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# A Different Shade of Brown: Latinos and School Desegregation

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# A different shade of Brown: Latinos and school desegregation

by Kristi L. Bowman

School desegregation cases have long been dominated by a Black-White conception of race, yet Latinos, as an ethnic group, do not fit squarely within this binary. This disconnect has led to the popular misconception that Latinos have been largely absent from the history of school desegregation. Quite to the contrary, the first successful school desegregation case in this country prohibited the educational segregation of Latinos and Whites. Latinos' struggles have been a crucial part of the pursuit of educational equality since that case was decided by the San Diego County Court in 1931, 23 years before *Brown v. Board of Education*.<sup>1</sup> In the years before and after *Brown*, Latinos'

and African-Americans' civil rights battles have been similar, but certainly not coterminous. Now, when courts continue to restrict the use of race-conscious remedies and when the social context in which the law operates continues to change, issues of equality for Latinos and others are becoming even more complicated.

## "Latino" as a category

In contemporary American society, being White—or, more importantly, being perceived as being White—is

Equality for Latino children can become a reality when we fully appreciate that American school children are not just Black and White—and never were.



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like walking with the wind at one's back: the breeze is rarely noticed by the person it helps and, even if detected, may not seem particularly strong. Walking into that same wind, however, is a much more strenuous experience. Non-Whites, including Latinos, struggle in the face of white privilege when they encounter greater difficulty finding housing or jobs; when they are subject to profiling because of their skin color or name at a police roadblock or in an airport; when others presume they are less likely to speak English or be American citizens; and when authors and editors marginalize the achievements of their racial or ethnic groups from the stories that compose American history.

The social assumption that Latinos are Non-White is hardly new. In 1954, two weeks before deciding *Brown*, the Supreme Court rendered a decision in *Hernandez v. Texas*.<sup>2</sup> Pete Hernandez, a criminal defendant accused of murder, had been tried and convicted by an all-White jury. Hernandez chal-

The author views racial and ethnic categories as proper nouns and capitalizes them as such.

1. 347 U.S. 483 (1954).

2. 347 U.S. 475 (1954).

lenged his conviction, arguing that because the site of his trial (Jackson County, Texas) systematically excluded Latinos from the jury pool, he as a Latino had not been tried by a jury of his peers. The Supreme Court reversed the conviction and remanded the case, rejecting Texas's argument that Latinos such as Hernandez were White and therefore not excluded from jury service.

In reaching this conclusion, the Supreme Court examined the attitudes of the local community and evaluated, among other factors, the disparity in educational opportunities available to White and Latino children in Jackson County. This approach is consistent with the theory that race and ethnicity are socially constructed—in other words, the color of one's skin, one's physical features, and one's country or countries of origin do not have inherent meaning. Rather, our understandings of race and ethnicity change over time due to the fluidity of beliefs about who fits in a given racial or ethnic category, what the supposedly shared group characteristics are, and even the importance of the categories themselves.

The history of the racial classification of Latinos illustrates that race and ethnicity are not static categories: in 1848, when the Mexican-American war ended, and in 1850, when California gained statehood, Latinos became citizens by virtue of their "Whiteness." From 1940 through 1970, the decennial United States census generally classified Latinos as racially White. Only since 1980 has the short form of the census questionnaire given Latinos the opportunity to classify themselves as racially White, Black, Asian or Pacific Islander, Native American, or Other, and ethnically as a member of a Latino subgroup. In the 2000 census, 42 percent of Latinos classified themselves as racially "Other," compared to only 0.1 percent of non-Latinos.

Extensive variety exists among and within groups of Latinos, of course, but the broad classification "Latino" has meaning today because it desig-

nates a category of people who share a similar heritage, some physical characteristics, and a general commonality of experience in the United States. By traditional measurements of group wealth, and when compared to Whites and African Americans, Latinos without question are the poorest of the poor. The Pew Hispanic Center's 2002 National Survey of Latinos confirmed that Latinos continue to have a lower average family income, spend a higher percentage of income on housing, have lower rates of homeownership, and have less access to such financial resources as banks and credit cards.

Taken together, these facts present a stark picture of Latinos' economic status, though the picture is noticeably less bleak for Latinos who were born in the United States and speak English or are bilingual than for those who were born in other countries and do not speak English. Nonetheless, today when the rates of segregation of Non-White children are rapidly rising, Latino children often are segregated at the highest levels of any Non-White group<sup>3</sup>—giving renewed meaning to the idea of commonality of experience based on group membership.

### Desegregation before *Brown*

In the early-to-mid 1900s, Latinos were routinely assigned to segregated schools based on various rationale, including the views that it was necessary to "Americanize" Latinos; that Latinos required English-language instruction; that Latinos were not as smart as Whites; and that Latinos should be trained for "appropriate" jobs. Courts sanctioned the segregation. For example, a Texas appellate court decision in 1930 permitted the segregation as long as it was purportedly pedagogically based.<sup>4</sup>

In 1931, the integrated school that existed in Lemon Grove, California, was an anomaly. That is, it was an anomaly until the school board decided to divide the school's 169 students (nearly equal numbers of White and Latino children) by constructing a barn-like building on the

outskirts of town where the Latino children were to attend classes. The White children were to remain in the existing school building. Latino parents protested, but the school board would not rescind its decision. Latino parents filed suit in the Superior Court of San Diego County alleging the school district had violated state law.<sup>5</sup>

At that time, California law permitted school districts to segregate "African" and "Indian" students, but the statute did not mention Latino students. The court concluded that, within the framework of the statute, Latinos were "White," and therefore the school board could not discriminate among "White" (White and Latino) students when assigning them to particular schools. Consequently, the court prohibited the school board from sending the Latino children alone to the barn-like school for the supposed purpose of "Americanization." The Lemon Grove case thus became the first known successful school desegregation case in the United States, accompanied by the first known court-ordered school desegregation remedial order.<sup>6</sup>

The Lemon Grove case is important for several reasons: it is significant in the history of the battle for educational equity; it is notable as a pioneering yet still practically unknown accomplishment of Latinos; and it is another link in the long historical narrative that defines what race and ethnicity in this country mean today. After the Lemon Grove decision, Latino segregation remained relatively unchallenged for another decade and a half, until a group of Latino parents in two

3. Frankenberg, Lee, and Orfield, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? <http://www.civilrightsproject.harvard.edu/research/reseg03/reseg03.htm> (2003).

4. See *Indep. Sch. Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930).

5. See *Alvarez v. Owen*, No. 66625 (Cal. Sup. Ct. San Diego County filed Apr. 17, 1931).

6. *Id.* The judgment and peremptory writ of mandate are available on microfilm in the records of the San Diego County Courthouse and are attached as the appendix to my article *The New Face of School Desegregation*, 50 DUKE L.J. 1751 (2001).

southern California school districts challenged the routine educational segregation of their children in *Mendez v. Westminster*.<sup>7</sup>

In *Mendez*, the school districts claimed the segregation of Latino students was based on a need for English language instruction. The federal district court found, however, that the student assignment process was sometimes completed on the

tional segregation of children of Indian, Chinese, Japanese, and Mongolian descent.

In 1952, the Supreme Court heard arguments in *Brown* for the first time. Grappling with the weighty issues in the case and hamstrung by internal division, the Court asked the parties to reargue the case the following term. Between the first and second arguments, the membership of the

of Latinos' racial and ethnic identity became important in a new way. If Latinos were "White," then the rationale of the Lemon Grove case would seem to apply: schools cannot discriminate among Whites, and thus schools cannot isolate Latinos from "other" Whites. Also, under this same theory, Latinos would be considered White for purposes of racially balancing school enrollment between White and Black students, which would allow fully Latino-Black schools that appeared properly balanced along "White"-Black lines. Because of the Supreme Court's decision in *Hernandez*, nearly simultaneous with *Brown*, the Lemon Grove rationale was forestalled. By 1954, the idea that Latinos were White for purposes of school desegregation did not reflect Latinos' lived experiences, if it ever had.

It was not until 1972 that a federal court addressed the segregation of Latinos under the *Brown* framework, and then two cases were decided within three months. In *Cisneros v. Corpus Christi Independent School District*, a federal district court examined a school system in Texas that was 4 percent African American, nearly half White, and nearly half Latino.<sup>11</sup> Concluding that *Brown* protected Latino students and prohibited their *de jure* segregation in educational facilities, the district court struck down the educational segregation of Latinos that typically had been permitted by state statute or local school board policy. The U.S. Court of Appeals for the Fifth Circuit affirmed,<sup>12</sup> correctly anticipating the Supreme Court's decision a year later in *Keyes v. School District No. 1*.<sup>13</sup>

The *Keyes* litigation began in Denver, Colorado, and presented two novel legal issues. First, *Keyes* questioned the permissibility of *de facto* segregation, as opposed to *de jure* segregation outlawed under *Brown*. Second, like *Cisneros*, *Keyes* addressed the extent to which *Brown* protected Latino schoolchildren. The demographic composition of the Denver public schools was unique for the time. In 1968, when *Keyes* was filed, 71

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basis of a student's name alone and without regard to the student's English language proficiency. Eight years before the Supreme Court would render its decision in *Brown*, the district court in *Mendez* prophetically rejected the "separate but equal" defense of school segregation:

"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. A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.<sup>8</sup>

*Mendez* gave fuel to California's civil rights movement. In 1947, then-California Governor Earl Warren signed into law the act repealing the California school segregation statute, which, although it did not specifically pertain to Latino children, had sanctioned the educa-

Court changed significantly—Chief Justice Fred Vinson, a proponent of upholding the separate but equal doctrine of *Plessy v. Ferguson*,<sup>9</sup> died unexpectedly from a heart attack. Soon thereafter, Earl Warren was sworn in as the new chief justice. In 1954, through Chief Justice Warren's leadership and under his authority, the Court issued its landmark, unanimous decision in *Brown*.

### Desegregation after *Brown*

Civil rights activists had hoped *Brown* would lead to educational equality for all children, but that goal has been much more elusive than even Thurgood Marshall initially anticipated. Nearly a half-century has passed since the Court's second ruling in *Brown*, which instructed America's public schools to desegregate with "all deliberate speed."<sup>10</sup> The benefits of *Brown* have been slow in coming to African Americans, and they have been even slower in coming to Latinos. *Brown*, the paradigmatic school desegregation case, arose out of the history of slavery and out of the legacy of Jim Crow segregation; it reinforced a Black-White conception of race relations—W.E.B. DuBois's "problem of the color line"—and a binary system into which Latinos do not easily fit.

Accordingly, after *Brown*, the issue

7. 34 F.Supp. 544 (S.D. Cal. 1946).

8. *Id.* at 549.

9. 163 U.S. 537 (1856).

10. 349 U.S. 294 (1955).

11. 321 F.Supp. 599 (S.D. Tex. 1970).

12. See *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 467 F.2d 142 (5th Cir. 1972).

13. 413 U.S. 189 (1973).

percent of district students were White, 13 percent were African American, and 16 percent were Latino.

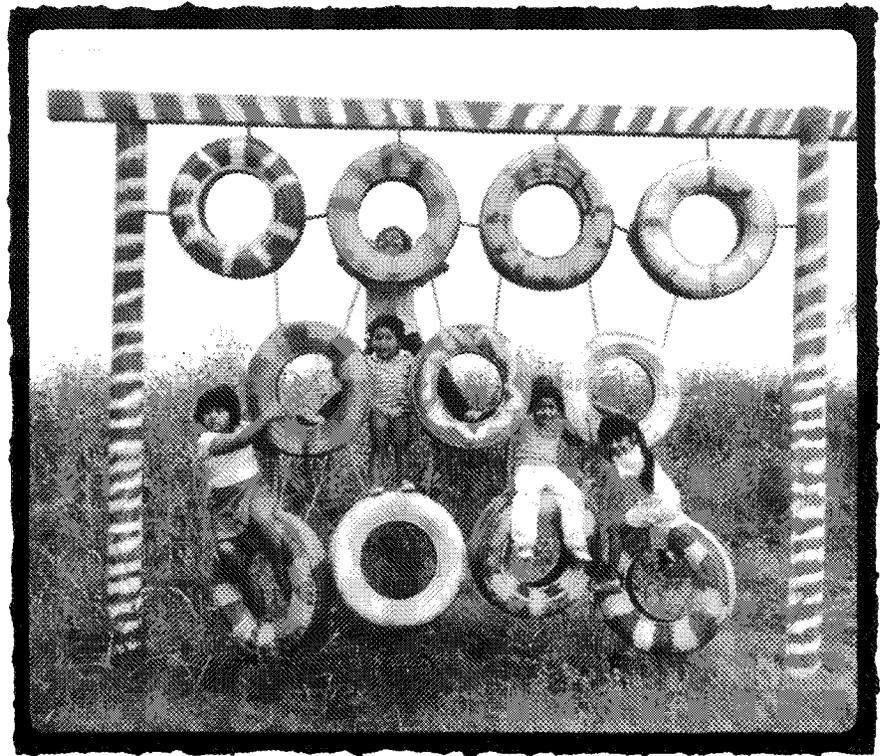
The district court in *Keyes* found the school district liable for intentional (albeit *de facto*) segregation of Latino and African American students and implemented a remedial order noting the “desirability (even though it is not constitutionally required) of having both Negroes and Hispanos in the desegregated schools on as close to an equal basis as possible.”<sup>14</sup> In 1972, the U.S. Court of Appeals for the Tenth Circuit affirmed in part and reversed in part the district court’s decision.<sup>15</sup>

When *Keyes* was argued in the U.S. Supreme Court later that year, the district’s demographics had changed since just four years earlier when the case was filed: 66 percent of district students were White, 14 percent were African American, and 20 percent were Latino. In *Keyes*, the Supreme Court held that Latinos, like African Americans, were protected by *Brown*.<sup>16</sup> *Keyes* also specified that in Denver any school that was 70-75 percent Latino, African American, or a combination of Latinos and African Americans was impermissibly racially identifiable. The Court acknowledged its holding in *Hernandez* that Latinos can constitute a separate and protected group, but relied on the United States Commission on Civil Rights to conclude that “though of different origins, Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students.”<sup>17</sup> *Keyes* expanded *Hernandez*’s limited holding and definitively classified Latinos as Non-White.

Before *Keyes*, the constitutional violation in school desegregation was the *de jure* segregation of Whites and African Americans. The Supreme Court’s decision in *Keyes* caused the framework to shift in two important ways: impermissible segregation now could be *de facto*, and the groups that were impermissibly segregated became Whites and all other students. In *Keyes*, the paradigm shifted to one where all children are defined

in reference to Whiteness—a child is either White or Non-White. Because the key question is whether Whites and Non-Whites are intentionally

the problem of the isolation of Latino students appears not to exist presently, and never to have existed previously.



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segregated, if a child is Non-White, the racial and ethnic groups to which that child belongs appears not to matter. The resulting message is that differences among Non-White minority groups are irrelevant in school desegregation.

Thus, Latinos, whose history and contributions to this country have been marginalized, possibly even more than those of African Americans, have remained largely invisible in the school desegregation context even when they have been protected by *Brown*. In fact, because leading constitutional law textbooks omit any discussion of the role of Latinos in school desegregation litigation, including the important and unique aspect of *Keyes* that guarantees Latinos the benefits of *Brown*, it is not very likely that more than a few law school professors across the country discuss the educational segregation of Latinos in their classes. As a result, the history of Latinos in school desegregation remains silent;

### Today’s complicated reality

School desegregation battles of the past presented what now seem like straightforward legal questions; they also occurred in more traditionally predictable social contexts. However, not only the law but also the social context in which the law operates continues to change. In particular, presently existing segregation looks different than the segregation at issue in *Brown* and *Keyes*; the Supreme Court and federal appellate courts continue to restrict how school districts may consider race or ethnicity even to foster diversity within schools; and school districts’ choices about English language instruction present a new set of factors that complicate issues of racial and ethnic isolation as well as integration.

14. 313 F.Supp. 90, 100 (D. Colo. 1970).

15. See 445 F.2d 990 (10th Cir. 1972).

16. See 413 U.S. 189 (1973).

17. *Id.* at 197-198.

First, the amount of intentional school segregation today is only a small fraction of the intentional segregation that existed at the time of *Brown*. This is not to say that any intentional discrimination occurring today is excusable, but it is important to remember that school districts are liable only for remedying educational segregation they have inten-

assume that segregative intent always drives a decision to educate children in schools close to their homes.

Second, although a school district may want to remedy racial or ethnic isolation, it is not required to do so and actually may be extremely limited in taking such action by recent judicial decisions that restrict the use of race-conscious remedies to

from one of the most prominent federal appellate circuits in the country, it is unclear how, if ever, a school district will be able to voluntarily consider its students' races or ethnicities during school assignment even for the purpose of creating racially and ethnically diverse schools. The Ninth Circuit is not alone in considering this question; the U.S. Court of Appeals for the First Circuit heard oral arguments in a challenge to a similar voluntary desegregation plan, *Comfort v. Lynn School Committee*.<sup>21</sup> The case is still pending.

Third, school districts must respond to the linguistic challenges faced by many Latino students, an issue related to ongoing segregation but notably distinct from the challenges faced by African American students. According to the National Clearinghouse for English Language Acquisition and Language Instruction Educational Programs, more than 3.6 million Limited English Proficient (LEP) students are enrolled in America's public schools, and 76 percent of these students are native Spanish-speakers. The next highest concentrations of LEP students, both approximately 2 percent of the LEP population, speak Vietnamese or Hmong.

Thus, school districts are faced with decisions about what sort of language instruction programs to provide: immersion, bilingual, or dual language. The type of language instruction program employed in a school district can influence racial and ethnic isolation dramatically. Immersion results in faster English language acquisition at the risk of subject matter acquisition. Traditional bilingual instruction results in significantly slower English language acquisition but does not sacrifice subject matter acquisition. Dual-language instruction, a rare program designed to make both non-native English speakers as well as English speakers bilingual, is often referred to as "two-way immersion."

While an intensive pedagogical debate rages over which system of English language instruction provides more effective instruction over-

## Existing segregation looks different than the segregation at issue in *Brown* and *Keyes*.

tionally caused, not for racial or ethnic isolation that exists for other reasons, such as housing segregation, which runs rampant across the United States from major cities to rural areas and is considered a matter of individual "choice" constrained by a family's economic reality. Additionally, more frequently than Whites or African Americans, Latinos prefer to live near extended family members and in communities that have a critical mass of Latinos.

At the same time as housing patterns remain effectively drawn along racial and ethnic lines, school districts across the country are returning to school boundary systems based on the theory that children should attend schools as close to home as possible. This so-called neighborhood schools model is supported by individuals of various races and ethnicities, including many Latinos. Many factors influence a school district's decision to employ a neighborhood schools model—community support, parental involvement, less transportation—and although a school district theoretically could employ a neighborhood schools model because it is trying to create racially or ethnically segregated schools, it simply is not credible to

address racial inequalities. In July 2004, the U.S. Court of Appeals for the Ninth Circuit established strict limits for school districts trying to create diverse schools through, in part, considering race. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Ninth Circuit evaluated the Seattle school district's "controlled choice" high school student assignment plan.<sup>18</sup> Under this plan, students were given the option to attend high schools across the district, and if a particular school was "oversubscribed," meaning the demand for seats exceeded the supply, the school district considered a student's race as a tiebreaker to determine which students would be admitted to the oversubscribed school.

The Seattle school district implemented the plan in a voluntary effort to make its high schools more diverse, and not as part of a school desegregation lawsuit. In *Parents Involved in Community Schools*, the Ninth Circuit applied the Supreme Court's decisions in last year's University of Michigan cases, *Gratz v. Bollinger*<sup>19</sup> and *Grutter v. Bollinger*.<sup>20</sup> The Ninth Circuit concluded that although the Seattle school district had a compelling interest in fostering diverse enrollments in its high schools, the manner in which the school district used race was not sufficiently narrowly tailored to be constitutional. As a result of this decision

18. No. 01-35450, 2004 WL 1662244 (9th Cir. July 27, 2004).

19. 539 U.S. 744 (2003).

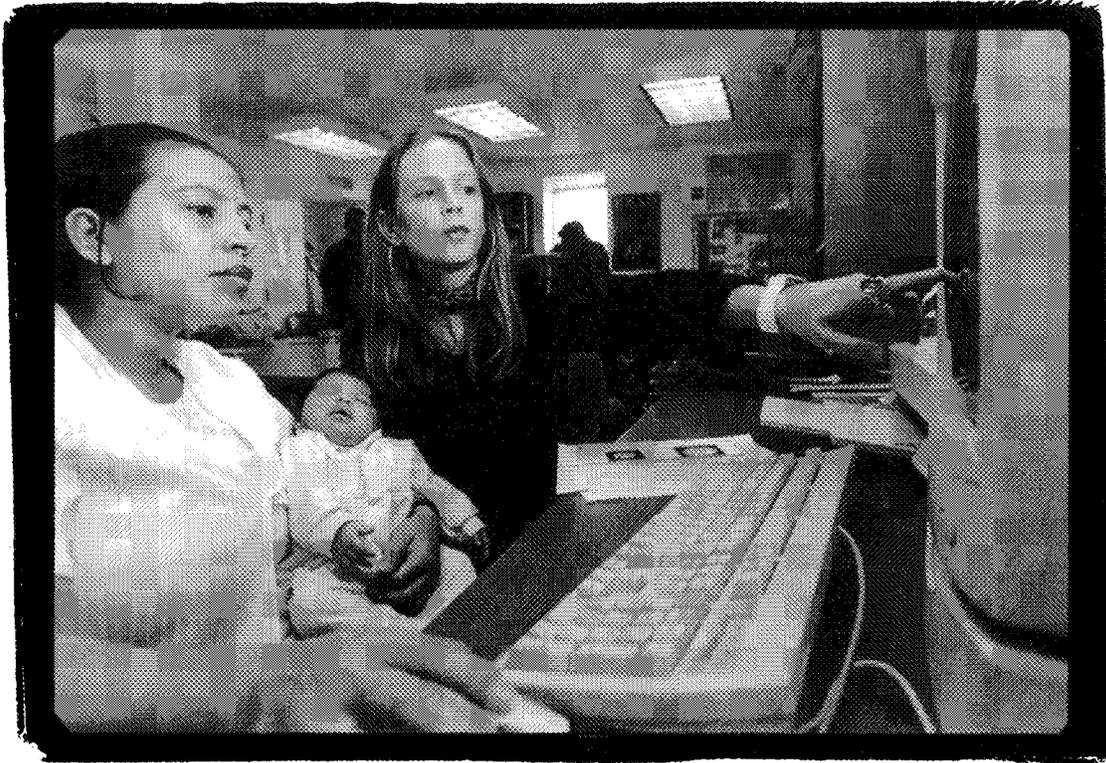
20. 539 U.S. 306 (2003).

21. No. 03-2415 (1st Cir. Filed Oct. 17, 2003).

all, the integrative potential of immersion and dual-language programs and the segregative potential of bilingual programs are more clear cut. However, proponents of immersion usually are not traditional civil

(nearly 1.5 million) aged 16 to 24 had dropped out of school, compared to only 7 percent of Whites and 13 percent of African Americans the same age. Of the dropouts, 40 percent of the Latinos

ethnic disparities still haunt our public school systems. As we move forward in the 21st century, we have the opportunity to be cognizant of the racial and ethnic diversity of the children who fill the classrooms of our



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rights advocates. Rather than support immersion based on its integrative potential, they tend to support the English-only movement and value the assimilation of immigrant groups as quickly as possible with little concern for those groups' retention of their cultural identities. Immersion may be occurring more by necessity than by school districts' preferences, though, because of a national shortage of qualified bilingual teachers.

The legal and social contexts are complicated. Yet, when the unique needs of Latino students are ignored, the statistics documenting Latinos' struggles as a group will continue to be staggering. According to studies by the U.S. Department of Education, at the end of the 20th century, 28 percent of Latinos

had less than a ninth-grade education, compared to 13 percent of Whites and 11 percent of African Americans. This situation is not inevitable.

### Looking forward

In 2002, Latinos became the United States' largest racial or ethnic minority group. This demographic shift occurred only four years after the same shift occurred among school-aged children. There is no question that the racial and ethnic composition of our country is changing rapidly and that not only the census numbers but also social practices and assumptions look very different 73 years after the Lemon Grove case and 50 years after *Brown*.

Despite school desegregation efforts across the country, racial and

nation's public schools and to provide educational opportunities to, and legal protections for, children of all races and ethnicities. Equality for Latino children can become a reality when we fully appreciate the implications of recognizing that American schoolchildren are not just Black and White—and never were. ❧

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