MALDEF proudly linked its mission to "the people of La Raza" and its purpose to advocate "for La Raza Rights guaranteed by the constitution of the United States." Yet, what La Raza actually meant was still an open question for many both inside and outside the legal community. As a matter of law, MALDEF recognized that under current jurisprudence, the experiences of Mexican Americans did not fit comfortably with a paradigm of racial justice that contemplated equality in Black and White terms. In the seminal Hernandez v. Texas case in 1954, Justice Earl Warren argued that the Fourteenth Amendment was not subject to a "two-class" theory of protection, school desegregation jurisprudence seemingly disregarded this assertion. As a result, MALDEF feared that judges would view bilingual and

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28. Romero, *Our Selma is Here*, supra note 1, at 91-95.

29. Preamble to Articles of Incorporation, La Raza National Institute for Law and Justice, MALDEF Collection, M673, RG 2 Box 5, Fol. 4.


31. *Brown v. Board* and *Hernandez* were both decided within weeks of another. Yet, racialized issues in each case played no role in its disposition. Indeed, neither the parties, nor the amici, nor the authors in *Brown* cited Mexican American school desegregation or discrimination at any stage in the case. Romero, *Our Selma is Here*, supra note 1, at 103-04. As one study noted,

[The Court was considering the issues of Latino [racial] and of school desegregation concurrently. Because the Court carefully dodged the question of Latinos' racial identity in Hernández ... it is not surprising that the Court did not address the question of Latino school segregation in Brown. After all, Brown occurred within the familiar Black-White binary.]

multicultural education’s goal to desegregate the nation’s schools as anathema to the integration ideals established in Brown v. Board of Education and subsequent cases. On one level, this had to do with a scarcity of resources. One MALDEF memo zeroed in on the legal dilemma: “As the goal of a unitary school system is approached, the difficulties of providing bilingual education are compounded and perhaps impossible to overcome. It would seem, then, that only one of these goals can be vigorously pursued.”

On another level, however, the problem lay precisely in the tendency of MALDEF (as seen in the Plainview, Texas investigation) and others to equate the experiences of Chicanos and Blacks. The challenge, as MALDEF repeatedly pointed out, lay in convincing the nation’s judges about the distinctive racialization of Mexican Americans as neither “other White” nor “other Black.” Indeed, it required courts to evaluate seriously the different origins of Mexican American discrimination that in turn, would provide a multifaceted remedy to school segregation that reflected such multicolor differences.

MALDEF’s direct involvement in the Keyes case after 1973 outlined the ways in which the organization began to describe, as a matter of law, Mexican Americans as a distinct non-White nor non-Black group. Arguing that school integration litigation had been “clearly Black dominated,” MALDEF questioned the ability of the legal system to understand the very different conditions that had produced a Chicano race. Foremost, among such conditions was a pedagogical approach in schools that was monolingual and mono-cultural in its orientation. Consequently, Chicano students found themselves consistently tracked to vocational, non-college preparatory programs, or in many cases, were subjected to punishment and harassment by their teachers and peers because of the perception that Mexicans’ European and Indian “bloodlines” created an “inferior” people. In one flashpoint


32. Chief Justice Earl Warren’s decision in Brown focused explained that separating Black students “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954). Six years after Brown, “forty-six school desegregation cases were pending in southern states.” COTTROL ET. AL., CASTE, CULTURE, AND THE CONSTITUTION, supra note 12, at 204. Beginning with Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964) and culminating in Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1 (1971), the Supreme Court encouraged courts to be proactive in dismantling segregated schools “root and branch,” including the use of bussing to achieve “racial balance.” MALDEF understood well that “the goal of school integration possibly conflicts with another goal sought to be effected by MALDEF, that of bilingual education.” Criteria suggested in determining litigation priorities Spanish Surname Population, (undated), MALDEF Collection, M673, Box 5, Fol. 2, at 5.

33. MALDEF Collection, M673, Box 5, Fol. 2, at 5.

34. The following discussion is explored in fuller detail in Romero, ¿La Raza Latino?, supra note 1.

35. Motion to Intervene as Parties Plaintiffs, MALDEF Collection, Box 5, Book 1, at 318.

36. Id. at 3. The idea of a Chicano or Latino race was one that courts never fully embraced. Nevertheless, the political and legal discourse of the Chicano Movement conceptualized the community in distinct racial terms. See ¿La Raza Latino?, supra note 1; Romero, Our Selma is Here, supra note I, at 115-17. El Plan Espiritual de Aztlan, drafted at the First Chicano National Youth Liberation Conference in Denver in 1969 explicitly makes this point in its preamble: “In the spirit of a new people that is conscious not only of its proud historical heritage, but also of the brutal 'Gringo' invasion of its territories.” See ERNESTO VIGIL, THE CRUSADE FOR JUSTICE: CHICANO MILITANCY AND THE GOVERNMENTS WAR ON DISSENT 97-100 (1999); Guillermo LUX & Maurilio E. Vigil, Return to Aztlan: The Chicano RedisCOVERS His Indian Past, in AztLÁN: ESSAYS ON THE CHICANO HOMELAND 93-110 (Rodolfo Anaya & Francisco Lomeli eds., 1991).
incident that preceded Keyes, a Denver high school teacher allegedly told a group of Mexican American students that “[i]f you eat Mexican food you’ll get stupid and even look like a Mexican . . . Hispanics are stupid because their parents are stupid and their parents were stupid.”37

In order to overcome the alienation and isolation Mexican American students faced in public schools, MALDEF faced a choice. Should the organization “vigorously” pursue an approximate balance of Mexican Americans with White and Black students in schools or should it argue instead for bilingual education? One early MALDEF memo highlighted the evaluation of the two strategies: “Whichever goal is selected should be that one which in the long run would provide the greatest opportunity for Chicano students to truly improve their position vis-à-vis Anglo society.”38 Partially a result of their inconsistent success in the Texas school desegregation cases, as well as the Supreme Court’s recognition of a “tri-[racial]” color paradigm in the Supreme Court’s 1973 Keyes decision, it was evident for MALDEF that “bilingualism” was the obvious choice.39 As the Court sent Keyes back down to the trial court for reconsideration, the court’s ability to provide bilingual and multicultural education as one remedy to segregated schools had the potential to make substantive the Supreme Court’s recognition of the different origins of Mexican American and Black discrimination.

Critically important to MALDEF’s bilingualism strategy was its implicit rejection of Brown v. Board of Education’s premise that separate schools were inherently unequal.40 Particularly as this premise came to rest on the belief that White students and their culture would lift minority students out of their “shared” culture of poverty, indifference, and inferiority,41 MALDEF proposed a remedy, premised upon some of the articulated goals of the Chicano Movement,42 to serve as a means for Mexican Americans to resist racism, and reclaim and resolve their non-White identity in an American racial and color paradigm.

The remedy, known in the Keyes litigation as the “Cardeñas Plan,” rested fundamentally on a commitment to bilingual and multicultural programs at “every level” of the school system.43 The Cardeñas Plan, accordingly, adopted the

37. Romero, Our Selma is Here, supra note 1, at 91.
38. Criteria Suggested in Determining Litigation Priorities, supra note 32, at 5.
39. This is my own reading of MALDEF’s turn to bilingualism. More research, however, needs to be conducted into what specifically catalyzed the organization to adopt this as a legal strategy. Some very helpful clues can be found in Rachel F. Moran, Foreword: Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond, 9 BERKELEY LA RAZA L. J. 1, 11-12 (1995); Rachel F. Moran, Bilingual Education as a Status Conflict, 75 CALIF. L. REV. 321, 340-42 (1987); Rachel F. Moran, The Politics of Discretion: Federal Intervention in Bilingual Education, 76 CALIF. L. REV. 1249, 1250-55 (1988).
40. See Moran, Demography and Distrust, supra note 39, at 11.
41. As Justice Earl Warren noted, to separate “Black” and “White” students “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954). Judge Doyle in Keyes explained such segregation and resulting inferiority as the “minority factor.” Keyes v. School Dist. No. 1 Denver, Colorado, 313 F. Supp. 61, 96 (1970).
42. Some of the Chicano movement’s goals, in this sense, are explored in Lux & Vigil, Return to Aztlan, supra note 36, at 93-108; IGNACIO M. GARCIA, CHICANISMO: THE FORGING OF A MILITANT ETHOS AMONG MEXICAN AMERICANS 86-87 (1997).
43. Dr. Jose Cardeñas drafted and submitted the plan. Mexican American Legal Defense and Education Fund, Addendum to the Intervener’s Plan for the Denver Public Schools, MALDEF Collection,
following guiding principles:

- The culture, heritage, and language of minorities are worthy of study and recognition by the educational system, its students, and its personnel;

- The development of pride, coupled with resilience, will motivate minority youngsters toward higher academic goals and aspirations;

- Learning another language at a very early age is instrumental for developing a student’s appreciation of all languages;

- It is essential for students to participate in a strong oral English language program before beginning other English language skills;

- It is essential for students initially to receive instruction in the dominant language;

- It is essential for schools to evidence concretely the recognition of other cultures, especially those of the Southwest and Mexico; and

- It is essential for schools to make available materials that accurately and objectively reflect the culture, history, and language of minorities.

For MALDEF, this desegregation plan would “positively and effectively” foster a social identity that both recognized and respected the non-Whiteness and non-Blackness of Chicanos. By reinvigorating an abandoned approach to cultural pluralism in education in the late 1940s and early 1950s and anticipating the multiculturalism of the 1980s and the 1990s, MALDEF argued that a bilingual and multicultural remedy to Chicano school segregation would allow both racialized Chicano and White students to “enlarge their cultural universe and perceive each other as acceptable and equally good.” For MALDEF, anything less would fundamentally deny La Raza rights as guaranteed by a Chicano reading of the Constitution.

As I have explored elsewhere, the influence of MALDEF on Keyes was profound. According to the trial judge in the case, the Cardeñas Plan “is [a]
particularly appropriate [remedy] for the Denver school system because of the city and the region’s long tradition of Mexican and Chicano influences.\(^4^9\) Despite the attempt of the trial court to respect the different origins of Chicano discrimination, however, the Plan’s implicit challenge to the integration of the ideal of Brown subjected it to two lines of legal attack. The first was the assertion that curricular integration only reinforced a “dual system,” one for Chicanos and one for Whites.\(^5^0\) The second line of attack focused squarely on the remedy’s incompatibility with the constitutional remedy as envisioned exclusively by Brown.\(^5^1\) As the Tenth Circuit argued,

The clear implication of arguments in support of the court’s adoption of the Cardeñas Plan is that minority students are entitled under the Fourteenth Amendment to an educational experience tailored to their unique cultural and development needs. Although enlightened educational theory may well demand as much, the Constitution does not.\(^5^2\)

In the end, both legal challenges undermined the multi-color strategy of MALDEF. While “Keyes provided the possibility for Mexican Americans to be considered non-White for purposes of constitutional law, it held very little value, particularly as courts compared and contrasted the rights of Mexican American litigants with those from other groups.”\(^5^3\)

In the same year that the Tenth Circuit rejected the Cardeñas Plan as constitutionally viable, MALDEF found itself on the outside of the Supreme Court’s first consideration of the role that language rights and bilingual education would play in a constitutional order. \(Lau v. Nichols\) centered on the alleged failure of the San Francisco Unified School District to provide any type of English language instruction to nearly 1,800 Chinese and non-English speaking students.\(^5^4\) For MALDEF, who had been actively pursuing a caseload towards achieving bilingualism for Mexican American students, a case involving Chinese students had the potential to dramatically mischaracterize the importance of bilingualism to equality of educational opportunity. One attorney advising MALDEF noted, “I am now more certain than before, that this is the wrong case to go to the Supreme Court first. A case involving the vast majority of the 5,000,000 children involved—Spanish-speaking children—should go up first.”\(^5^5\) What made \(Lau\) potentially threatening to the interests of Mexican Americans “was an increasingly popular association of Asian Americans as a ‘model’ ethnic minority group who had

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50. Romero, \(Our Selma is Here, supra\) note 1, at 118.
52. Id. at 482.
53. Romero, \(La Raza Latino?, supra\) note 1. The Tenth Circuit was not the only court to devalue bilingual and multicultural education as a desegregation strategy. The Sixth Circuit, in \(Bradley v. Milliken\) in 1980 noted “[w]hen the choice is between maintaining optimal conditions in a bilingual education program and desegregating all-black schools, desegregation must prevail.” Bradley v. Milliken, 620 F.2d. 1143, 1154 (6th Cir. 1980).
55. Sanford Jay Rosen to Alan Exelrod, Apr. 10, 1973, MALDEF Collection, \(supra\) note 19, at M673 RG 5, Box 729, Fol 12, at 1.
effectively assimilated into the American mainstream." \(^{56}\) Particularly as these images contributed to the perception of both Black and Chicano unassimilability, \(^{57}\) the experiences of Chinese students had the potential to minimize if not completely efface the centrality of language to the racialization of Mexican Americans as non-White.

MALDEF's amicus brief to the Supreme Court reinforced the color status of Mexican Americans as a racialized non-White group. According to MALDEF, the "denial of equal educational opportunity presently taking place in the Chinese community in San Francisco is but a microcosm of the situation facing Spanish-speaking communities in the United States today." \(^{58}\) Central to MALDEF's argument was the color implications of language discrimination. Indeed, because American society systematically excluded Mexican Americans from the privileges of Whiteness that it extended to the "large mass of... ethnic groups from Europe," \(^{59}\) language discrimination subjected Mexican Americans to "the same type of social, economic and political discrimination as the black American." \(^{60}\) For MALDEF, language discrimination was centrally about the color status "forced on [Mexican Americans] by the dominant Anglo society." \(^{61}\)

MALDEF's fears came to fruition in the Supreme Court's resolution of the case. For the first time in its post-\textit{Brown v. Board of Education} educational jurisprudence, the Supreme Court rested its decision on statutory, rather than constitutional authority. \(^{62}\) To be sure, MALDEF General Counsel and President Vilma Martinez, in a speech to commemorate the 20 year anniversary of \textit{Brown v. Board of Education}, lamented that by "substitut[ing] a constitutional mandate for bilingual education for a statutory one," \(^{63}\) \textit{Lau} would be almost impossible to enforce for non-English speakers, the majority of whom were Spanish speaking. \(^{64}\) Ironically, just like their non-White brothers and sisters in "bondage," Mexican Americans would find equality of educational opportunity a highly elusive ideal. \(^{65}\)

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56. Romero, \textit{¿La Raza Latino?}, supra note 1.
57. \textit{Id.}
59. \textit{Id.} at 9.
60. \textit{Id.}
61. \textit{Id.} at 12. While MALDEF articulated the position that language discrimination contributed to the non-White color status of Mexican Americans, it also suggests that the remedy of bilingual education could contribute to the Whiteness of the community, rather than some other non-White status. To the extent that MALDEF consistently argued for a well-funded and coherent bilingual curriculum, however, indicates the organization's commitment towards identifying a non-White and non-Black separate status for Mexican Americans in policy, law, and jurisprudence.
62. \textit{Brown} and its progeny, including \textit{Keyes}, rested on whether inequities in the school system were a violation of the Equal Protection Clause of the Fourteenth Amendment. Instead, the Court framed its analysis under Title VI of the Federal Civil Rights Act of 1964. 42 U.S.C. § 2000(d). I explore the reasons behind this in Romero, \textit{¿La Raza Latino?}, supra note 1.
63. Vilma Martinez, Speech by Vilma S. Martinez, General Counsel of the Mexican American Legal Defense and Educational Fund Before the \textit{Brown v. Board of Education} Twentieth Anniversary Conference University of Notre Dame Center for Civil Rights, Mar. 21 & 22, 1974, MALDEF Collection, \textit{supra} note 19, at M673 RG 2, Box 36, Fol. 16, at 8.
64. \textit{Id.} at 38.
65. \textit{See, e.g.,} GARY ORFIELD & CHUNGMEI LEE, \textit{DENVER PUBLIC SCHOOLS: RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION} 4 (The Civil Rights Project at Harvard University, 2006); CHUNGMEI LEE, \textit{DENVER PUBLIC SCHOOLS: RESEGREGATION, LATINO STYLE} (The
By the end of 1974, Mexican Americans occupied a dramatically new color position in the United State’s Constitutional order. No longer conceptualized in most cases as legally White, Mexican American litigants—represented prominently by MALDEF—unambiguously claimed a non-White status. Yet, MALDEF’s successful attempts to insert Mexican Americans squarely into the nation’s legal discourse surrounding Black and White tensions did not overcome this discourse’s own dual logic. To be sure, for many American courts, MALDEF’s claims to non-Whiteness carried two problematic interpretations. The first interpretation was that a remedy to discrimination against Mexican Americans had to be functionally the same as that given to their Black brothers and sisters in “bondage.” A second interpretation ignored the claim altogether. Particularly when courts evaluated an issue such as bilingualism, they failed to connect the issue of language discrimination to the process of racial formation and color categorization. Mexican Americans were either “other Blacks” or “other immigrants,” but very rarely, if ever, received constitutional guarantees as Chicanos.

Nevertheless, MALDEF continued to push a litigation agenda to force courts to recognize the distinct racialization and color positioning of Mexican Americans. In so doing, MALDEF tested the legal boundaries of a potentially more expansive color line in jurisprudence and legal discourse by investing in the non-Whiteness and non-Blackness of the Mexican American community. Though courts would consistently relegate Mexican Americans to an in-between racial and ethnic space, a claim and commitment to “brownness” would continue to animate Mexican American legal claims to equality into the 21st Century.

Romero, ¿La Raza Latino?, supra note 1.