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ARTICLE

LATINO EDUCATION IN TEXAS: A HISTORY OF SYSTEMATIC RECYCLING DISCRIMINATION

ALBERT H. KAUFFMAN*

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IX. Summary and Final Observations915

I. INTRODUCTION:
 TEXAS–MEXICO INTERRELATIONSHIPS
 AND THE FOCUS ON LATINO EDUCATION

All of Texas was once part of Mexico.¹ Texas has never forgotten it. This is the historical basis for much of the Texas Latino population's struggle for equal educational opportunities.² This article will discuss those struggles endured by the Latino population in their quest for equal educational opportunity from the time of Texas's entry into the Union in 1845 to present—with greater emphasis on the last half century. In each section I will briefly describe the history of discrimination against Mexican-Americans³ in that segment of education history, and the relationship between the developments in that segment of education history with the development of other educational issues. More specifically, I will discuss the history of Latino segregation in public schools—inter-district, intra-district, as well as in-school discrimination. Then I will describe the role of the Latino population in the quest for school finance equity and the effect of the inequities in school finance on their educational struggle. No history of Latino education is complete without a study of the development of bilingual education programs, to which Texas has been the national epicenter for bilingual education development.⁴ Any analysis of Latino

1. See Andrew Walker, *Mexican Law and the Texas Courts*, 55 BAYLOR L. REV. 225, 226–27 (2003) (noting “the history of Texas’s relations with Mexico since the time Texas separated from Mexico”); Lupe Salinas, *Latino Educational Neglect: the Result Bespeaks Discrimination*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 269, 270–75 (2005) (detailing the history and growth of the Latino-American population in the United States and its impacts on the formation of Texas).

2. See Albert H. Kauffman, *Effective Litigation Strategies to Improve State Education and Social Service Systems*, 45 J.L. & EDUC. 453, 519 (2016) (“MALDEF was aware of this increasing frustration . . . and the struggle of Latinos for equal educational opportunity in Texas focused attention on the overall border of Texas and its long-term suffering at the hands of the rest of the State.”).

3. In this article, the term “Mexican-American” will describe persons of Mexican as well as other Hispanic origins. The term Mexican-American is the most commonly used term in studies of the effects of Texas educational policy on persons also described as “Chicano,” Hispanic,” and “Latino/a.” See Ian F. Haney López, *Race Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CALIF. L. REV. 1143, 1155 (1997) (providing a thorough explanation of these terms and their various meanings and histories).

4. Many of the landmark cases regarding bilingual education came out of Texas courts. See *Castaneda v. Pickard*, 781 F.2d 456, 458–59 (5th Cir. 1986) (upholding the district court’s finding that “RISD’s bilingual education program survived scrutiny under the EEOA”); *United States v. Texas*, 680 F.2d 356, 372 (5th Cir. 1982) (“The [district] court’s refusal to reconsider its injunctive order in light of the 1981 Act imposed a judicial gloss on the new legislative scheme without testing that scheme

education issues must include a discussion of the education of undocumented children and the use and misuse of standardized testing in the schools. Dropout rates are the effect rather than the cause of discrimination, and there has been a tragically high rate of dropouts among Latinos and a disproportionately higher rate of dropouts for Latinos compared to white students. We have lost more than two million Latino students from our Texas education system in just the last thirty years.

Most of this article focuses on discrimination in public education, that is, pre-kindergarten through high school graduation; however, a pattern of discrimination continues in the higher education systems.⁵ This article will discuss both the discrimination against Latinos in higher education institutions around the state and in the border area as compared to higher education in the rest of Texas.⁶ This article will not describe the community college system in detail because there has not been litigation related to Texas community colleges.

In each one of the sections, I will describe the major litigation in the area, the developments in the Texas legislature, and the developments in Texas and federal administrative agencies. Also in each section, I will briefly describe the interrelationship of the developments in that section to developments in all the other sections. For example, developments in the use of standardized testing affected segregation in schools,⁷ and segregation in public schools affected discrimination in higher education,⁸ and the lack

against the requirements of section 1703(f) as elaborated by *Castaneda*."); *Morales v. Shannon*, 516 F.2d 411, 412 (5th Cir. 1975) (noting that plaintiffs alleged there was discrimination because there was no bilingual-bicultural program); *Santamaria v. Dallas Indep. Sch. Dist.*, No. 3:06-CV-692-L., 2007 WL 1073850, at 1 (N.D. Tex. Apr. 10, 2007) (stating plaintiffs brought suit alleging Mexican-American students were placed in "English as a Second Language (ESL) classes" when the students were already proficient in English).

5. See e.g., Kauffman, *supra* note 2, at 459 ("Mexican-Americans were almost completely excluded from the public higher education institutions well into the twentieth century.").

6. The flagship universities in Texas have historically low proportions of Mexican-Americans when compared to the Mexican-American population, Mexican-American public education students, or even Mexican-American high school graduates. *Id.*

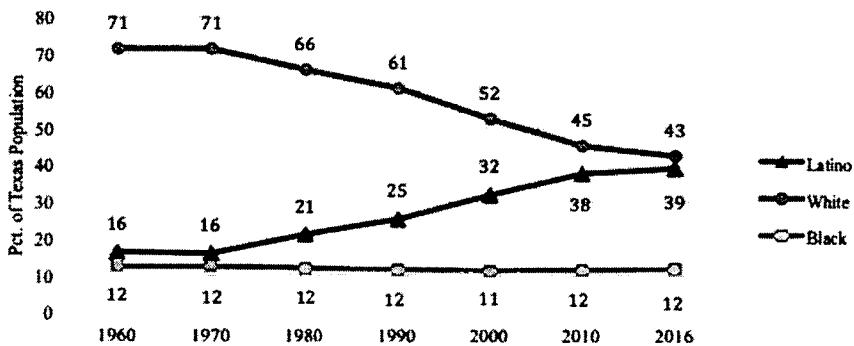
7. See Blakely Latham Fernandez, *TAAS and GI Forum v. Texas Education Agency: A Critical Analysis and Proposal for Redressing Problems With the Standardized Testing in Texas*, 33 ST. MARY'S L.J. 143, 161 (2001) (discussing how standardized testing has had a "disparate impact" on minority groups).

8. See Kauffman, *supra* note 2, at 455 ("The lawsuit alleged that this lack of quality and equality in higher education was caused by a history of discrimination and that the Texas higher education funding system had serious negative effects on educational attainment and economic development in the Texas border area.").

of bilingual education⁹ affected the testing systems as well as school finance systems.¹⁰

As we review this history of Mexican-American education issues, we must remember the significant changes in the demographics of Texas. Mexican-Americans have increased from 16% to 39% of the total Texas population¹¹ and from 20% to 48% of the students in Texas public schools in the last fifty years.¹²

Figure 2. Percentage of Texas Population that is Latino, Non-Hispanic White, and African American, 1960-2016.



Source: Integrated Public Use Microdata Samples (Ruggles et al. 2018).

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9. See José Roberto Juárez, Jr., *The American Tradition of Language Rights, ¡Que Viva Texas! The Forgotten Right to Government in a "Known Tongue"*, 1 SCHOLAR 45, 89 (1999).

10. See Albert H. Kauffman, *The Texas School Finance Litigation Saga: Great Progress, then Near Death by a Thousand Cuts*, 40 ST. MARY'S L.J. 511, 514 (2008) ("The relationship between property wealth per student and revenue the district can raise at any tax rate is a simple mathematical computation; but this relationship has caused the inequities in the Texas school finance system and created group and political interests which have defined the political debate on school finance . . .").

11. Rogelio Sáenz, *The Latino Population of Texas: 1968–2018*, at 6 (2018) (unpublished manuscript) (on file with author). The Paper was presented at the 50th Anniversary of U.S. Civil Rights Commission Hearing on Mexican-Americans in the Southwest Conference, San Antonio, November 16, 2018.

12. Compare U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATION STUDY: ETHNIC ISOLATION OF MEXICAN AMERICANS IN THE PUBLIC SCHOOLS OF THE SOUTHWEST 94 tbl.I (1971) (using a table to show the enrollment total of Mexican-American students at 20.1% in Texas schools in 1968), with *Demographic Profile of Hispanics in Texas, 2014*, PEW RES. CTR., <https://www.pewhispanic.org/states/state/tx/> [<https://perma.cc/YMA8-5EUE>] (showing Mexican-Americans in Texas schools at 48% in 2014).

13. Sáenz, *supra* note 11.

As a Texas native, an attorney for twenty years at the Mexican-American Legal Defense and Education Fund (MALDEF),¹⁴ and a student and teacher of civil rights in Texas for twenty additional years, I will mention some personal observations of these various cases and issues as they relate to the overall themes.

In general, I will focus on the discrimination by the Texas legislature and governors, the Texas Education Agency, and many Texas school districts, and to a great extent, how these groups “caused” much of this discrimination. Although some of the discrimination has been “caused” by Texas or federal court decisions, we must acknowledge that these institutions reflect the opinions, will, malice, and goodness of my fellow Texans from this generation and many generations of the past.

I will end on a positive note. Because of the continuous and painful struggles in each one of these areas there has been some progress.¹⁵ This progress has greatly benefited the Texas Latino population¹⁶ as well as the Latino population in the United States. And this improvement in Latino education has benefitted all Texans. The increase in the number and proportion of Latinos with college degrees and graduate degrees¹⁷ as well as progress in the business and education fields in general¹⁸ has led to a great improvement in the educational outcomes and educational features of the next generation. To some extent, this article is to remind this generation of the struggles of their parents, grandparents, and the state as a whole.

Also, at the outset I wish to thank some of my major sources of information and inspiration to write this article. Jorge Rangel and Carlos Alcala wrote a famous 1971 law review article with an extremely careful review of discrimination against Chicanos in the Texas public school context

14. MALDEF, <http://www.maldef.org> [<https://perma.cc/UM63-SBR3>]. The author was an original drafter and lead attorney of the cases on school finance, testing, and higher education filed by MALDEF in 1984–2002, specifically the *Edgewood v. Kirby* cases discussed in Section III, *United States v. Texas* (P-PST) and *GI Forum* cases in Section VI, and *Richards v. LULAC* case in Section VIII of this article. The author also worked on the MALDEF cases described in Sections II, IV, and VI of this article.

15. *E.g.*, Kauffman, *supra* note 2, at 456 (“[T]he border area has progressed from receiving [11%] to [18%] of the state’s higher education funding, and from three to at least sixty doctoral programs.” (footnote omitted)).

16. *See id.* at 456 (“After twenty years, it is clear that [LULAC] has been an effective catalyst in improving access, quality[,] and funding for public higher education in the Texas border region.”).

17. *See id.* at 499–503 (“There was a very rapid growth of bachelors and master’s programs at the border universities within [five] years of the passage of the South Texas Border Initiative in 1993.”).

18. *See id.* at 471–73 (discussing the advantages with having access to higher education programs and its impacts on attracting new businesses to an area).

during the periods of the 1940s, 1950s, and 1960s.¹⁹ Dr. David Montejano's book *Anglos and Mexicans in the Making of Texas, 1836–1986* set a structural framework for the relationship of Latinos in the state to the history and sociology of the state.²⁰ In addition, Dr. Guadalupe San Miguel, Jr. and Dr. Richard Valencia have written extensively about the history of discrimination against Latinos in public education.²¹ Dr. Valencia's *Chicano Students and the Courts* has been especially informative.²² I tip my hat to all of these works, and I seek to only rely on them for the legal issues involved. And Dr. José Cárdenas and Dr. Albert Cortez of Intercultural Development Research Associates (IDRA) were my experts on many of the topics I cover in this article. I dedicate this article to Dr. José Cárdenas, Dr. Albert Cortez, teachers, mentors, friends, and champions of Latino education equity.

II. SEGREGATION OF MEXICAN-AMERICANS IN THE PUBLIC SCHOOLS

Latinos in Texas struggled for over 100 years to obtain equal access to public education. There has been a pattern of segregation from complete exclusion to indirect means of segregating students within schools to begrudging acknowledgment of and acquiescence to the demographic changes in the state.²³

More specifically, from the time of Texas independence from Mexico in 1836 until the late 1800s, Mexican-American students were not given access

19. See Jorge C. Rangel & Carlos M. Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 308–09 (1972) (discussing the various types of discrimination during the 1940s, 1950s, and 1960s and how this discrimination impacted Mexican-American segregation in Texas schools).

20. DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1986*, at 8–11 (1987).

21. See Guadalupe San Miguel, Jr. & Richard R. Valencia, *From the Treaty of Guadalupe Hidalgo to Hopwood: The Educational Plight and Struggle of Mexican Americans in the Southwest*, 68 HARV. EDUC. REV. 353, 354 (1998) (“In this article, we offer some insights into the schooling of Mexican Americans over the last 150 years.”).

22. RICHARD R. VALENCIA, *CHICANO STUDENTS AND THE COURTS: THE MEXICAN AMERICAN LEGAL STRUGGLE FOR EDUCATIONAL EQUALITY* (2008).

23. See generally Haney López, *supra* note 3, at 1143.

School segregation became, in terms of its rationale, self-confirming: racist thinking held that Mexican-American children should be taught in separate schools because of their intellectual inferiority, the evidence of which lay manifest in the widespread maleducation of the Mexican-American adult community, which itself stemmed largely from discrimination in the provision of schooling.

to public education.²⁴ Even after the Texas constitution was amended in 1876 to include an education clause,²⁵ there was still almost complete exclusion of Mexican-American students. Indeed, the Texas constitution's requirement of separate schools for "Negroes" was applied against Mexican-American students as well.²⁶

The next step in the process was the creation of "Mexican schools." Scores of Texas school districts created separate Mexican schools.²⁷ Some of the schools were explicitly created for Mexicans only. Other schools were described as special schools for students who did not speak English fluently. However, the schools allegedly designed for English language instruction in fact became segregated schools by combining students who were English Language Learners (ELL) with students who spoke English only—students who did not speak or understand Spanish but had Spanish surnames.²⁸

24. See San Miguel, *supra* note 21, at 357 (explaining the slow progression of providing public education for Mexican-American children).

25. TEX. CONST. art. VII, § 1.

26. Article VII, section 7 of the Texas constitution read: "Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both." *Id.* art. VII, § 7 (repealed Aug. 5, 1969). Theoretically this provision was invalidated by *Brown v. Board of Education*, 347 U.S. 483 (1954), but Texas fought desegregation tooth and nail for at least the next ten years. See *United States v. Tex. Educ. Agency*, 467 F.2d 848, 852 (5th Cir. 1972) ("The law of the land, since *Brown I* and *II*, requires the conversion of a dual system into a unitary system. Every judge on this Court understands that there is no school district where this conversion has been simple."). The Supreme Court issued a comparatively unknown case, *Hernandez v. Texas*, two weeks before *Brown v. Board of Education*. See *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (holding the exclusion of Mexican-Americans from grand juries unconstitutional). *Hernandez* held that Mexican-Americans can be considered a separate class entitled to separate protection under the Equal Protection Clause because of their group subordination, not because of specific state statutes discriminating against them. See Ian Haney López & Michael A. Olivas, *Jim Crow, Mexican Americans, and the Anti-Subordination Constitution: The Story of Hernandez v. Texas*, in *RACE LAW STORIES* 273 (Rachel F. Moran & Devon Wayne Carbado eds., Foundation Press 2008) ("*Hernandez* helps demonstrate that the Warren Court declared constitutional war not on racial classifications per se, but on group subordination.").

27. Rangel & Alcalá, *supra* note 19, at 314.

28. The author's wife, Olga Garza Kauffman, a Mexican-American, attended a Mexican school, "La Jarrita," in Lyford, Texas, from 1960 to 1965. The school simply put its Mexican-American students in the lower first grade one year and the higher first grade the next year; and some districts repeated this process in the second grade as well. Both monolingual Spanish speakers and monolingual English speakers with Spanish surnames were sent to the separate "Mexican" school.

**SEGREGATED TEXAS SCHOOL
DISTRICTS**



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Furthermore, additional segregation occurred within the buildings that housed students. Even in school buildings that had roughly equal numbers of Mexican-American and Anglo students, schools resorted to tracking students into separate sections and classrooms.³⁰ Some of the segregation was based on alleged need to provide English instruction to students who did not speak English fluently.³¹ However, school districts also used such

29. Rangel & Alcala, *supra* note 19, at 324.

30. Separate classrooms were introduced in response to the abolition of separate Mexican schools. *Id.* at 331.

31. See *Castaneda v. Pickard*, 648 F.2d 989, 998 (5th Cir. 1981) (allowing the grouping of children on the basis of language for purposes of a language remediation or bilingual education program).

techniques as standardized tests, IQ tests, and unreliable English language tests to segregate students in schools.³²

Not every school district purposely segregated. Some schools generally followed the law, though they did not do enough to combat housing segregation. The major urban districts in Texas, specifically Dallas,³³ Houston,³⁴ Austin,³⁵ Corpus Christi,³⁶ El Paso,³⁷ Waco,³⁸ and Midland,³⁹ used a combination of techniques to segregate its Mexican-American students.

Superimposed on this hodgepodge of different segregatory techniques was a statewide policy of the Texas Education Agency not to enforce the U.S. Constitution's Fourteenth Amendment⁴⁰ against the school districts of the state. In 1970, the United States brought a lawsuit against the State of Texas, styled *United States v. Texas*,⁴¹ in which the federal government alleged—and proved—that the Texas Education Agency suffered, and in many cases allowed the continuation and funding of school districts that were built on a history of discrimination against African-Americans.⁴² This

32. See generally VALENCIA, *supra* note 22, at 7–78 (detailing the various methods used to segregate Mexican-American students in Texas school districts).

33. See *Tasby v. Estes*, 517 F.2d 92, 98 (5th Cir. 1975) (rejecting the Dallas Independent School District's "television plan" due to its incompatibility with desegregation jurisprudence).

34. See *Ross v. Eckels*, 699 F.2d 218, 227 (5th Cir. 1983) (holding Houston Independent School District's desegregation techniques of rezoning, pairing, and clustering were sufficient in light of the characteristics of the geographic area).

35. See *Price v. Austin Indep. Sch. Dist.*, 945 F.2d 1307, 1311, 1322 (5th Cir. 1991) (affirming the trial court's determination that Austin Independent School District's majority-minority transfer policy lacked discriminatory intent in relation to previous desegregation plans).

36. See *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 467 F.2d 142, 148–49 (5th Cir. 1972) (rejecting argument that school board's failure to remedy de facto segregation is permissible due to its historical existence).

37. See *Alvarado v. El Paso Indep. Sch. Dist.*, 426 F. Supp. 575, 595, 610 (W.D. Tex. 1976) (holding El Paso Independent School District's zoning lines, feeder patterns, and selection of school construction sites was intentionally segregative).

38. See *Arvizu v. Waco Indep. Sch. Dist.*, 495 F.2d 499, 508 (5th Cir. 1974), *rev'g in part and remanding in part*, 373 F. Supp. 1264 (W.D. Tex. 1973) (addressing Waco Independent School District's "neighborhood school concept" and the disproportionate burden it placed upon black and Mexican-American students).

39. *United States v. Midland Indep. Sch. Dist.*, 519 F.2d 60, 64 (5th Cir. 1975) (holding Midland Independent School District clearly intended to continue isolating and segregating Mexican-American and black students through a neighborhood assignment system).

40. U.S. CONST. amend. XIV, § 1.

41. *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), *aff'd*, 447 F.2d 441 (5th Cir. 1971).

42. See *id.* at 1049 (requiring the school to submit a plan for desegregation).

discrimination was manifested both by the creation of separate African-American school districts and in the creation of separate schools within school districts in effect segregated on the basis of race. Scholars have analyzed each one of these steps of segregation in great detail,⁴³ and I will only summarize the major developments here.

A. *Complete Exclusion*

Although Texas as a whole was behind the eastern United States⁴⁴ in creating schools of any sort for its children, when Texas did begin to open schools—both private and public schools—those schools purposely excluded Mexican-American students.⁴⁵ As the population of Mexican-Americans increased, both in terms of numbers and in terms of proportion of persons in a certain geographic area, cities and towns began to open up their schools to the Mexican-American population.⁴⁶ In Texas, there were not a significant number of schools allowing Mexican-American students to attend until at least 1900.⁴⁷

B. *Separate Mexican-American Schools*

However, even when school districts began to offer an educational program to Mexican-American students, they often achieved this goal by creating separate Mexican-American schools.⁴⁸ In-depth research by Rangel and Alcala identified 122 school districts with separate Mexican

43. See Rangel & Alcala, *supra* note 19, at 326–33 (discussing the utilization of school construction, freedom of choice plans, transfer policies, attendance zones, busing, and remedial classes to perpetuate segregation of schools); San Miguel, *supra* note 21, at 381 (“This is not to suggest that Mexican American students in segregated schools are incapable of learning and performing at satisfactory or high levels of academic achievement. Rather, the reality is that such schools are typically neglected and are low priorities for school districts.”); VALENCIA, *supra* note 22, at 48–49 (listing the stark differences between Anglo and Mexican-American students with regard to the quality of school facilities and student services provided).

44. The first American public school was established in 1635 in Boston, Massachusetts. Mary Crooks, *Apr 23, 1635 CE: First Public School in America*, NAT’L GEOGRAPHIC (Dec. 16, 2013), <https://www.nationalgeographic.org/thisday/apr23/first-public-school-america> [https://perma.cc/5XPG-EF2P].

45. MONTEJANO, *supra* note 20, at 192.

46. This occurred in around 1870, soon after the Civil War. San Miguel, *supra* note 21, at 357.

47. *Id.* at 364.

48. Local authorities established separate Mexican-American schools. Rangel & Alcala, *supra* note 19, at 311–12.

schools through at least the 1940s.⁴⁹ Although the schools were most often described as efforts to teach English to non-English speakers, in fact, these schools became separate and segregated schools based on national origin rather than merely English training programs for non-English speakers.⁵⁰

Schools used freedom-of-choice plans, gerrymandered zones, option zones, transfer policies, construction of neighborhood schools, and public transportation plans to perpetuate segregation.⁵¹ Freedom-of-choice policies allow Anglo children residing near a predominantly Mexican-American school to choose to attend an Anglo school, expanding ethnic segregation in schools.⁵² With transfer policies, students are allowed to transfer schools in neighboring districts if overcrowding is thereby alleviated, but this often resulted in the transfer of only Anglos out of predominantly Black or Chicano schools.⁵³ School officials used their discretionary power to transport Anglo students out of neighborhoods in which they are an ethnic minority but did not bus Latino students out of neighborhoods where they are an ethnic minority.⁵⁴

Legal challenges to this separate system of education began in Texas in 1930.⁵⁵ In the *Independent School District v. Salatierra*⁵⁶ case involving the schools in Del Rio, Texas, the court recognized that the Texas constitution did not allow segregation of Mexican-Americans on the basis of race, but the court did not directly order the school district to desegregate the

49. *See id.* at 314 (explaining “Chicano pupils were often required to register at the Mexican school regardless of residential proximity”).

50. *See id.* at 345 n.227 (noting the segregation of a Mexican-American child, who spoke only English, into a non-English speaking classroom).

51. *Id.* at 326 (“These arrangements have been ‘condemned as calculated . . . to maintain and promote a dual school system . . .’” (quoting *Cisneros v. Corpus Christi Ind. Sch. Dist.*, 324 F. Supp. 599, 620 (S.D. Tex. 1970))).

52. Freedom-of-choice policies have also been used to segregate African-Americans in educational situations. *Id.* at 328.

53. *See id.* at 329 (asserting that the primary abusers of transfer policies are school districts with an influx of Anglo military personnel).

54. *Id.* at 331 (“School officials’ transportation programs have perpetuated the identifiability of Mexican-American schools.”).

55. *See Indep. Sch. Dist. v. Salatierra*, 33 S.W.2d 790, 795 (Tex. App.—San Antonio 1930), *cert. denied*, 284 U.S. 580 (1931) (ruling the constitutional mandate of 1876 for separate schools did not authorize local authorities to segregate for any other purpose).

56. *Indep. Sch. Dist. v. Salatierra*, 33 S.W.2d 790 (Tex. App.—San Antonio 1930), *cert. denied*, 284 U.S. 580 (1931).

schools.⁵⁷ The *Salvatierra* case was an early but unsuccessful effort by Mexican-American advocates and organizations to force school districts to desegregate Mexican-American students within those districts.⁵⁸

It was not until 1948, in *Delgado v. Bastrop Independent School District*, that a Texas court specifically ruled on the issue of the constitutionality of segregating Mexican-American students, and ordered a remedy.⁵⁹ The Texas case *Delgado* relied in part on the recently litigated case of *Mendez v. Westminster*⁶⁰ from California.⁶¹ These cases were extremely important to the later development of desegregation efforts in Texas given their important holdings that school districts were segregating directly because of a student's national origin, and because of the development of the important legal concepts that eventually formed the basis of *Brown v. Board of Education*,⁶² a Supreme Court case in 1954. Specifically, these cases began to consider the educational and personal effects of segregation on students.⁶³ These opinions addressed the clear legal issues of equal protection, i.e., the separation of races in schools, but also described the continuing permanent negative effects of segregation on individual students.

C. Segregation Among and in Schools

After Texas state and local school officials became aware that school districts could not directly segregate students on the basis of their Mexican origin, discrimination became more indirect. As late as the 1950s and 1960s,

57. See *id.* at 796 (holding the boards proposed actions are allowed and the court will not restrain the board under the presumption "that they as public officials will violate the law, exceed their powers, and divert the public facilities to unlawful uses and purposes").

58. See *id.* (failing to take steps to implement the decision beyond the facts of the case); Rangel & Alcalá, *supra* note 19, at 315–16 (explaining the failure of the court to look beyond the case at hand despite recognizing the arbitrary nature of Chicano segregation); see also VALENCIA, *supra* note 22, at 18–19 (discussing the ramifications of the court's unwillingness to look beyond the case).

59. See *id.* at 51 ("Defendants were 'permanently restrained and enjoined from segregating' Mexican American pupils and 'from denying said pupils use of the same facilities and services enjoyed by other children of the same age or grade.'").

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

61. See *id.* at 781 (ruling that segregating Mexican-American children in public schools violates not only California law but also the Equal Protection Clause of the Fourteenth Amendment). For more information on this case, see generally PHILIPPA STRUM, *MENDEZ V. WESTMINSTER SCHOOL DESEGREGATION AND MEXICAN-AMERICAN RIGHTS* (University Press of Kansas 2010) (detailing the trial strategies, information on the relevant parties, and history of this case).

62. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

63. See *id.* at 492 (1954) ("We must look instead to the effect of segregation itself on public education.").

separate Mexican-American schools remained in many districts in Texas.⁶⁴ However, the larger urban districts began to remove their Mexican schools in name and replace them in practice.⁶⁵ There was a pattern among Texas school districts to zone based on the concentration of the Mexican-American population in certain areas of the district.⁶⁶ Given the demographics of the school districts, school boards had a variety of powers by which they could desegregate schools themselves. However, Texas school districts misused their powers to continue segregation in schools, and they did this by either direct or indirect means.⁶⁷

The *Cisneros v. Corpus Christi Independent School District*⁶⁸ case was Texas's closest case, regarding segregation of Mexican-Americans, to the classic desegregation cases litigated throughout the United States.⁶⁹ In *Cisneros*, plaintiffs proved a series of misuses of attendance zones, faculty and administrator's segregation, and other policies that led to segregated schools.⁷⁰ The district court's opinion, affirmed by the Fifth Circuit, found these methods to be unconstitutional and ordered a desegregation plan.⁷¹ However, as with most desegregation cases, the battle went on for several decades.⁷²

64. See VALENCIA, *supra* note 22, at 61–62 (explaining Texas laws considering Mexican-Americans as “white” allowed for prolonged discrimination in Texas school districts).

65. This is probably because of the effects of *Brown v. Board of Education* on education policy in the United States.

66. There is a pattern of historically segregated schools. See Rangel & Alcalá, *supra* note 19, at 310 (commenting how “the contemporary pattern of Chicano school segregation is a vestige of *de jure* segregation necessitating *de jure* relief.”). See generally GUADALUPE SAN MIGUEL, JR., “LET ALL OF THEM TAKE HEED:” MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS 1910–1981 (1987) (providing a historical view of the educational policies and practices employed in Texas and describes the legal, administrative, and political mechanisms used to combat school segregation).

67. See VALENCIA, *supra* note 22, at 63 (explaining Texas’s dual segregation structure maintained by state action).

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

69. See *id.* at 144 (relying on the holding in *Brown v. Board of Education*, Corpus Christi parents believed the school district was unlawfully desegregating Latino and Black students from Anglo students). The Latino cases in Texas were similar in leading desegregation cases outside the South in which were “*de facto*” rather the “*de jure*” discrimination. See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 191–95 (1973).

70. *Id.* at 146, 151.

71. See *id.* at 144 (holding segregation of Mexican-American children in Texas schools violated the Constitution).

72. See VALENCIA, *supra* note 22, at 60–64 (explaining the “other white” strategy plaguing Chicano civil rights attorneys since the 1960s).

Cisneros is particularly relevant to this discussion. In a seminal en banc decision by the fifteen-member Fifth Circuit, the court held that Mexican-Americans could bring a classic desegregation case against a school district even if there had not been a specific statute or constitutional provision requiring that segregation.⁷³ The court made this important precedential holding: "Thus, we discard the anodyne dichotomy of classical de facto and de jure segregation."⁷⁴

Cisneros dealt with a school district that at the time was 47.4% Anglo, 47.2% Mexican-American, and 5.4% black, but had segregated schools at all levels. The court's description of the segregation of the district's schools is particularly telling.⁷⁵

The en banc court concluded that the actions and policies of the Board had, in terms of their actual effect, either created or maintained racial and ethnic segregation in the public schools of Corpus Christi.⁷⁶

The ability of courts to find a constitutional violation where there was no specific statute requiring segregation, i.e., "de facto" discrimination, was later affirmed by the Supreme Court in *Keyes v. School District No. 1*⁷⁷ in 1973.

73. *Cisneros*, 467 F.2d at 148-49.

74. *Id.* at 148.

75.

The ethnic distribution figures further show that in 1969-[19]70, one-third of the district's [M]exican-[A]merican high school students attended Moody High School, the enrollment of which was 97% [M]exican-[A]merican and black (11% black). Another one-third of the [M]exican-[A]merican high school students attend Miller High, which is 80% [M]exican-[A]merican and black (14% black). One-third of the district's [A]nglo high school students attend King High, the enrollment of which is over 90% [A]nglo. Another 57% of the [A]nglo high school students attend either Carroll or Ray high schools, each of which is over 75% Anglo.

In the junior high schools, approximately 61% of the [M]exican-[A]merican students attend three junior highs which are over 90% [M]exican-[A]merican in enrollment. Over 50% of the [A]nglo junior high students attend junior highs that are over 90% [A]nglo in enrollment. Of the 24,389 elementary level students, approximately 10,178 [M]exican-[A]mericans and blacks (1,250 blacks) attend elementary schools in which over 90% of the enrollment is non-[A]nglo. Approximately 6,561 Anglo elementary students attend schools in which the non-[A]nglo enrollment is less than 20%. The enrollment in eleven of the [forty-five] elementary schools in the school system is over 90% [M]exican-[A]merican, over 75% [M]exican-[A]merican in three other schools, over 95% [M]exican-[A]merican and black in four other schools, over 90% Anglo in six other schools, and over 80% [A]nglo in nine other schools.

Id. at 145.

76. *See id.* at 149 (holding the racial and ethnic segregation of the Corpus Christi school system was unconstitutional).

77. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 190-92 (1973).

In Houston, a long-term desegregation case, *Ross v. Houston Independent School District*,⁷⁸ led to a “desegregation plan” by the school district.⁷⁹ However, in what can best be described as “racial triangulation,” the district decided to designate Mexican-American students as whites.⁸⁰ This technique had also been used by the Corpus Christi school district in the *Cisneros* case.⁸¹ Houston Independent School District tried to desegregate schools based on combining Mexican-American and African-American populations, describing that as an integrated school.⁸² Neither the African-American community nor the Mexican-American community accepted this as true desegregation. MALDEF intervened in *Ross* to oppose this policy.⁸³

MALDEF filed several desegregation cases in the early 1970s alleging discrimination against Mexican-Americans by the El Paso Independent School District,⁸⁴ Uvalde Independent School District,⁸⁵ and the Waco Independent School District.⁸⁶ In each case, the court found a pattern of segregation of Mexican-American students and ordered desegregation plans.⁸⁷ However, the rapidly changing demographics of these districts, i.e., the significant increase in both the number and proportion of the Mexican-American population, made desegregation efforts increasingly difficult; the population changes allowed the school districts to avoid the thrust of the decrees by merely pointing to the demographic changes.⁸⁸ Dr. Valencia has

78. *Ross v. Hous. Indep. Sch. Dist.*, 699 F.2d 218 (5th Cir. 1983).

79. *See id.* at 230 (5th Cir. 1983) (determining the school district had done everything practical to eliminate segregation in the schools, and the continued lack of integration was due to issues beyond the control of the school district).

80. *See id.* at 221 (classifying Hispanic students as white “for purposes of pairing schools”).

81. *See Cisneros*, 467 F.2d at 146 (“Students of [M]exican-[A]merican descent have always been classified as [A]nglo by the school board.”).

82. *See Ross*, 699 F.2d at 221 (discussing the pairing to achieve integration).

83. *See generally id.* (counsel for plaintiff members of MALDEF).

84. *Alvarado v. El Paso Indep. Sch. Dist.*, 426 F. Supp. 575 (W.D. Tex. 1976), *aff’d*, 593 F.2d 577 (5th Cir. 1979).

85. *Morales v. Shannon*, 516 F.2d 411 (5th Cir. 1975).

86. *Arvizu v. Waco Indep. Sch. Dist.*, 373 F. Supp. 1264 (W.D. Tex. 1973).

87. *See Alvarado*, 426 F. Supp. at 611 (“It seems clear that Defendant School District must be required to ameliorate the segregative effects inherent in the construction of both the new Bowie High School and Roberts Elementary School.”); *Morales*, 516 F.2d at 413 (“Having concluded that the district court was clearly erroneous in finding no segregatory intent, we remand to the district court with direction that the remedy . . . be implemented.”); *Arvizu*, 373 F. Supp. at 1271 (“This Court having heard all evidence, testimony, stipulations and argument presented, and having made its findings of fact and conclusion of law herein, must now proceed to fashion a remedy to eliminate the dual school system as it has existed in Waco . . .”).

88. School districts often blamed demographic changes on the everlasting ethnic segregation in schools. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (“Once the racial imbalance due to the *de*

developed an informative list of Mexican-American desegregation cases, including twenty-three from Texas.⁸⁹ Nevertheless, thorough records were developed in these cases, and several of them were not dismissed until the 2000s.⁹⁰ MALDEF consistently sought enhanced bilingual education plans as well as classic desegregation plans.⁹¹

In a more recent case from Dallas Independent School District,⁹² the plaintiffs proved that the principal, working with the Parent Teacher Association (PTA) and others, purposely put Mexican-American students into separate sections in a separate hall of the school building.⁹³ Mexican-American students, regardless of their English-speaking ability and overall academic performance, were assigned to rooms that had almost all Mexican-American children.⁹⁴ Other rooms were limited to Anglo children, and the school district marketed itself as a diverse school while developing marketing materials showing its Anglo students in separate Anglo classrooms.⁹⁵ The district court found that the school principal, in conjunction with the PTA, purposely discriminated against Mexican-American students.⁹⁶ The trial court did not hold the school district itself liable for this discrimination based on a very strict interpretation of the municipal liability⁹⁷ strand of § 1983⁹⁸ jurisprudence. Nevertheless, the case is instructive in showing us that even in heavily diverse school districts

jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.”).

89. VALENCIA, *supra* note 22, at 8.

90. For example, the Longview Independent School District was not declared unitary until nearly fifty years after the federal court order. Aliyya Swaby & Alexa Ura, *It Took This Texas School District 48 Years to Desegregate. Now, Some Fear a Return to the Past*, TEX. TRIB. (Nov. 29, 2018, 12:00 AM), <https://www.texastribune.org/2018/11/29/texas-longview-school-segregation-disintegration> [http://perma.cc/8ACX-G24V].

91. The bilingual education plans and their associated issues are discussed later and in greater detail in the article. *See infra* Section IV.

92. Santamaria v. Dallas Indep. Sch. Dist., No. 3:06-CV-692-L, 2007 WL 1073850 (N.D. Tex. Apr. 10, 2007) (mem. op.).

93. *See id.* at *1 (segregating Latino students as ESL, even though the school had already determined these students were English proficient).

94. *Id.* at *5.

95. Santamaria v. Dallas Indep. Sch. Dist., No. Civ.A.3:06CV692-L, 2006 WL 3350194, at *19 (N.D. Tex. Nov. 16, 2006) (mem. op.).

96. *Id.* at *53.

97. *See id.* at *39 (citing Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 403 (1997)) (“A governmental entity, such as the DISD, can be sued and subjected to monetary damages and injunctive relief under 42 U.S.C. § 1983 only if its official policy or custom causes a person to be deprived of a federally protected right.”).

98. 42 U.S.C. § 1983 (2012).

such as Dallas, which has a majority of Mexican-American students, purposeful discrimination does continue.⁹⁹

Texas's Longview Independent School District is an excellent example of the effect of demographic changes on old, settled desegregation cases that were originally filed just on behalf of African-Americans.¹⁰⁰ A federal court order against the school district in 1970 required the school district to implement a broad reaching comprehensive school desegregation plan.¹⁰¹ The federal court did not release Longview Independent School District from its desegregation order until 2016.¹⁰² But the demographics of the school district, showing both the large increase in the Hispanic population and the decrease of the white population because of white flight to surrounding districts or private schools, is particularly instructive.¹⁰³

1972-73 school year

35.1% Black



0.2% Hispanic

64.7% White



2017-18

35.3% Black



38.6% Hispanic

20.2% White



5.9% Other

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Specifically, in 1972–1973, Longview Independent School District was 35% black and 65% white, and 0.2% Hispanic.¹⁰⁵ In 2017–2018, Longview Independent School District was 35% black, 20% white, and 39%

99. *Santamaria*, 2007 WL 1073850, at *4; see also Michelle R. Wood, *ESL and Bilingual Education as a Proxy for Racial and Ethnic Segregation in U.S. Public Schools*, 11 *J. Gender Race & Just.* 599, 601 (2008) (showing “[the] not so obvious . . . attempts to segregate the school’s classrooms”).

100. Swaby & Ura, *supra* note 90.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

Hispanic.¹⁰⁶ While the African-American population percentage stayed the same, the whites had decreased from 65% of students to 20% of students, and Hispanics had increased from 0.2% to 39%.¹⁰⁷ While the border area of Texas, with its historically majority Latino population, did not have such overwhelming demographic change in its school districts, northern and eastern parts of Texas have gone from negligible numbers of Latinos to larger populations.¹⁰⁸

Mere campus desegregation does not guarantee students in the school district equal opportunity. Based on the long-term use of standardized tests, clearly discriminatory tracking systems, and programs for ELL that increased segregation rather than increasing desegregation, in-school segregation has been a consistent problem for minority students in Texas schools. San Miguel and Valencia, and the Rangel and Alcala articles provide vivid and depressing descriptions of the methods used to develop and maintain in-school segregation.¹⁰⁹

D. *Statewide Desegregation Efforts*

In 1970, the United States Department of Justice, confronted with school district segregation in the majority of Texas school districts, and the lack of state enforcement of the United States Constitution Equal Protection clause to prevent segregation, filed an important and unique desegregation case against the entire state of Texas.¹¹⁰ The *United States v. Texas* case became the basis for many separate desegregation cases filed around the state of Texas; it is beyond the scope of this article to describe them all. However, three of the related cases are especially relevant to the history of discrimination against Mexican-Americans in Texas education.

106. *Id.*

107. *Id.*

108. "The Hispanic population countywide increased during the six years since the census, from 17,928, to 21,824." Glenn Evans, *East Texas Latino Population Growing, Census Numbers Show*, LONGVIEW NEWS-J. (June 24, 2017), https://www.news-journal.com/news/local/east-texas-latino-population-growing-census-numbers-show/article_1a0d64be-6864-55c9-ab92-42b6ff02bb25.html [<https://perma.cc/L72W-XZBL>].

109. Local officials established segregated facilities for secondary schools for Mexican children who had not been withdrawn from school. State officials supported segregation of Mexican-American students by allocating state funds for these segregated schools. San Miguel, *supra* note 21, at 357.

110. See *United States v. Texas*, 321 F. Supp. 1043, 1060 (E.D. Tex. 1970) (addressing the overall failure to enforce equal protection by requiring school districts to desegregate), *aff'd*, 447 F.2d 441 (5th Cir. 1971).

Soon after the *United States v. Texas* case was filed, and the initial decree entered by Judge Justice, the Del Rio and San Felipe school districts (on the Texas-Mexico border about 150 miles west of San Antonio) were about to consolidate. The local populations and civil rights attorneys wanted to ensure that the consolidation would at the same time improve the educational opportunities of the Mexican-American students who comprised almost all of the students in the San Felipe District and many of the students in the Del Rio district. Based on a motion by the attorneys, Judge Justice entered a detailed decree requiring that the consolidation be done with an eye toward accommodating the Mexican-American students in developing curriculum and language programs specifically suited to their needs.¹¹¹ Although the extremely strong decree by Judge Justice was modified by the Fifth Circuit,¹¹² it nevertheless provided a model of a school district decree requiring bilingual-bicultural education in order to facilitate educational opportunity for Mexican-American students.

In 1976, MALDEF and the META-project filed a motion to enforce the desegregation parts of the *San Felipe-Del Rio* court order by requiring the State to offer a constitutional system of bilingual education to all qualified students in Texas.¹¹³ This case, soon called *United States v. Texas* (bilingual),¹¹⁴ became the basis for a statewide bilingual education order entered by Judge Justice in 1980. Although this court order was later reversed by the Fifth Circuit Court of Appeals,¹¹⁵ the provisions in Judge Justice's 1980 order became the basis for the Texas bilingual education system when legislation was passed in 1981. This *United States v. Texas* (bilingual) case will be discussed in more detail in the section discussing bilingual education.¹¹⁶

111. *Id.* at 1060. Dr. José Cárdenas, a lead witness for the plaintiff, United States, has described the issues in the *San Felipe-Del Rio* litigation in exquisite detail and included segments of his own testimony as a lead expert in the case. See JOSÉ A. CÁRDENAS, *MULTICULTURAL EDUCATION A GENERATION OF ADVOCACY* 35–57 (Simon & Schuster 1995).

112. See *United States v. Texas*, 447 F.2d 441, 443–49 (5th Cir. 1971) (providing direction to the State of Texas and Texas Education Agency on how they will eliminate the dual school structure and compensate for past discrimination).

113. *United States v. Texas*, MALDEF (Mar. 23, 2010), <https://www.maldef.org/2010/03/united-states-v-state-of-texas/> [<https://perma.cc/K2GR-889F>].

114. *United States v. Texas*, 506 F. Supp. 405 (E.D. Tex. 1981), *rev'd*, 680 F.2d 356 (5th Cir. 1982).

115. *United States v. Texas*, 680 F.2d 356 (5th Cir. 1982).

116. See *infra* Section IV.

The Fifth Circuit dismissed the *United States v. Texas* case decades later.¹¹⁷ In the last 30 years, however, the order had little effect on the desegregation policy in Texas; yet, it was an extremely important order in the 1970s and 1980s.¹¹⁸ It was used as a sword to desegregate small school districts throughout the state of Texas and to force the Texas Education Agency to develop policies and practices that would monitor desegregation efforts and force desegregation on districts that sought to continue segregation of Mexican-American and African-American students.

Both in 1970s and at the present time, Mexican-Americans are still attending schools in majority Mexican-American campuses and, in most cases, majority Mexican-American school districts.¹¹⁹ Clearly the increase in the Mexican-American population, from 16% of the total Texas population in 1970 to 39% now, contributes to this concentration of Mexican-Americans in certain schools.¹²⁰ However, even in school districts with less than 50% Mexican-American population, there still are disproportionate Mexican-American schools, and segregation within the school district as well as within individual campuses remains.¹²¹

E. *Effects of Segregation*

There is a robust and developing scholarly body of work showing that desegregation of schools has a positive effect on both the educational and personal development of children of all races.¹²²

Unfortunately, Texas remains the third most segregated state in the United States, with 53.7% of its Latino students in 90%–100% non-white

117. *United States v. Texas*, 601 F.3d 354, 375 (5th Cir. 2010).

118. *Id.* at 358–60.

119. *Id.* at 21–38; GARY ORFIELD ET AL., *BROWN AT 62: SCHOOL SEGREGATION BY RACE, POVERTY AND STATE* 5–6 (2016).

120. Sáenz, *supra* note 11 (displaying the percentage of Texas population that is Latino, Non-Hispanic White, and African American between 1960–2016).

121. GARY ORFIELD ET AL., *supra* note 119, at 6 tbl.3.

122. See Amy Stuart Wells et al., *How Racially Diverse Schools and Classrooms Can Benefit All Students*, CENTURY FOUND. (Feb. 9, 2016), <https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/?session=1> (last visited Mar. 25, 2019) (“[S]tudents educated in racially segregated schools are ill-prepared for higher education or work in our increasingly diverse society or the global economy . . .”); *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms*, CENTURY FOUND. (Feb. 10, 2016), <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms/?session=1> (last visited Mar. 25, 2019) (asserting children who attend integrated schools have a higher likelihood of seeking out more integrated settings when they reach adulthood).

schools, and only 17.6% of its Latino students exposed to white students.¹²³

Segregation of Mexican-Americans had a direct effect on the discrimination in the school finance system by informing state decision makers of the disproportionately negative effects of their school finance systems on predominately Mexican-American poor districts. If legislators had either conscious or other intent to discriminate against Mexican-Americans, continuing the disparities between low-wealth and high-wealth districts was an effective method. The segregation also made the negative effects of standardized testing even more problematic on the Mexican-American population because of their concentration in underperforming districts. Segregation lead to an overconcentration of English-speaking Mexican-American students in bilingual education programs that they did not need, and a concentration of ELL in under-resourced schools that could not afford to provide the high-quality bilingual education programs these students needed. And by limiting equal educational opportunities to Latino students, the cohorts of Latinos prepared for work in university environments was decreased.

III. THE TEXAS SCHOOL FINANCE SYSTEM

The system of funding Texas public schools has had from its inception a negative effect both on the Mexican-American community and on the equal-education opportunity rights of Mexican-Americans. More specifically, at the present time and in every study done to date, there is a concentration of Mexican-American students in the lowest wealth districts and a concentration of Mexican-Americans in the lowest spending districts.¹²⁴ In other articles, I have described the Texas school finance cases in great detail.¹²⁵ In this chapter I will only describe the parts of the school finance system that have had the most negative direct effects on the Mexican-American community and outline a case for intentional

123. GARY ORFIELD ET AL., *supra* note 119, at 6 tbl.3.

124. Kauffman, *supra* note 10, at 517 n.11 (“[T]he 5% of students in the lowest wealth districts are 95% Hispanic, the 5% of students in the second poorest group of districts are 75% Hispanic, and the same districts are 89% and 77% economically disadvantaged, respectively.”).

125. Albert H. Kauffman, *The Texas School Finance Litigation Saga: Great Progress, Then Near Death by A Thousand Cuts*, 40 ST. MARY’S L.J. 511 (2008) [hereinafter *The Texas School Finance Litigation Saga*]; Albert H. Kauffman, *Effective Litigation Strategies to Improve State Education and Social Service Systems*, 45 J.L. & EDUC. 453 (2016) [hereinafter *Effective Litigation Strategies*]; Albert H. Kauffman, *The Texas Supreme Court Retreats from Protecting Texas Students*, 19 SCHOLAR 145 (2017) [hereinafter *The Texas Supreme Court Retreats*].

discrimination against Mexican-Americans by the Texas school finance system.¹²⁶

Although school finance is a very technical study and requires an in-depth analysis to understand a very complex set of formulas, one must consider the overall negative effect that the school finance system has had on Mexican-American communities. Specifically, poor districts have been caught in a cycle of poverty. Low-wealth school districts have less to spend on their students,¹²⁷ making them less attractive to persons deciding where to move to raise their families. Consequentially, low-wealth districts, where the majority of the students were Mexican-American, could not attract middle-class and upper-middle-class housing, or businesses that sought to relocate in an area with excellent educational offerings. This denied the development of a tax base sufficient to provide resources for better schools. Briefly, the system hurts low-wealth districts in at least three major ways:

- (1) The system sets the guarantee of funding at a level below what a district needs to deliver an adequate education in Texas. Further, this guarantee does not include sufficient recognition of the extra costs for districts with large proportions of low-income, special-education students and ELL.
- (2) Above the funding level of the guarantee, the system allows districts to raise funds from their own tax bases, which are of wildly varying values, leading to wildly varying yields of funding per student for the same tax rates.
- (3) The system has never provided for the full funding of facilities and major renovations, leaving these expenses to already overburdened districts.¹²⁸

The negative aspects caused by insufficient educational resources in the low-wealth districts are identifiable in standardized testing. In *G.I. Forum v.*

126. Jonathan Kozol, *Savage Inequalities: Children in America's Schools 206–29* (1991).

127. “Wealthier districts would prefer to spend more money increasing the yield per penny of tax, because a greater proportion of richer districts will get money from the state and less of their property taxes are necessary to meet their part of the school finance funds. On the other hand, lower wealth districts would prefer a system that maximizes the total yield for them from any amount of state funds.” Kauffman, *The Texas School Finance Litigation Saga*, *supra* note 125, at 521.

128. The mechanics of Texas school finance and its associated weaknesses are described in greater detail in a law review article analyzing the first six school finance cases concerning the Edgewood Independent School District. *Id.* at 514–24.

Texas Education Agency,¹²⁹ a standardized testing case, the record shows that on every indicator of quality measured by the Texas Education Agency, Mexican-Americans scored lower than their fellow Anglo students.¹³⁰ Further, based on the thorough record developed in the most recent school finance cases,¹³¹ predominantly Mexican-American school districts of low property wealth suffered on every educational indicator as well.

On the subject of school finance, we are extremely fortunate to have an excellent book written by one of the strongest advocates in the history of Texas school finance: Dr. José A. Cárdenas, former superintendent of the Edgewood Independent School District and founder of the Intercultural Development Research Association.¹³² Dr. Cárdenas wrote *Texas School Finance Reform: An IDRA Perspective*.¹³³ Dr. Cárdenas describes the history of the Texas school finance system, the *Rodriguez* lawsuit, the efforts to obtain equity after the *Rodriguez* case, different state statutes passed leading to the 1984 amendments to the Texas school finance system, the *Edgewood* litigation up through 1995, and general comments on the effect of the Texas school finance system on low-wealth students.¹³⁴ Dr. Cárdenas and others

129. *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000).

130. *See, e.g., id.* at 675 (discussing the disparate impact of Mexican-American student passage rates in comparison with Anglo students). *See infra* at Section VII.

131. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826 (Tex. 2016); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). The author of this article has written a law review article strongly criticizing the *Morath* decision, which did not address the factual findings of the district court at all, but merely expressed the Texas Supreme Court's opinion that the legislature must be given almost complete deference in designing school finance plans. Kauffman, *The Texas Supreme Court Retreats*, *supra* note 125; *see also Morath*, 490 S.W.3d at 846 ("Whether the public school system is constitutional is ultimately a question of law. . . . At bottom, the 'crux' of this standard is 'reasonableness,' and the lens through which we view these challenges maintains a default position of deference to the Legislature—that political branch responsible for establishing a constitutionally compliant system.").

132. Dr. José Cárdenas was born in Laredo, Texas, in 1930 with an extensive number of relatives on both sides of the U.S.–Mexico border. In 1973, he founded the Intercultural Development Research Association, a non-profit research and public education organization dedicated to strengthening schools to benefit all children. When he was named as vice principal of Edgewood High School in San Antonio in 1955, he became the first Hispanic administrator serving the district. In 1969, he was appointed superintendent of the Edgewood School District, thus becoming the first Hispanic school superintendent in the City of San Antonio and Bexar County.

133. JOSÉ A. CÁRDENAS, *TEXAS SCHOOL FINANCE REFORM: AN IDRA PERSPECTIVE* (1997).

134. *See id.* at xiii–xv (outlining the topic addressed throughout the book).

wrote the articles during the various struggles, and it provides both an excellent long-term perspective as well as a contemporary perspective of the various battles in Texas school finance.

Although the issue was not directly raised in the seminal U.S. Supreme Court case *San Antonio Independent School District v. Rodriguez*,¹³⁵ and the Supreme Court did not find a system of discrimination against Mexican-Americans in the Texas school finance system, this defect was still there.¹³⁶ In addition, in the first Texas court case on Texas school finance, *Edgewood Independent School District v. Kirby (Edgewood I)*,¹³⁷ there was a record of discrimination against districts with high numbers and percentages of Mexican-American students, but the district court declined to find that this school finance system discriminated directly against Mexican-American students.¹³⁸

In *Rodriguez*, the Court was involved in monumental issues of the meaning of the Constitution and how to define which governmental policies were or were not subject to strict scrutiny. The Court noted that the very low-wealth Edgewood school district was almost completely Mexican-American, while the nearby very wealthy Alamo Heights school district had only a small proportion of Mexican-American students. The following chart is a short summary of those differences.

135. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

136. *See generally id.* (discussing the school finance system of the San Antonio Independent School District without raising the issue of standardized testing). For an in-depth analysis of the factual and legal background of *San Antonio Independent School District v. Rodriguez*, see generally PAULA SRACIC, *SAN ANTONIO V. RODRIGUEZ AND THE PURSUIT OF EQUAL EDUCATION: THE DEBATE OVER DISCRIMINATION AND SCHOOL FUNDING* (2006), and MICHAEL HEISE, *THE STORY OF SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ: SCHOOL FINANCE, LOCAL CONTROL, AND CONSTITUTIONAL LIMITS* (2008).

137. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989).

138. *Id.* at 392.

FACTS IN *RODRIGUEZ*

DISTRICT	TAX RATE	LOCAL FUNDS	STATE FUNDS	LOCAL + STATE	TOTAL WITH FED FUNDS	% MINORITY
EDGEWOOD	\$1.05	\$22	\$222	\$248	\$356	96%
ALAMO HEIGHTS	\$0.85	\$333	\$225	\$558	\$594	19%

In other words, Edgewood, a 96% minority district had 23% higher taxes and only 60% total funds per student compared with Alamo Heights.¹³⁹ Also, at the time of the filing of the *Rodriguez* case, the school districts with the greatest wealth in the state had only 8% minority students and revenues of \$815 per student per year, and the lowest wealth districts had 79% minority students and revenues of only \$305 per student per year.¹⁴⁰

At the time of the trial and appeal in *Rodriguez*, approximately 20% of the Texas students were Mexican-American.¹⁴¹ By the time of the original *Edgewood I* case in 1987,¹⁴² Mexican-American students had increased to 30% of the total student body in Texas. At the present time, Mexican-Americans comprise more than half of all students within the Texas public education system.¹⁴³ In the *Rodriguez* case, while Mexican-Americans were 20% of the total student body in Texas, they were a much higher percentage of the students in the very poorest districts in the state. Specifically, the quintessential poor districts in Texas, (Edgewood Independent School District and the South and West San Antonio districts), along with the Texas Valley (Cameron, Hidalgo, Starr, and Willacy counties and El Paso school districts), were 90% or more Mexican-American. The record in the *Edgewood I* case in Texas courts in 1987 was much more detailed than the

139. See *Rodriguez*, 411 U.S. at 12–13 (stating the racial, economic, and funding discrepancies between Edgewood and Alamo Heights).

140. VALENCIA, *supra* note 22, at 95 (2008) (citing *Rodriguez*, 411 U.S. at 12–13).

141. In *San Antonio Independent School District*, however, 90% of the students were Mexican-American. *Rodriguez*, 411 U.S. at 12.

142. The district court opinion in *Edgewood I* is not published. The case was decided on April 29, 1987. CÁRDENAS, *supra* note 133, at 221.

143. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 12, at 17.

record in the *Rodriguez* case. The *Edgewood I* record shows that although at the time of the litigation, Mexican-Americans were 30% of all students in the state of Texas, they also accounted for 95% of the students in the poorest districts.¹⁴⁴ At the time of the school finance case in 2012–2013, Mexican-Americans were 51% of all Texas students.¹⁴⁵

So why did the U.S. Supreme Court in *Rodriguez* and the state district court in *Edgewood* decline to find discrimination against Mexican-Americans? In the *Rodriguez* case, the major focus was on both the broader constitutional issues of the fundamental right to education and wealth discrimination as a suspect class under the constitutional analysis of equal protection cases.¹⁴⁶ Specifically, the argument was that there is a fundamental right to education guaranteed by the U.S. Constitution, and that the Texas system of school finance, with this high concentration of the poor in the very lowest wealth districts and the continuing negative effects of poverty on educational opportunity, created the need for strict scrutiny analysis.¹⁴⁷ The Supreme Court, as well as even the defendant State of Texas in *Rodriguez*, agreed that if the Texas school finance system had been subjected to strict scrutiny analysis—the most stringent form of equal protection analysis—the system would have failed and been declared unconstitutional.¹⁴⁸ The Court held that, although they would not subject the Texas school finance system to strict scrutiny, the school finance system barely survived analysis under the least searching system of analysis: rational basis analysis.¹⁴⁹ Nonetheless, the Court held that the Texas school finance system was justified by its adherence to important state issues in taxation and local control. In reaching its holding in *Rodriguez*, the Court was also affected by its own analysis of the limited data available in the case, finding that there was limited evidence on the racial composition of the other districts in the case.

The record at each stage of the *Edgewood v. Kirby* litigation has been much more comprehensive, including data on scores of variables on almost every

144. CÁRDENAS, *supra* note 133, at 232.

145. *Tex. Taxpayer & Student Fairness Coal. v. Williams*, No. D-1-GN-11-003130, 2014 WL 4254969, at 19 (200th Dist. Ct. Travis County, Tex. Aug. 28, 2014), *aff'd in part and rev'd in part*, 490 S.W.3d 826 (Tex. 2016).

146. *See generally Rodriguez*, 411 U.S. 1 (discussing whether education is a fundamental right and what form of scrutiny to apply).

147. *See id.* at 28–31 (“[I]t is clear that appellees’ suit asks this Court to extend [strict scrutiny] to review a system that allegedly discriminates against a large, diverse, and amorphous class . . .”).

148. *See id.* at 16 (“Texas virtually concedes that its historically rooted dual system of financing education could not withstand . . . strict judicial scrutiny.”).

149. *See id.* at 44 (refusing to apply the strict scrutiny analysis).

facet of school finance.¹⁵⁰ The record was the basis of the 1989 holding by the Texas Supreme Court that the Texas system of school finance violated the Texas constitution Education Clause, Article VII, section 1.¹⁵¹ In the most recent Texas school finance case, decided at the district court level in 2014, the district court wrote an incredibly detailed, nearly 400-page opinion outlining almost every conceivable fiscal and socioeconomic fact of the school districts of Texas.¹⁵²

The district court in the *Edgewood I* case denied the claims of the plaintiffs that the system discriminated against Mexican-Americans. This was caused in part by the high and increasing numbers of Mexican-Americans in the large urban districts that were either mid-wealth or wealthy. So, this was not a case like cases on exclusion of farmworkers from unemployment compensation or workers' compensation benefits where virtually all of the affected class was Mexican-American. Also, the attorneys in the *Edgewood I* case, including the author of this article, soon realized that the basic efficiency and equal protection arguments were the stronger arguments and were more likely to lead to large numbers of districts and education advocates unifying for later stages of the litigation.

In summary, the record, both in 1989 and in 2014, reveal that Mexican-Americans are concentrated in the very poorest districts in Texas. Furthermore, Mexican-Americans are concentrated in districts with extremely large numbers of poor students and ELL, both groups of students requiring significantly more per-pupil funding than the funding that is necessary to educate other students. The incredibly detailed opinion of the district court in the latest school finance case¹⁵³ should be required reading for members of school boards and the Texas legislature. The opinion is particularly relevant to our discussion in its detailed findings on the

150. See generally *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826 (Tex. 2016); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

151. See TEX. CONST. art. VII, § 1 ("A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.").

152. *Tex. Taxpayer & Student Fairness Coal. v. Williams*, No. D-1-GN-11-003130, 2014 WL 4254969 (200th Dist. Ct., Travis County, Tex. Aug. 28, 2014), *aff'd in part and rev'd in part*, 490 S.W.3d 826 (Tex. 2016).

153. *Id.*

increasing number of ELL in the state, to 863,974 in 2012–2013, or one out of every six students in the state.¹⁵⁴ The opinion also found that the ELL programs for these students are significantly underfunded, and this underfunding is made worse by the general inadequacy of the funding of Texas schools.¹⁵⁵ This lack of funding leads to the disproportionately high dropout rates and low graduation rates for ELL students.¹⁵⁶

The U.S. Commission on Civil Rights extensively documented the concentration of Mexican-American students in poor districts in its series of studies on Mexican-Americans in the Southwest.¹⁵⁷ At the time of the study, the commission found that the school finance system had direct and very negative effects on Mexican-American educational opportunity in the late 1960s and early 1970s.¹⁵⁸ The commission replicated this finding in later studies.¹⁵⁹

The leaders and legislators of the State of Texas drawing up school finance plans were very aware of this concentration of Mexican-American students in low-income districts. Although this knowledge is not sufficient to support a case of intentional discrimination, it is certainly an element that should be considered by any court reviewing a challenge to the school finance system based on intentional racial discrimination against Mexican-Americans.

The records in the school finance cases show there were many opportunities for the Texas legislature to modify the school finance system, even within the funding available at the state and local levels, that would have positively affected Mexican-Americans; but Texas did not take these

154. *See id.* at 19 (“In 2012–[20]13, there were 863,974 limited English proficient (‘LEP,’ also referred to as ‘English Language Learner,’ or ‘ELL’) students. This represents 17.1% of the total student population in Texas, up from 14.5% (600,922 students) in 2001–[20]02.” (footnote omitted)).

155. *See generally id.* at 21–38 (finding “[t]he arbitrary changes to the structure of the school finance system since *WOC II* and the severe underfunding of Texas school districts have rendered the school finance system unsuitable”).

156. *Id.* at 106–07 (recognizing students who were economically disadvantaged dropped out of school and struggled with achieving academically).

157. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 12, at 21–38 (1971).

158. U.S. COMM’N ON CIVIL RIGHTS, TOWARD QUALITY EDUCATION FOR MEXICAN AMERICANS REPORT VI: MEXICAN AMERICAN EDUCATION STUDY 1 (1974).

159. *Id.* at ix.

actions.¹⁶⁰ The general discrimination against Mexican-Americans in Texas was exhaustively documented in the *GI Forum* record.¹⁶¹

This cycle of poverty goes on to higher education. Section VIII describes how the state of Texas spent significantly fewer resources on higher education¹⁶² in areas of high Mexican-American population percentages. Mexican-American students, because of their lower quality public educations, perform poorly on college entrance tests and other criteria, greatly limiting their ability to go on to obtain a high-quality higher education.

So, beyond the often-depressing statistics that this article will reveal, one must consider the dynamic relationships of these various types of discrimination and how they have, in effect, reinforced each other to provide a “perfect storm” of limitation on Mexican-American educational rights. Though preventable through proper legislation, school finance disparities are especially damaging. Sending fewer resources to low-wealth districts that also have the highest concentrations of “high-cost” students exacerbates the damage caused by segregation, tracking, and a lack of proper bilingual education, and leads to disparities in access to higher education.

160. Compare *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (“The State candidly admits that [n]o one familiar with the Texas system would contend that it has yet achieved perfection’ . . . [E]ducational financing in Texas has ‘defects.’”), and *Edgewood I*, 777 S.W.2d 391, 396 (Tex. 1989) (discussing how the spirit of the Texas school finance law did not contemplate gross disparities), with *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 495–96 (Tex. 1991) (discussing that despite the holding in *Edgewood I* the school finance changes have not removed the Texas constitutional violation), and *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 492–93 (Tex. 1992) (discussing the previous holdings related to school finance and the conflict between efficiency and equality in school finance systems). Accord *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 726 (Tex. 1995) (“Yet sadly, the existence of more than 1000 independent school districts in Texas, each with duplicative administrative bureaucracies, combined with widely varying tax bases and an excessive reliance on local property taxes, has resulted in a state of affairs that can only charitably be called a ‘system.’”); see also *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003) (discussing the “series of cases . . . challenging the constitutionality of the Texas public school finance system on various grounds”). See generally *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 842 (Tex. 2016) (“The basis of this holding [unconstitutional provision] was wide disparities in property, wealth, tax rates, and spending per student, perhaps most memorably a 700 to 1 ratio between the property wealth per student in the richest and poorest school districts.”); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 752 (Tex. 2005) (discussing how underfunded schools violate the Texas constitution).

161. Plaintiffs’ Post-Trial Brief, *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000) (No. SA–97–CA–1278–EP).

162. See *infra* Section VIII.

IV. BILINGUAL EDUCATION

The basic theory behind bilingual education is straightforward. If a student enters school without a working knowledge of English—the language of instruction in Texas schools—that student will be at a significant learning disadvantage. That seems quite clear. However, how the public school system should react to try to provide an equal educational opportunity for that student has been fraught with issues of discrimination, English-only movements, and efforts to discourage non-English speakers from entering the country and Texas public schools.

The basic model is that a student who is not yet able to participate in school in English, but can participate in another language, should be taught the basic facts of education while learning English.¹⁶³ In other words, it is significantly better for the student to learn reading, writing, arithmetic, and basic subjects of the early grades while learning English. This model, usually called the transition model, has a goal of making sure the student does not get behind in subject matter topics while learning English.¹⁶⁴ Many Mexican-American students in Texas were pushed out of schools because they fell further and further behind their age cohort while they were trying to simultaneously learn English and subject matter in a language they did not understand.¹⁶⁵ There is a diversity of expert opinion on whether a transitional bilingual education model is superior to other proposed models.¹⁶⁶

As stated in the desegregation section above,¹⁶⁷ the inability to speak English was used to segregate Mexican-American students into separate Mexican schools. And the inability to speak English by some members of the population was extrapolated to cover many students who spoke only English.

In the 1960s, several scholars, as well as a broad spectrum of educators, began to demand that the schools teach students in their home language while they learned English. The U.S. Supreme Court decided the *Lau v. Nichols*¹⁶⁸ case in 1971, holding that the failure to provide any instruction to Chinese-speaking students violated Title VI of the Civil

163. *Castaneda v. Pickard*, 648 F.2d 989, 998 (5th Cir. 1981).

164. *Id.* at 1005.

165. *Id.* at 1006.

166. *Id.* at 1007–09.

167. *See supra* Section II.

168. *Lau v. Nichols*, 414 U.S. 563 (1974).

Rights Act as a clear discrimination against persons based on their national origin.¹⁶⁹

At about the same time, the district court in *United States v. Texas (San Felipe-Del Rio)*¹⁷⁰ issued a broad and comprehensive order requiring instruction in both English and Spanish to the students in the recently consolidated San Felipe Del Rio school district.¹⁷¹ This plan, designed and supported by Dr. José Cárdenas, became the model for the bilingual case, *United States v. Texas*,¹⁷² that followed ten years later. The comprehensive decree in *San Felipe-Del Rio* also became a model for how to design and implement a proper program of instruction for non-English speakers.¹⁷³

The *United States v. Texas* bilingual litigation led to a comprehensive order against the entire State of Texas requiring school districts to make significant improvements in Texas's bilingual education program, including changes in the curriculum, faculty, materials, and protocols for implementation by every school district in Texas.¹⁷⁴

Unfortunately, the Fifth Circuit Court of Appeals reversed the district court decision because of the district court's failure to set further hearings on a challenge by the Texas Attorney General's office to the stipulations made by its own attorney.¹⁷⁵ Nevertheless, the district court opinion had a catalytic effect on the Texas legislature. Legislation by Senator Carlos Truan¹⁷⁶ passed in 1981 based upon the federal court order in *United States v. Texas*. This legislation, S.B. 477,¹⁷⁷ became the basis for

169. *See id.* at 569 (deciding the lack of supplemental language instruction in public school for students with limited English proficiency violated the Civil Rights Act of 1964); Jennifer Michel Solak, *Texas, Why Wait? The Urgent Need to Improve Programming for Limited English Proficient Students*, 12 SCHOLAR 385, 388–89 (2010).

170. *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex. 1971).

171. *See* CÁRDENAS, *supra* note 111, at 35–57 (detailing a first-hand account of the issues in the litigation from the main expert for the plaintiff United States).

172. *United States v. Texas*, 680 F.2d 356 (5th Cir. 1982).

173. *See* *United States v. Texas*, 509 F.2d 192, 193 (5th Cir. 1975), *affg San Felipe-Del Rio*, 342 F. Supp. 24 (E.D. Tex. 1971) (requiring the school district to file a semi-annual report with the district court).

174. TEX. EDUC. CODE § 11.002. Under this regulation, school districts have the primary authority to implement bilingual and ESL programs. *Id.* at § 29.053.

175. *United States v. Texas*, 680 F.2d 356, 368–69 (5th Cir. 1982).

176. Carlos Flores Truan, Sr., was an American businessman from Corpus Christi, Texas. He was a Texas state representative from 1969 to 1977 and a Texas senator from 1977 until his retirement in 2003. Senator Truan passed away in 2012.

177. Act of June 12, 1981, 67th Leg., R.S., ch. 498, 1981 Tex. Gen. Laws 2138 (amended 1995) (current version at TEX. EDUC. CODE §§ 29.051–29.064).

future bilingual-education legislation in Texas.¹⁷⁸

Texas has modified its bilingual education program by allowing districts significantly more flexibility in adopting either transitional bilingual education programs, immersion programs, or some other program. The state has never implemented its own legislation sufficiently. And further litigation in the 1990s into the 2000s was necessary to force the state education agency to enforce its own state statutes and the orders of the court.¹⁷⁹

Texas was also the scene of *Castaneda v. Pickard*,¹⁸⁰ the Fifth Circuit case that established the basic method of proving a bilingual-education case. In particular, *Castaneda* determined that there is an adequate cause of action under the Equal Educational Opportunity Act 20 U.S.C. 1703(f) to address school districts that do not provide sufficient language remediation programs for their students.¹⁸¹ This three-part test, still called the *Castaneda* test, has been approved by the U.S. Supreme Court as the basic structure for a bilingual-education case. The three elements of the *Castaneda* test require a court to:

- (1) [E]xamine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. . . .
- (2) [Inquire] whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. . . .
- (3) [Continue the] inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.¹⁸²

178. CÁRDENAS, *supra* note 133, at 160.

179. *United States v. Texas*, 601 F.3d 354 (5th Cir. 2010).

180. *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981).

181. *Id.* at 1009–10.

182. *Id.*

Advocates of bilingual education criticize the first element as approving almost any theory of bilingual education that has at least some experts willing to vouch for it. Nevertheless, it has provided a structure for later litigation in Texas and around the United States.¹⁸³ The test does provide that districts must at least deal with their non-English-speaking students by addressing their educational opportunity through “legitimate” theory, properly funding the system, and evaluating it for compliance with the law.¹⁸⁴

Unfortunately, significant gaps remain between the achievement, measured by standardized tests, of ELL compared to the general population.¹⁸⁵ Advocates and educators throughout the state argue that the bilingual education program does not have sufficient resources in terms of teachers, materials, and curriculum to offer a quality program fit to the students’ needs.

After the Texas legislature passed the bilingual education act in 1981, bilingual education became a special part of the Texas school finance system in the 1984 amendments to school finance, often called House Bill 72.¹⁸⁶ Specifically, the 1984 act granted the additional funding of 10% for each student who was enrolled in an ELL program.¹⁸⁷ This encouraged school districts to identify and provide a program to their ELL.

183. See Solak, *supra* note 169, at 391 (“Although this test is now almost thirty years old, it is still used by federal courts to determine whether school districts are meeting their obligations under the EEOA.”).

184. See *Castaneda*, 648 F.2d at 1009–10 (creating a test for bilingual education).

185.

The student performance evidence . . . —including the hundreds of thousands of high school students who are off-track for graduation, the low levels of college readiness, and the substantial performance gaps (especially for economically disadvantaged and ELL students)—makes it clear that the Legislature has in fact substantially defaulted on that responsibility. Rather than attempt to solve the problem, the State has buried its head in the sand, making no effort to determine the cost of providing all students with a meaningful opportunity to acquire the essential knowledge and skills reflected in the state curriculum and to graduate at a college and career-ready level.

Tex. Taxpayer & Student Fairness Coal. v. Williams, No. D–1–GN–11–003130, 2014 WL 4254969, at *9 (200th Dist. Ct., Travis County, Tex. Aug. 28, 2014), *aff’d in part and rev’d in part*, 490 S.W.3d 826 (Tex. 2016).

186. Act of July 13, 1984, 68th Leg., 2d C.S., ch. 28, 1984 Tex. Gen. Laws 117 (amended 1995) (current version at TEX. EDUC. CODE ANN. § 42.152) (describing the Compensatory Education Allotment).

187. See *id.* (explaining the additional funding that the Compensatory Education Allotment provides).

Unfortunately, the 10% weight is not nearly sufficient to cover the additional cost necessary to provide for a quality bilingual-education program.¹⁸⁸ The need to increase this weight from 10% to 40% was a significant issue in the latest round of the school finance litigation.¹⁸⁹ The district court specifically found that both the bilingual weight and the compensatory education weight should be increased to 40%.¹⁹⁰ However, this finding was reversed by the Texas Supreme Court in its complete reversal of the district court's findings in the latest *Edgewood* case.¹⁹¹

In Texas, as in many other states, a movement toward dual-language programs has been developed, and immersion programs are often adopted by school districts.¹⁹² The dual-language program is based on a concept that mixing English-only students with Spanish-only students can, in effect, allow students to teach each other the languages.¹⁹³ At the same time, experienced faculty can teach both groups to be bilingual and bi-literate in English and Spanish.¹⁹⁴ However, the lack of properly trained teachers, materials, and will on the part of many school districts has led to comparatively few programs.¹⁹⁵

Another legal issue in bilingual-education cases is the lack of coherence between the language spoken by children and their national origin. Of course, Spanish is spoken by almost all persons of Mexican descent as well as persons from Central America, most of South America, and Spain.¹⁹⁶ ELL programs must provide bilingual instruction in a student's home language, regardless of what the home language is. Larger urban school

188. CÁRDENAS, *supra* note 133, at 160–61.

189. The plaintiffs in the latest *Edgewood* case, represented by MALDEF, proved to the district court the need to raise the weight for bilingual education students from 0.10 to 0.40. *Williams*, 2014 WL 4254969, at *103.

190. *Id.*

191. Kauffman, *The Texas Supreme Court Retreats*, *supra* note 125, at 161–68.

192. States have struggled with adopting and implementing appropriate programs to address the needs of language-minority students. Sandra Cortes, *A Good Lesson for Texas: Learning How to Adequately Assist Language-Minorities Learn English*, 13 TEX. WESLEYAN L. REV. 95, 96 (2006).

193. The focus of the program is not one language over the other. Rather, both the native and English languages are given roughly the same amount of emphasis. *Id.* at 101.

194. Although federal legislation has never specifically mandated bilingual education, it has, in the past, supported and encouraged bilingual education by funding such programs. *Id.* at 99; Joseph A. Santosuosso, Note, *When in California . . . In Defense of the Abolishment of Bilingual Education*, 33 NEW ENG. L. REV. 837, 837–41, 845 n.11 (1999).

195. Bilingual education requires extra financing to hire and train bilingual teachers, paraprofessionals, or teacher aids. Some school districts throughout the states pay college tuition for individuals who pursue a career in the bilingual education field. Cortes, *supra* note 192, at 118.

196. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 12, at 69 (1971).

districts in Texas have identified more than 100 different languages spoken by their students.¹⁹⁷ Therefore, many argue that the lack of well-funded education in Texas is not just an indicator of discrimination against Mexican-Americans but also an indicator of discrimination against all “non-natives.” This might well be true. However, in the history of Texas, the philosophy that “Spanish-speaking students need to learn to speak English and be a proper American” has imbued much of the state’s resistance to bilingual education with a clear anti-Mexican animus.

There has been and will continue to be debates on the effect of transitional bilingual-education programs on student achievement as compared to other methods of instruction for ELL. However, the weight of authority and the several “meta” studies of the data in the area support the use of properly structured and funded transitional bilingual education as superior for ELL.¹⁹⁸

The lack of bilingual education has led to decreased achievement and progress in schools, increased dropout rates, and a lack of college participation.¹⁹⁹

V. THE EDUCATION OF UNDOCUMENTED CHILDREN

Texas shares a 1,256-mile border with Mexico. Texas was once a part of Mexico,²⁰⁰ and San Antonio was the capital of the Mexican state of Tejas y

197. See *Special Student Populations*, TEX. EDUC. AGENCY, https://tea.texas.gov/Academics/Special_Student_Populations/ [<https://perma.cc/QAU4-P679>] (“Students enrolled in Texas schools speak more than 120 different languages.”).

198. RICHARD R. VALENCIA, CHICANO SCHOOL FAILURE AND SUCCESS, PAST PRESENT AND FUTURE 177 (2d ed. 2002); Viorica Marian & Anthony Shook, *The Cognitive Benefits of Being Bilingual*, NAT’L CTR FOR BIOTECHNOLOGY INFOR. (Oct. 31, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3583091/> [<https://perma.cc/MJ6U-HLHU>]; Reza Kormi-Nouri et al., *The effect of childhood bilingualism on episodic and semantic memory tasks*, SCANDINAVIAN J. PSYCHOL. (2008), <https://www.ncbi.nlm.nih.gov/pubmed/18352979> [<https://perma.cc/B7NY-W753>]; John King, U.S. Sec’y of Educ., *The Importance of Bilingual Education*, Address at CABE 2016 (Mar. 25, 2016) (transcript available at <https://www.ed.gov/news/speeches/importance-bilingual-education> [<https://perma.cc/MZ2A-XLXX>]).

199. *Tex. Taxpayer & Student Fairness Coal. v. Williams*, No. D-1-GN-11-003130, 2014 WL 4254969, at 110–19 (200th Dist. Ct., Travis County, Tex. Aug. 28, 2014) (reviewing the findings of fact and noting the various discrepancies in academic performance of English language learners), *aff’d in part and rev’d in part*, 490 S.W.3d 826 (Tex. 2016).

200. *E.g.*, Salinas, *supra* note 1, at 271 (“Approximately two-thirds of New Spain, later known as the Mexican Empire, continued north of the Rio Grande into the current states of Texas, New Mexico, Colorado, Arizona and California.”); see also Nat’l Geographic Soc’y, *Land Lost by Mexico*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.org/photo/land-lost-mexico/> [<https://perma.cc/>]

Coahuila until the Texas Revolution from Mexico in 1836.²⁰¹ Mexican power, culture, and language thrived in the border area of Texas until long after Texas became a republic in 1836 and one of the states in 1845.²⁰²

Many Mexican-Americans in Texas who trace their lineage to Mexican families of the 1700s in what is now the border area of Texas often say: "I didn't cross the border, the border crossed me."

The Texas government has long had a fraught relationship with its southern neighbor Mexico. At times, Texans were very active in encouraging migration from Mexico into Texas. At other times, Texans discouraged migration but encouraged the movement of labor from Mexico into the Texas border area for farm, ranching, and construction work. Professor Montejano explains this relationship in great detail in his book *Anglos and Mexicans in the Making of Texas*.²⁰³

Although the United States Supreme Court supported the use of other languages in public schools in the 1920s,²⁰⁴ Texas schools discouraged any use of a language other than English in schools except in foreign language courses. Texas schools punished students for speaking Spanish in the classrooms and even on the playgrounds.²⁰⁵ These policies were of course especially damaging to immigrant students, most of whom were more recent immigrants from Mexico, and either monolingual-Spanish or Spanish-predominant.²⁰⁶

For years Texas schools did not really pay attention to the issue of citizenship in the schools. However, in the mid-1970s, a strong anti-immigrant movement began to affect the Texas legislature. As a result, the Texas legislature passed especially draconian legislation preventing the

4D6K-C32S] (depicting the land lost by Mexico from 1836 to 1853, which included present-day Texas and all or part of nine other present-day U.S. states).

201. MONTEJANO, *supra* note 20, at 28.

202. *Id.* at 15-49.

203. *Id.* at 179-96.

204. See *Meyer v. Nebraska*, 262 U.S. 390, 397 (1923) (reviewing a statute that forbid teachers from teaching in any language other than English).

205. VALENCIA, *supra* note 22, at 156-58. José Cárdenas provides an in-depth and contemporary account of the struggles to educate undocumented children both before and after *Plyler v. Doe*. See JOSÉ A. CÁRDENAS, MULTICULTURAL EDUCATION: A GENERATION OF ADVOCACY 247-76 (1995).

206. Dr. Angela Valenzuela has conducted long term studies showing that recent Mexican American immigrants in Houston schools were performing better than second- and third-generation persons of Mexican descent on many indicators. See generally ANGELA VALENZUELA, LEAVING CHILDREN BEHIND: HOW "TEXAS-STYLE" ACCOUNTABILITY FAILS LATINO YOUTH (2005) (describing the results of her research).

funding of any school for any student who is not a citizen or legal alien, and specifically allowing schools to exclude undocumented persons. The statute, Texas Education Code Section 21.031,²⁰⁷ was attacked in the state courts of Texas in *Hernandez v. Houston Independent School District*.²⁰⁸ Tragically, the Texas courts rejected the attack and upheld the statute.²⁰⁹

In 1977, a group of undocumented students and their families filed suit in federal court against the Tyler Independent School District in East Texas. Simultaneously a large group of cases in the Southern, Western, and Northern Districts of Texas were consolidated in Houston for a hearing in the case *In re Alien Children Education Litigation*.²¹⁰

In the Tyler case *Doe v. Plyler*,²¹¹ Judge Justice²¹² held that the State's immigration statute violated both the Equal Protection Clause²¹³ and the Supremacy Clause²¹⁴ of the United States Constitution. Specifically, Judge Justice held that the Texas statute violated students' rights to equal protection in the right to education and that the Texas statute should be subjected to "strict scrutiny," the most searching form of inquiry and one generally fatal to state statutes. However, the court also held that even if one were to consider the state statute under the lowest level of scrutiny—rational basis—the Texas statute would fail.²¹⁵ Further, Judge Justice

207. TEX. EDUC. CODE ANN. § 21.031.

208. *Hernandez v. Hous. Indep. Sch. Dist.*, 558 S.W.2d 121, 122–23 (Tex. App.—Austin 1977, writ ref'd n.r.e.) (characterizing the issue as whether the enforcement of Section 21.031 violated the due process rights of children illegally residing in Texas).

209. *See id.* at 125 (“[T]he fact that the state has provided tuition-free education for citizens and legally admitted aliens does not require the state to provide free schooling to aliens residing in the state without the law.”).

210. *In re Alien Child. Educ. Litig.*, 501 F. Supp. 544 (S.D. Tex. 1980).

211. *Doe v. Plyler*, 458 F. Supp. 569 (E.D. Tex. 1978).

212. For a short analysis of some of the cases by Judge Justice, *see* Albert H. Kauffman, *Tribute: Judge William Wayne Justice: A Life of Human Dignity and Refractory Mules*, 41 ST. MARY'S L.J. 215 (2009) and *see also* FRANK R. KEMERER, *WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY* (1991).

213. *See* U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

214. U.S. Const. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

215. *See Plyler*, 458 F. Supp. at 585 (“In any case, since it appears that defendants have not demonstrated a rational basis for the state law or the local school policy, it is not necessary to resolve

determined that the Texas statute violated the Supremacy Clause because the statute interfered with the broad range of immigration legislation passed by the United States Congress and implemented through federal agencies.²¹⁶ Judge Justice's opinion on the Supremacy Clause issue was vindicated by the United States Supreme Court in 2012.²¹⁷

The Houston case *In re Alien Children Education Litigation* also held that the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment;²¹⁸ however, that case did not hold that the statute violated the Supremacy Clause.²¹⁹

The United States Supreme Court then heard the cases and held that the Texas statute was unconstitutional under the Equal Protection Clause.²²⁰ To reach that holding, the Supreme Court had to jump several hurdles. First, Texas argued that undocumented persons were not "persons" under the Fourteenth Amendment because other language found in both the Amendment and other parts of the Constitution showed a clear distinction between undocumented persons and persons legally within the country.²²¹

finally the difficult conceptual problems posed by the [strict scrutiny] test."); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPALS AND POLICIES* 697–701 (5th ed. 2015) (formulating a short, clear explanation of rational basis, intermediate scrutiny and strict scrutiny).

216. See *Plyler*, 458 F. Supp. at 592 (E.D. Tex. 1978) ("The Texas statute challenged here defeats the clear implications of federal laws covering both illegal aliens and education of disadvantaged children.").

217. See generally *Arizona v. United States*, 567 U.S. 387 (2012) (holding Arizona statutes controlling immigration were preempted by federal law).

218. See *In re Alien Children Education Litigation*, 501 F. Supp. 544, 583–84 (S.D. Tex. 1980) ("Section 21.031 of the Texas Education Code does not employ a classification which is necessary or substantially related to a compelling governmental interest. Accordingly, that statute violates the equal protection clause of the [F]ourteenth [A]mendment of the United States Constitution.").

219. See *id.* at 588 ("The court concludes that Title I of the Elementary and Secondary Education Act does not pre-empt section 21.031 of the Texas Education Code.").

220. See *Plyler*, 457 U.S. at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.").

221. See *id.* at 210 ("[The State argues] that the Equal Protection Clause directs a State to afford its protection to persons *within its jurisdiction* while the Due Process Clauses of the Fifth and Fourteenth Amendments contain no such assertedly limiting phrase."). This holding has heightened relevance today. Alabama has filed a federal court lawsuit challenging the method of apportionment of congressional seats in the United States. See *Alabama v. United States Dep't of Commerce*, BRENNAN CTR FOR JUST. (Feb. 26, 2019), <https://www.brennancenter.org/legal-work/alabama-v-united-states-dept-commerce> [https://perma.cc/J3UN-EGY8] ("The State of Alabama filed a lawsuit against the Commerce Department and Census Bureau, challenging the Bureau's policy of including all U.S. residents in the Census count used for apportionment."). Alabama's argument is that undocumented persons are not to be counted when the legislature determines the number of United States House of

The Supreme Court rejected that argument. The Court held that undocumented persons within the United States are clearly entitled to equal protection of the laws.²²²

The Court then considered an even more difficult issue: whether undocumented persons, as a class of people, were entitled to strict scrutiny protection or the lower level of “rational basis” review. In order to apply strict scrutiny, the classifications and statute must disadvantage a suspect class or impinge upon the exercise of a fundamental right.²²³ The Court weighed the disadvantage—in fact, the disability—applied to children who were denied a public education in Texas against the fact that the plaintiff children were indeed in the United States without documentation and had illegally entered.²²⁴ The Court noted that undocumented status is not irrelevant to a proper legislative goal, but that in this case, the classification was directed against children and imposed the burden on children who were not responsible for their illegal presence in the United States.²²⁵ On the issue of fundamental rights, the Court acknowledged the holding in *San*

Representatives seats to which a state is entitled. *Id.* (“The suit argues that including undocumented individuals in the population count will deprive Alabama of its “rightful share of political representation,” as well as cause the state to lose a congressional seat and an electoral vote to a state with a higher number of undocumented individuals.”). Nebraska recently considered legislation that would require state legislators to redistrict based only on persons who are citizens or legally admitted aliens and to exclude undocumented persons from the count. Joe Duggan, *Committee Hears Feedback on Bill that Would Exclude Noncitizens During Redistricting*, OMAHA WORLD-HERALD (Feb. 28, 2018), https://www.omaha.com/news/legislature/committee-hears-feedback-on-bill-that-would-exclude-noncitizens-during/article_1c9ea04c-951c-537c-bb48-d71b97ec2438.html [https://perma.cc/UZ3K-335G]. *Phyller v. Doe* will be an extremely important precedent in opposing these recent lawsuits and legislation.

222. See *Phyller*, 457 U.S. at 214 (“Congress, by using the phrase ‘person within its jurisdiction,’ sought expressly to ensure that the equal protection of the laws was provided to the alien population.”).

223. See *id.* at 217 n.15 (“In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein.”); see also CHEMERINSKY, *supra* note 215, at 702 (“Usually, equal protection is used to analyze government actions that draw a distinction among people based on specific characteristics, such as race, gender, age, disability, or other traits. Sometimes, though, equal protection is used if the government discriminates among people as to the exercise of a fundamental right.”).

224. See *Phyller*, 457 U.S. at 215–16 (“The more difficult question is whether the Equal Protection Clause has been violated by the refusal of the State of Texas to reimburse local school boards for the education of children who cannot demonstrate that their presence within the United States is lawful, . . .”).

225. See *id.* at 220 (“Of course, undocumented status is not irrelevant to any proper legislative goal. . . . But [the statute] is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control.”).

Antonio Independent School District v. Rodriguez that education is not a fundamental right under the federal Constitution.²²⁶

Then the Court concluded that the interests in this case fit between the strict scrutiny analysis and the rational basis analysis. In a holding of true enlightenment, the Supreme Court held:

[P]ublic education is not a right granted to individuals by the Constitution. But neither is it merely some governmental benefit indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The American people have always regarded education and the acquisition of knowledge as matters of supreme importance. . . . [E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rest.²²⁷

The Court went on to explain the basis for its opinion.²²⁸ Although undocumented children were indeed in the United States illegally—not by their own choice—they were very likely to remain in the country, and if the state did not offer them a chance to be educated, they would be a tremendous burden on the United States.²²⁹ On the other hand, well-educated children can contribute significantly both to Texas and to the United States.²³⁰ Significant scholarly research has since shown that undocumented students who are allowed to attend public schools perform extremely well; in fact, they usually perform better than other minority

226. See *id.* at 221 (“Public education is not a ‘right’ granted to individuals by the Constitution.”); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (concluding education is not a fundamental right) (“We have carefully considered each of the arguments supportive of the district court’s findings that education is a fundamental right or liberty and have found those arguments unpersuasive.”).

227. *Plyler*, 457 U.S. at 221 (citations omitted) (quotations omitted).

228. See *id.* at 222 (“Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.”).

229. See *id.* at 223 (“By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”).

230. See *id.* at 222 n.20 (“Moreover, the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained.”).

students in the Texas public schools.²³¹

The *Plyler v. Doe*²³² opinion is often seen as an example of “mid-level scrutiny.”²³³ Under that standard, the Texas statute would have to fail. The *Plyler v. Doe* case is the basis of the successful challenge to Proposition 187, a California proposition that would have denied all undocumented children from attending public schools in California.²³⁴

Immigration issues continue to be extremely polarizing in public debates around employment, voting, and education.²³⁵ Fortunately, *Plyler v. Doe* is still a bulwark of protection for persons who are participating in and contributing to society—regardless of their immigration status.

The exclusion of immigrant students before 1982 has perpetually conveyed negative effects on Mexican-American students, through the under-education of excluded students and later the negative effects on their children. Also, the anti-immigrant attitudes reflected in Texas’s intransigence on the issue played a major role in the State’s objections to bilingual education and adequate access to higher education resources along the Texas border area.

VI. STANDARDIZED TESTING

Texas is proud that it has been one of the leading states in the country to design and implement a system of using standardized tests in the schools. The state has applied these tests to the testing of potential teachers, potential

231. See generally ANGEL NOÉ GONZÁLEZ, *BILINGUAL EDUCATION: LEARNING WHILE LEARNING ENGLISH* (2014) (compiling the experiences of education advocates and practitioners to dispel common misconceptions about bilingual education); VALENZUELA, *supra* note 206 (providing a collection of academic articles detailing Texas’s accountability system and its impact on Latino students).

232. *Plyler v. Doe*, 457 U.S. 202 (1982).

233. See CHEMERINSKY, *supra* note 215, at 808–09.

234. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1255 (C.D. Cal. 1997) (invalidating Section 7 of Proposition 187 because it contradicted the Supreme Court’s holding in *Plyler v. Doe*, 457 U.S. 202 (1982), “that a state cannot deny basic public education to children based on their immigration status”).

235. Immigration is not a monolithic issue: there is no one immigration question. See Derek Thompson, *How Immigration Became So Controversial*, ATLANTIC (Feb. 2, 2018), <https://www.theatlantic.com/politics/archive/2018/02/why-immigration-divides/552125> [<https://perma.cc/SMZ7-9NWX>] (refuting the concept of a monolithic immigration issue and instead addressing three main issues. “How should the United States treat illegal immigrants, especially those brought to the country as children? Should overall immigration levels be reduced, increased, or neither? And how should the U.S. prioritize the various groups—refugees, family members, economic migrants, and skilled workers among them—seeking entry to the country?”).

college students, and most extensively, to public school students.²³⁶ The state system of testing and accountability was a major model for the federal No Child Left Behind Act.²³⁷ Former President George W. Bush ran for Texas Governor in 1994 on a platform advocating education reform. As the governor of Texas, he extended the use of standardized tests in the public schools, building upon the significant extension of testing in the public schools under his predecessor Governor Ann Richards. Standardized tests, early in the form of intelligence tests, and later in the form of tests of critical knowledge and skills, have continued to negatively impact Mexican-American students.²³⁸ The state has argued that the tests have very positive effects on students, especially minority students, by identifying students who need help and tying the test scores to school district accountability and duty to provide a good educational program for all of the students.²³⁹

Testing in the public schools used as a tracking mechanism was addressed in *Castaneda v. Pickard*,²⁴⁰ as discussed in the bilingual education chapter above. In almost every one of the school desegregation cases, the plaintiffs allege there was a system of tracking that resulted in an overconcentration of minority students in lower sections and sections for students with intellectual disabilities, and an overconcentration of Anglo students in the top and most competitive sections, including AP courses and other highly competitive curriculum.

The first major challenge to Texas's use of standardized tests was in *United States v. LULAC*.²⁴¹ In 1981, Texas adopted a policy of requiring all college students who wanted to enter a school of education in a university in Texas to pass a three-part standardized test produced by the Educational Testing Service. This standardized test, the Pre-Professional Skills Test (PPST), had

236. This article does not address the use of standardized tests like the SAT and similar national standardized tests for college admissions.

237. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (amended 2015).

238. See CARDENAS, *supra* note 111, at 405-24 (providing on context to testing, especially about the English Language Learner (ELL)).

239. NAT'L RESEARCH COUNCIL, COMM'N ON BEHAVIORAL & SOC. SCI. & EDUC., HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION 95-106 (Robert M. Hauser & Jay. P. Huebert eds., 1999).

240. See *Castaneda v. Pickard*, 648 F.2d 989, 994 (5th Cir. 1981) (discussing the use of testing as a grouping practice).

241. *United States v. LULAC*, 793 F.2d 636, 639 (5th Cir. 1986) (challenging the Texas Pre-Professional Skills Test (PPST)).

a very significant adverse impact on Mexican-American and African-American applicants. After the first few years of the test's implementation, the state's own statistics showed that 73% of whites had passed the test but only 34% of Hispanics and 23% of Blacks had done so. The long-term effect of this test was clearly to decrease the number and percentages of Mexican-Americans and African-Americans who would be able to obtain a teacher certification and therefore to greatly reduce the cohort of minority teachers in Texas public schools. The district court enjoined Texas's use of the PPST test.

Unfortunately, the Fifth Circuit reversed the district court and upheld the use of the test.²⁴² *United States v. LULAC* upheld the test because the court found that there was no proof that the test used was invalid.²⁴³ The court also found that even if the test was not sufficiently validated as to actual teacher performance, it was validated as to the coursework necessary to complete the teacher education programs for which it was designed.²⁴⁴ The Fifth Circuit did note that at the time of its opinion, Hispanic students constituted 29% of the total state enrollment in public schools, but that only 12% of teachers were Hispanic.²⁴⁵ More specifically, the court of appeals found that the trial court had not determined whether the test requirements served the PPST's stated nondiscriminatory purpose. And under the stringent requirements of the United States Supreme Court cases of "intentional discrimination,"²⁴⁶ the Fifth Circuit found that the minority plaintiffs in the case had not met their obligation to show it was indeed a case of discriminatory intent.

Texas eventually stopped its use of the PPST for the purpose of limiting enrollment in schools and replaced that test with a general test of achievement, largely preventing university enrollment of minorities, called the TASP.²⁴⁷ This test also had a significant negative effect on

242. *See id.* (reversing the district court's order).

243. *Id.* at 643.

244. *Id.* at 640.

245. In Texas schools, minority groups "provide 44% of the students but only 23% of the teachers." *Id.* at 641.

246. *See, e.g.,* *Washington v. Davis*, 426 U.S. 229, 239 (1976) (quoting *Akins v. Texas*, 325 U.S. 398, 403–04 (1945)) (holding "a purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination").

247. VALENCIA, *supra* note 22, at 278. For a complete description of the TASP test, *see* Texas Academic Skills Program (TASP) (Sept. 1988) (Tex. Educ. Agency & Tex. Higher Educ. Coordinating Bd.), <https://files.eric.ed.gov/fulltext/ED305853.pdf> [<https://perma.cc/R8W5-FDITY>].

Mexican-Americans, and Texas eventually ended its use of the TASP test as well.²⁴⁸

In Texas, the majority of standardized testing is conducted in public schools. In 1997, the American G.I. Forum, several other minority groups, and individual students who had failed the TAAS test brought litigation against the State to suspend the use of the standardized test that had prevented students from obtaining a high school diploma.²⁴⁹ Under the State's use of the TAAS test, Texas prevented students who failed any one part of a three-part standardized test from receiving a high school diploma. Texas allowed students to take the test many times, and indeed, some students who originally failed did eventually pass. However, the record in the TAAS litigation was clear that this test had a significantly greater negative impact upon Latino and African-American students than white students.

The trial court in the *G.I. Forum* case confirmed the TAAS test's adverse impact on Latino and African-American students. The plaintiffs produced an extremely persuasive record, providing evidence of the adverse impact:

- (1) of the preliminary administration of the TEAMS test used by the State Board of Education to set the initial TAAS cutoff scores;
- (2) of the original actual implementation of the TAAS test in 1992;
- (3) of each and every administration since 1992 and through 1998—the date of the record in the litigation;
- (4) on repeat test takers who failed and were thus prevented from graduating grade levels; and
- (5) on students who did not fit any of the Texas Education Agency indicators that one would assume would lead to lower test scores. Specifically, even if one were to look only at students who were neither ELL, low income, specially educated, nor migrant, there was still a significant difference between test scores of white students and test scores of minority students, specifically Latinos.

248. *See id.* at 278 (“In all, 2,841 teacher education candidates took the TASP exam in 1989, and the failure rates for Whites, Latinos, and African Americans were 14%, 39%, and 52%, respectively . . .”).

249. *See generally* *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000) (challenging the TAAS test under the Equal Protection and Due Process Clauses of the Constitution, and the regulations implementing Title VI of the Civil Rights Act of 1964).

The trial court's decision did summarize some of the statistics.²⁵⁰ Therefore, they will not be repeated in detail here. Nevertheless, a few sets of the statistics must be considered to understand the depth of the adverse impact.

On the first administration of the test that would have an effect of limiting students from graduation, only 33% of African-Americans passed the test, 41% of Hispanics, and 69% of whites.²⁵¹ Plaintiffs' statistical analysis showed that even after a student took all opportunities to take and retake the test, still, on the last test, only 27% of Hispanics passed the test compared to 41% of whites.²⁵²

These statistics failed to directly address one of the major negative effects of this testing system. Plaintiffs produced significant evidence that the dropout rate of Hispanic and African-American students increased significantly after the implementation of the TAAS test.²⁵³ Although the trial court recognized this relationship, they did not, however, find a causal relationship between the implementation of the test and the increased dropout rates.

In a study that has not been widely reported, but was an admitted exhibit in *GI Forum*, the plaintiff showed that even after removing all socioeconomic factors as defined by the Texas Education Agency from the analysis, there was still a significant adverse effect on Mexican-American students.²⁵⁴ Even though only 10% of the Hispanic students taking the test did not fit any of the socioeconomic categories, while 37% of the white students did not fit any of the socioeconomic categories, still the white-passing percentage was 92% and the Hispanic-passing percentage was 76%.²⁵⁵ In other words, even when one eliminates from the analysis all of the core

250. *Id.* at 673–74; see also Placido Gomez et al., *The Texas Assessment of Academic Skills Exit Test—“Driver of Equity” or “Ticket to Nowhere?”*, 2 SCHOLAR 187, 232 (2000) (providing edited versions of reports admitted in the *GI forum* litigation by Professor Amilcar Shabazz, Dr. Jose Cardenas, Dr. Susan Phillips, Professor Phillip Treisman, Dr. Walter Haney, Dr. Linda McNeil, Professor Ernesto Bernal, and Dr. Angela Valenzuela).

251. *Id.* at 673.

252. Plaintiffs' Post-Trial Brief at 10, *GI Forum*, 87 F. Supp. 2d 667 (No. SA–97–CA–1278–EP).

253. *GI Forum*, 87 F. Supp. 2d at 676.

254. “Socio-economics, family support, unequal funding, quality of teaching and educational materials, individual effort, and the residual effects of prior discriminatory practices were all implicated as reasons for inequality in education. The Court [found] that each of these factors, to some degree, is to be blamed.” *Id.* at 674.

255. Plaintiffs' Post-Trial Brief at 12, *GI Forum*, 87 F. Supp. 2d 667 (No. SA–97–CA–1278–EP).

“reasons” often advanced for differences in test scores,²⁵⁶ the TAAS test still had significant negative effects on minority students.

Beyond the numbers, the record illustrated that such extensive standardized testing in the public schools carried extremely negative effects on lower income and low-performing schools.²⁵⁷ In other words, at the schools with consistently lower test scores, the curriculum was distorted to cover only matters that were required by the test rather than a broader, more enriching curriculum that might encourage students to maintain attendance in school and to complete high school.²⁵⁸

Although the trial court did find adverse impacts, it found that the State had met its burden to show that there was an educational necessity for the testing system, and that the plaintiffs had not shown a sufficient record of pretext to prove that the educational justification offered by the State was merely an excuse for a discriminatory system.²⁵⁹

Texas went on to add additional layers of testing in the areas of particular subject-matter tests, and the adverse impact of the testing system was even more pronounced on some of these tests.²⁶⁰ The testing system had several related negative effects:

- (1) The tests directly denied many students a high school diploma;
- (2) The tests directly denied many Latino students the ability to move on in school or access higher-level courses in school;
- (3) The use of the tests had the effect of “dumbing down” schools with high percentages of minority enrollments by turning them into test-practice facilities rather than educational institutions; the tests have discouraged many families from placing their students within high-

256. *E.g.*, minority students come from poor families, are not English-language literate, and are more likely to be migrant students or low income.

257. *See GI Forum*, 87 F. Supp. 2d at 676 (noting the “legally significant adverse impact” standardized tests have on minority students).

258. *See* LINDA MCNEIL, CONTRADICTIONS OF SCHOOL REFORM: EDUCATIONAL COSTS OF STANDARDIZED TESTING 259 (2000) (“Scarce resources at the school and district level are being invested more in those materials and activities that will raise scores, than in curricula of lasting intellectual or practical value to students.”).

259. *See GI Forum*, 87 F. Supp. 2d at 684 (“[T]he TEA has demonstrated an educational necessity for the test, and the Plaintiffs have failed to identify equally effective alternatives.”).

260. *See* Plaintiffs’ Post-Trial Brief at 35, *GI Forum*, 87 F. Supp. 2d 667 (No. SA-97-CA-1278-EP) (explaining how later renditions of the test “lock[ed] in the inequities created by the first test”).

minority schools because the test scores at these schools are lower and the schools therefore appear to be of lower quality;²⁶¹ and

- (4) Focusing on improvement of test scores distorts the whole system of education as one sensitive to each student's needs and encouraging of teachers and students to work together to discover the world. This overconcentration on the testing system is especially damaging in schools with a high concentration of minority, low-income, and ELL students.²⁶²

Extensive research on the TAAS test and its implementation has been gathered in several journals and books.²⁶³ To get a good sense of these negative impacts, one needs to do a thought experiment: what if the test had consistently shown that white students performed at much lower levels than did African-American and Latino students, and that the test led to higher dropout rates of white students, fewer course availabilities for white students than for other students, and to the classification of high-concentration-white schools as low-performing schools not worthy of attendance by mobile families? We who love and know Texas well know that the test would have been rapidly changed both in its content and its use.

The negative effects of the state's misuse of standardized tests is particularly related to dropout rates, which increased significantly right after the TAAS exit test was implemented. The district court found this relationship but was not convinced that the TAAS caused the increase in the rate of non-retention. However, the National Research Council study concluded that the increase in use of high-stakes standardized tests was related to an increase in retention rates in all grades, especially the ninth-

261. See MCNEIL, *supra* note 258, at 97 (explaining how “[a] predominantly African American high school in a mostly African American neighborhood was losing enrollment” steadily after the emergence of a gifted-and-talented magnet school in the nearby vicinity).

262. See *id.* (discussing how test-driven teaching harms the overall education of minority students); see also Linda McSpadden McNeil, *Faking Equity: High-Stakes Testing and the Education of Latino Youth*, in LEAVING CHILDREN BEHIND: HOW “TEXAS-STYLE” ACCOUNTABILITY FAILS LATINO YOUTH, *supra* note 206, at 57 (concluding state-specific standardized test performance has little bearing on minority students' long-term education success).

263. See Gomez et al., *supra* note 250 (explaining while high minority schools focus their curriculum on the TAAS, “preliminary research [has] show[n] that those schools that score higher on TAAS (usually wealthier, with fewer minority children) rarely teach directly to TAAS”).

grade cohorts.²⁶⁴ In addition, standardized test scores can lead to reductions in funding of Texas public schools, and the general devaluation of school districts serving large percentages of minority and low-income children.

VII. DROPOUTS

As far back as we have records, there has been a significantly higher rate of dropouts among Mexican-American students than among whites or African-American students.²⁶⁵ Whether this rate is called dropouts, attrition rates, retention rates, or push-out rates, Mexican-Americans have suffered in this area in every study performed.

In the early 1960s, the studies showed Mexican-American dropout rates of 59%, i.e., only 41% of Mexican-American students who entered public schools actually completed the high school diploma requirement.²⁶⁶ In an excellent annual series, the Intercultural Development Research Association (IDRA) has done studies on retention. Their annual studies over the last thirty-three years (1985–1986 to 2017–2018) found consistently lower rates of retention for Mexican-American students than for students of other ethnic groups.²⁶⁷

The numbers show a tragic loss of human resources but some improvement over the last thirty-three years. Mexican-American attrition rates²⁶⁸ are still twice as high as white attrition rates (27% for Hispanics and 13% for whites), yet there has been great improvement since the first year of the study, 1985–1986, when the Hispanic rate was 45% and the white rate was 27%. The worst attrition rates for Hispanics were in the 1993–1994 period when the attrition rates were consistently above 50%. As a final and

264. NAT'L RESEARCH COUNCIL, *supra* note 239, at 128 (“Although retention rates can change even when tests are not used in making promotion decisions, there is evidence that using scores from large-scale tests to make such decisions may be associated with increased retention rates.”).

265. Sáenz, *supra* note 11, at 13 fig.10 (“Latinos, including native-born Latinos, continue to have noticeably higher status dropout levels, compared to their white and African American peers . . .”).

266. *Id.*

267. Roy L. Johnson, *Texas Public School Attrition Study, 2017–18: High School Attrition Rate Drops by Two Percentage Points from Previous Year*, IDRA, 4 (Dec. 2018), <https://www.idra.org/wp-content/uploads/2018/12/IDRA-Texas-Public-School-Attrition-Study-2017-18Dec.pdf> [<https://perma.cc/V3JJ-PQAR>].

268. *Id.* Attrition rate is a comparison between the number of a group entering ninth grade to the number of that group who enroll in the twelfth grade, three years later, e.g., a comparison of the 205,530 Hispanic students in Texas public schools in 2014–2015 to the expected number of that group graduating three years later in 2017–2018. The methodology is explained in detail in the IDRA report. *Id.* at 5.

tragic study, the IDRA study shows that Texas schools have lost 2,131,473 Hispanics, 1,005,128, whites and 639,337 blacks²⁶⁹ in the last thirty years.²⁷⁰

IDRA and its many partners in the Texas legislature have consistently tried to correct this imbalance through legislation as well as through overall efforts in the area of educational quality. More specifically, at times the “counting system” on dropout rates used by the state of Texas distorted the actual numbers of students that were leaving school. In the 1980s and 1990s, Texas only counted dropouts as students who did not return to school to graduate and informed the school that they were leaving and were not going back to school.²⁷¹

Nevertheless, if one looks at any sort of objective analysis comparing the numbers of Mexican-American students entering kindergarten or first grade to the numbers graduating twelve years later, or the number of Mexican-Americans entering ninth grade to the numbers graduating from high school four years later, or the documented dropout rates, Mexican-Americans have significantly suffered.

This gap in dropout rates is more a result of the types of discrimination discussed in other parts of this article than a cause. Mexican-American retention rates are much lower in large part because Mexican-American students attend less-funded schools, attend segregated schools, suffer from the testing system, suffer from a lack of bilingual education, and have indeed been pushed out through the misuse of the testing system.

In *GI Forum*, plaintiffs established that the already abominable rates for Hispanic dropouts increased after Texas implemented the TAAS exit test system.²⁷² Plaintiffs also produced testimony that the increase in dropout rates was in part a response to the pressures and penalties of the new testing system and its effect on students fearing ultimate failure on the test. However, the district court, although finding the temporal relationship, did

269. *Id.* at 11.

270. *Id.* at 4–5.

271. *Compare* TEX. EDUC. AGENCY, SECONDARY SCHOOL COMPLETION AND DROPOUTS IN TEXAS PUBLIC SCHOOLS 2016–17 19 (2018) (citation omitted) (“A dropout was first defined . . . in 1987 as a student in grades 7–12 who did not hold a high school diploma or the equivalent and who was absent from school for 30 or more consecutive days with no evidence of being enrolled in another public or private school.”) *with* Johnson, *supra* note 267, at 46 (“Using the NCES definition, a dropout is defined as ‘a student who is enrolled in public school in grades 7–12, does not return . . . the following fall, is not expelled, and does not graduate, receive a [GED] certificate, continue school outside the public school system, begin college, or die.’”).

272. *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 679 (W.D. Tex. 2000).

not find that the increase in dropout rates was caused by the testing system.²⁷³

Increased dropouts or reductions in retention have several negative effects on Latino education rights. Dropouts almost never get to college, make decent wages, or contribute to the fiscal health of their communities. Any study of the prison population shows extremely and disproportionately high rates of dropouts among their prison populations.²⁷⁴

VIII. HIGHER EDUCATION

Unfortunately, Texas discrimination against Mexican-Americans is not only at the public-school level. Since the inception of the Texas higher education system in 1876, the state rarely placed institutions of higher education in areas of heavy Mexican-American population and specifically used admissions criteria that limited the number and participation of Mexican-American students.²⁷⁵

There were almost no Mexican-Americans in Texas institutions of higher education through at least 1950. As of 1930, Manuel reported “that of the 38,538 students enrolled in colleges and universities in Texas,” only 188 (0.49%) were “Mexican,” which included persons who claimed residence in Mexico.²⁷⁶

In 1950, the census showed that only 2.2% of “Spanish[-]speaking” people in Texas (predominantly Mexican-American) had completed “college or more.”

The discrimination against Mexican-Americans in higher education in Texas manifested in a number of ways. The methods used to categorize discrimination by MALDEF in its higher education lawsuit, *Richards v.*

273. *Id.* at 676.

274. Kathryn Hanson & Deborah Stipek, *Schools v. Prisons: Education's the Way to Cut Prison Population*, MERCURY NEWS (May 15, 2014, 9:26 AM), <https://www.mercurynews.com/2014/05/15/schools-v-prisons-educations-the-way-to-cut-prison-population/> [<https://perma.cc/YVM2-RJFA>].

275. In other work, the author has summarized the development of the Texas higher education system in great detail. Kauffman, *Effective Litigation Strategies*, *supra* note 125, at 460–62 (showing the progression of higher education, beginning when “Texas A&M opened its doors in 1876,” but, “[i]n 1946, while one-sixth of Texas’s population was Mexican American, comprising over twenty percent of the state’s scholastic population, Mexican Americans made up only 1.7% of the state’s college population”).

276. VALENCIA, *supra* note 22, at 251–52. In 1950, the census showed that only 2.2% of “Spanish speaking” people in Texas (predominantly Mexican-American) had completed “college or more,” though they constituted 13.4% of the Texas population. *Id.* at 252.

LULAC,²⁷⁷ is most useful for our discussion:

- (1) Based on a series of investigations by the Department of Health, Education and Welfare (HEW) beginning in the early 1970s, there has been a clear pattern of discrimination against Mexican-Americans in higher education in terms of admissions, course offerings, faculty employment and graduate schools.²⁷⁸
- (2) A separate manifestation of the discrimination is the lack of funding available to universities within the border area of Texas, an area of very high Mexican-American population proportions, and an area long seen by many Texans as “part of Mexico.”

Based on federal litigation against the Department of HEW in the early 1970s,²⁷⁹ the Office for Civil Rights of HEW (after 1980 jurisdiction of the matter shifted to the new Department of Education Office for Civil Rights) investigated discrimination in systems of higher education around the country. The department found discrimination against both African-Americans and Mexican-Americans in the higher education system of Texas.²⁸⁰ After an initial finding, Texas and the Department of Education negotiated an end to the action in 1973.²⁸¹ However, the Department of HEW developed an extensive record of universities with very few, if any, Mexican-American students, admissions policies that had discriminatory impacts on Mexican-Americans, schools and graduate schools with virtually no Mexican-American students, and a great dearth of Mexican-American faculty and high-level staff.

This general discrimination against Mexican-Americans in Texas higher education was one prong of a lawsuit filed by MALDEF in 1987, originally

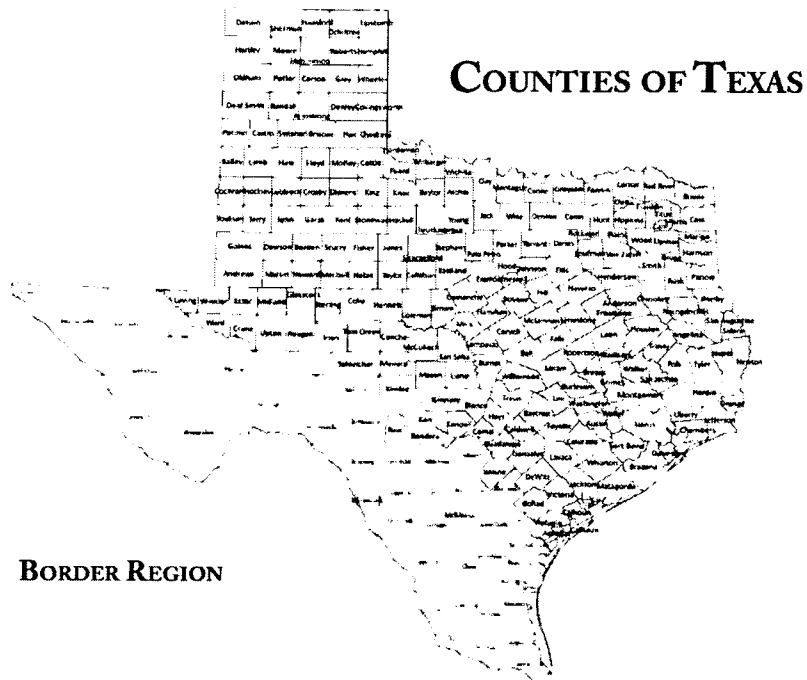
277. *Richards v. League of United Latin Am. Citizens (LULAC)*, 868 S.W.2d 306 (Tex. 1993).

278. *E.g., id.* at 309.

279. *See Adams v. Richardson*, 480 F.2d 1159, 1160–61 (1973) (“This action was brought . . . against the Secretary of Health, Education, and Welfare, and the Director of HEW’s Office of Civil Rights. Appellees . . . allege in their complaint that appellants . . . have not taken appropriate action to end segregation in public educational institutions receiving federal funds.”).

280. *See id.* at 1164 (finding [the Health, Education, and Welfare department] was aware of segregation issues in higher education).

281. *The Texas Plan for Equal Educational Opportunity: A Brief History*, TEX. HIGHER EDUC. COORDINATION BOARD (Nov. 1997), <http://www.theccb.state.tx.us/reports/PDF/0021.PDF?CFID=6758024&CFTOKEN=54037207> [<https://perma.cc/D2CZ-AZ4A>]. Investigation of “Texas[s] higher education institutions came as a result of the *Adams v. Richardson* case . . .” *Id.*



filed as *League of United Latin American Citizens (LULAC) v. Clements*²⁸² but eventually renamed to *Richards v. LULAC*.²⁸³ The second prong of *Richards v. LULAC* was the allegation of discrimination with regard to the funding of universities within areas of predominantly Mexican-American population. The *LULAC* plaintiffs identified the border area of Texas, roughly from El Paso to San Antonio to Corpus Christi to Brownsville, approximately all of Texas within 150 miles of the Mexican border, as an area that was especially negatively affected by the Texas higher education system. This 150-mile stretch of land²⁸⁴ was the home to approximately 20% of Texas's population but distributed only 10% of the resources allocated for higher education. This area had a 64% Mexican-American population compared to 16% for the rest of the state. In the border area,

282. *League of United Latin Am. Citizens (LULAC) v. Clements*, No. 12-87-5242-A (107th Dist. Ct., Cameron County, Tex. Dec. 1987).

283. *LULAC*, 868 S.W.2d at 308. The case was renamed after Governor Richards was elected in November 1990. See Kauffman, *Effective Litigation Strategies*, *supra* note 125, at 478 n.89.

284. DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986*, at 2 (1997); Kauffman, *Effective Litigation Strategies*, *supra* note 125, at 455 (displaying a map titled "The Texas Border Region: Counties of Texas").

only three doctoral programs were offered compared to the roughly 600 in the rest of the state. On every indicator of quality, the border area suffered as compared to the rest of Texas.²⁸⁵

Based on a two-month jury trial in Brownsville, Texas, the state district court in Brownsville held that the Texas higher education system was unconstitutional and that the State of Texas had until the end of the next legislative session, i.e., from January 1992 until June 1993, to correct the discrimination.²⁸⁶

This extremely powerful trial court judgment, modeled on the effective trial court judgment in the Edgewood school finance cases in Texas, had the effect of immediately galvanizing the attention of legislators, community groups throughout the border area, and all persons involved with higher education finance throughout Texas. Based on a detailed and systematic effort to identify the lack of higher education opportunities at each institution within the border area and the development of community groups to identify community concerns as well as university faculty and administrative concerns, the plaintiffs developed a detailed plan for the development of higher education in the border area to be funded by approximately \$2 billion of funds over the next several years.²⁸⁷

This plan became legislation in Texas called the South Texas Border Initiative passed by the Texas legislature in 1993.²⁸⁸ Only under a combination of unified community support for a plan, robust support for a plan by border members of the Texas House of Representatives and Texas Senate, and the power of the court injunction did the legislature design a plan to invest more than \$400 million in the border area during the next two to four years with long-term development plans for all of the universities in the area.

The plan resulted in truly outstanding improvement in the access to higher education by Mexican-Americans in the border area. Specifically, the border area, while remaining the home of 20% of the Texas population,

285. Richard C. Jones & Albert Kauffman, *Accessibility to Comprehensive Higher Education in Texas*, 31 SOC. SCI. J. 263, 272–74 (1994).

286. Kauffman, *Effective Litigation Strategies*, *supra* note 125, at 478–83.

287. *Id.* at 490.

288. The South Texas Border Initiative is a set of statutes and proposals dating back to 1993. *See id.* at 491–92; *see also, e.g.*, H.R. 2186, 73rd Leg., R.S. (codified at TEX. EDUC. CODE § 87.302) (approving new departments, schools, and programs at Texas A&M University–Kingsville); S.B. 6, 73rd Leg., R.S. (codified at TEX. EDUC. CODE § 87.501) (changing Laredo State University into a full four-year university named Texas A&M International University).

increased from 11% of state funding in 1991 to 18% of state funding in 2013, from three doctoral programs to sixty doctoral programs, and from a complete lack of comprehensive universities to the creation of two comprehensive universities with two additional universities about to achieve that level.²⁸⁹ Every one of the major universities in the border area achieved quantum leaps in educational opportunities and Mexican-American participation and success in these institutions.²⁹⁰

Though the Texas Supreme Court reversed the judgment for plaintiffs in the case, it did offer this objective view of the basic facts found by the district court in the case²⁹¹:

- (1) About 20% of all Texans live in the border area, yet only about 10% of the state's funds spent for public universities are spent on public universities in that region;
- (2) About 54% of the public university students in the border area are Hispanic, as compared to 7% in the rest of Texas;
- (3) The average public college or university student in the rest of Texas must travel forty-five miles from his or her home county to the nearest public university offering a broad range of master's and doctoral programs, but the average border-area student must travel 225 miles;
- (4) Only three of the approximately 590 doctoral programs in Texas are at border-area universities;
- (5) About 15% of the Hispanic students from the border area who attend a Texas public university are at a school with a broad range of master's and doctoral programs, as compared to 61% of public university students in the rest of Texas;
- (6) The physical plant value per capita and number of library volumes per capita for public universities in the border area are approximately one-half of the comparable figures for non-border universities; and
- (7) These disparities exist against a history of discriminatory treatment of Mexican-Americans in the border area (with regard to education and

289. See Kauffman, *Effective Litigation Strategies*, *supra* note 125, at 495–502 (“No matter how one looks at the changes in border higher education, there’s been clear and consistent improvement in the funding of these universities and the programs they can offer to students.”).

290. See *id.* at 493–94 (detailing the improvements made in higher education in the border area).

291. *Richards v. League of United Latin Am. Citizens (LULAC)*, 868 S.W.2d 306, 317 (1993).

otherwise) and against a present climate of economic disadvantage for border-area residents.

As just described, we must consider how the discrimination against Latinos in higher education had a symbiotic and systemic negative effect on Mexican-American educational opportunities.²⁹²

More specifically, the lack of comprehensive universities within the border area greatly decreased the number and percentages of Mexican-American students who were able to attend comprehensive universities.²⁹³ Lack of higher education institutions also limited access to graduate and professional programs.²⁹⁴ Additionally, the dearth of higher education resources made moving to the Texas border area unattractive to high-tech industries, and therefore limited employment opportunities for Mexican-Americans.²⁹⁵ Lack of higher education opportunities also produced negative effects on public schools in the border areas because fewer public school teachers were able to attend the more comprehensive universities that offered broader and more robust academic programs, and as a result, within the border area, there were simply much fewer higher level educational resources made available for public education.

IX. SUMMARY AND FINAL OBSERVATIONS

I base the conclusion in this article on forty years of litigation and study and an immersion in the education issues of Texas. Some of my observations might not be generally held or completely correct, but the conclusions are all well-informed.

All of these issues have affected Latino education for at least the last 100 years with particular relevance in the last fifty years. Yet to some extent, each issue has been a reaction to the previous issues. Resistance to bilingual education was in part a reaction to the forced integration of the schools and the significant increase in the number and percentage of Latino students in the schools. The segregation techniques in particular were reactions to the failure of previous techniques sufficient to separate the Latino students from

292. For an excellent summary of the litigation and educational policies implicated in the litigation see MICHAEL A. OLIVAS, *Location, Location, Location: Richards v. League of United Latin American Citizens and the Cartography of Colleges*, in *SUING ALMA MATER: HIGHER EDUCATION AND THE COURTS* 108–19 (2013).

293. Kauffman, *Effective Litigation Strategies*, *supra* note 2, at 474.

294. *League of United Latin Am. Citizens (LULAC)*, 868 S.W.2d at 309.

295. *Id.*

others. The discrimination in the school finance system was, to some extent, a reaction to the rapid increase in Latino students in the early- and mid-1900s.

Unfortunately, both the state and federal courts have been weakened in their ability to deal with these patterns of discrimination. Courts have been necessary elements to change by in effect breaking open discriminatory systems to minority interests and then monitoring public compliance and resistance to the new legal order.

Yet there is a great deal of progress as well. Texas leaders have increasingly begun to realize that the progress of the state as a whole will depend on the success of Latino students, who are already the majority of students in the state with all demographic analyses predicting further increases in those proportions. Chambers of Commerce have been increasingly interested in the effects of funding of schools and universities and have become allies of Latino groups on these issues.

Forward-looking political and education leaders have begun to take steps to deal with these demographic realities. There will be continuing struggles as in all parts of our society. In Latino education struggles, we have a very deep and documented record of successes and failures. My hope is that this article will remind us of some of these successes and failures and, hopefully, will lead to more of the successes and fewer of the failures.