

FROM A “LEGAL ORGANIZATION OF MILITANTS” INTO A
“LAW FIRM FOR THE LATINO COMMUNITY”*:
MALDEF AND THE PURPOSIVE CASES OF *KEYES*,
RODRIGUEZ, AND *PLYLER*

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ABSTRACT

Keyes was the first school desegregation case decided by the Supreme Court that did not originate in a Southern city. Geography was its quintessence—not merely the line drawing and school assignment form—but its political geography and demography variant. In Denver, as was the case in most Southwestern cities, the number of Mexican Americans was as large or larger than the number of Black schoolchildren. In several important cases taken up at approximately the same time, Anglo community lawyers and NAACP Legal Defense and Educational Fund lawyers took up important cases in desegregation (*Keyes v. School District No. 1*), bilingual education (*Lau v. Nichols*), and Texas school finance (*San Antonio Independent School District v. Rodriguez*) without significant formal involvement by lawyers representing Latino interests. In part, this Article argues, it was a traditional blind spot in the Black–White legal theory that doomed the cases; even though the Chinese American plaintiffs prevailed in *Lau*, it was undertaken without significant Latino legal involvement. In addition, the Mexican American Legal Defense and Educational Fund was not yet the major purposive legal organization it became in the next decade, when it won significant voting rights and immigrant education Supreme Court cases. However, it had already begun to undertake Tenth Circuit education litigation and was building its organizational capacity, and the failure of White lawyers in Denver and Texas to incorporate a Mexican American theory of the case contributed to an unsuccessful litigation strategy.

* David A. Badillo, *MALDEF and the Evolution of Latino Civil Rights*, RES. REP., Jan. 2005, at 4, 7 (quoting Interview with Mario Obledo, Former MALDEF President (Aug. 2003)).

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I. INTRODUCTION

There is always a backstory to a complex lawsuit, one that clarifies why the case was brought and, importantly, who brought it. By many readings, *Keyes v. School District No. 1*¹ was the one that got away, sort of like *San Antonio Independent School District v. Rodriguez*² got away. In *Keyes*, forced into an arranged and adversarial marriage, private lawyers and litigants from the NAACP Legal Defense and Educational Fund (LDF) overreached in retrying *Swann v. Charlotte-Mecklenburg Board of Education*³ in the Southwest and failed to involve Mexican American interests in a school district that was more Latino than African American. When the remedial plan offered by the intervenor Mexican American Legal Defense and Educational Fund (MALDEF) was largely adopted by the district court, it repudiated the desegregation shibboleth pursued by the plaintiff lawyers; when the U.S. Supreme Court remanded the case after vacating the plan, the Denver school district board was given a free hand in fashioning its own remedy.⁴ One can only imagine how a better

1. 413 U.S. 189 (1973).

2. 411 U.S. 1 (1973).

3. 402 U.S. 1 (1971). *Swann* was, in the eyes of many scholars and observers, the high-water mark of desegregation following and implementing *Brown*, a short-lived pinnacle largely undermined by 1974's *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974), which refused to employ cross-district or cross-jurisdictional remedies. See, e.g., Kevin Brown, *Reflections on Justice Kennedy's Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735, 738 (2008).

4. *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 324 F. Supp. 599, 604 (S.D. Tex. 1970); Tom I. Romero, II, *¿La Raza Latina?: Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the Twentieth Century*, 37 N.M. L. REV. 245, 268 (2007) (footnotes omitted) (quoting *Keyes v. Sch. Dist. No. 1*, 521 F.2d 465, 482 (10th Cir. 1975) (“[T]rue ‘integration’ of the nation’s schools required the introduction of curricula that recognized Chicana/os as members of a legally distinct non-White group. MALDEF’s influence, at least on the trial court in *Keyes*, was profound. . . . Judge Doyle’s attempt to provide a remedy that recognized distinct differences in the experiences of Chicana/o students proved fleeting. Although disguised in ethnic terms, the Cardenas Plan proved incompatible with the color vision of desegregation established in the years and decades since *Brown*. As the Tenth Circuit held in reversing Judge Doyle’s remedy, the ‘clear implication of arguments in support of the court’s adoption of the Cardenas [sic] Plan is that minority students are entitled under the [F]ourteenth [A]mendment to an educational experience tailored to their unique cultural and development needs. Although enlightened educational theory may well demand as much, the Constitution does not.’ In short, the Tenth Circuit’s opinion made it clear that courts were to consider Chicana/os solely as an indistinguishable ‘non-White’ group. The Tenth Circuit’s rejection of the Cardenas Plan and the U.S. Supreme Court’s decision not to grant certiorari to review the rejection represented the end of a robust but highly problematic era in the racial construction and color positioning of Latina/os in U.S. law. Represented most prominently in *Keyes* and *Cisneros*, the articulation of Mexican Americans as a ‘readily identifiable, ethnic-minority group’ in

and more successful case could have been taken up with a more comprehensive litigation strategy, one where the different racial and language interests could have been coordinated with the various parties, rather than pitted against each other with competing theories of the case. In another matter involving Chicano students, a similar effort also failed when an Anglo lawyer brought an ill-advised case in *Rodriguez*, litigation that shut off federal litigation routes and set back school finance efforts.⁵

Whether or not one accepts these narratives, *Keyes* was a disappointing underachievement, one that combined with the *Milliken v. Bradley* litigation⁶ to end desegregation remedies for all intents and purposes. In *Rodriguez*, the Court could not resolve the exceedingly complex and rival economic models of school finance (the field was “unsettled and disputed” and “this Court’s lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels”)⁷ and so deferred to the states and local schools districts by declaring that education was not a fundamental right. The *Rodriguez* case was brought in San Antonio, where virtually all the children were Chicano, but the legal strategy decision was made not to argue the case in racial or ethnic terms.

II. CASE STUDIES

A. *Keyes v. School District No. 1*

This Article is about several important civil rights cases litigated by MALDEF in its early life as a purposive organization. Therefore, this Article is also about how a civil rights litigation organization serving Mexican American interests found its voice and trajectory. If, in *Rodriguez* and *Keyes* the relative newcomer MALDEF in the early 1970s was uncoordinated or too late to the game to play, well-intentioned progressive Anglo lawyers and the LDF can be accused of proceeding ill-advisedly into litigation where, unlike the Southern strategy that had prevailed in so many school desegregation cases before and after *Brown v. Board of Education (Brown I)*,⁸ Southwestern or Western desegrega-

each instance was subsequently constitutionalized in the U.S. Supreme Court’s decisions to combine Black and Latina/o students in relation to White students in the ‘tri-ethnic’ school district.”).

5. See *Rodriguez*, 411 U.S. at 54–55.

6. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977); *Milliken I*, 418 U.S. 717 (1974).

7. *Rodriguez*, 411 U.S. at 23, 42.

8. 347 U.S. 483 (1954). *Brown* was essentially a Southern strategy, broadly construed. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY passim* (2004); BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 125–26 (1984); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1956–1961*, at 150–86 (1994); MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991*, at 68–90 (1997); MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 167–85 (2004); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68

tion would inevitably have to account for the Mexican American schoolchildren. These children were likely to be in greater numbers than even the African American children, and with different linguistic instructional needs. (This flawed strategy would be even less likely to prevail when, as in Denver (*Keyes*) and San Francisco (*Lau v. Nichols*⁹), there were large numbers of students speaking Asian languages as well.) This myopic, singular focus showed most notably in *Keyes*, which ended up setting desegregation against bilingual education instruction, a conundrum that need not have occurred. The Supreme Court, even as it vacated the district court's remedial plan that had included bilingual education instructional programs for "Hispano" children, noted what could have been, given the similar racial histories of the two communities in the Southwest or areas with substantial numbers of Mexican Americans:

Before turning to the primary question we decide today, a word must be said about the District Court's method of defining a "segregated" school. Denver is a tri-ethnic, as distinguished from a bi-racial, community. The overall racial and ethnic composition of the Denver public schools is 66% Anglo, 14% Negro, and 20% Hispano. The District Court, in assessing the question of de jure segregation in the core city schools, preliminarily resolved that Negroes and Hispanos should not be placed in the same category to establish the segregated character of a school. Later, in determining the schools that were likely to produce an inferior educational opportunity, the court concluded that a school would be considered inferior only if it had "a

GEO. L.J. 1, 34-44 (1986); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L. J. 256 *passim* (2005); Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867 *passim* (1991). In Denver, Colorado, local White lawyers and outside LDF counsel filed suit on behalf of eight "Negro," "Hispano," and "Anglo" families against the Denver public school board and its administration on June 19, 1969. See Brief for Respondents at 2-3, *Keyes v. Sch. Dist. No. 1*, 313 F. Supp. 61 (D. Colo. 1970) (No. 71-507), 1972 WL 136241, at *2-3; see also *Keyes*, 313 F. Supp. 61.

Plaintiff co-counsel Craig Barnes has written a useful first-person version of the events, where he mentions Latinos in one paragraph: "La Raza Unida erupted out of the west side . . . [Its] leader [was] militant Hispanic Corky Gonzales . . . [At a school board meeting,] Gonzales made a passionate speech to the packed auditorium. The speech crackled with threats and tension." Craig Barnes, *A Personal Memoir of Plaintiffs' Co-counsel in Keyes v. School District No. 1*, 90 DENV. U. L. REV. 1059, 1062 (2013). After my symposium panel presentation, when I made the obvious and verifiable point that there had been no Latino lawyers involved in the case when it was originally filed, he vigorously upbraided me at the microphone for having said so. After his questioning, he came up to the table and said that the plaintiffs' attorneys had "tried to get Corky to help" them and that they had tried to get MALDEF on board, but that "MALDEF had a different theory of the case than ours, so they refused." I confess I was nonplussed to discover that they had tried to consult non-lawyer Corky Gonzales, whose children had all gone to parochial schools in Denver, for any legal involvement or counsel. I said so, and responded to him, "But I think you made my point about not involving any Latino lawyers." He said, "There weren't any others except MALDEF, and they refused." His published version of events tellingly omits any other mention of Latino children, MALDEF's ultimate intervention and role, or references to bilingual education or pedagogy. In addition, I have consulted the MALDEF papers from that period, and found no written evidence of the exchange. My version is supplemented by discussions with and writings by Peter Roos and discussions with George Korbel, MALDEF lawyers at the time involved with these cases, as well by discussions with *Keyes* historian Professor Tom Romero.

9. 414 U.S. 563 (1974).

concentration of either Negro or Hispano students in the general area of 70 to 75 percent.” We intimate no opinion whether the District Court’s 70%-to-75% requirement was correct. The District Court used those figures to signify educationally inferior schools, and there is no suggestion in the record that those same figures were or would be used to define a “segregated” school in the de jure context. What is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school’s student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration. The District Court has recognized these specific factors as elements of the definition of a “segregated” school, and we may therefore infer that the court will consider them again on remand.

We conclude, however, that the District Court erred in separating Negroes and Hispanos for purposes of defining a “segregated” school. We have held that Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment. Indeed, the District Court recognized this in classifying predominantly Hispano schools as “segregated” schools in their own right. But there is also much evidence that in the Southwest Hispanos and Negroes have a great many things in common. The United States Commission on Civil Rights has recently published two Reports on Hispano education in the Southwest. Focusing on students in the States of Arizona, California, Colorado, New Mexico, and Texas, the Commission concluded that Hispanos suffer from the same educational inequities as Negroes and American Indians. In fact, the District Court itself recognized that “[o]ne of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination.” This is agreement that, though of different origins Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of “segregated” schools.¹⁰

This strategic mistake by the private lawyers and the experienced, purposive organization LDF—perhaps miscalculating that the Court would not take Latino interests into account if they were simply not argued—meant that MALDEF was allowed to intervene. However, its theory of the case not only undermined that of the Black schoolchildren, but these competing theories inevitably led to different proposals for the appropriate remedies, ones that were treated as mutually exclusive or inconsistent. This conflict not only countermanded the other parties’ larger vision for the Denver school district but also allowed the district to play the two sides against each other, with its own plan emerging as the plau-

10. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 195–98 (1973) (alteration in original) (footnotes omitted) (citations omitted) (quoting *Keyes*, 313 F. Supp. at 69, 74).

sible interest-free and efficacious remedy.¹¹ A different set of Anglo lawyers and the LDF miscalculated in *Rodriguez* as well in briefs supporting the plaintiffs, where the LDF urged that the case be treated as one of racial discrimination, not the theory being pursued by attorney Arthur Gochman, who had strategically chosen a different path.¹² Indeed, this choice of a theory led the LDF to mischaracterize and misstate the district court's holding, noting that the *Rodriguez* "claim based on race was specifically upheld" by the trial court, when this was not accurate.¹³ It also urged that the state's program of school finance was unconstitutionally racially discriminatory and that Gochman's clients had *sub silentio* claimed racial discrimination: "The money differences proved by plaintiffs in this case are material enough to warrant judicial intervention in light of their relationship to the other factors present, including race and poverty" and, tellingly, "Plaintiffs are all Mexican-Americans. They claimed relief as and for Mexican Americans."¹⁴

Prior to the rise of MALDEF, the Puerto Rican Legal Defense and Education Fund (PRLDEF), other organizations, and lawyers advancing the interests of Latinos, the NAACP LDF pursued a sole and clear focus on its African American client interests, ones that in a more plural and diverse school universe would more likely begin to collide with the growing exercise of Mexican American legal interests, especially if it took up litigation in regional areas where Latinos were likely to reside or even predominate, as in Denver. And as the *Keyes* case's leading scholars over the years have noted, this was a case where MALDEF was accorded respect and made an important entry into complex educational litigation, but it also introduced a number of difficult issues into the binary world of Black and White school districts in the polity, including nomenclature, terminology, forms of relief, the history of Mexican American schooling, and the role of Spanish-language instruction or bilingual

11. See Peter D. Roos, *Bilingual Education: The Hispanic Response to Unequal Educational Opportunity*, LAW & CONTEMP. PROBS. 111, 134-40 (1978) (discussing the tension between desegregation and bilingual education). The LDF lawyers in *Keyes* were not Denver lawyers and were imported from other regions of the organization.

12. Tom I. Romero, II, *MALDEF and the Legal Investment in a Multi-colored America*, 18 LA RAZA L.J. 135, 146 (2007) (footnote omitted) ("MALDEF continued to push a litigation agenda to force courts to recognize the distinct racialization and color positioning of Mexican Americans. In so doing, MALDEF tested the legal boundaries of a potentially more expansive color line in jurisprudence and legal discourse by investing in the non-Whiteness and non-Blackness of the Mexican American community. Though courts would consistently relegate Mexican Americans to an in-between racial and ethnic space, a claim and commitment to 'brownness' would continue to animate Mexican American legal claims to equality into the [twenty-first century].").

13. See Brief for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae at 7-8, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332), 1972 WL 136434, at *7-8 [hereinafter Brief for LDF]; see also *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 281 (W.D. Tex. 1971) (holding that the method of state financing for public elementary and secondary education deprived plaintiffs equal protection of the laws under the Fourteenth Amendment to the United States Constitution).

14. Brief for LDF, *supra* note 13, at 7, 14 (emphasis omitted). This charge was the mirror image of that raised by MALDEF in its attempt to intervene in *Keyes*.

education in districts where other languages were also prevalent.¹⁵ To be sure, these were not inappropriate or unwelcome, but the entry of MALDEF must have been as exasperating to the LDF as was the entry of Chinese Americans into the turbulent waters of language instruction in the San Francisco schools. MALDEF President Vilma Martinez snapped to an interviewer that “*Lau* [would] be as hard to enforce as *Brown v. Board of Education*.”¹⁶

MALDEF lawyer Peter Roos put the best spin he could on the *Keyes* remedy that was eventually put into place:

Arguments over bilingual education invariably turn into debates about “success” as reflected in research findings. Putting aside the inherent weaknesses in much educational research, an additional factor ought to be weighed in such discussions. It is important to understand that a bilingual education program merely seeks to provide [limited-English-proficient (LEP)] students with what others take for granted, namely, comprehensible instruction and English proficiency. While it is correct to hold bilingual education programs to high degrees of rigor and scrutiny, it should not obscure the fact that the adoption of such a program merely is the first step in assuring educational success for LEP students. “Success” will not be achieved unless those additional components of any effective school instructional program are made part of bilingual programs.¹⁷

This requirement had been observed in the breach historically when predominantly Anglo school boards and educators used the existence of Latino schoolchildren to be traded off in demographic measures against African American children. This bad faith measure was made possible by plaintiffs’ lawyers employing the “other-White” or “class apart” legal strategies that had mousetrapped attorneys representing Mexican American children’s interests and had thwarted desegregative efforts by Mexican American parents over the years, where they had objected to Mexican-only schools in inferior situations.¹⁸

Of the remedial phase in *Keyes*, Roos wrote:

15. See Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911, 949–58 (2010); Rachel F. Moran, *Foreword—The Lessons of Keyes: How Do You Translate the American Dream*, 1 LA RAZA L.J. 195 *passim* (1986) [hereinafter Moran, *Lessons of Keyes*]; Rachel F. Moran, *Getting a Foot in the Door: The Hispanic Push for Equal Educational Opportunity in Denver*, 2 KAN. J.L. & PUB. POL’Y 35 *passim* (1992); Rachel F. Moran, *Neither Black nor White*, 2 HARV. LATINO L. REV. 61 *passim* (1997); Roos, *supra* note 11, *passim*.

16. Linda Mathews, *Lau Ruling Sparks New Litigation*, RACE REL. REP., Sept. 1974, at 38, 38 (quoting Vilma S. Martinez, President & Gen. Counsel, MALDEF) (internal quotation marks omitted).

17. Peter D. Roos, *Implementation of the Federal Bilingual Education Mandate: The Keyes Case as a Paradigm*, 1 LA RAZA L. J. 257, 276 (1986).

18. See, e.g., Steven H. Wilson, *Brown over “Other White”: Mexican Americans’ Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HIST. REV. 145 (2003); Jorge C. Rangel & Carlos M. Alcala, Comment, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 342–48 (1972).

The trial of a language rights case, like most other complex civil rights litigation, is properly viewed in two phases. The first phase is the “liability” phase in which the plaintiffs have the burden of establishing that the practices of the educational authority violate their rights under law. Once that is established, and the court so rules, a “remedial” phase is entered. Drawing upon the practice that has evolved in desegregation litigation, the second phase typically involves the presentation of a remedial plan by the school district, followed by an opportunity for the plaintiffs to question its adequacy and to present their own plan should the school district proposal fail.

It is appropriate at the remedial phase to include matters in a plan whose absence might not trigger liability in the first instance. This may be necessary to make the plaintiffs whole, and to remove “root and branch” barriers to educational success that have evolved through the unlawful practice. The one limitation is that the remedy must bear some reasonable relationship to the wrong found at the liability phase.

As we approached this second phase of the case, we were confronted with a decision that is common to this litigation: Do you continue with a formal litigation posture or do you attempt to reach an agreement on the remedy? We made the determination that an agreed-upon plan was a preferable solution and that a return to court should occur only if the negotiations failed. At the heart of this decision was the belief that the school district would be more likely to faithfully implement a plan for which they felt some ownership. Conversely, it was felt that a court-imposed plan might be followed to the letter but without the spirit to make it truly work. We thus approached the school district and the court with the proposal that we work toward such a plan with certain fairly demanding time frames. If negotiations did not bear fruit within these time frames, it was understood that we would feel compelled to invoke the court’s processes. The school district and the court agreed.¹⁹

As perceptively and thoroughly documented by legal scholar Rachel F. Moran, the structure of the various education cases leading to the *Keyes* litigation in effect pitted the two groups against each other as each maintained a different theory of the case. Moreover, the theories of the case were not only different but at cross-purposes. Professor Moran cited the school board attorney as inevitably attempting to play one interest off the other:

The first challenge presented by *Keyes* was reconciling the mandate to desegregate the Denver school district with the contemporaneous effort to implement bilingual education programs. The language claims in *Keyes* were brought only after a far-reaching desegregation decree had been issued. [However, MALDEF] mobilized

19. Roos, *supra* note 11, at 268–69 (footnotes omitted).

precisely because the decree threatened to destroy bilingual education programs in Denver.

The [Denver school board attorney Michael] Jackson and [Peter] Roos [viewpoints] differ markedly in their treatment of the relationship between bilingual education and desegregation. Jackson states that the school district was concerned that the court's evaluation of instructional programs for LEP and [non-English-proficient (NEP)] children would be prejudiced by a previous adverse holding in the desegregation litigation. According to Jackson, his client [the Denver school board] believed that:

[T]he earlier finding that the school district violated the Constitution [in conjunction with the desegregation decree] would weigh heavily in the court's consideration of the evidence [regarding an entitlement to bilingual education]. Our strategy centered on impressing upon the court the need to consider the language rights issue independently from any prior history of segregation. Ultimately, this proved to be the most crucial and least successful [school board strategy].

Jackson concludes that the board did not succeed in dissociating the language issue from the desegregation case, citing the district court's refusal to speculate on how the language claims would have been resolved if they had not been part of the desegregation case.²⁰

Professor Moran also determined that these antagonisms arose at least in part due to the structural features of the attorney participation and the inescapable differences in perspective between those on the inside defending the school district and those on the outside who were motivated by their clients' historic involvement in this case and others before it:

Clearly, in *Keyes*, prospective implementation of the legal mandate was as critical for the intervenors as [was] demonstrating past violations.

Although additional investigation will be necessary to substantiate these observations, the disparity in the attorneys' concern with implementation may reflect their differential participation in the remedial phase of the case. The intervenors' counsel undoubtedly played a pivotal role in negotiating the consent decree and probably enjoyed enhanced client confidence after a recent courtroom victory. In marked contrast, defense counsel's influence may have diminished at the remedial stage. The defense attorneys had suffered a demoralizing loss that probably undermined their attorney-client relationship. Moreover, they were certainly less familiar with school district affairs than [were] local administrators. School personnel therefore

20. Moran, *Lessons of Keyes*, *supra* note 15, at 199–200 (seventh, eighth, ninth, and tenth alterations in original) (footnotes omitted) (quoting Michael Jackson, *Bilingual Education Litigation in Denver: The School District's Perspective*, 1 LA RAZA L.J. 250, 252 (1986)).

may have played a greater role in the negotiation process than they had at earlier stages of the case.

. . . To address more comprehensively the multiplicity of interests affected by *Keyes*, future research will have to examine not only the litigators' perspectives but also those of their LEP and NEP clients, the judge, litigators and clients demanding desegregation, and community representatives of other language groups. Only then will the interplay of litigation strategies, judicial responses, and meaningful reform be more fully understood.²¹

Thus, in Professor Moran's telling of this rich and complex Denver story, the backstory is largely one of the civil procedure of complex litigation and its political algebra, including who gets to make the decisions among the various parties and how management of a complicated and sprawling case favors the governmental insiders, such as the Denver school board, who may lose at the front end but prevail in the remedy and implementation stages. If they do so, it is not only due to the structural advantages that insiders enjoy but also due to the deeper pockets and better access to social science expertise at the trial level and to implementers at the remedy stages. MALDEF played a remarkably significant role in the case but intervened well after the race had begun and then had its more complex story arc of linguistic minority children, disagreements among experts over the efficacy of bilingual education as an instructional strategy for remedying complex language interests, and a poorly meshed or coordinated litigation plan with the original plaintiff lawyers and community. Professor Moran has usefully catalogued these various political features as "status conflict analysis."²² Fighting on all these fronts would have been difficult if MALDEF had undertaken the litigation originally on its own; yet, doing so as an intervenor proved to be fatal and ineffective because MALDEF was the resented and late-intervening party.

In the end, MALDEF's approach in comprehensive equal educational policy litigation may have had a better chance of prevailing, despite the judicial ambivalence to bilingual education as either a legal theory or instructional remedy.²³ In today's courts, when racial assign-

21. *Id.* at 202–03 (footnotes omitted).

22. See Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321, 325 (1987).

23. For example, Dean Moran has looked at the cruel Structured Immersion Initiatives (SEI) that have arisen in California and elsewhere, requiring that all children, no matter their language status, be taught in English:

Whatever the debate over colorblindness as a constitutional aspiration, it is hard to imagine how courts can be deaf to linguistic diversity. Language is far from irrelevant to the ability to participate in the educational process, and therefore attending to linguistic difference is an integral part of sound pedagogy. Yet, because courts afford constitutional protection only when they find irrational animus, the safeguards for English language learners who challenge language policy have been significantly diluted. In order to obtain relief, these students must establish an egregious abuse of discretion. Indeed, to be ac-

ments, even voluntary ones, have been essentially banned by subsequent Supreme Court decisions²⁴ and when there are virtually no public predominantly Anglo school districts, this algorithm may be instructive in a well-pleaded case, especially in a school district where immigration may have played a substantial role in increasingly diverse home languages and where there may be a state constitution that has favorable constitutional traction for bringing such a case. *Keyes* was not such a case.

How do *Keyes* and *Rodriguez*—both ostensibly parallel cases where MALDEF was not the lead architect, but where both the organization and Mexican American client schoolchildren played such important roles—intersect? The plaintiff lawyers in *Keyes* argued a case with three interlocking pieces: various school board policy decisions over the years had produced segregated schools through manipulation of residency policies, boundary lines, and the other segregatory school siting mechanisms. But the Court held that many of the policies were so longstanding and well-established (many of them over twenty-five years old), that they were neither de jure (they occurred before *Brown* had outlawed them, and there was substantial mobility in the city) nor de facto (the data were complex and confusing): any segregation evident probably “occurred long after these [school board] decisions were made” or “[t]he impact of the housing patterns and neighborhood population movement stand out as the actual culprits.”²⁵ Plaintiffs also argued that the neighborhood school policy, even if there was no discriminatory intent evident, should be found unconstitutional if it led to segregation in fact, as they argued it did.²⁶ Finally, invoking *Plessy v. Ferguson*,²⁷ they and the LDF attempted to prove to the Court that many of the Denver schools, whether de jure or de facto segregated or racially isolated, resulted in unequal educa-

tionable, deficiencies in language instruction have to be grave enough to deny children a meaningful opportunity to learn.

This traditional civil rights framework ignores significant differences between language and race. Courts already have recognized the constitutive role of language in other legal contexts. In these cases, the focus is not on equality but on liberty. Judges have been steadfast in recognizing a parent’s right to bring up a child free of undue governmental interference, and an integral part of this freedom is the capacity to transmit the patrimony of language and culture. These decisions raise the possibility that courts should evaluate SEI initiatives by considering both the equality and liberty interests that are implicated. In particular, public schools could be required to uphold a principle of equal liberties that would protect a linguistic minority parent’s right to participate in shaping his or her child’s education on the same terms as other parents do. SEI initiatives, by substantially constraining a parent’s voice in instructional decisions, arguably would violate this norm of basic fairness.

Rachel F. Moran, *Equal Liberties and English Language Learners: The Special Case of Structured Immersion Initiatives*, 54 HOW. L.J. 397, 398–99 (2011).

24. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–11 (2007) (disallowing voluntary racial transfer policy); see also *Brown*, *supra* note 3, at 739–40.

25. *Keyes v. Sch. Dist. No. 1*, 313 F. Supp. 61, 75–76 (D. Colo. 1970), *aff’d in part, rev’d in part*, 445 F.2d 990 (10th Cir. 1971), *modified and remanded*, 413 U.S. 189 (1973).

26. See *id.* at 63–64.

27. 163 U.S. 537 (1896).

tional opportunity.²⁸ Thus, they argued for *Swann*-style or other relief, no matter the underlying cause.²⁹

Importantly, although the Court gave short shrift to the first two pieces, it did hone in on the third piece, determining that “segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity.”³⁰ Thus, in a remedy that would mirror *Rodriguez*-like equality measures, the Court produced more than a dozen tables of statistical data measuring the inequalities among the various schools, noting that in almost all cases the matches showed minority schools were receiving fewer resources.³¹ To determine unconstitutional inequality, the Court contrasted the minority-racially isolated school data with the predominantly White school data along five measures: three educational input measures (teacher experience, teacher turnover, and school facilities) and two outcome measures (student achievement and dropout rates). It also minimized the role of busing—the then-preferred form of remedy—in any remedial plan: “In connection with equalizing the educational opportunity, it is not so clear that compulsory transportation is the answer.”³²

At the end of the day, upon its remand, the district court found that the intentional segregation demonstrated in parts of the city rendered the entire Denver system an unconstitutionally segregated system, and the court adopted a system-wide desegregation plan.³³ On appeal, the Tenth Circuit upheld the district court’s holding that there was evident district liability and affirmed the student assignment and transportation plan.³⁴ Here is the intersection between the two theories: while the district court determined that segregation played a key role in producing inequality, it did not believe that the actual remedy necessitated traditional desegrega-

28. See *Keyes*, 313 F. Supp. at 63–64; see also *id.* at 83 (citing *Plessy*, 163 U.S. at 537).

29. *Swann* was clearly the backdrop of this point, even though it was not prominently argued, perhaps because it grew from a Southern de jure segregated setting. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 5–6 (1971).

Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems. No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system.

Id. at 28 (footnote omitted).

30. *Keyes*, 313 F. Supp. at 82.

31. See *id.* at 78–85.

32. *Id.* at 84.

33. See *Keyes v. Sch. Dist. No. 1*, 380 F. Supp. 673, 682–83 (D. Colo. 1974), *aff’d in part, rev’d in part*, 521 F.2d 465 (10th Cir. 1975).

34. See *Keyes*, 521 F.2d at 479.

tion rather than compensatory educational measures.³⁵ The remedy elided the original theory brought by the plaintiff lawyers, and although it did not embrace the detailed and comprehensive relief plan proffered by MALDEF, it did adopt MALDEF's theory of relief: that there be a relief irrespective of causal factors and that it should look like compensatory educational measures, such as those that were likely to arise in school equity finance.³⁶

But to those keeping track of entrepreneurial policy winners and losers, it is inarguable that MALDEF came out of the *Keyes*, *Lau*, and *Rodriguez* cases tempered in the crucible of high-stakes litigation, and while the organization had not prevailed, it had endured. As for the long-term efficacy of its status, by the time Denver finally mopped up all the *Keyes* litigation issues in 1983–1984,³⁷ MALDEF had already become the chief architect of an even more fundamental issue, and an education-policy entrepreneur on the growing issue of undocumented schoolchildren, by prevailing in *Plyler v. Doe*.³⁸

B. *Plyler v. Doe*³⁹

In 1975, the State of Texas enacted section 21.031 of the Texas Education Code, allowing its public school districts—called independent school districts (ISDs) in Texas—to charge tuition to undocumented children. The legislature held no hearings on the matter, and no published record explains the origin of this revision to the school code. Dis-

35. See *Keyes*, 380 F. Supp. at 682.

36. See *id.* at 684–89.

37. See *Keyes*, 380 F. Supp. at 682–83. A number of years ensued, with the various parties quarreling over the remedy and its implementation. See, e.g., *Keyes v. Sch. Dist. No. 1*, 540 F. Supp. 399 (D. Colo. 1982). After many years of presiding over the parties disagreeing over the appropriate instructional remedy (in English, Spanish, and Asian languages), district court Judge Richard Matsch issued a Memorandum of Opinion on December 30, 1983, in which the LDF was not even a party, with Peter Roos, MALDEF, and META lawyers representing the Congress of Hispanic Educators, et al., as plaintiff-intervenors. The judge noted:

A failure to take appropriate action to remove language barriers to equal participation in educational programs is a failure to establish a unitary school system.

On December 16, 1982, an order was entered appointing three persons as the Compliance Assistance Panel and at a hearing held on January 4, 1983, it was established that the panel would attempt to work with the district on the ten matters identified in an earlier order to show cause as necessary steps toward developing a final order in this case. While this court has some awareness that there have been contacts by the panel members with the Board of Education and administrative staff of the district, there has been no formal submission to this court on any of those items.

Keyes v. Sch. Dist. No. 1, 576 F. Supp. 1503, 1522 (1983). The district court ordered a January 1984 hearing. *Id.*

38. 457 U.S. 202 (1982); see MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN *passim* (2012).

39. This Part II.B utilizes my chapter, Michael A. Olivas, *Plyler v. Doe, the Education of Undocumented Children, and the Polity*, in IMMIGRATION STORIES 197 (David Martin & Peter Schuck eds., 2005). I revisit and add to this chapter in this Part in order to explore the larger context of Mexican American school litigation at the times *Keyes* was being argued. The material was reprinted from *Immigration Stories* with permission of West Academic Publishing.

cussions with legislators from that time have suggested that it was inserted into a larger, more routine education bill, simply at the request of some border-area superintendents who mentioned the issue to their representatives.⁴⁰ The statute, in pertinent part, read:

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.⁴¹

Even though they were entitled under the statute to do so, not all the state's school boards chose to charge tuition. The state's largest district, Houston ISD (with over 200,000 students), and a smaller one, Tyler (with approximately 16,000 students) allowed them to enroll but required parents or guardians to pay \$1,000 annually for each child. In addition, several of the school districts nearest the border, such as Ysleta ISD (near El Paso and across the border from Ciudad Juarez) and Brownsville ISD (across the border from Matamoros), reported they had excluded these children from enrolling, as did the state's second largest district, Dallas ISD, many hundreds of miles from the border.

40. In the Houston case challenging this statute, the federal court trial judge found:

The court cannot state with absolute certainty what the Legislature intended when passing the amendment to 21.031. Neither the court nor the parties have uncovered a shred of legislative history accompanying the 1975 amendment. There was no debate in the Legislature before the amendment was passed by a voice vote. There were no studies preceding the introduction of the legislation to determine the impact that undocumented children were having on the schools or to project the fiscal implications of the amendment.

In re Alien Children Educ. Litig., 501 F. Supp. 544, 555 n.19 (S.D. Tex. 1980). The record, such as it is, showed that the legislation likely arose after a Texas attorney general opinion held that prior to 1975, the Texas education law did not differentiate among children based upon their immigration status. *Alien Children Entitled to Attend Public Schools*, Op. Tex. Att'y Gen. H-586, 3 (1975).

41. TEX. EDUC. CODE ANN. § 21.031 (West 1994) (repealed by Acts of 1995, 74th Leg., ch. 260 (May 30, 1995)).

The first challenge to section 21.031 was *Hernandez v. Houston Independent School District*,⁴² filed in spring 1977 in state court by a local Houston attorney, Peter Williamson. The district court and the court of civil appeals rejected the due process and equal protection arguments against the statute, and in November 1977, the appeals court held that such legislation was reasonable: “The determination to share [the state’s] bounty, in this instance tuition-free education, may take into account the character of the relationship between the alien and this country.”⁴³

While there was some localized resistance across the state to the practice of charging tuition for what was generally referred to as “free public schools” and from which absence constituted truancy under Texas law, the issue appears to have come to MALDEF’s attention just prior to a September 26, 1977 letter from Joaquin G. Avila, director of the San Antonio office of MALDEF, to the MALDEF National Director for Education Litigation, Peter Roos. He wrote:

This statute was made effective on August 29, 1977. Basically, this statute seeks to regulate the number of students who move in with relatives to attend another school district. As the amended statute now provides (Section 21.031(a)), a student who lives apart from his parent, guardian, or other person having lawful control of him under an order of a court, must demonstrate that his presence in the school district was not based primarily on his or her desire to attend a particular school district. In other words, if a case of hardship can be established, a student will be able to attend the school district. Otherwise, the relatives will have to secure a court order of guardianship. This requirement will impose a hardship on those families who cannot afford an attorney to process a guardianship. So far we have not received any complaints only a request by Pete Tijerina, our first general counsel to launch a lawsuit.

What are your feelings on the constitutionality of such a provision. What would we have to show to demonstrate a disparate impact. Please advise at your earliest convenience.⁴⁴

42. 558 S.W.2d 121 (Tex. Civ. App. 1977).

43. *Id.* at 125. The case was tried in Austin rather than in Houston because of the administrative proceedings required to challenge the state administrative agency.

44. Letter from Joaquin G. Avila, Dir. of San Antonio Office, MALDEF, to Peter Roos, Nat’l Dir. of Educ. Litig., MALDEF (Sept. 26, 1977) (on file with Stanford University Cecil H. Green Library) [hereinafter Letter from Avila to Roos]. I found a copy of the letter in the Stanford University Cecil H. Green Library special collections room. The concordance to these records is RESEARCH GUIDE TO THE RECORDS OF MALDEF/PRLDEF (Theresa Mesa Casey & Pedro Hernandez eds., 1996). Additional files from early MALDEF work in Houston are available in the archives of the Houston Metropolitan Research Center (HMRC), particularly the Abraham Ramirez collection, used extensively by Guadalupe San Miguel Jr. to explain earlier Houston school desegregation cases and bilingual education issues in his excellent study, BROWN, NOT WHITE: SCHOOL INTEGRATION AND THE CHICANO MOVEMENT IN HOUSTON (2001). Ramirez was a local civil rights attorney who was affiliated with MALDEF in its early years, although he was not an employee. See OLIVAS, *supra* note 38, at 107 n.10. For additional studies of Houston schooling, see generally WILLIAM HENRY KELLAR, MAKE HASTE SLOWLY: MODERATES, CONSERVATIVES, AND SCHOOL DESEGREGATION IN

This letter contains the spores of the *Plyler* case (without referencing the *Hernandez* litigation that was underway in the state courts in Houston at the same time), even though Avila does not appear to have appreciated the full dimensions of the matter that had been flagged by MALDEF board member (and one of the organization's founders in the mid-1960s) Pete Tijerina. To Avila, the issue kicked up to San Francisco was whether the revised Texas statute improperly affected the residency of undocumented students by requiring the parents or formal legal guardians to reside in the district. This was a related issue but one far less essential to the algebra of undocumented school attendance than was the tuition issue presented eventually in *Plyler*, especially for school districts located in the interior, away from the border. Indeed, a year after *Plyler* ruled in favor of the schoolchildren, the exact issue Avila noted in his letter reached the Supreme Court in *Martinez v. Bynum*,⁴⁵ where it was resolved in favor of the school districts involved.⁴⁶ By that time, however, the more fundamental and important threshold issue had been settled; all else was detail.

But this was not clear in 1977, when Roos began to discover the full extent of the practice in Texas and other states, even those without such statutes but where border districts unevenly enforced residency and truancy rules. He looked especially at the Southwestern and Western states, where most undocumented families resided, where undocumented Mexican immigration was most pronounced (as opposed to undocumented immigration from other countries and other hemispheres), and where MALDEF concentrated most of its program activities. After experiences as amici in *Keyes*,⁴⁷ *Serrano v. Priest*,⁴⁸ and other cases, and as attorneys in *Rodriguez*⁴⁹ and *Serna v. Portales*,⁵⁰ a case tried in New Mexico fed-

HOUSTON *passim* (1999); ANGELA VALENZUELA, SUBTRACTIVE SCHOOLING: U.S.–MEXICAN YOUTH AND THE POLITICS OF CARING *passim* (1999).

45. 461 U.S. 321 (1983). In order to end this practice, Congress in 1996 enacted what is now Immigration and Nationality Act, 8 U.S.C. § 1184(m) (2012).

46. *Martinez*, 461 U.S. at 321.

47. See Brief Amici Curiae, *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973) (No. 71–507), 1972 WL 137533.

48. 487 P.2d 1241, 1243–44 (Cal. 1971) (noting Mario Obledo, a co-founder of MALDEF, as amici curiae on behalf of the appellants).

49. Brief for Appellees, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332), 1971 WL 134333 (noting Mario Obledo, a co-founder of MALDEF, as an attorney for the appellees).

50. 499 F.2d 1147 (10th Cir. 1974). MALDEF took this New Mexico bilingual education case to the Tenth Circuit, applying *Swann*'s theory, and prevailed, an early and important success.

There was adequate evidence that appellants' proposed program was only a token plan that would not benefit appellees. Under these circumstances the trial court had a duty to fashion a program which would provide adequate relief for Spanish surnamed children. As the Court noted in *Swann v. Charlotte-Mecklenburg Board of Education*, "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Under Title VI of the Civil Rights Act of 1964 appellees have a right to bilingual education. And in following the spirit of *Swann*, we believe the trial court, under its inherent equitable power, can properly fashion a bilingual–bicultural program which will

eral court and in the Tenth Circuit by MALDEF lawyers, the organization had been searching for an appropriate Texas federal court vehicle to consolidate its modest victories in the many small state court cases it had taken on in its first decade of existence. It had also taken *White v. Regester*⁵¹ to a successful round in the U.S. Supreme Court, only to see the follow-up remand fall short of its desirable outcome.⁵² Unlike the more experienced focus of its role model, the NAACP Legal Defense Fund, which had strategically targeted desegregation as its reason for being, MALDEF had been somewhat behind the curve, in part due to its representation of ethnic and national-origin interests for Mexican Americans; in part due to the diffuse focus that derived from representing the linguistic, political, racial, financial, and even class interests of its variegated clients; and in part due to its incomplete involvement in these cases, where it aligned with other organizations but did not have full strategic reins or controls on the approach and strategy of the cases.

If it aspired to become a regular player in the elite U.S. Supreme Court litigation bar and civil rights world, MALDEF would have to take up its own cases, and win, and then preserve its wins down the road, making their stories known and their causes important to the larger world. After all, Mexican Americans in court were not African Americans, although their histories of oppression and exclusion from American Anglo life were more similar than they were dissimilar, especially in “Jaime Crow” Texas, the Mexican American Mississippi.⁵³ Even after

assure that Spanish surnamed children receive a meaningful education. We believe the trial court has formulated a just, equitable and feasible plan; accordingly we will not alter it on appeal.

Id. at 1154 (10th Cir. 1974) (citations omitted) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)).

51. 412 U.S. 755 (1973).

52. *Id.* at 755 (“In this litigation challenging the Texas 1970 legislative reapportionment scheme, a three-judge District Court held that the House plan, statewide, contained constitutionally impermissible deviations from population equality, and that the multimember districts provided for Bexar and Dallas Counties invidiously discriminated against cognizable racial or ethnic groups. Though the entire plan was declared invalid, the court permitted its use for the 1972 election except for its injunction order requiring those two county multimember districts to be reconstituted into single-member districts.”); see also Paul W. Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353, 382–87 (1976) (discussing the facts of *White*). But see *White v. Regester*, 422 U.S. 935, 935–36 (1975) (per curiam) (“We are informed that the State of Texas has adopted new apportionment legislation providing single-member districts to replace the multimember districts which are at issue before us in this case. That statute by its terms does not become effective until the 1976 elections, and intervening special elections to fill vacancies, if any, will be held in the districts involved as constituted on January 1, 1975. Rather than render an unnecessary judgment on the validity of the constitutional views expressed by the District Court in this case, which we do not undertake to do at this time, we vacate the judgment of the District Court and remand the case to that court for reconsideration in light of the recent Texas reapportionment legislation and for dismissal if the case is or becomes moot.”); see also *White v. Regester*, JUSTIA.COM, <http://supreme.justia.com/cases/federal/us/422/935/case.html> (last visited Apr. 20, 2013) (“In light of recent Texas apportionment legislation substituting single-member election districts for the multimember districts at issue, the District Court’s judgment is vacated, and the case is remanded to that court for reconsideration and for dismissal if the case is or becomes moot.”).

53. See Wilson, *supra* note 18, at 193; see also IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE passim* (1996); Richard Delgado & Vicky Palacios, *Mexican Amer-*

1954's *Hernandez v. Texas*⁵⁴ and earlier cases brought in the U.S. Supreme Court had addressed discrimination, MALDEF entered several cases and was required to educate courts on the poor educational opportunities available to Mexican Americans.⁵⁵ Historian Steven H. Wilson has noted the origins of the different litigation theories employed by the two groups to combat school segregation:

The . . . creation of MALDEF had less to do with the shift in thinking [about school desegregation strategies] than might be expected. The upheavals brought by the black civil rights struggle, the farm workers' movement, and antiwar protests inspired many disaffected Mexican-descended youths to adopt similar goals and direct action tactics—such as walkouts and other disruptive demonstrations—in order to combat the inequities they encountered. As a result, however, activists frequently found themselves sanctioned by school administrators or even law enforcement agencies. Instead of suing schools to change the rules of desegregation, therefore, MALDEF undertook a number of cases that established the new organization as something of an unofficial civil liberties bureau for militant Chicano students. Significantly, in these cases, MALDEF's attorneys did not argue—and in civil liberties cases had no reason to claim—that Mexican Americans were and ought to be considered a group distinct from Anglos. Nevertheless, MALDEF's early victories in this field helped to reestablish litigation as a tool for vindicating Mexican Americans' civil rights.⁵⁶

Evidence from the MALDEF side of the *Plyler* case clearly indicated that Roos and MALDEF President Vilma Martinez, a young Texas

icans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause, 50 NOTRE DAME L. REV. 393 *passim* (1975); Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CALIF. L. REV. 1143, 1151–52 (1998); Margaret E. Montoya, *A Brief History of Chicana/o School Segregation: One Rationale for Affirmative Action*, 12 LA RAZA L.J. 159, 163 (2001); Clare Sheridan, "Another White Race": *Mexican Americans and the Paradox of Whiteness in Jury Selection*, 21 LAW & HIST. REV. 109, 112 (2003); cf. Vicki L. Ruiz, "We Always Tell Our Children They Are Americans": *Mendez v. Westminster and the California Road to Brown v. Board of Education*, C. BOARD REV., Fall 2003, at 20, 22–23, 25 (describing the history of discrimination in California).

54. 347 U.S. 475 (1954).

55. See "COLORED MEN" AND "HOMBRES AQUI": *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN AMERICAN LAWYERING 131–33 (Michael A. Olivas ed., 2006). On this point, legal historian Romero has noted, in the matter of *Keyes*:

[I]t is no surprise that color consciousness played a central role in MALDEF's understanding of law and jurisprudence. Accordingly, the remainder of my essay briefly explores the manner by which MALDEF began to conceptualize the non-Whiteness of Mexican Americans as a matter of law. My analysis is therefore suggestive of not only an important transformation in the color consciousness for many in the Mexican American community, but of an emerging critique of the Black–White paradigm in American law. Indeed, as numerous Mexican Americans legally invested themselves in their non-White color status, largely but not exclusively as Chicana/os, the legal strategy pursued by MALDEF at this foundational moment reflected the extent that many in the community remained similarly committed to a categorization that recognized Chicana/os' distinctive status as a non-White and non-Black group.

Romero, II, *supra* note 12, at 136–37.

56. Wilson, *supra* note 18, at 193 (footnote omitted).

lawyer who had begun her civil rights career with the NAACP Legal Defense Fund, soon saw the case as the Mexican American *Brown v. Board of Education*: a comprehensive vehicle for consolidating attention to the various strands of social exclusions that kept Mexican-origin persons in subordinate status. This case promised to improve the lot of Mexican migrant workers and to address Texas school practices, long considered the most insensitive to Mexicans and Mexican Americans. It incorporated elements of school leadership and community relations, where the political powerlessness of Chicanos was evident even in geographic areas where they were the predominant population. The tuition dimension resurrected school finance and governance issues that had earlier been raised by Chicano plaintiffs, seeking to have the radically unequal school financing scheme in Texas declared unconstitutional. After initial success, Chicano plaintiffs lost in a controversial and disappointing 1973 decision, *San Antonio Independent School District v. Rodriguez*.⁵⁷ The ruling seemed designed to call a halt to any expansions in the use of the equal protection doctrine, and it specifically declared that education was not a fundamental right that would trigger strict scrutiny under that clause.⁵⁸ MALDEF was not the architect and only a supportive player in the *Rodriguez* litigation, although the plaintiffs were Mexican American families in San Antonio, then the headquarters and birthplace of the organization. And importantly, *Plyler* involved immigration status and even held out the promise to unite the class interests between immigrant Mexicans and the larger, more established Mexican American community in a way that earlier, important cases litigating jury selection, school finance, and desegregation had not been designed to achieve.⁵⁹ Although

57. For a detailed history of the case, see generally Michael Heise, *The Story of San Antonio Indep. Sch. Dist. v. Rodriguez: School Finance, Local Control, and Constitutional Limits*, in EDUCATION LAW STORIES 51, 51–82 (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

58. *Rodriguez*, 411 U.S. at 37–38 (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which ‘deprived,’ ‘infringed,’ or ‘interfered’ with the free exercise of some such fundamental personal right or liberty.”).

59. George A. Martinez, *Legal Indeterminacy, Judicial Discretion, and the Mexican American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555 *passim* (1994); see also NEIL FOLEY, *THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE* 8 (1997) (describing the unity of class interests); MARIO T. GARCÍA, *MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY & IDENTITY, 1930–1960*, *passim* (1989); Christopher Arriola, *Knocking on the Schoolhouse Door: Mendez v. Westminster, Equal Protection, Public Education, and Mexican Americans in the 1940s*, 8 LA RAZA L.J. 166 *passim* (1995); Delgado & Palacios, *supra* note 53, *passim*; Gary A. Greenfield & Don B. Cates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CALIF. L. REV. 662 *passim* (1975); Juan F. Perea, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420 *passim* (2004) (arguing “that there is a strong assimilative bias toward Whiteness and the English language both in our educational system and in the Supreme Court’s equal protection jurisprudence” and “that the Equal Protection Clause, as currently implemented through assimilation and integration, actually denies equality to Latinos, many of whom are native or bilingual Spanish speakers”); cf. GEORGE J.

these cases all occurred in Texas over many years—before and after the 1967–1968 birth of MALDEF—and had even included some significant victories, they had not appreciably improved the status of Chicanos or broken down the barriers for large numbers of the community.

In his pathbreaking study of Mexican American education litigation, historian Guadalupe San Miguel analyzed the lawsuits undertaken by MALDEF in Texas in the years 1970–1981, its earliest record. MALDEF undertook ninety-three federal and state court cases in the state during those years and compiled a substantial record across several areas: seventy-one cases in the area of desegregation (76.3%), four in employment (4.3%), three in school finance (3.2%), seven in political rights (7.5%), six in voting (6.5%), and two other education cases (2.2%); in addition, a number of the cases included collateral issues such as language rights and bilingual education.⁶⁰ As an example of these cases, MALDEF undertook *United States v. Texas*,⁶¹ a comprehensive assault upon the worst exclusionary practices by school districts, such as class assignment practices and inadequate bilingual education.⁶² The judge in that district court decision noted with some bite: “Serious flaws permeate every aspect of the state’s effort. . . . Since the defendants have not remedied these serious deficiencies, meaningful relief for the victims of unlawful discrimination must be instituted by court decree.”⁶³ The case, which began in 1970, ended with a whimper on September 27, 2010, with a final order from the U.S. District Court for the Eastern District of Texas,⁶⁴ following an April 12, 2010 revised order from the Fifth Circuit.⁶⁵ For any lawyering organization, forty years is a long time to oversee, even loosely, a court case.

SÁNCHEZ, BECOMING MEXICAN AMERICAN: ETHNICITY, CULTURE AND IDENTITY IN CHICANO LOS ANGELES, 1900–1945, at 87–128 (1993) (describing the different class interests between Mexican-Americans and Mexican immigrants in Los Angeles).

60. GUADALUPE SAN MIGUEL, JR., “LET ALL OF THEM TAKE HEED”: MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910–1981, at 174 tbl.10 (1987); see also Rangel & Alcalá, *supra* note 18, *passim*. I also examined in April 2007 and October 2010 all MALDEF board minutes and annual reports stored in the Los Angeles national headquarters.

61. 506 F. Supp. 405, 428 (E.D. Tex. 1981), *rev’d*, 680 F.2d 356 (5th Cir. 1982).

62. *Id.*

63. *Id.* The judge in this case was William Wayne Justice. *Id.* at 408. It is not surprising that such anti-Mexican legislation and practices would have originated in Texas, a jurisdiction widely regarded to be officially inhospitable to its Mexican-origin population. See ARNOLDO DE LEÓN, THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821–1900, *passim* (1983); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1986, *passim* (1987); CYNTHIA E. OROZCO, NO MEXICANS, WOMEN, OR DOGS ALLOWED: THE RISE OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT *passim* (2009); RICHARD R. VALENCIA, CHICANO STUDENTS AND THE COURTS: THE MEXICAN AMERICAN STRUGGLE FOR EDUCATIONAL EQUALITY *passim* (2008); cf. MARCOS PIZARRO, CHICANAS AND CHICANOS IN SCHOOL: RACIAL PROFILING, IDENTITY BATTLES, AND EMPOWERMENT *passim* (2005) (describing anti-Mexican legislation and practices in Los Angeles, California, and Washington state).

64. *United States v. Texas*, No. 08-40858, slip op. at 4 (E.D. Tex. Sept. 27, 2010).

65. *United States v. Texas*, No. 08-40858, slip op. at 33–34 (5th Cir. Apr. 12, 2010).

Over the years, MALDEF had joined forces with other Mexican American organizations, including more conservative groups such as the League of United Latin American Citizens (LULAC) and the American G.I. Forum, organizations active over the years in assimilationist and citizenship issues and Latino military veteran issues. Thus, these national organizations, all founded in Texas to combat discrimination, merged their divergent interests in order to effect solidarity and have since served as plaintiffs in cases filed by MALDEF, as have other regional and local Latino organizations.⁶⁶

Just as Thurgood Marshall had traveled the South to execute the NAACP Legal Defense Fund's longstanding strategic approach toward dismantling segregated schooling and the American apartheid system by seeking out the proper cases and plaintiffs, Martinez, Roos, and other MALDEF lawyers and board members had been seeking just the right federal case. They wanted to have a larger impact than they could expect from dozens of smaller cases in various state courts in the Southwest. If Mexican American plaintiffs could not win the school finance case in *Rodriguez*, with such demonstrable economic disparities as had been evident in that trial, MALDEF needed to win a big one, both to establish its credibility within and without the Chicano community and to best serve its clients. If a winning MALDEF case eventually disappointed, as in *Regester*, it needed to gain traction beyond the first round victory, so as to be—and importantly to seem to be—an important player over the long haul.⁶⁷ This case, involving vulnerable schoolchildren in rural Texas being charged a thousand dollars for what was available to other children for free, seemed that it might be that vehicle. The MALDEF lawyers

66. For example, *United States v. Texas*, 506 F. Supp. 405 (E.D. Tex. 1981), was formally styled United States of America, Plaintiff, Mexican American Legal Defense Fund, LULAC, and G.I. Forum, Plaintiffs–Intervenors v. State of Texas et al., Defendants. *Id.* For histories of these organizations, see generally CARL ALLSUP, THE AMERICAN G.I. FORUM: ORIGINS AND EVOLUTION *passim* (1982); BENJAMIN MARQUEZ, LULAC: THE EVOLUTION OF A MEXICAN AMERICAN POLITICAL ORGANIZATION *passim* (1993); SUZANNE OBOLER, ETHNIC LABELS, LATINO LIVES: IDENTITY AND THE POLITICS OF (RE)PRESENTATION IN THE UNITED STATES *passim* (1995); OROZCO, *supra* note 63, *passim*; HENRY A. J. RAMOS, THE AMERICAN GI FORUM: IN PURSUIT OF THE DREAM, 1948–1983, *passim* (1998); Laura E. Gomez, *The Birth of the “Hispanic” Generation: Attitudes of Mexican-American Political Elites Toward the Hispanic Label*, 75 LATIN AM. PERSP. 45 *passim* (1992); cf. Suzanne Oboler, *The Politics of Labeling: Latino/a Cultural Identities of Self and Others*, 75 LATIN AM. PERSP. 18 *passim* (1992) (describing how immigrants from different Latin American countries identify with the label “Hispanic”).

67. *White v. Regester*, 422 U.S. 935 (1975). My understanding of this case was greatly enhanced by former VISTA (Volunteers in Service to America) attorney and former MALDEF lawyer George Korbel, who filed a brief for MALDEF in the 1975 *Regester* case, only to be fired soon after in what he termed a “political bloodbath pushed by Ford” to relocate the national office to San Francisco. In several written and telephone exchanges in December 2012, he gave me generous time and details from the political squabbling that occurred during this period. Telephone Interviews with George Korbel, Former Attorney, MALDEF (Dec. 2012). His version of events was quite critical, but accurately dovetailed with several other accounts of that time, including discussions I have had with other present and former MALDEF staff. In full disclosure, I am a current MALDEF board member, although all conclusions I draw are my own and do not represent the organization or its leadership.

found their Linda Brown in Tyler, Texas, where brothers and sisters in the same family held different immigration statuses.⁶⁸ Some had been born in Mexico, and those born in Texas held birthright U.S. citizenship.⁶⁹ Perhaps more importantly, they found their Earl Warren in federal district court Judge William Wayne Justice, widely admired and reviled for his liberal views and progressive decisions.⁷⁰ Thus, in this small rural town of Tyler, Texas, the stage was set.

The first issue to arise after the case was filed was whether the children could be styled in an anonymous fashion in the caption and conduct of the case, so that their identities and those of their families would not be divulged. Use of the actual names of the plaintiffs in the earlier *Hernandez* case in state court against the Houston schools had placed all of them at risk of deportation. In the Tyler case, even though Judge Justice permitted the case to proceed with “John Doe” plaintiffs, the risk persisted. The U.S. Attorney had apparently asked the Dallas District Director of the Immigration and Naturalization Service (INS) to conduct discretionary immigration sweeps in the area that would have intimidated the families into dropping their suit.⁷¹ In response, Roos wrote to the head of

68. The families represented in this civil action have lived in the City of Tyler for a period of three to thirteen years. Each such family includes at least one child, not of school age, who is a citizen of the United States by virtue of his or her birth in the United States. *Doe v. Plyler*, 458 F. Supp. 569, 574 (E.D. Tex. 1978).

69. *Id.*

70. For example, Judge Justice was the trial judge in *United States v. Texas*, 506 F. Supp. 405 (E.D. Tex. 1981), *rev'd*, 680 F. 2d 356 (5th Cir. 1982), in which he found Texas and the school districts to have been out of compliance with regard to school desegregation and English language instruction obligations under federal law. *Id.* at 441–42. For examples of his long record of progressive decisions, see JOHN J. DILULIO, *GOVERNING PRISONS* 115 (1987); *id.* at 212–15 (describing Judge Justice’s role in Texas prison reform). For this record, he earned an impeachment bill, introduced on June 24, 1981, but never passed. H.R. 168, 97th Cong. (1981); *see also* FRANK R. KEMERER, *WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY* 94–98 (1991) (describing hostility towards Judge Justice and his family resulting from his record). He died in October 2009, with virtually all the obituaries citing his role in the *Plyler* case. *See* Albert H. Kauffman, *Judge William Wayne Justice: A Life of Human Dignity and Refractory Mules*, 41 ST. MARY’S L. J. 215, 216 n.1, 5 & 7 (2009). On the twenty-fifth anniversary of the case, the judge said of his ruling: “I think it’s the most important case I ever decided.” Katherine Leal Unmuth, *25 Years Ago, Tyler Case Opened Schools to Illegal Migrants*, DALL. MORNING NEWS, June 11, 2007, at 1A. The University of Texas School of Law maintains a website dedicated to him, with many of his papers, stories, decisions, etc. *The William Wayne Justice Papers*, UNIV. TEX. AUSTIN TARLTON L. LIBR., http://tarlton.law.utexas.edu/exhibits/ww_justice/doe_v_plyler.html (last visited Apr. 20, 2013).

71. The plaintiff in that early case was named Carlos Hernandez. *See* the letter from Peter Roos to Leonel Castillo where he warns, “We have been informed that the local United States Attorney, John Hannah, has requested the Director of [the Dallas INS] to take steps to deport the plaintiffs in this case and possibly to conduct a sweep in the Tyler region.” Letter from Peter Roos, Nat’l Dir. of Educ. Litig., MALDEF, to Leonel Castillo, Comm’r of Immigration & Naturalization, U.S. Dep’t of Just. (Sept. 13, 1977) (on file with Stanford University Cecil H. Green Library). This issue arose in another MALDEF case in which undocumented college students in Virginia who brought an action concerning a state statute that denied state college access to undocumented students sought to file their case anonymously. The judge ruled against them on this issue. *Doe 1 et al. v. Merten*, 219 F.R.D. 387, 396 (E.D. Va. 2004). And then he ruled against them on the larger issue, once alternative plaintiff organizations were enlisted as substitutes, holding that the State of Virginia could enact practices which denied undocumented students admission or residency status. *Equal Access Educ. v. Merten*, 325 F. Supp. 2d 655, 660 (E.D. Va. 2004) (finding that students did not have standing, absent evidence that institution denied admission on perceived immigration status); *see also* Nathan

the INS in Washington, requesting that he call off any planned raids and characterizing them as “trial-tampering,” a serious charge. As it happened, in this endeavor MALDEF enjoyed a run of luck, which is always an ingredient of successful trials. The then-INS Commissioner was Leonel Castillo, a native of Houston and a prominent Mexican American politician with progressive politics, himself a former Peace Corps volunteer who was married to an immigrant. At his direction, the INS undertook no raids during the trial. After these preliminary skirmishes, Judge Justice issued an injunction on September 11, 1977, enjoining the Tyler ISD from enforcing section 21.031 against any children on the basis of their immigration status.⁷²

Meanwhile, as a part of the overall trial strategy, Roos, Martinez, and other MALDEF officials began to press public opinion leaders to support the schoolchildren and to develop a backstory of public acceptance of their schooling and immigration status. As an example, in October 1977, Roos wrote leaders of the National Education Association (NEA), the progressive national teachers union to request support and assistance; NEA later filed a brief and provided additional support to MALDEF. In addition, MALDEF leaders traveled to meet with other Latino organizational leaders to enlist support and solicit resources and to encourage legal organizations to file amicus briefs on behalf of the plaintiff children.

On September 14, 1978, after a two-day hearing, Judge Justice issued his opinion, striking down section 21.031 as applied to the Tyler ISD. He found that the state’s justifications for the statute were not rational and violated equal protection, and that the attempt to regulate immigration at the state level violated the doctrine of preemption, which holds immigration to be a function solely of federal law.⁷³ Immediately after, the state moved for leave to reopen the case, citing the decision’s implications for other school districts in the state and seeking a chance to bolster the record. Observers have suggested that the state had simply underestimated the plaintiffs’ case, inasmuch as the judge in the *Hernan-*

Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 61 SMU L. REV. 47, 50 (2008); Amy Argetsinger, *Va. Student Unsure of His Standing: Colleges’ Views Differ on Immigrant’s Status*, WASH. POST, Sept. 25, 2004, at B1.

72. In the *Plyler* trial court case and at the Fifth Circuit, the U.S. Department of Justice and the U.S. Attorney intervened on the side of the schoolchildren. After he left office, Castillo returned to Houston. In 1983, he wrote in a foreword to a special immigration issue of a law review:

[T]he authors are all persons of recognized ability and concern . . . [Among others, Isaias Torres and Peter Schey] have all been involved in the daily battles of making the INA [Immigration and Nationality Act] fit a particular individual’s situation at a particular time.

During the time that I served as Commissioner (1977–[19]79), it was my privilege to be sued . . . by some of these individuals. I knew that regardless of the outcome, the ultimate goal of justice for immigrants would prevail because effective advocates help cure improper procedures and faulty legislation.

Leonel Castillo, *Foreword*, 5 HOUS. J. INT’L L. 191, 191 (1983).

73. *Doe v. Plyler*, 458 F. Supp. 569, 585–86, 590 (E.D. Tex. 1978).

dez case had sustained the statute fairly readily.⁷⁴ But Judge Justice overruled the motion because the “amended complaint does not state a cause of action against any school district other than the Tyler [ISD] and since this court intends to order relief only against [the Tyler ISD].”⁷⁵

During the federal trial, the issue of *Plyler*’s potential impact upon other Texas school districts naturally arose, as word had spread to dozens of other communities and sparked many companion lawsuits. The original *Hernandez* decision had not spawned similar state court litigation; MALDEF and others immediately turned to the federal courts so as to avoid having to litigate over the long haul in multiple, hostile state venues before elected state judges. MALDEF now confronted questions about how best to mesh its efforts, including its response to the *Plyler* appeals filed by the Tyler ISD and the State of Texas, with proceedings in other Texas venues. Some of the issues became clearer when the state’s largest school district, Houston ISD, faced a lawsuit in federal court in September 1978, filed by a group of local attorneys and another California-based public interest law firm, the Center for Immigrant Rights, with civil rights lawyer (and South African immigrant) Peter Schey as lead counsel. By this time, with the good news spreading from the Tyler case, four cases raising these issues had been filed in the U.S. District Court for the Southern District of Texas and two in the northern district. Moreover, the U.S. District Court for the Eastern District that had just decided *Plyler* faced six additional cases after the ruling. Rather than just suing the particular ISDs, these suits included as defendants the State of Texas, the Texas Governor, the Texas Education Agency (the state agency that governed K–12 public education in the state), and its Commissioner.⁷⁶ Eventually, all these fresh cases were consolidated into *In re Alien Children Education Litigation*⁷⁷ and tried in the U.S. District

74. Interview with Peter Williamson, *Hernandez* Lawyer, in Houston, Tex. (Oct. 12, 2010).

75. *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 552 (S.D. Tex. 1980).

76. See *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980); see also *Certain Named & Unnamed Noncitizen Children & Their Parents v. Texas*, 448 U.S. 1327 (1980); *In re Alien Children*, 501 F. Supp. at 549 nn.3–5 (noting that *Plyler* became a veritable magnet, as various plaintiffs and defendants were added, requiring many pages of explanation for these procedural issues, and included the following cases: *Martinez v. Reagen*, C.A. No. H-78-1797 (S.D. Tex. filed Sept. 18, 1978), *Cardenas v. Meyer*, C.A. No. H-78-1862 (S.D. Tex. filed Sept. 27, 1978), *Garza v. Reagen*, C.A. No. H-78-2132 (S.D. Tex. filed Nov. 6, 1978), *Mendoza v. Clark*, C.A. No. H-78-1831 (S.D. Tex. filed Sept. 22, 1978), *Doe v. Wright*, No. 3-79-0440-D (N.D. Tex. filed Apr. 1, 1979), *Roe v. Holm*, MO-79-CA-49 (W.D. Tex. filed June 26, 1979), and *Coe v. Holm*, MO-78-CA-54 (W.D. Tex. filed July 5, 1979)); see also *id.* at 550 n.6 (describing “tag-along actions” originally filed in the Southern District of Texas that were consolidated—including *Cortes v. Wheeler*, C.A. H-79-1926 (S.D. Tex. filed Sept. 20, 1979), *Rodriguez v. Meyer*, C.A. H-79-1927 (S.D. Tex. filed Sept. 20, 1979), *Adamo v. Reagen*, C.A. H-79-1928 (S.D. Tex. filed Sept. 20, 1979), and *Arguelles v. Meyer*, C.A. H-79-2071 (S.D. Tex. filed Oct. 4, 1979)—as well as six additional cases originally filed in the Eastern District of Texas that were likewise consolidated, including *Doe v. Sulphur Springs*, P-79-31-CA (E.D. Tex. filed Oct. 29, 1979), *Doe v. Lodestro*, B-79-618-CA (E.D. Tex. filed Sept. 18, 1979), *Doe v. Ford*, TY-79-351-CA (E.D. Tex. filed Sept. 28, 1979), *Roe v. Horn*, TY-79-338-CA (E.D. Tex. filed Sept. 24, 1979), *Roe v. Como-Pickton*, P-79-234-CA (E.D. Tex. filed Oct. 19, 1979), and *Poe v. Chappel Hill*, TY-79-449-CA (E.D. Tex. filed Dec. 10, 1979)).

77. 501 F. Supp. 544 (S.D. Tex. 1980).

Court for the Southern District of Texas in Houston before Judge Woodrow Seals, who held a twenty-four-day trial.⁷⁸

These sprawling cases presented an even broader assault upon the system, whereas *Plyler* had been narrowly focused on section 21.031 and solely at the Tyler ISD. The various cases were brought by several different attorneys on many fronts, relying upon several theories, hoping that they could replicate the victory Roos had carved out in his Tyler case. At this point, it became crucial that the various parties coordinate because the defendants had deep pockets, legions of deputy attorneys general and private counsel, and other advantages, most importantly the staying power to mow down the plaintiffs at the trial and appellate levels. It was true that Roos had convinced the United States to intervene in his case on the side of the alien schoolchildren, but over the long haul, the federal government could not do so in every such case or be wholly relied upon in civil rights cases, because its interests could change depending upon the Administration in office.⁷⁹ This scenario did occur in 1980–1981, when California Governor Ronald Reagan defeated the incumbent President Jimmy Carter and took office.

In May 1979, after *Plyler* was decided at the trial level but before *In re Alien Children* was to go to trial, the local Houston counsel for the plaintiffs in the case before Judge Seals wrote Peter Roos, requesting that MALDEF consolidate its efforts into their case, which was more complex and comprehensive than the original case against the Tyler ISD. Roos responded to attorney Isaias Torres, a Texas native who had just graduated from law school and was working for the non-governmental organization (NGO) Houston Center for Immigrants, Inc., that MALDEF felt “quite strongly that consolidation would not be in the best interests of our mutual efforts.”⁸⁰ After all, MALDEF had carefully selected Tyler as

78. Observers of this trial have reported that Judge Woodrow Seals committed an interesting gaffe during arguments when he asked “whether anything of worldwide importance had ever been written in Spanish,” or words to that effect. (Apparently he had not heard of the classic works by Miguel Cervantes, Octavio Paz, Juan Vasconcellos, Gabriel Garcia Marquez, Pablo Neruda, Sor Juana, or the many other Latino or Latina writers.) Witnesses report that it was an electric moment, one he sensed, and after which he publicly apologized. See Juan Ramon Palomo, *Judge Seals Calls Spanish Comment ‘Senseless, Dreadful,’* HOUS. POST, Mar. 7, 1980, at 4A.

79. A good example of this unreliability appeared in connection with a long-running dispute involving public colleges in Nashville, Tennessee. The U.S. Department of Justice supported the plaintiffs over the course of many years, and after working out the dispute among the many parties, the judge entered a final order that included racially specific remedies. Later, after the Reagan Administration took office, the U.S. Department of Justice attempted to switch horses and get the court to strike down the agreement. The judge refused to accept this too-little-too-late intervention. *Geier v. Alexander*, 801 F.2d 799, 806 (6th Cir. 1986); see also *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977). The original case finally wound down on June 18, 2004, when the issue of attorney fees was decided. *Geier v. Sundquist*, 372 F.3d 784, 785–86 (6th Cir. 2004).

80. Letter from Peter Roos, Nat’l Dir. of Educ. Litig., MALDEF, to Isaias Torres, Lawyer, Hous. Ctr. for Immigrants (May 17, 1979) (on file with Stanford University Cecil H. Green Library) [hereinafter Letter from Roos to Torres]. In the interest of full disclosure, I note that Mr. Torres was my Georgetown University Law Center classmate. I also note that I relied upon insider baseball

the perfect federal venue for arguing its case: a progressive judge, sympathetic clients, and a rural area where the media glare would not be as great. In addition, in Tyler the case could be made that excluding the small number of undocumented children (the practical effect of charging \$1,000 tuition to each) would actually lose money for the district, inasmuch as the state school funding formulae based allocation amounts upon overall head count attendance. Applying a hard lesson learned from *Rodriguez*, MALDEF felt that in a large urban school district or a border school district, the fact questions and statistical proofs would be more complex and expensive to litigate for both sides. Moreover, because the Tyler trial had been a case of first impression at the federal level, the legal defense strategy had not been as sophisticated as it would be in another similar trial. The earlier *Hernandez* case in Texas state court had not involved the full panoply of legal and social science expertise and financial support available to a national effort, such as that being mounted by MALDEF with witnesses and research. The organization had taken note in *Rodriguez* and *Keyes* that it must employ experts with uniquely nuanced scholarship or risk making things worse. The *Rodriguez* school finance litigation had not only precipitated a substantial amount of educational data, but its scholarly provenance and involvement by expensive social scientists had upped the stakes for educational access litigation and its attendant infrastructure of technical assistance, measurement and other evaluation data, and complex immigration expertise.⁸¹

Roos noted to Torres that the State had tried to make a late-in-the-day correction for its ineffective original efforts by seeking the leave to reopen the record, a request that Judge Justice had denied. State counsel would not likely make that mistake again and would mount a more aggressive strategy in their second go-around on appeal. Roos wrote: “While no doubt you have been incrementally able to improve upon our record [developed in the Tyler trial], consolidation would allow the state and other parties to buttress their record. I believe that one could only expect a narrowing of the present one-side[d]ness [of the trial record in MALDEF’s favor]. Consolidation would play right into th[e] hands of [the State’s attorney] Mr. Arnett.”⁸²

Torres, on the other hand, worried that unless the cases were consolidated, the relief in *Plyler* might not extend beyond that small district. Tyler had folded, but what about Houston, Dallas, and the more important border districts? After all, Texas had over a thousand ISDs, and

conversations with Dr. Augustina H. Reyes, who was a senior Houston ISD administrator and then a member of the Houston ISD board as an elected official. I married her in 1984.

81. These were some of the problems that had doomed the educational finance case. See generally Michael Heise, *State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis*, 63 U. CINN. L. REV. 1735 *passim* (1995); Augustina H. Reyes, *Does Money Make a Difference for Hispanic Students in Urban Schools?*, 35 EDUC. & URB. SOC’Y 363 *passim* (2003).

82. Olivas, IMMIGRATION STORIES, *supra* note 39, at 206 (quoting Peter Roos).

many of them had the same policies towards undocumented students as had Tyler; it was a state statute that gave them such permission. To this understandable concern, Roos indicated that his original strategy was aimed at winning once and then applying it elsewhere later, not joining up with other pending actions and thereby increasing the risk of losing on appeal: “Most importantly, I believe that once we have a Tyler victory, we will have started down a slippery slope which will make it impossible for the court to legally or logistically limit the ruling to Tyler.” This approach mirrors that of the NAACP on the road to *Brown*, where Thurgood Marshall and his colleagues had carefully picked their fights, each case incrementally building upon the previous litigation.⁸³ Indeed, MALDEF General Counsel Vilma Martinez had worked at the legal defense fund with Marshall’s former colleague and successor, Jack Greenberg, and clearly understood the value of such an overarching strategic vision and litigation plan.

But Roos had yet another reason for declining to join in the consolidated cases: he felt he had drawn ineffective opposing local counsel and wished to press his momentary advantage. He wrote, in a remarkable and candid private assessment, “A final, but important reason for believing consolidation unwise is, frankly, the quality of opposing counsel. Our [local] opposing counsel in Tyler is frankly not very good.”⁸⁴ He went on to say that this would likely not be the case in Houston, where the defense would include experienced attorneys from the specialized education law department of a major law firm and where other districts would also contribute their efforts and resources.⁸⁵ He added, “I believe it is our mutual interest to isolate the worst counsel to argue the case against us. Consolidation works against that. For the above-stated reasons, I would urge you not to seek consolidation. I just don’t believe that it serves our mutual interest of getting this statute knocked out.”⁸⁶

Although Roos did not agree to join forces with other litigants at the crucial early stages, this issue was eventually taken out of his hands at the U.S. Supreme Court. At the request of the State of Texas, the U.S. Judicial Panel on Multidistrict Litigation eventually did consolidate a number of the cases—but significantly, not *Plyler*—into the *In re Alien Children* litigation, and notwithstanding Roos’s doubts about whether the Houston plaintiffs would succeed, Judge Seals rendered a favorable decision on the merits on July 21, 1980.⁸⁷ The plaintiff schoolchildren prevailed in a big way, most importantly on the issues of whether the State

83. See sources cited *supra* note 8.

84. Letter from Roos to Torres, *supra* note 80. This narrative derives from the various papers in this extensive file, and my discussions with Attorney Roos.

85. *Id.*

86. *Id.*

87. *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 596–97 (S.D. Tex. 1980). His remarks about the Spanish language had occurred on the final day of the plaintiffs’ testimony.

of Texas could enact a statute to limit inducements to immigration and whether equal protection applied to the undocumented in such an instance. Judge Seals determined that Texas's concern for fiscal integrity was not a compelling state interest and that charging tuition to the parents or removing the children from school had not been shown to be necessary to improve education within the state. Most importantly, he concluded that section 21.031 had not been carefully tailored to advance the state interest in a constitutional manner.

In the Fifth Circuit, meanwhile, Judge Justice's *Plyler* decision was affirmed in October 1980, and in May 1981, the U.S. Supreme Court agreed to hear the matter.⁸⁸ The Fifth Circuit issued a summary affirmation of the consolidated Houston cases a few months later, and the Supreme Court combined the Texas appeals of both cases under the styling of *Plyler v. Doe*, handing Peter Roos the lead vehicle over Peter Schey's cases.⁸⁹ Having developed fuller records and armed with Fifth Circuit wins, the two organizations worked out a stiff and formal truce, dividing the oral arguments down the middle but with MALDEF's case leading the way. MALDEF had maneuvered itself into the first chair and went to the Supreme Court with predominant control of the case, with the newly established California-based NGO as its collaborator.

Roos spent the time until the Supreme Court arguments shoring up political support and coordinating the many strands of such a complex case, including the media strategy to humanize the children's plight. In March 1979, he had written to Drew Days, the Assistant Attorney General for Civil Rights, urging the government to join the litigation. Eventually, he persuaded the Secretary of Health, Education, and Welfare, Joseph A. Califano Jr., to write the Solicitor General urging him to enter into the fray on the side of the children, whose side the government did take. Other MALDEF letters went to state officials in California and elsewhere, requesting and receiving their support. After the Reagan Administration took office in January of 1981, Roos wrote William Clohan, the incoming Under Secretary of the recently created Department of Education, to urge him to continue the actions of the Carter Administration. Although the Reagan Administration did not formally enter its amicus brief on the side of the plaintiffs (as had the Democrat lawyers) and took no position on the crucial equal protection issue, fortunately for Roos, it did not seek to overturn the lower court decisions. In fact, the brief

88. See *Doe v. Plyler*, 628 F.2d 448, 450 (5th Cir. 1980); *Certain Named & Unnamed Noncitizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1327 (1980); see also *Plyler v. Doe*, 451 U.S. 968, 968 (1981) (noting probable jurisdiction in the *Plyler* litigation).

89. *Texas v. Certain Named & Unnamed Undocumented Alien Children*, 452 U.S. 937, 937 (1981) (noting probable jurisdiction in *In re Alien Children*). Again, it is good to be king, and first in line. MALDEF retained formal control over this collaboration due to the styling and civil procedure of the case, even as the two organizations were in sync now that their cases had been joined at the Supreme Court level.

stressed the primacy of the federal government in immigration, a position that favored the schoolchildren.⁹⁰

In June 1982, the Supreme Court gave Roos and Schey their win on all counts by a 5–4 margin. Justice Brennan, in his majority opinion striking down the statute, characterized the Texas argument for charging tuition as “nothing more than an assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools.”⁹¹ He employed an equal protection analysis to find that a state could not enact a discriminatory classification “merely by defining a disfavored group as non-resident.”⁹² Justice Brennan dismissed the State’s first argument that the classification or subclass of undocumented Mexican children was necessary to preserve the state’s “limited resources for the education of its lawful residents.”⁹³ This line of argumentation had been rejected in an earlier case, *Graham v. Richardson*,⁹⁴ where the Court had held that the concern for preservation of Arizona’s resources alone could not justify an alienage classifica-

90. Although the Carter Administration officials had actually supported MALDEF and the Houston children’s attorneys in the earlier stages of the cases, including both the trial court and Fifth Circuit phases, the Reagan Administration did not side with the appellee children when the cases finally made their way to the Supreme Court, filing instead only as amicus curiae. Even more importantly, the Administration did not file with the Texas side, and did not seek to become intervenors. See Brief for the United States as Amicus Curiae in No. 80-1538 and Brief for the United States in No. 80-1934, *Plyler v. Doe*, 458 U.S. 1131 (1982) (Nos. 80-1538, 80-1934), 1981 WL 390001. As examples of the support MALDEF tried to line up for its side, the MALDEF files include numerous letters written by Roos. See, e.g., Letter from Peter Roos, Nat’l Dir. of Educ. Litig., MALDEF, to Peter Schilla, W. Ctr. on Law & Poverty, Sacramento, Cal. (May 19, 1981) (on file with Stanford University Cecil H. Green Library); Letter from Peter Roos, Nat’l Dir. of Educ. Litig., MALDEF, to Peter Schilla (May 14, 1981) (on file with Stanford University Cecil H. Green Library, M0673, Box 63, Folder 6); Letter from Peter Roos, Nat’l Dir. of Educ. Litig., MALDEF, to Norella Beni Hall (May 14, 1981) (on file with Stanford University Cecil H. Green Library, M0673, Box 63, Folder 6) (urging her support, but focusing upon education issue); Letter from Peter Roos, Nat’l Dir. of Educ. Litig., MALDEF, to Lorenza Schmidt, Member, Cal. Bd. of Educ. (June 25, 1981) (on file with Stanford University Cecil H. Green Library, M0673, Box 63, Folder 7); Letter from Peter Roos, Nat’l Dir. of Educ. Litig., MALDEF, to Drew Days, Assoc. Attorney General (Mar. 28, 1979) (on file with Stanford University Cecil H. Green Library, M0673, Box 61, Folder 8); Letter from Peter Roos, Nat’l Dir. of Educ. Litig., MALDEF, to William Clohan, Under Secretary, U.S. Dept. of Educ. (May 20, 1981) (on file with Stanford University Cecil H. Green Library, M0673, Box 63, Folder 6). The files also include a letter from Health, Education, and Welfare Secretary Joseph A. Califano Jr. to the U.S. Solicitor General Wade McCree, urging the United States to enter the case on behalf of the children plaintiffs. Letter from Joseph A. Califano, Jr., Sec’y, U.S. Dep’t of Health, Educ. & Welfare, to Wade McCree, U.S. Solicitor General (July 17, 1979) (on file with Stanford University Cecil H. Green Library, M0673, Box 907, Folder 9). These letters and dozens more show the extent to which Roos and MALDEF sought and then shored up support for their clients. Veteran Supreme Court observer Linda Greenhouse has carefully reviewed the notes and files from the case deliberations, and captured the dynamics of the transitions between Department of Justice administrations, which likely accounted for the unusual silence. See Linda Greenhouse, *What Would Justice Powell Do? The ‘Alien Children’ Case and the Meaning of Equal Protection*, 25 CONST. COMMENT. 29, 30–33 (2008). Noting the inconsistencies, she characterized it this way: “The brief the Solicitor General filed was an extremely odd, even tortured, document.” *Id.* at 31 n.10. At the end of the day, and at the margins, this ambivalence likely worked to the advantage of the children’s case. See *id.*

91. *Plyler v. Doe*, 457 U.S. 202, 227 n.22 (1982).

92. *Id.* at 227.

93. *Id.* (quoting Brief for the Appellants at 26, *Plyler v. Doe*, 457 U.S. 202 (1982) (Nos. 80-1538, 80-1934), 1981 WL 389967, at *26) (internal quotation mark omitted).

94. 403 U.S. 365, 370–71 (1971).

tion used in allocating welfare benefits.⁹⁵ In addition, he relied on the findings of fact from the *Plyler* trial: although the exclusion of all undocumented children might eventually result in some small savings to the state, those savings would be uncertain (given that federal and state allocations depended primarily upon the number of children enrolled),⁹⁶ and barring those children would “not necessarily improve the quality of education.”⁹⁷

The State also argued that it had enacted the legislation to protect itself from an influx of undocumented aliens.⁹⁸ The Court acknowledged the concern but found that the statute was not tailored to address it: “[C]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration.”⁹⁹ The Court also noted that immigration and naturalization policy is within the exclusive powers of federal government, although it did not rest upon preemption.¹⁰⁰ Finally, the State maintained that it singled out undocumented children because their unlawful presence rendered them less likely to remain in the United States and to use the free public education they received in order to contribute to the social and political goals of the U.S. community.¹⁰¹ Justice Brennan distinguished the subclass of undocumented aliens who had lived in the United States as a family, for all practical purposes, permanently from the subclass of adult aliens who had entered the country alone to earn money temporarily.¹⁰² For those who remained with the intent of making the United States their home, “[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.”¹⁰³

Prior to *Plyer*, the Supreme Court had never taken up the question of whether undocumented aliens could seek Fourteenth Amendment equal protection.¹⁰⁴ The Court had long held that aliens are “persons” for purposes of the Fourteenth Amendment¹⁰⁵ and that undocumented aliens are protected by the due process provisions of the Fifth Amendment.¹⁰⁶

95. *Id.* at 374–76.

96. *Doe v. Plyler*, 458 F. Supp. 569, 576–77 (E.D. Tex. 1978).

97. *Plyler*, 457 U.S. at 229.

98. *Id.* at 227–29.

99. *Id.* at 228 (quoting *Plyler*, 458 F. Supp. at 585) (internal quotation marks omitted).

100. *Id.* at 225–26.

101. *Id.* at 230.

102. *Id.*

103. *Id.*

104. “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

105. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“[The Fourteenth Amendment provisions] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . .”).

106. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

However, Texas argued that because undocumented children were not “within its jurisdiction,” they were not entitled to equal protection.¹⁰⁷ Justice Brennan rejected this line of reasoning, concluding that there “is simply no support for [the] suggestion that ‘due process’ is somehow of greater stature than ‘equal protection’ and therefore available to a larger class of persons.”¹⁰⁸

After the *Rodriguez* school finance decision, Justice Brennan had to walk a fine line to apply what amounted to scrutiny more demanding than the usual rational basis review. Although he rejected treating undocumented alienage as a suspect classification,¹⁰⁹ he concluded that the children were not responsible for their own citizenship status and that treating them as the Texas school finance law envisioned would “not comport with fundamental conceptions of justice.”¹¹⁰ He was more emphatically concerned with education, however, carefully elaborating the nature of the entitlement to it. He wrote carefully and reaffirmed the earlier *Rodriguez* holding that public education was not a fundamental right (undoubtedly to attract the vote of Justice Powell, the author of the *Rodriguez* majority opinion), and recited a litany of cases holding education to occupy “a fundamental role in maintaining the fabric of our society.”¹¹¹ He also noted that “[i]lliteracy is an enduring disability,” one that would plague the individual and society.¹¹² These observations enabled him to establish “the proper level of deference to be afforded § 21.031.” He concluded, in light of the significant ongoing costs, that the measure “can hardly be considered rational unless it furthers some substantial goal of the State”—subtle and nuanced phrasing that nudged the level of scrutiny to what would be characterized as intermediate scrutiny.¹¹³ Chief Justice Burger’s dissent, in contrast, stuck with the customary formulation, requiring only “a rational relationship to a legitimate state purpose.”¹¹⁴ As a result of Justice Brennan’s careful construction, the Court rejected the claim, which the dissent found persuasive, that the policy was sufficiently related to protecting the State’s asserted interests.

Further, while the Court did not reach the claim of federal preemption,¹¹⁵ it did draw a crucial distinction between what states and the fed-

107. *Plyler*, 457 U.S. at 211.

108. *Id.* at 213.

109. *Id.* at 219 n.19.

110. *Id.* at 219–20 (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977), an important case applying greater scrutiny to classifications disadvantaging children born to unmarried parents).

111. *Id.* at 221.

112. *Id.* at 222.

113. *Id.* at 223–24.

114. *Id.* at 248 (Burger, C.J., dissenting). In the dissent, Chief Justice Burger concurred that the Equal Protection Clause applies to undocumented aliens. *Id.* at 243.

115. *Id.* at 210 n.8 (majority opinion). In a post-secondary education residency alienage case decided soon after *Plyler*, *Toll v. Moreno*, 458 U.S. 1 (1982), the decision turned on preemption. See Michael A. Olivas, *Plyler v. Doe, Toll v. Moreno, and Postsecondary Admissions: Undocumented Adults and ‘Enduring Disability,’* 15 J.L. & EDUC. 19, 29–30 (1986).

eral government may do in legislating treatment of aliens.¹¹⁶ The Court had upheld state statutes restricting alien employment¹¹⁷ and access to welfare benefits,¹¹⁸ largely because those state measures mirrored federal classifications and congressional action governing immigration. For example, in *De Canas v. Bica*,¹¹⁹ the Supreme Court held that a state statute punishing employers for hiring aliens not authorized to work in the United States was not fully preempted by federal immigration law.¹²⁰ In public education, however, Brennan wrote, distinguishing *De Canas*, “[W]e perceive no national policy that supports the State in denying these children an elementary education.”¹²¹ As was seen, Justice Brennan’s majority opinion did not rely upon the preemption doctrine, finding that the Texas legislation foundered even upon lesser shoals, those of equal protection, stretching the children’s status and their innocence to find the State’s reasoning to be “ludicrously ineffectual.”¹²²

Although *Plyler*’s incontestably bold reasoning has not substantially influenced subsequent Supreme Court immigration jurisprudence in the thirty years since it was decided, the educational significance of the case is still clear, even if it is limited to this small subset of schoolchildren—largely Latinos—in the United States. Given the poor overall educational achievement evident in this population, even this one success story has significance. Again, the parallel to *Brown* is striking: *Brown*’s legacy is questioned even after almost sixty years, largely due to Anglo racial intransigence and the failure of integration’s promise.¹²³

That September 1982, the Court denied Texas’s petitions to rehear the case, and the matter was over.¹²⁴ More than five years had passed since the issue had first appeared on the MALDEF radar screen, and the extraordinary skills and disciplined legal strategy of Roos and Martinez prevailed. Indeed, their overarching strategic vision enabled them to avoid the many centripetal political forces that threatened *Plyler* at every turn. To be sure, luck and the grace of God appeared to have intervened at all the key times: sympathetic clients with a straightforward story to tell, confronting an unpopular state statute that never had its own com-

116. *Plyler*, 457 U.S. at 224–26.

117. *Id.* at 225 (citing *De Canas v. Bica*, 424 U.S. 351, 361 (1976)).

118. *Id.* at 225 (citing *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

119. 424 U.S. 351 (1976).

120. *Id.* at 356.

121. *Plyler*, 457 U.S. at 225–26. This sentence became the focus of efforts to change federal law in 1996, led by California Republican Representative Elton Gallegly, to incorporate an explicit provision authorizing exclusion of undocumented children from public schools. See *Gallegly on School Funding*, L.A. TIMES, Apr. 10, 1995, at 4.

122. *Plyler*, 457 U.S. at 228 (quoting *Doe v. Plyler*, 458 F. Supp. 569, 585 (E.D. Tex. 1978)) (internal quotation marks omitted).

123. For critiques of *Brown*, see generally DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM *passim* (2004); WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE BEEN: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION *passim* (Jack M. Balkin ed., 2002).

124. *Plyler v. Doe*, 458 U.S. 1131 (1982).

elling story; flying under big-city legal radar and lucking into poor opposing local counsel; federal and state officials at the critical early stages who were sympathetic and helpful; a change in the national Administration that did not result in formal opposition; the ability to keep the Tyler case on track and for the Houston-based cases to prevail at their own speed and upon their own legs; and the right array of judges hearing the cases as they wended their way through the system. This issue could have foundered at any one of the many turns, winding up like *Rodriguez*, with a similar gravitational pull but a more complex statistical calculus and worse luck or, like *Keyes*, with active opposition from the plaintiffs' original purposive lawyers.¹²⁵ But the considerable legal and political skills of the MALDEF lawyers and the other lawyers served the school-

125. By this time, MALDEF lawyers had also argued many desegregation cases, including ones where the LDF had brought the original case, leading to the unresolved question—Why didn't these groups collaborate at the beginning of the cases and bring them together, rather than undermine each other's hopes with fundamentally different strategies? There may be no perfect solution for such a competitive situation and two important purposive organizations, but the competition heated up substantially during this period, as MALDEF was moving to the forefront with its own litigation strategies. One way to divide the cases might have been a more carefully coordinated regional strategy, for example, allowing MALDEF to pursue the de facto cases, leaving the LDF to pursue de jure cases. In the portfolio of cases, particularly the desegregation litigation brought by MALDEF over the years, a small number of them have been ongoing and not completely closed for over four decades. For example, in May 1974, MALDEF had intervened in another LDF case brought to desegregate a Southwestern school district, this one in Tucson, a case that has continued through 2013. In 1974, the NAACP sued Tucson Unified School District No. 1 on behalf of African American students, charging the district with segregating and otherwise discriminating against its African American students. *Fisher v. Lohr*, No. CIV 74-90-TUC-WCF (D. Ariz. Mar. 5, 1996). In October 1974, MALDEF filed a later-consolidated lawsuit containing similar allegations on behalf of Mexican American students. *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1341 (9th Cir. 1980), cert. denied sub nom. *Sanchez v. Tucson Unified Sch. Dist. No. 1*, 450 U.S. 912 (1981); *Mendoza v. Tucson Unified School District*, MALDEF.ORG, http://www.maldef.org/education/litigation/mendoza_v_tucson_unified/ (last visited May 22, 2013). In 1976, the United States intervened. The case was tried by the district court in January 1977, and Findings of Fact and Conclusions of Law were entered on June 4, 1978. The parties subsequently reached a settlement, including a comprehensive desegregation plan that was filed with the trial court, on August 11, 1978. The Stipulation of Settlement was approved by the court by order dated August 31, 1978. More than twenty-five years later, on January 18, 2005, the school district filed a Petition for Unitary Status, which the court granted in April 2008, terminating court oversight pending acceptance of a Post-Proposed Desegregation/Unitary Status Plan (PUSP) "fashioned by a joint committee of the parties and experts." *Fisher v. Lohr*, Nos. CV 74-90 TUC DCB, CV 74-204 TUC DCB, 2011 WL 4102233, at *2 (D. Ariz. Sept. 14, 2011) On December 18, 2009, the court approved the PUSP and ended federal judicial oversight of the district. The plaintiffs appealed, and on July 19, 2011, the United States Court of Appeals for the Ninth Circuit reversed the trial court's decision, ordering continued jurisdiction by the district court until the Tucson school district has met its burden to achieve unitary status. See *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1143–45 (9th Cir. 2011). On September 14, 2011, the district court ordered the appointment of a Special Master to develop a Proposed Desegregation/Unitary Status Plan (the Plan) for the district. *Fisher*, 2011 WL 4102233, at *3. On January 6, 2012, the Special Master was appointed and directed to work with the parties on a plan containing "[s]pecific substantive programs and provisions to be implemented by the [Tucson Unified School District] to address all outstanding *Green* factors and all other ancillary factors." *Fisher v. Lohr*, Nos. 110-15124, 10-15375, 10-15407, at 5 (D. Ariz. Jan. 6, 2012) (granting Order Appointing Special Master). "Because [the Plan] is intended by the Parties [to serve as] a consent order, it shall be referred to interchangeably as a Plan and an Order." *Id.* Public comment extended through late November 2012. Notice of Proposed Desegregation/Unitary Status Plan and Public Opportunity for Comment, MALDEF.ORG, http://www.maldef.org/assets/pdf/12_11_09_Public_Notice_EN.pdf (last visited Apr. 20, 2013).

children well, as they had the earlier minority lawyers and Anglo lawyers on the path to *Brown*.

Soon after *Plyler*, both Vilma Martinez and Peter Roos left MALDEF—she to a Los Angeles law firm and he to the San Francisco-based public interest organization, META, Inc. (Multicultural Education, Training and Advocacy), where he continued education litigation on bilingual rights and immigrant rights.¹²⁶ In 2009, Martinez became President Barack Obama's Ambassador to Argentina.¹²⁷ The original MALDEF San Antonio lawyer who had written the first *Plyler* memo, Joaquin Avila, succeeded Martinez as MALDEF's president and general counsel. In 1996, he won a MacArthur Foundation "genius" fellowship after several years in private practice concentrating on voting rights; he now is a law teacher at Seattle University School of Law. Whatever became of the undocumented schoolchildren from Tyler, Texas? According to a newspaper story following up on them a dozen years later, nearly all of them graduated and through various immigration provisions, obtained permission to stay in the United States and regularize their status.¹²⁸ In 2007, on the twenty-fifth anniversary of the case, a number of reporters covered their lives for follow-up stories, and more have since appeared.¹²⁹ In June 2012, the thirtieth anniversary, President Obama announced his Deferred Action for Childhood Arrivals (DACA) initiative, addressing the issue of undocumented college students, hundreds of

126. See *Biography: Vilma Martinez*, U.S. DEP'T ST., <http://www.state.gov/r/pa/ei/biog/129351.htm> (last visited May 22, 2013); Roger L. Rice, *Multicultural Education, Training, and Advocacy (META)*, SAGE KNOWLEDGE, <http://knowledge.sagepub.com/view/bilingual/n212.xml> (last visited May 22, 2013).

127. See *Biography of Vilma Martinez*, U.S. DEP'T ST., <http://www.state.gov/r/pa/ei/biog/129351.htm> (last visited Apr. 20, 2013).

128. See Paul Feldman, *Texas Case Looms over Prop. 187's Legal Future Justice: U.S. High Court Voided that State's '75 Law on Illegal Immigrants, but Panel Has Since Shifted to the Right*, L.A. TIMES, Oct. 23, 1994, at 1. For more information on the education of undocumented children post-*Plyler*, see generally Jorge Chapa, *A Demographic and Sociological Perspective on Plyler's Children, 1980–2005*, 3 NW. J.L. & SOC. POL'Y 186 (2008); Roberto G. Gonzales, *Left Out but Not Shut Down: Political Activism and the Undocumented Student Movement*, 3 NW. J.L. & SOC. POL'Y 219 (2008); Aarti Kohli, *Educating Undocumented Students: The Legacy of Plyler v. Doe*, 3 NW. J.L. & SOC. POL'Y 185 (2008); and John Rogers et al., *Civic Lessons: Public Schools and the Civic Development of Undocumented Students and Parents*, 3 NW. J.L. & SOC. POL'Y 201 (2008).

129. The twenty-fifth anniversary of the case occasioned several follow-up articles interviewing participants. See, e.g., Barbara Belejack, *A Lesson in Equal Protection: The Texas Cases that Opened the Schoolhouse Door to Undocumented Immigrant Children*, TEX. OBSERVER (Austin, Tex.), July 13, 2007, at 14; Lucy Hood, *Educating Immigrant Students*, CARNEGIE REP., Spring 2007, at 2, 2–8 (interviewing Judge William W. Justice regarding *Plyler*); Unmuth, *supra* note 70; Mary Ann Zehr, *Case Touched Many Parts of Community*, EDUC. WK., June 6, 2007, at 13. A special *Plyler* issue of the *Northwestern Journal of Law and Social Policy* included several articles on the case and its aftermath. See e.g., Jorge Chapa, *A Demographic and Sociological Perspective on Plyler's Children, 1980–2005*, 3 NW. J.L. & SOC. POL'Y 186 *passim* (2008); Roberto G. Gonzales, *Left Out but Not Shut Down: Political Activism and the Undocumented Student Movement*, 3 NW. J.L. & SOC. POL'Y 219 *passim* (2008); Aarti Kohli, *Educating Undocumented Students: The Legacy of Plyler v. Doe*, NW. J.L. & SOC. POL'Y 185 *passim* (2008); John Rogers et al., *Civic Lessons: Public Schools and the Civic Development of Undocumented Students and Parents*, 3 NW. J.L. & SOC. POL'Y 201 *passim* (2008).

thousands of whom attend college only because of the pathway cleared for them by the *Plyler* holding.¹³⁰

The year after *Plyler* was decided, the U.S. Supreme Court took up a related case, *Martinez v. Bynum*,¹³¹ and upheld a different part of section 21.031, which provided that the parents or guardians of citizen and undocumented children had to reside in a school district before they could send their children to free public schools.¹³² Although this was the element of the statute that first drew Avila's attention and started the ball rolling towards MALDEF's filing of the *Plyler* lawsuit, the holding of *Martinez* does not amount to a significant narrowing of *Plyler*, where the parents actually resided in the school districts, albeit in unauthorized immigration status. The student in *Martinez* was the U.S. citizen child of undocumented parents who had returned to Mexico after his birth and left him in the care of his adult sister who was not his legal guardian; the Court sustained Texas's determination that the child did not "reside" in the district and thus did not qualify for free public schooling there, ruling that *Plyler* did not bar application of appropriately defined bona fide residence tests.¹³³ The *Plyler* Court indicated in passing that the undocumented may establish domicile in the country, a much larger issue than the issue presented in *Martinez*, where the child's parents had not established the requisite residence in the district. Justice Brennan noted, "A State may not . . . accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as non-resident. And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State."¹³⁴

In 1994, an unpopular Governor of California, Pete Wilson, revived his reelection campaign by backing a state ballot initiative known as Proposition 187, which would have denied virtually all state-funded benefits, including public education, to undocumented aliens. Proposition 187 passed with nearly 60% of the vote and Wilson was reelected, but the federal courts enjoined implementation of most of the ballot measure, relying prominently on *Plyler*.¹³⁵ During the congressional debates that eventually led to the enactment of the Illegal Immigration Reform and

130. See Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 537–38, 542 (2012) [hereinafter Olivas, *Dreams Deferred*]; Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009) [hereinafter Olivas, *The Political Economy*]; Miriam Jordan, *Anatomy of a Deferred-Action Dream*, WALL ST. J., Oct. 15, 2012, at A2; Julia Preston, *Young Immigrants Say It's Obama's Time to Act*, N.Y. TIMES, Dec. 1, 2012, at A1.

131. 461 U.S. 321 (1983).

132. *Id.* at 333.

133. *Id.* at 323–24, 327–29.

134. *Plyler v. Doe*, 457 U.S. 202, 227 n.22 (1982).

135. *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997); see also VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA 73–82 (2007) (reviewing advocacy and litigation on behalf of immigrants).

Immigrant Responsibility Act of 1996, California Republican Representative Elton Gallegly proposed an amendment that would have allowed states to charge tuition to undocumented students or exclude them from public schools. He was banking that in the wake of such federal legislation, the courts would distinguish *Plyler* and sustain the state measure. The provision became quite politicized, receiving prominent support from Republican presidential candidate Robert Dole.¹³⁶ Gallegly might have been right that the Constitution would not be read by the Court of the 1990s to nullify a federal enactment of the kind he proposed, but he never got a chance to find out because *Plyler* proved to have considerable strength in the political arena. The Gallegly amendment drew heated opposition in Congress and in the media, and critics relied heavily on the values and arguments highlighted in *Plyler*—and often on the decision itself.¹³⁷ After months of contentious debate, the amendment was dropped from the final legislation, and no provisions became law that restricted alien children's right to attend school.¹³⁸ *Plyler* and the polity appear to have settled the question, although bills have been introduced in Congress and even in states over the years to deny birthright citizenship to children born in the United States.¹³⁹

Although *Plyler* had addressed the issue of public schoolchildren in the K–12 setting, almost immediately after the ruling, questions arose about how far the decision could be extended, notably whether it would protect undocumented college students. Before long, Peter Roos was going for the long ball again, litigating post-secondary *Plyler* cases in California and elsewhere.¹⁴⁰ The ultimate irony is that in 2001, just after

136. See Gerhard Peters and John T. Woolley, *Republican Party Platform of 1996*, AM. PRESIDENCY PROJECT (Aug. 12, 1996), <http://www.presidency.ucsb.edu/ws/index.php?pid=25848> (announcing Republican Party stance on illegal immigration and reform for the 1996 presidential election); *Where Bob Dole Stands on Immigration*, 4PRESIDENT.ORG, <http://www.dolekemp96.org/agenda/issues/immigration.htm> (last visited May 21, 2013) (highlighting Robert Dole's support of immigration reform during his 1996 bid for presidency); see also THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1354–1419 (2008); STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1140–1247 (2009); Rebecca A. Maynard & Daniel J. McGrath, *Family Structure, Fertility and Child Welfare*, in THE SOCIAL BENEFITS OF EDUCATION 125, 125 (Jere R. Behrman & Nevzer Stacey eds., 1997); *Clinton Vows Veto of Immigration Bill if Gallegly Amendment Is Included*, 73 INTERPRETER RELEASES 1111 *passim* (1996); *Education Bar Dispute Again Stalls Immigration Bill*, 73 INTERPRETER RELEASES 1255 *passim* (1996); *Eleventh-Hour Agreement Folds Immigration Bill Into Omnibus Spending Measure*, 73 INTERPRETER RELEASES 1281 *passim* (1996); *Immigration Legislation Moving Again, Conference, Floor Action Imminent*, 73 INTERPRETER RELEASES 1209 *passim* (1996).

137. Representative Gallegly has continued his campaign, such as the bill he introduced on January 6, 2009. H.R. 126, 111th Cong. (2009).

138. See, e.g., KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 137–42 (2009); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1565 n.264 (1995).

139. See Joshua Zingher, *Get on the Omnibus: Immigration Reform and the Electoral Motivations of State Legislators* (Apr. 6, 2013) (unpublished manuscript) (on file with the Denver University Law Review).

140. Roos later litigated such cases as *Leticia "A" v. Bd. of Regents of Univ. of Cal.*, No. 588982-5 (Cal. App. Dep't Super. Ct. May 30, 1985). See Peter D. Roos, *Postsecondary Plyler* 12–

Governor George Bush left Texas to become President George Bush, the state enacted House Bill 1403, establishing the right of undocumented college students to establish resident status and pay in-state tuition in the state's public colleges.¹⁴¹ Governor Rick Perry, who signed the legislation into law, paid dearly for his actions in the 2012 GOP primary, where all his opponents took him to task.¹⁴² In those years since Texas had enacted section 21.031, this was silent testimony to the idea that you reside where you live, quite apart from your immigration status.

Over a dozen states have acted since the Texas innovation.¹⁴³ And in Congress, the Development, Relief, and Education for Alien Minors (DREAM) Act has been considered in Congress and voted on more than once, but has remained elusive to date. If enacted, it would remove a provision from federal law that addresses the issue of states providing in-state tuition status to undocumented college students and would allow the students the opportunity to regularize their federal immigration status—an enormous benefit that would go well beyond what a state could provide. And in 2012, DACA emerged for administrative relief, if not reform.¹⁴⁴ *Plyler* clearly is alive and well in its adolescence. And MALDEF has cemented its reputation as the major purposive player in immigration litigation.

III. REFLECTIONS ON A STRATEGIC LITIGATION DOCKET

As has been noted, organized groups whose *raison d'être* is to advocate for a given position, purpose, interest, or perspective are deemed by political scientists to be “purposive groups,” with long- and short-term ideological goals and organizational structures that allow them to best advance their goals in the polity, legislatures, and courts.¹⁴⁵ These groups' purposiveness emerges as they focus on specific organizational

13 (Inst. for Higher Educ. Law & Governance, Monograph No. 91-7, 1991), available at <http://www.law.uh.edu/ihe/g/monograph/91-7.pdf>. He was also involved as amicus defending the state statutes in *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), and *Martinez v. Bd. of Regents*, 241 P.3d 855 (Cal. 2010). Brief of Intervenors—Defendants/Appellees Hispanic American Leadership Organization & the Kansas League of United Latin American Citizens, *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007) (No. 05-3309), 2005 WL 6045905; Application to File Brief Amicus Curiae, and Brief Amicus Curiae of Californians Together, the Ass'n of Mexican American Educators, & the California Ass'n of Bilingual Education, *Martinez v. Bd. of Regents*, 241 P.3d 855 (Cal. 2010) (No. S167791), 2009 WL 2510799.

141. TEX. EDUC. CODE ANN. § 54.052 (2012); see also Clay Robison, *Budget Hits Include Judges' Pay Hike*, HOUSTON CHRON., June 18, 2001, at A1 (describing tuition and revenue bill details). For insomniacs in the reading public, see generally Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99 (2008) (reacting to the work of Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473 (2007)).

142. Trip Gabriel, *Stance on Immigration May Hurt Perry Early On*, N.Y. TIMES, Sept. 24, 2011, at A12.

143. Olivas, *The Political Economy*, supra note 130, at 1764; see also JOHNSON ET AL., supra note 138, at 144–49.

144. See Olivas, *Dreams Deferred*, supra note 130, at 537; Julia Preston, *More Young Illegal Immigrants Apply for, and Receive, Reprieves*, N.Y. TIMES, Nov. 16, 2012, at A14.

145. BAIRD, supra note 135, at 49.

goals and enact defined strategies for gathering resources and making their point of view known, heard, and accommodated. For example, in a detailed study of church–state separation cases, purposive groups were involved in nearly every case that reached the Supreme Court (and lower appellate courts) between 1951 and 1971, a trend that became even more evident in the period between 1971 and 1974.¹⁴⁶ A similar study of the many obscenity cases brought between 1957 and 1982 showed the same deep group structure.¹⁴⁷ The organizational formats are as varied as there are such groups, and they can be very large membership service organizations, such as the National Rifle Association or American Association of Retired Persons, or more focused ideological groupings with defined purposive points of origin, such as MALDEF, the NAACP Legal Defense Fund, or the Alliance Defense Fund.¹⁴⁸ Today’s American Civil Liberties Union (ACLU) may be the quintessential purposive organization, national in scope with decentralized governance and a broad attention span. The groups can take the shape of profit making, nonprofit, church-related, or professional organizations, and many undertake no litigation as their mode of operation but identify and search out legal issues to fan the flames. But those groups that do litigate as their mission organize in order to bring suits or file amicus briefs, and many of these groups will do both by monitoring the various dockets where their cases arise and by engaging in signaling activities to make their preferences heard in the din surrounding any case. Supreme Court scholar Vanessa Baird has noted:

Because of the various goals and actors who participate in litigation, it is difficult to devise a theory for whether these different goals affect the relationship between the Supreme Court’s policy priorities and its resulting agenda. The only plausible prediction that remains consistent across different kinds of groups with different goals is that previous decisions create a reason to test new legal arguments. Previous decisions can close issues, which may lead to the opening of others or create uncertainty about how far the Court is likely to go. Groups that lose at the Supreme Court have reason to support future litigation to contain that loss, and groups whose interests are favored by the Court have an interest in pushing the envelope further. The

146. See generally FRANK J. SORAUF, *THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE* *passim* (1976) (explaining the most important Supreme Court cases in First Amendment doctrine and the various political groups frequently associated with this area of law).

147. See Joseph F. Kobyłka, *A Court-Created Context for Group Litigation: Libertarian Groups and Obscenity*, 49 J. POL. 1061 *passim* (1987) (studying sixty-nine U.S. Supreme Court cases brought by “libertarian” and “proscriptionist” groups).

148. See MICHAEL A. OLIVAS, *SUING ALMA MATER: HIGHER EDUCATION AND THE COURTS* *passim* (2013) (studying the Alliance Defense Fund bringing college law cases). In the fall of 2012, the Alliance Defense Fund changed its name to Alliance Defending Freedom. Alliance Defense Fund Is Now Alliance Defending Freedom, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/page/new-name?referral=I0712RB> (last visited Apr. 24, 2013).

combined end result of all of these activities is that there are more well-framed cases in a particular policy area on the Court's agenda in the years that follow the decisions that indicate their priorities.¹⁴⁹

In the first half of the twentieth century, most of the major litigation brought by or on behalf of Mexican American plaintiffs in the general areas of civil rights—particularly education, voting rights, equal employment opportunity, immigration, and other antidiscrimination domains—was not brought by organized purposive organizations with substantive legal capacities or even by Mexican American lawyers. But the few Mexican American lawyers who did practice worked with a variety of other lawyers and were actively engaged in resisting the discriminatory practices visited upon the community. As I have reflected elsewhere,¹⁵⁰ given the clearly documented and lamentable educational achievement of Mexican Americans in the twenty-first century and the longstanding roots of this phenomenon, this long history of resistance, reaching back nearly a century, will likely come as a surprise to many observers. But the trails have been marked and recorded by many scholars, including Richard R. Valencia, in his *Chicano Students and the Courts: The Mexican American Legal Struggle for Educational Equality*.¹⁵¹ In a revealing table listing Mexican American school desegregation cases, he counts thirty-five such cases between 1925 and 1985, beginning with *Romo v. Laird*,¹⁵² in which a Mexican American family sought the right for their four children to attend a comprehensive “white” school in Tempe, Arizona, rather than the “Spanish-Mexican” school these children were assigned, which served as the laboratory school for the nearby Tempe State Teachers’ College (later Arizona State University).¹⁵³ While the Romo family won this battle for a single school term, it lost the war because the school officials began to assign Mexican-origin children exclusively to “Mexican schools” on the asserted pedagogical assumption that Spanish-speaking children would only learn when instructed in Spanish. This was a widely employed means of segregating Mexican American children—even those who were English speakers—to aver that their linguistic needs were best met by separating them, despite the flawed premise and segregative effect that this instructional choice had upon the children. Valencia labeled this tactic a “practice, used over and over, [that] was, at its core, racialized segregation”¹⁵⁴ This theme ran

149. BAIRD, *supra* note 135, at 50–51.

150. Michael A. Olivas, *The Arc of Triumph and the Agony of Defeat: Mexican Americans and the Law*, 60 J. LEG. EDUC. 354, 357–62, 365–66 (2010).

151. VALENCIA, *supra* note 63, at 8.

152. Findings of Fact and Order, *Romo v. Laird*, No. 21617 (Maricopa Cnty. Super. Ct. 1925), reprinted in Laura K. Muñoz, *Separate but Equal? A Case Study of Romo v. Laird and Mexican American Schooling*, 15 OAH MAG. HIST. 28, 131–32 (2001).

153. *Id.*

154. VALENCIA, *supra* note 63, at 15.

through *Keyes*, and it was not new to litigation by and on behalf of Chicanos.¹⁵⁵

Ignoring the children's actual language ability was a practice often used with the other common but unsubstantiated ascription that migrant worker children required separate schools so that their sojourner farm labors would not disrupt the flow of instruction. School districts failed to assess the language capacity of the children or to account for the small number of children actually involved in migratory labor. This reasoning was particularly widespread in Texas, such as in *Independent School District v. Salvatierra*,¹⁵⁶ a 1930 case set in Del Rio, Texas. As legal scholar George A. Martinez has noted of the case, which he situates as the first Mexican American desegregation case:

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

155. Legal scholar George Martinez has written a detailed chronology of Chicano litigation in several arenas, including education. See generally George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555, 574–611 (1994). He also reviewed the effect of *Keyes* upon subsequent cases. *Id.* at 585–611; see also Rangel & Alcalá, *supra* note 18, at 319–69; see generally Brian D. Behnken, *Elusive Unity: African Americans, Mexican Americans, and Civil Rights in Houston*, in SEEKING INALIENABLE RIGHTS: TEXANS AND THEIR QUESTS FOR JUSTICE 123–45 (Debra A. Reid ed., 2009) [hereinafter SEEKING INALIENABLE RIGHTS] (discussing the legal struggles of Mexican Americans, the groups used to organize communities, and the cases that removed barriers to education); Lisa Y. Ramos, *Not Similar Enough: Mexican American and African American Civil Rights Struggles in the 1940s*, in THE STRUGGLE IN BLACK AND BROWN: AFRICAN AMERICAN AND MEXICAN AMERICAN RELATIONS DURING THE CIVIL RIGHTS ERA 19–38 (Brian D. Behnken ed., 2011); Steven H. Wilson, *Chicanismo and the Flexible 14th Amendment: 1960s Agitation and Litigation by Mexican American Youth in Texas*, in SEEKING INALIENABLE RIGHTS, *supra*, at 147–68.

156. 33 S.W.2d 790 (Tex. Civ. App. 1930), *cert. denied*, 284 U.S. 580 (1931). Interestingly, this case was tried by a small group of lawyers, including the first two Mexican American lawyers licensed in Texas, J.T. Canales and M.C. Gonzales, and the third such lawyer, Alonso S. Perales, who collaborated upon the appeal to the U.S. Supreme Court. This was the only case that the three of them ever tried together. See Michael A. Olivas, *The Legal Career of Alonso S. Perales*, in "IN DEFENSE OF MY PEOPLE": ALONSO S. PERALES AND THE DEVELOPMENT OF MEXICAN-AMERICAN PUBLIC INTELLECTUALS 315, 318 (Michael A. Olivas ed., 2012).

express legislation, segregation was illegal. As no legislation expressly authorized the specific segregation at issue in *Salvatierra*, the court could have held that segregation—even for linguistic or migrant farm worker reasons—was illegal.

Moreover, the court allowed the segregation to stand despite clear evidence that the district practiced arbitrary segregation. For example, white children who started school late were not placed in the Mexican school. Thus, the school board's assertion that it segregated children in the Mexican school because they started school late was a mere pretext. In addition, there were no tests demonstrating that the Mexican-American children were less proficient in English, the other alleged justification for the segregation. In any event, the court did not consider the possibility that bilingual education might address any language problems better than segregation.¹⁵⁷

During the early 1930s, when there were very few Mexican American scholars, George I. Sánchez had already taken aim at the misuse of psychometric instruments and the failure to assess the linguistic characteristics of Spanish-speaking children.¹⁵⁸ Similarly, Texas writer Jovita Gonzalez had begun her careful folklore studies.¹⁵⁹ Valencia comprehensively reviews these efforts at litigation and scholarship, both with an overarching theoretical section and through single chapters on the various subjects of educational litigation, including school segregation, school financing, special education, bilingual education, undocumented students, higher education financing, and high-stakes testing. His novel contribution is his synthetic treatment of the elements of Mexican American activism that have historically fed the struggle for educational opportunity:

[A]dvocacy organizations, individual activists, political demonstrations, legislation, and the subject of this book—litigation. In order for the Mexican American people to optimize their campaign for equality in education, they must draw from all five forms of struggle. Each one in itself is important, but all five streams flowing simultaneously and eventually becoming one fast-moving river have the potential to create a powerful confluence for systemic change in education.¹⁶⁰

One of the important cases Valencia discusses is *Delgado v. Bastrop Independent School District*,¹⁶¹ a federal district court opinion from June 1948, which struck down the segregative practices in this cen-

157. Martinez, *supra* note 155, at 575 (footnotes omitted).

158. See, e.g., George I. Sánchez, *Group Differences and Spanish-Speaking Children—A Critical Review*, 16 J. APPLIED PSYCHOL. 549 *passim* (1932); George I. Sánchez, *Bilingualism and Mental Measures: A Word of Caution*, 18 J. APPLIED PSYCHOL. 765 *passim* (1934).

159. See, e.g., José E. Limón, *Folklore, Gendered Repression, and Cultural Critique: The Case of Jovita Gonzalez*, 35 TEX. STUD. LIT. & LANG. 453, 453–54 (1993).

160. VALENCIA, *supra* note 63, at 319.

161. Civ. No. 388 (W.D. Tex. June 15, 1948).

tral Texas community of Bastrop, a small town near Austin, the state capital.¹⁶² Because the case was never reported and not appealed to the Fifth Circuit, it is not widely known, even though it was in proximity to 1954's *Brown v. Board of Education* and followed *Westminster School District v. Mendez*,¹⁶³ the April 1947 Ninth Circuit decision successfully brought by Mexican American plaintiffs against California schools. The *Delgado* decision angered local officials who did not want the ruling upheld or widened to other districts. At the time, before it was split into the Fifth and Eleventh Circuits, the Fifth Circuit extended all the way from Texas to Florida, and a decision by the circuit upholding *Delgado* would have had bearing upon the Southern judges and the region's Jim Crow schools and social practices.¹⁶⁴ Valencia carefully details the many instances of "intransigence and subterfuge"¹⁶⁵ by disgruntled school officials and brings light to this most obscure steppingstone to *Brown*. He also usefully points out the intersections connecting the lawyers of *Mendez*, *Delgado*, and *Brown*, who corresponded and interacted behind the scenes; for example, Gus Garcia and Carlos Cadena tried *Delgado*, hoping to replicate the victory by non-Latino lawyers in the earlier *Mendez* case.¹⁶⁶ As historian Guadalupe San Miguel and many other careful scholars have shown, there was state perfidy in the resolution of the case in Bastrop, while the school board simply forged ahead, employing the official trope of the children's "special linguistic needs" to continue isolating them from their Anglo counterparts.¹⁶⁷

In *Mendez v. Westminster: School Desegregation and Mexican-American Rights*, Philippa Strum has written the first full-length book on this Ninth Circuit case.¹⁶⁸ For the same reasons that *Delgado* is important

162. VALENCIA, *supra* note 63, at 49–50.

163. 161 F.2d 774 (9th Cir. 1947).

164. See Carlos Kevin Blanton, *A Legacy of Neglect: George I. Sánchez, Mexican American Education, and the Ideal of Integration, 1940–1970*, TCHRS. C. REC., June 2012, at 1, 1–27; see also Neil Foley, *Over the Rainbow: Hernandez v. Texas, Brown v. Board of Education, and Black v. Brown*, 25 CHICANO-LATINO L. REV. 139, 146–51 (2005); see generally Ian Haney Lopez, *Race and Colorblindness After Hernandez and Brown*, 25 CHICANO-LATINO L. REV. 61 *passim* (2005) (discussing the effects of *Hernandez*); Steven Harmon Wilson, *Some Are Born White, Some Achieve Whiteness, and Some Have Whiteness Thrust upon Them: Mexican Americans and the Politics of Racial Classification in the Federal Judicial Bureaucracy, Twenty-five Years After Hernandez v. Texas*, 25 CHICANO-LATINO L. REV. 201 *passim* (2005) (discussing the effects of *Hernandez*).

165. VALENCIA, *supra* note 63, at 52.

166. *Id.*

167. Guadalupe San Miguel, among others, has shown that Latino children's purported "special linguistic needs" were employed to continue isolating them from their Anglo counterparts, both in the early twentieth-century cases, and even those since. Readers familiar with the fascinating and extensive treatments of *Brown* by Kluger, Tushnet, and many other accomplished scholars would do well to reread the case through the lens of Valencia, Martinez, and others who have filled in the parallel tracks. SAN MIGUEL, JR., *supra* note 60, at 117–34; see also Nancy MacLean, *The Civil Rights Act and the Transformation of Mexican American Identity and Politics*, 18 LA RAZA L.J. 123, 128, 130 (2007); Moran, *supra* note 22, at 326–41.

168. PHILIPPA STRUM, *MENDEZ V. WESTMINSTER: SCHOOL DESEGREGATION AND MEXICAN-AMERICAN RIGHTS* (2010).

on the road to *Brown*, so is *Mendez*.¹⁶⁹ Strum explains the many strands that led to the case, including previous litigation (there were few California cases on point but enough to suggest how to proceed), how the plaintiffs came to their grievance (their children were not admitted into the better school in the Westminster system, located outside Los Angeles, due to their alleged lack of fluency in English), how they picked their lawyer (he had litigated a public accommodations case that led to integration of the San Bernardino public swimming pools and parks), how he strategized with other civil rights lawyers and organizations, and what came of the holding after the State of California lost (the state passed an antisegregation statute in June 1947, signed into law by Governor Earl Warren).¹⁷⁰ Through its journey to the Ninth Circuit, *Mendez* drew upon White, Jewish, Asian, and African American lawyers but not a single Latino or Mexican American attorney. I had not put two and two together to connect the appearance of A.L. Wirin, who served as co-counsel in both *Mendez* and *Delgado*; for that matter, I had not known he had been involved in litigation following the earlier Sleepy Lagoon violence against Mexican Americans,¹⁷¹ or that afterward he had gone on to try

169. See Carlos K. Blanton, *George I. Sánchez, Ideology, and Whiteness in the Making of the Mexican American Civil Rights Movement: 1930–1960*, 72 J. S. HIST. 570, 589, 595 (2006); Jeanne M. Powers & Lirio Patton, *Between Mendez and Brown: Gonzales v. Sheely (1951) and the Legal Campaign Against Segregation*, 33 L. & SOC. INQUIRY 127 *passim* (2008); Wilson, *supra* note 18, at 156; see generally Bowman, *supra* note 15, at 919–29 (discussing the isolation felt by Latino/a students as a result of segregation and linguistic differences).

170. STRUM, *supra* note 168, at 38–41, 68, 140. I have read this case many times over the years, along with many of the law reviews and the historical literature about the case. I thought I knew the details, but I learned much from Strum's book. The texture she reveals is an excellent example of why the backstories to important cases are so essential to understanding the full context. Strum is particularly accomplished at the telling detail; for instance, her account of how the Mendez family took up the cause, especially with a Mexican American father and Puerto Rican mother, and at some risk to their social standing, is particularly compelling.

However, she is not as sure in her grasp of the post-*Mendez* matters. She mistakenly places the four school districts in the *Delgado v. Bastrop* case as being in "south Texas," *id.* at 149, when any political and topographical map would locate the three counties and four school districts in central Texas, including Travis County, where the case was tried in Austin federal court. The actual geography matters less than the considerable political cartography between Anglo Texas and the predominantly Mexican American south Texas and border areas. She does not dwell upon *Delgado*, although in many respects it was as crucial to the NAACP Legal Defense Fund's strategy as was *Mendez*, and was tried in the same courts as was *Sweatt v. Painter*, already begun against the University of Texas. I do not think that her rendition of the founding of the Mexican American Legal Defense and Educational Fund squares with all the available facts, or that the NAACP "contacted Pete Tijerina" and "offered to use some of [its Ford Foundation] money to help Mexican-American lawyers in Texas with litigation." *Id.* at 154–55. Remarkably, there has never been a full-length book on MALDEF or its founding, so the accurate version is still to be told. I also do not believe that it would be correct to characterize the funds that University of Texas Professor George I. Sánchez had at his disposal as "LULAC" funds, the way she describes them. *Id.* at 149. These may seem quibbles, but her telling of these details is not nearly as sure-handed as her account of the *Mendez* case. One last haunting connection among these books involves the sad demise of David Marcus, the lead *Mendez* lawyer. These small details aside, I am grateful that the Kansas University series on landmark Supreme Court cases apparently made an exception for this case, which did not reach the U.S. Supreme Court or achieve the iconic status of those in its other books, and grateful that Strum decided to write about it.

171. Wirin, *Abraham Lincoln*, in ENCYCLOPEDIA OF JAPANESE AMERICAN HISTORY: AN A-TO-Z REFERENCE FROM 1868 TO THE PRESENT, 412, 412–13 (Brian Niiya ed., 2d ed. 2001). Wirin

Gonzales v. Sheely,¹⁷² in Arizona, or that he had later argued several important civil rights cases before the U.S. Supreme Court¹⁷³ and filed an amicus in *Serrano*.¹⁷⁴ Ironically, the case most often considered to be an early “Mexican American” case, *Mendez*, involved no Mexican American lawyers, and because it was a California case rather than a Texas case, it had no significant involvement from the dominant Mexican American political organizations or the sociocultural community. However, *Mendez* did segue into and, through the connections noted here, influenced *Delgado*, *Hernandez*, and the cases that flowed eventually into the MALDEF “river” Richard Valencia has evocatively described.¹⁷⁵

Following the *Plyler* “river,” MALDEF’s purposive reputation was established, leading to a larger docket and more important litigation. In 1982, MALDEF won *Plyler v. Doe*, concerning undocumented children, its most important U.S. Supreme Court victory to that point.¹⁷⁶ In 2006, MALDEF lawyers won in *LULAC v. Perry*,¹⁷⁷ a voting rights Supreme Court case that had Latinos and Latinas on both sides, and because of the majority’s complex decision, allowed Nina Perales for MALDEF and Teodoro Cruz, the Texas solicitor general, to each claim victory on different sides.¹⁷⁸ Organizational capacity is the comprehensive collection of institutional resources gathered by purposive groups, including financial support and political capital, the collective reputational resources, and the technical capability to bring complex cases to court, as is required today. While it was first organizing itself, MALDEF was fortunate to have senior and experienced leadership and access to talented Mexican American and Anglo lawyers, but the ranks were thin. A num-

(1901–1978) served as an attorney for the Congress of Industrial Organizations (CIO), the ACLU of Southern California, and for the Japanese American Citizens League. *Id.* He and David C. Marcus both figured prominently as Anglo advocates for Mexican Americans. *Id.* For a review of Marcus’s personal life, see generally Genevieve Carpio, *Unexpected Allies: David C. Marcus and His Impact on the Advancement of Civil Rights in the Mexican-American Legal Landscape of Southern California*, in *BEYOND ALLIANCES: THE JEWISH ROLE IN RESHAPING THE RACIAL LANDSCAPE OF SOUTHERN CALIFORNIA I*, 1–23 (George J. Sánchez ed., 2012). He was the lawyer for an important World War II, Chicano housing discrimination case, *Doss v. Bernal*, No. 41466 (Cal. App. Dep’t Super. Ct. 1943). See generally Robert Chao Romero & Luis Fernando Fernandez, *Doss v. Bernal: Ending Mexican Apartheid in Orange County*, UCLA CHICANO STUD. RES. CENTER (Feb. 2012), <http://www.chicano.ucla.edu/publications/report-brief/doss-v-bernal>.

172. 96 F. Supp. 1004 (D. Ariz. 1951).

173. He argued *Yasui v. United States*, 320 U.S. 115 (1943), *Korematsu v. United States*, 323 U.S. 214 (1944), and *Oyama v. California*, 332 U.S. 633 (1948), before the U.S. Supreme Court, and served as a lawyer to Sirhan Sirhan, Robert F. Kennedy’s assassin, hitting the cycle for representing unpopular persons and causes. See *Wirin Abraham Lincoln*, *supra* note 171, at 412; *Controversy over Defense of Sirhan*, LODI NEWS-SENTINEL (Lodi, Calif.), June 19, 1968, at 2.

174. *Serrano v. Priest*, 487 P.2d 1241, 1243 (Cal. 1971). MALDEF filed as amicus as well, as did several other players in the *Rodriguez* litigation. *Id.*

175. VALENCIA, *supra* note 63, at 319.

176. See Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLIN L. REV. 51, 82 nn.148 & 149 (1985); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 54 (1984).

177. 548 U.S. 399 (2006).

178. See *id.* at 447 (holding that MALDEF won the argument concerning Congressional District 23, while Texas was upheld on District 25).

ber of the early lawyers were short term, and there was much turnover, politicized personnel decisions, and gaps in personnel. More than three-quarters of its early cases in Texas were desegregation cases, which required considerable legal and technical sophistication, social science research capability and expertise, and sufficient political and legal resources to try the years-long cases.¹⁷⁹ MALDEF lost many of these, and even when it did prevail, often it had to wait many years to receive attorney's fees, rather like wildcatting in courts instead of in oil fields. While it is true that MALDEF did prevail by obtaining single-member voting districts in the original *White v. Regester*, the case was in the genre of complex ongoing litigation, decided in 1973, but remanded for further findings, and the remand was finalized by the Supreme Court in 1975, when single-member districts were maintained as a voting rights tool.¹⁸⁰ In the 1973 decision, the Court had held:

Very likely, larger differences between districts would not be tolerable without justification "based on legitimate considerations incident to the effectuation of a rational state policy," but here we are confident that appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variations alone. The total variation between two districts was 9.9%, but the average deviation of all House districts from the ideal was 1.82%. Only 23 districts, all single-member, were overrepresented or underrepresented by more than 3%, and only three of those districts by more than 5%. We are unable to conclude from these deviations alone that appellees satisfied the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause. Because the District Court had a contrary view, its judgment must be reversed in this respect.¹⁸¹

Thus, *White* was MALDEF's first major case taken to the U.S. Supreme Court, where it was argued by Edward Idar Jr., along with lawyers representing the African American plaintiffs and where the sole amicus—the League of Women Voters—urged affirmance of the minority plaintiffs' position.¹⁸² In this case, MALDEF established itself as a force to be reckoned with on voting and electoral litigation, and the 1975 remand brought the relief that MALDEF had hoped would come to the voting practices in San Antonio and elsewhere, where the organization was founded and where it was headquartered at the time. The detailed statistical voting behavior, electoral politics, and mathematical analyses

179. As detailed in note 125, *supra*, *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131 (9th Cir. 2011), or its predecessors, has been active since the early 1970s in an attempt to desegregate Tucson schools. *Edgewood* and its variants have the potential to consume many decades. 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 *passim* (2008).

180. *White v. Regester*, 422 U.S. 935 (1975).

181. *White v. Regester*, 412 U.S. 755, 764 (1973) (citations omitted) (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)).

182. *Id.* at 756.

required for the case revealed the kind of deep analytic and technical expertise that the organization would need, either by employing lawyers and experts in-house or by cultivating access to these progressive scholars and lawyers who could undertake this work on an outside consultant basis.

Rather than actually litigating a number of significant cases such as *Rodriguez* and *Lau*, MALDEF followed an early strategy of filing amicus briefs to focus those courts upon the pending legal and constitutional issues affecting Mexican Americans.¹⁸³ In some instances, particularly for a nascent organization, this was an efficacious means of having some say in complex litigation or of actually intervening late in cases that had already been in progress when the Mexican American interests formally surfaced. *Keyes* is a good example of this strategy, when MALDEF intervened in litigation brought by White and African American litigants in the Southwestern city of Denver.¹⁸⁴ But in a city where the enrollment in the public schools was more Mexican American than it was African American and where educational programs and services for Chicanos were inescapably different than those for African American children, this strategy revealed the weakness of MALDEF's overarching efforts to be the group that would draw attention to educational failures and discriminatory practices for its Mexican American clients. Intervenors, by defini-

183. It has been suggested to me that filing amicus briefs can be merely a symbolic act, especially if it is a case that attracts many dozens of such briefs, as in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), major U.S. Supreme Court affirmative action admissions cases, but that sometimes a substantive and salient brief will score with the Court. Mitchell J. Chang et al., *Beyond Magical Thinking: Doing the Real Work of Diversifying Our Institutions*, ABOUT CAMPUS, May–June 2005, at 9, 11; Scott Jaschik, *Friends of Affirmative Action*, INSIDE HIGHER ED (Aug. 14, 2012, 3:00 AM), <http://www.insidehighered.com/news/2012/08/14/college-groups-flood-supreme-court-briefs-defending-affirmative-action>. I am not gainsaying the effect that amicus participation can have on a given matter, but the impact of being an amicus is almost always less dramatic and less effective than would be participating as a litigant or, failing that, as an intervenor. Any mature purposive organization involved in a U.S. Supreme Court practice will likely have occasion to do both, as a form of the requisite signaling that is the major activity of such groups. In my experience, it is also a matter of political economy because many law firms and legal scholars will get involved in cases they do not have time or resources to try, but to which they can contribute writing and drafting services on behalf of potential amici.

184. See generally *Romero, II*, *supra* note 12, at 141; *Roos*, *supra* note 17, at 257–58. Legal historian Marc Simon Rodriguez has noted this accurately in the early cases:

One other reason for the lack of risk taking may have stemmed from the fact that most Mexican-American litigation was an underfunded and often grass roots affair and not a well organized bureaucratic effort with a functioning headquarters and annual budget. Mexican-American civil rights lawyering, prior to the founding of the Mexican-American Legal Defense and Educational Fund (MALDEF) in 1968, lacked the organization and funding of the National Association for the Advancement of Colored People's (NAACP) Legal Defense Fund [LDF]. Mexican-Americans lacked the national network of membership and supportive non-minority sponsors that the NAACP relied on. Because Mexican-Americans existed outside the black–white paradigm, the reform efforts relied on a small group of lawyers and individual litigants who worked with meager budgets and their formal status as “whites” to challenge their segregation and mistreatment at the hands of Anglos.

Marc Simon Rodriguez, *More than Whiteness: Comparative Perspectives on Mexican American Citizenship*, 18 LA RAZA L. J. 79, 81 (2007) (footnote omitted).

tion, do not get to direct litigation strategies, and the poor results from *Keys* show this as well as any other example could. Although it was becoming a repeat amicus player and purposive organization bringing cases, at this time, MALDEF simply did not have sufficient organizational capacity or lawyer stability to bring better cases or choose its own litigation.

Intervening late or submitting amicus briefs also are unlikely to generate fees should the original plaintiffs prevail. There was also an evident lack of focus in the earliest MALDEF docket, with efforts splayed along many fronts. Historian San Miguel gives examples of cases that, even if the plaintiffs had prevailed, would not have had a major impact or provided political and fiscal resources, such as the many students and faculty who were discriminated against in school struggles.¹⁸⁵ These were important cases, especially to the parties, but they simply did not have enough traction to serve as major litigation foci, especially when the bulk of the cases were the small-town Texas desegregation cases, themselves expensive and elusive, especially before a judiciary that did not consider Chicanos to have been discriminated against or marginalized.¹⁸⁶ This invisibility meant that MALDEF had to establish

185. San Miguel notes that the earliest cases brought by MALDEF were often designed to bail out and defend students who had been involved in school protests, walkouts, and other activism: "MALDEF became a key supporter of student activists and contributed both to the shaping of legal principles to eliminate discrimination against Mexican Americans and to establishing special services aimed at promoting equality in American life." SAN MIGUEL, JR., *supra* note 60, at 169. Historian Steven Wilson, in his authoritative review of these early litigation patterns, especially informed by his interaction with Texas lawyer James DeAnda, notes the rise of the Chicano student movement that grew up at the same time MALDEF was becoming established. *See* Wilson, *supra* note 18, at 176. In some instances, these protests took the form of civil disobedience and defiance against school authorities, including short-lived "huelga (strike) schools." *See* Wilson, *supra* note 165, at 214–15 n.42; *see generally* DAVID MONTEJANO, *QUIXOTE'S SOLDIERS: A LOCAL HISTORY OF THE CHICANO MOVEMENT, 1966–1981*, *passim* (2010) (describing the work of second-generation Chicano civil rights movement organizations); CARLOS MUÑOZ, JR., *YOUTH, IDENTITY, POWER: THE CHICANO MOVEMENT passim* (2d ed. 2007) (describing the origins of the 1960s Chicano civil rights movement).

186. Sometimes, the court just threw up its hands, as happened in a version of the Houston desegregation case (begun in a different guise in 1956), *Ross v. Eckels*, 434 F.2d 1140 (1970), a case involving the LDF but no Latino organizations or lawyers:

Of more ominous portent is the type of partial racial balancing the majority opinion actually effects. Approximately 36,000 students in the Houston, Texas system are Spanish surnamed Americans. They have been adjudicated to be statistically white. As the majority states, we know they live in the very areas required to be paired with all or predominantly Negro schools. I say it is mock justice when we "force" the numbers by pairing disadvantaged Negro students into schools with members of this equally disadvantaged ethnic group. I would be greatly surprised if a single school teacher could be found in the entire Houston Independent School District who would testify that the educational needs of either of these groups is advanced by such pairings. We seem to have forgotten that the equal protection right enforced is a right to education, not statistical integration. Why, on this kind of a theory, we could end our problems by the simple expedient of requiring that in compiling statistics every student in every school be alternately labeled white and Negro. Then, you see, everything would come out 50–50 and could get our seal of approval once and for all.

....

the bona fides of its population and politics each time and in each case, even in small-town Texas and other inhospitable venues where the de facto educational and political practices were widespread and long established.

MALDEF suffered underachievement in its earliest years—or did not reach its peak quickly—until it had the institutional maturity and organizational discipline to choose how to frame issues strategically and to pick its cases carefully. This is a subgenre of its failure to focus, and even though the organization was never a membership organization, such as the ACLU and original NAACP Legal Defense Fund models, it attempted to redress the widespread discriminatory practices that its clients faced, especially in the hostile Southwestern states. San Miguel's careful count of MALDEF litigation (by trials or other legal means and amicus briefs) in its first full decade revealed nearly 100 total cases in Texas alone, including seventy-one involving desegregation, seven in political rights, six in voting, four in employment, three in educational finance, and two other cases, totaling ninety-three from 1970 to 1981.¹⁸⁷ Bursting on the scene as it did, there was enormous early pressure to sue widely and to establish itself as a litigious purposive organization; San Miguel notes an early admonition that it was to be reckoned with: "Let all of them take heed."¹⁸⁸

MALDEF then, as now, partnered with a number of advocacy groups, including Latino groups such as LULAC and the American G.I. Forum, others who offered themselves as named plaintiffs for a number of cases, and other purposive groups whose litigation interests aligned with those of Mexican Americans. These broke into distinct groupings, each with a different valence and resource requirement and with varying centripetal forces for MALDEF's consideration. First, there were the cases that the organization brought on behalf of Mexican Americans in the various agenda areas, where the organization had its own clients and directed the litigation, such as *Serna*, an early New Mexico bilingual

The law in this field is entirely empirical. All must admit we are just beginning experiments to find our way along an obscure path to the constitutional goal of a unitary school system—one in which no child shall be effectively excluded from any school on account of race or color. I predict that we shall soon discover in this as in other experimentation that a basic rule holds which requires ingredients and methods to be introduced singly, not in groups or bunches, lest the experiment continuously fail because one new departure cancelled out the benefits that came from another.

Id. at 1150 (Clark, J., dissenting) (citation omitted).

187. SAN MIGUEL, JR., *supra* note 60.

188. *Id.* As illustrated in the Richard Valencia study of Chicano desegregation litigation, Mexican Americans brought almost three dozen cases in state and federal courts between 1925 and 1976, the last seventeen in the first decade of MALDEF's existence. VALENCIA, *supra* note 63, at 8 tbl.1.1. It was this sense of momentum that prompted Mario Obledo to respond in the words that make up the title of this study: "MALDEF slowly evolved, according to Obledo, from 'a legal organization of militants' into a 'law firm for the Latino community' as it entered into new areas of litigation" David A. Badillo, *MALDEF and the Evolution of Latino Civil Rights*, RES. REP., Jan. 2005, at 4, 7 (quoting Interview with Mario Obledo, Former MALDEF President (Aug. 2003)).

education case.¹⁸⁹ A second group of collaborations included secondary amicus participation as the vehicle of solidarity with other litigation efforts, as took place in *Serrano*, the successful California state court school finance litigation, decided for Chicano plaintiffs in the Supreme Court of California under the Constitution of the State of California, and in *Rodriguez*, where lead attorney Arthur Gochman argued the case as a school finance matter rather than as a racial or ethnic equity case.¹⁹⁰ As became evident, this partnering strategy enabled MALDEF to broaden its reach and general influence, but its result shows the difficulties that arise when any group comes somewhat late to the party or operates on the periphery as one of the many amicus brief sponsors. Third, there arose a formal intervenor option, as in *Keyes*, after the Tenth Circuit had already ruled on the case, and the late party could not dictate the litigation strategy. The Tenth Circuit actually relied upon the advice rendered by MALDEF in its remand to the district court, but the relief and remedy were managed by the original plaintiffs and defendant school board, not by intervenor amici.¹⁹¹ MALDEF chose this third option sparingly, as in *Ross v. Eckels*¹⁹² and other cases where MALDEF sought to become intervenors and shape the litigation strategy beyond the more scholarly amicus route.¹⁹³

189. *Serna v. Portales Mun. Sch.*, 499 F. 2d 1147 (10th Cir. 1974).

190. See Heise, *supra* note 57, at 54; Albert Kauffman, *Texas School Finance Litigation: Great Progress and Some Regression*, in *A QUALITY EDUCATION FOR EVERY CHILD: STORIES FROM THE LAWYERS ON THE FRONT LINES* 109, 112–13 (David Long et al. eds., 2009); Albert Kauffman & Carmen Maria Rumbaut, *Applying Edgewood v. Kirby to Analysis of Fundamental Rights Under the Texas Constitution*, 22 *ST. MARY'S L. J.* 69, 86–91 (1991).

191. A robust and inconsistent examination about the group's racial construction continued in jurisprudence until 1973, when *Keyes* seemed to settle the issue.

Notably absent from much of this discourse was the voice of MALDEF in each of the court's deliberations. Although, the question of why exactly this was needs more research, it is clear that MALDEF was keeping close tabs on these developments as the organization began to conceptualize what would emerge as a distinctly Chicano litigation strategy. From its inception, the organization encountered a world that defined Mexican Americans in relation to White power and privilege. . . .

Equally noticeable in these initial stages, moreover, was a consistent and conscious effort to describe Mexican American segregation and mistreatment as similar in degree if not equivalent to the experience of Blacks. . . . They also went to segregated schools that were dilapidated and underachieving and encountered racist and discriminatory attitudes in private and public settings on a consistent basis. . . . Centrally important in this description is MALDEF's conscious effort to insert Mexican Americans into a racial and color paradigm.

Romero, II, *supra* note 12, at 138–39 (footnotes omitted).

192. 468 F.2d 649 (5th Cir. 1972). *Ross v. Eckels* had been litigated for several years before MALDEF intervened.

193. Dean Rachel Moran, among the most thoughtful observers of the complex issues involving litigation and bilingual education, noted this feature in her appraisal of *Keyes*:

Keyes, like most institutional reform cases, implicates a wide range of divergent interests. The case is far more than a simple dispute between LEP and NEP students and the school district. It illustrates tensions between bilingual education advocates and proponents of desegregation as well as potential conflicts among multiple language groups. Although *Keyes* indicates that the district's willingness to comply with a decree is of concern, it also demonstrates that representatives of LEP and NEP children can overcome this intransigence in part by forging alliances with educators, such as those in [the Con-

Any such partnership arrangement meant that MALDEF would not be in the driver's seat and thus would not be setting the terms of the representation and the scope of the litigation. As focused litigation groups gain more experience, they seek to bring the litigation themselves so as to manage it throughout, including the resource allocation and strategic litigation choices, particularly the crucial issues of which cases to undertake and which entities should be sued, in what capacity, and under what theory of the case. There is a wistful sense that MALDEF in particular might have either undertaken the *Rodriguez* case—likely making more of its racial and ethnic discrimination roots—or at least intervened more authoritatively to move it in this direction. One educational historian who has carefully studied the biographies of school finance cases has noted of this dimension:

As well, the now-substantial intellectual and scholarly attention to school finance today was only emerging at the time [plaintiffs' attorney Arthur] Gochman crafted the *Rodriguez* complaint and, as a consequence, Gochman had comparatively fewer scholarly assets to leverage.

Interestingly (especially so in the shadow of the concurrent school desegregation litigation), the *Rodriguez* complaint did not pursue racial (or ethnic) discrimination theories. Indeed, Gochman assiduously avoided casting the *Rodriguez* case as a "race" case. He ignored the racial and ethnic dimensions even though the Edgewood district was overwhelmingly Hispanic and the Alamo Heights district predominately white. Nevertheless, *Rodriguez* was consciously framed as a finance case and the attorneys in *Rodriguez* emphasized the Edgewood district's poverty rather than the district's overwhelmingly non-white citizenry.

What might explain the strategic decision to cast *Rodriguez* in financial rather than racial or ethnic terms? After all, racial discrimination was the dominant theme of the quickly maturing school desegregation jurisprudence. The absence of perfect correlation between ethnicity and geography might have deterred Gochman. (If so, his intuition was vindicated by the Court's reliance on a study by Professor Burke documenting something less than a perfect correlation between a school district's percentage of minority students and per pupil spending levels.) Although Edgewood was overwhelmingly Hispanic, it was not exclusively so. Similarly, while Alamo Heights was predominately white, some—albeit few—residents were either His-

gress of Hispanic Educators], who have an interest in promoting bilingual education programs. To address more comprehensively the multiplicity of interests affected by *Keyes*, future research will have to examine not only the litigators' perspectives but also those of their LEP and NEP clients, the judge, litigators and clients demanding desegregation, and community representatives of other language groups. Only then will the interplay of litigation strategies, judicial responses, and meaningful reform be more fully understood. Moran, *Lessons of Keyes*, *supra* note 15, at 203.

panic or non-white. Another possibility is that the predominately Hispanic Edgewood residents were simply more interested in increasing resources for their schools than in increasing racial and ethnic integration levels. Regardless of the reason, it is difficult to overstate the strategic importance of the decision to frame *Rodriguez* in terms of poverty and education rather than in terms of race and ethnicity.¹⁹⁴

The complexities noted by Professor Heise exist in all these high-wire cases, even if they are brought by a single firm or solo practitioner with no purposive institutional support, but cohesion among the plaintiff parties is a genuine necessity in any joint endeavor brought as a civil rights case. The *Rodriguez* and *Keyes* cases showed the early and inexperienced MALDEF, but produced the sophisticated brief in *Keyes*—written by staff attorneys Michael Mendelson and Alan Exelrod and President and General Counsel Mario Obledo—which became the blueprint of the relief requested of the Court following its remand in 1974. These developments showed that MALDEF was improving its work product and gaining the litigation experience necessary to become a more effective repeat player in these cases.¹⁹⁵ That *Rodriguez* and *Keyes* were decided by the Supreme Court on the same day symbolizes MALDEF's growing expertise in salient cases; although it did not act as lead litigator in either case, its alignment with the private practitioner Gochman in the former and with the Anglo Denver lawyers and the established NAACP LDF in the latter showed the promise envisioned by the MALDEF founders: that Mexican Americans in the community would have access to their own national law firm, undertaking national civil rights litigation on a widespread basis. As the preeminent legal historian of *Keyes* has noted, MALDEF's DNA was all over the case, even if the relief ordered was not what the organization had sought and even if it were an arranged marriage:

Although Denver's diverse racial populations challenged the usefulness of the black–white dichotomy in constitutional law, the Tenth Circuit's rejection of Judge Doyle's desegregation remedy ensured

194. Heise, *supra* note 57, at 55 (emphasis omitted) (footnotes omitted).

195. The influential MALDEF lawyer Peter Roos noted that the apparent victory by MALDEF in *Serna* did not lead to a similar remedial result in *Keyes*, even though the two cases were close in time to each other and both in the same appellate jurisdiction, the Tenth Circuit, making it difficult to mount consistent litigation strategies in cases ranging from small Portales, New Mexico, to large urban Denver, Colorado. (He might have added that it made a difference who brings the cases.)

Indeed, the Tenth Circuit appeared to endorse the fact that “a meaningful desegregation plan” must help “Hispano school children to reach the proficiency in English necessary to learn other basic subjects.” Thus the *Keyes* decision, by the same circuit which had affirmed the extensive bilingual–bicultural education program in *Serna*, can be explained by the failure to find either that the rights of Hispanic students under Title VI (as interpreted by *Lau v. Nichols*) or the Equal Educational Opportunities Act had been independently violated or that the remedy was necessary to undo the effects of past segregation.

Roos, *supra* note 11, at 131 (footnotes omitted) (quoting *Keyes v. Sch. Dist. No. 1*, 521 F.2d 465, 482 (10th Cir. 1975)).

that Chicanos never seriously threatened the polarized premises of American jurisprudence. In the legal battle to desegregate Denver's schools, Mexican Americans were consistently described in relation to their relative whiteness or blackness, not their Chicanoness. Whether they were considered "other white" or, more recently, "other black," Mexican American students were denied a viable constitutional remedy and were left to compete with African Americans for limited resources in non-white Denver.

The attempt of Denver students, parents, educators, activists, lawyers, and judges to come to grips with its multiracialized citizenry suggests the challenges facing a demographically changing United States. The equality claims of Denver's diverse student body vividly demonstrated the extent that all these groups not only distinguished themselves, but also claimed legal rights in multiracial terms. Although in 1973 the United States Supreme Court wanted to use tri-ethnic Denver to develop national principles of equality, subsequent jurisprudence and legislative acts limited the implications of that decision and instead reinforced the bi-racial fiction of law. Thus, despite the efforts of Denver's Chicanos to declare that their "Selma" would take place in the city's public schools, the law failed to appreciate the multiracial transformation of the United States.¹⁹⁶

The disappointment was also evident in *Lau*, where an Anglo lawyer and Chinese American plaintiffs controlled the case strategy, even with substantial amicus and consultative participation by MALDEF and PRLDEF.¹⁹⁷ As legal scholar Rachel Moran has noted, the *Lau* lawyer deliberately did not include Spanish-speakers in his strategy, in part because he was trying to finesse the recent *Rodriguez* ruling, but also because if he lost his case, it would not preclude opportunities for Latinos to bring such cases:

Aware that the Court's recent [*Rodriguez*] ruling did not bode well for his clients, [*Lau* attorney Edward H.] Steinman nevertheless pursued Supreme Court review because he was confident that an adverse ruling could be limited to the situation of Chinese-speaking students in San Francisco. Attorneys representing Spanish speakers could readily distinguish the case away.¹⁹⁸

In high-stakes litigation, bringing the wrong case and losing can be more harmful than not bringing a case at all, as bad precedents can take up the oxygen in the room, consume all the available support resources, and block the path for subsequent cases with better theories or better facts or,

196. Tom I. Romero, II, *Our Selma Is Here: The Political and Legal Struggle for Education Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 SEATTLE J. SOC. JUST. 73, 123 (2004).

197. PRLDEF, founded in 1972 in New York City, later changed its name to LatinoJustice PRLDEF.

198. Rachel F. Moran, *The Story of Lau v. Nichols: Breaking the Silence in Chinatown*, in EDUCATION LAW STORIES, *supra* note 57, at 129.

for that matter, better purposive groups, who might be better situated for the contest.

The disappointing *Rodriguez* results cut off the federal route to school finance equity, but the *Serrano*, *Cahill*, and other state constitutional challenges were more clearly the proper pathway to advocates. By the time a decade later that Texas school finance was litigated again, the roadmap was *Serrano*-inspired state court constitutional challenges, and it was MALDEF that was asserting its expertise and calling the shots in a remarkable decade-plus run of education cases, the Texas Supreme Court's *Edgewood* opinions. By the time these cases were brought and tried, MALDEF had become the major player in such Southwest challenges and a major national school finance player. San Antonio lawyer, MALDEF Regional Counsel Albert Kauffman, now a law professor, and the organization undertook *Edgewood I* (1984–1989),¹⁹⁹ *Edgewood II* (1990–1991),²⁰⁰ *Edgewood IIIa* (1991),²⁰¹ *Edgewood III* (1991–1992),²⁰² *Edgewood IV* (1993–1995),²⁰³ *Edgewood V* (2001–2003),²⁰⁴ *Edgewood VI* (2003–2006),²⁰⁵ and successor cases, all in state courts in Texas.²⁰⁶ And, the *Lobato v. State of Colorado* litigation²⁰⁷ was still making its way through Colorado courts.²⁰⁸ Professor Heise notes:

Just over one decade following the [1974] *Rodriguez* decision, another lawsuit was filed, this time in Texas state court. Unlike the initial lawsuit, in the state litigation the Mexican American Legal Defense and Education Fund (MALDEF) took the litigation lead and argued that Texas'[s] school finance system violated the state's equal protection and education clause.²⁰⁹

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

200. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491 (Tex. 1991).

201. Order Denying Motion for Rehearing, *Edgewood Indep. Sch. Dist. v. Kirby*, No. D-0378 (Tex. Feb. 7, 1991).

202. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489 (Tex. 1992).

203. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717 (Tex. 1995).

204. *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis (Edgewood V)*, 107 S.W.3d 558 (Tex. 2003).

205. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746 (Tex. 2005).

206. For excellent and careful work on these complex cases, see Kauffman & Rumbaut, *supra* note 190.

207. MALDEF's newest Leviathan school finance case is *Lobato v. State of Colorado*. See, e.g., Brief for Brennan Center for Justice et al. as Amici Curiae Supporting Plaintiff-Appellees, *State v. Lobato*, 304 P.3d 1132 (Colo. 2013); Press Release, Brennan Center for Justice, *Lobato v. State of Colorado*, (Sept. 26, 2012), available at http://www.brennancenter.org/content/resource/lobato_v_state_of_colorado/. As this Article was in its final stages, the Colorado Supreme Court issued its disappointing opinion: "[T]he current public school financing system complies with the . . . Colorado Constitution . . ." *State v. Lobato*, 304 P.3d 1132, 1144 (Colo. 2013).

208. Fortunately, this complex litigation project has been encyclopedically analyzed by its chief participant-lawyer observer. See Kauffman, *supra* note 179.

209. Heise, *supra* note 57, at 70 (footnote omitted).

As he might have noted, MALDEF by then was no longer outside looking in.

In the complex ecosystem of school finance litigation, there was always the strategic reckoning to determine the best approach to the actual finance inequity, as in the *Rodriguez* decision to bring that case in federal court and then to treat it as a finance issue rather than as a racial and ethnic parity issue.²¹⁰ Case management was particularly difficult in this type of litigation, for dozens of social scientists on both sides were commissioned to undertake research, and, as the court noted, “The trial was delayed for two years to permit extensive pretrial discovery and to allow completion of a pending Texas legislative investigation concerning the need for reform of its public school finance system.”²¹¹ The California state court decision in *Serrano*, where Chicano plaintiffs prevailed in a case brought primarily by non-Chicano lawyers, forged a pathway that involved determinations of what constituted “equity,” “(in)adequacy,” “(in)efficiency,” and “equalization”—terms that make it clear how social science and economic technical expertise play a role.²¹² The problems of issue drift materialize, requiring detailed case management and focused litigation capacity, especially when these cases play out over such long periods of time, often necessitating coordination across cohorts of lawyers, not just on the plaintiffs’ side, but also continuity across changes in teams of defendants, political actors, and court personnel.²¹³

Such complexity and case management proficiency and adroitness are more evident in repeat group players, whose deep expertise and organizational resources assure that they will be involved over the long periods of time that such a litigation strategy requires. Issue drift will likely test the ability of focused purposive organizations to hone in substantively in the way that complex litigation necessitates; this will be particularly difficult in organizations that have multiple purposes and programs and where litigation will not be the only focus. From its earliest efforts, it became evident that voting behavior and ultimately Voting Rights Act (VRA) litigation, especially VRA Section 5 pre-clearance and language minority provisions, would become the premier vehicle for

210. See *supra* notes 177–82 and accompanying text.

211. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 n.4 (1973).

212. *Serrano v. Priest*, 487 P.2d 1241, 1247 (Cal. 1971).

213. For example, *Serrano* had five lawyers trying the case for the plaintiffs and appellants in the Supreme Court of California, and almost thirty lawyers from amici curiae on behalf of plaintiffs and appellants, including several representing MALDEF (Mario Obledo, Alan Exelrod, and Michael Mendelson, as in *Keyes*), and the sojourner A.L. Wirin. See *id.* at 1243. There is some evidence that the Ford Foundation, in helping to establish MALDEF, hoped that by funding scholarships and underwriting litigation, a cadre of professional Chicanos would emerge to strategize and support the community litigation. See, e.g., Victoria-María MacDonald & Benjamin Polk Hoffman, “Compromising La Causa?”: *The Ford Foundation and Chicano Intellectual Nationalism in the Creation of Chicano History, 1963–1977*, 52 HIST. EDUC. Q. 251 *passim* (2012) (examining the effect of the Ford Foundation on the Chicano civil rights movement).

MALDEF litigation and would become among the country's leading such voices in this important domain.²¹⁴

But MALDEF was also interested in other important areas, all of them interconnected with the relative lack of political resources that had led to such community powerlessness at all levels in the polity. So while VRA and political participation litigation were key areas of expertise, especially with the increased technical requirements for redistricting and the mathematical elements of line drawing, other areas were important for the comprehensive litigation reputation the organization was developing. In quick succession, the organization was also participating in different degrees and with varying levels of success in U.S. Supreme Court litigation in the large domains of desegregation, equal opportunity, school finance, bilingual instruction, and—with the advent of *Plyler* in September 1977, when Pete Tijerina wrote Joaquin Avila about the Texas statute that had just become law—immigration and immigrant education as well.²¹⁵ By the time that this case ripened, MALDEF was a fully mature, national, and purposive organization, competent to handle the complex case management and to determine its own organizational trajectory. Thus, although *Plyler* was not the first Supreme Court case brought by MALDEF or in which the organization participated, it was arguably the first case in which it fully determined its own fate and its own place in the polity, even as it teamed with Peter Schey's Center for Human Rights and Constitutional Law, a newly formed NGO that would have its own trajectory and purposive resources. Since that litigation, MALDEF has managed the post-*Plyler* developments, most notably the several attempts to overturn it, particularly California's Proposition 187, leading to a Ninth Circuit victory in the 1997 *LULAC v. Wilson* and negotiations with the State to settle the matter before it could do serious harm;²¹⁶ MALDEF has also fended off subsequent federal legislative threats such as the Gallegly amendment.²¹⁷

Political scientist Vanessa Baird noted the maturation of MALDEF into a transformative “policy entrepreneur[]” when she wrote:

The story about assistance for prenatal care for illegal immigrants in California was not over when Proposition 187 was declared unconstitutional [in the 1997 MALDEF case, *LULAC v. Wilson* and its settlement by the State]. Actors at the state and federal level responded to the court's decision by using whatever influence they could to

214. See Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT'L BLACK L.J. 201 *passim* (2004); Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479 *passim* (1993) (examining the history of the Voting Rights Act and Latino communities).

215. Letter from Avila to Roos, *supra* note 44.

216. *Supra* note 108.

217. See generally PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 141–43, 176–78 (2000).

change policy in their desired direction. [When] pro-immigrant policy entrepreneurs were presented with a new law to challenge, they used information from recent Supreme Court decisions to identify the best possible legal strategy. The new legal strategy, one that would have been improbable in the previous decade, resulted in a case on the judicial agenda that might not have existed otherwise. This illustration is important for the theory that courts depend on policy entrepreneurs to pay attention to the information contained within recent decisions to receive cases that are framed most appropriately for exerting policy-making power in public areas that the [J]ustices consider a priority.²¹⁸

Only major, repeat purposive organizations can plausibly serve as participant signalers in this field of operation, where their litigation agenda requires a number of cases to establish and then effectuate the larger organizational interests. In Baird's analysis, the organizations have a role to play, and the Supreme Court Justices also have both a receptor role and signaling role; that is, by accepting (or denying) certiorari appeals, the Court signals its willingness to consider the legal issue(s) imbedded within a case, thereby sending its receptiveness to those who would weigh in—the legal policy entrepreneurs and purposive litigation organizations. Through this symbiotic relationship, MALDEF had become the organization expected to take up civil rights for this population and the issues that demand resolution in the polity and space for political discourse:

Proponents of minority rights, who have always depended on the supremacy of the federal government to protect minorities, had to make the opposite legal argument when the federal government was responsible for restricting rights and the states were in the position of protecting them. When MALDEF responded to indications of the Court's priorities with a pro-states' rights argument, a federal court was presented with a case involving states' rights that most likely would not have been available to the judicial agenda. The implication of this telling example is that the relationship between the Supreme Court [J]ustices and policy entrepreneurs is symbiotic; the Supreme Court provided information to MALDEF to help it develop an effective legal strategy, and MALDEF provided a federal court with a case that it would not have otherwise been able to decide, thereby extending the power of [J]udiciary.²¹⁹

In the thirty years since 1982's *Plyler*, MALDEF has become the case study of how a case can require stewardship and nurturing in its incipient stages and its middle-age arc, rather like children require. Indeed, when President Barack Obama announced DACA in June 2012, he did so on the thirtieth anniversary of *Plyler*, drawing attention to it in

218. BAIRD, *supra* note 135, at 74.

219. *Id.* at 72.

Department of Homeland Security press announcements.²²⁰ DACA is possible only because the Supreme Court determined in *Plyler* that these undocumented children were community members entitled to equal protection and therefore deserved the same opportunities as did all children; this inchoate phenomenon has eventually morphed into the DREAM Act movement and program.²²¹

IV. CONCLUSION

Despite its modest beginnings in 1967 and 1968, MALDEF in relatively short order developed broad and deep professional expertise in a number of program areas where Supreme Court litigation has been the chief focus. While it has always been a small organization, never employing more than fifteen or twenty full-time lawyers in all its regional offices, it has marshaled these resources to establish itself as among the premier players in a relatively broad array of technical areas and is widely viewed as being among the handful of civil rights organizations that can be a repeat player and policy entrepreneur in constitutional litigation, particularly in the domains of immigration, desegregation, voting rights, educational finance, bilingual education, and other educational policy areas such as testing, benefits, and corollary issues. Its early politicized squabbling gave way to more stable and largely Latino legal staff, one widely recognized as effective and expert.

Being a purposive organization serving Latino interests is a difficult balancing act, made more difficult by the growing anti-Latino and restrictionist nativism that have arisen, particularly at the state and local levels, and also by resource constraints from its being a freestanding and not a membership organization, one funded by progressive foundations, attorney fees, and other professional contributions. For one example, when Arizona began enacting statewide anti-immigrant statutes, MALDEF had to make the difficult decision to close its busy Atlanta office, where it had cultivated a growing employment law and antidiscrimination presence, to redeploy legal resources to the Southwest.²²² Civil rights litigation, even when successful, can take many years and additional sophisticated litigation to realize attorney fees. *Serrano*, where MALDEF was not the main litigant organization, began in the late 1960s and was won in 1971, but fees were not awarded until 1977.²²³ In some states, it requires special state legislation to appropriate fees, a process that can take several years.²²⁴ This business model is a very precarious

220. Olivas, *Dreams Deferred*, *supra* note 130, at 542; Preston, *supra* note 130.

221. Olivas, *The Political Economy*, *supra* note 130, at 1759; *see also* OLIVAS, *supra* note 38.

222. Press Release, MALDEF, MALDEF Shifts Operations in Southeast (Apr. 9, 2009) available at http://www.maldef.org/news/releases/southeast_040909/.

223. *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977) (awarding attorney fees).

224. For example, in Illinois, there is no common law principle that allows attorney's fees either for costs or damages, and as a result, state courts do not award attorney's fees unless authorized by statute or by contractual agreement in advance. *See* Andrea Saltzman, *A Brief Look at Statu-*

one, especially in the league where MALDEF plays, necessitating large expenses up front for the cost of litigation, repayable at the back end only if the plaintiffs prevail and the courts and legislators approve the expenditures years later. Undertaking this course of action is not for the faint of heart or for the poor.

There are also daunting features of playing in the major leagues. The status of social science research in important complex cases is often vexing, especially if there is not a body of scholarship available or a coterie of experts willing to undertake the focused research needed for cases. Of course, these will not always be Latino or Latina experts, the stagnant state of Mexican American academics, even in core areas, renders it difficult to secure the expert testimony needed for high-stakes litigation. The actual risk for clients is problematic, especially in immigration cases, if the clients are not allowed to be styled anonymously, as occurred in *Plyler* and other MALDEF litigation involving undocumented clients.²²⁵ And public sentiment is always a consideration, especially in troubled financial periods and anti-immigrant times, where there is rampant racial violence and danger, which, in turn, makes fundraising development work more difficult. Being a significant player in the public imagination, especially the changing Latino polity, is always a balance of opportunities and disappointments. Perhaps the most difficult development is that once a purposive organization moves into the top ranks, it is difficult to maintain that status, especially when representing poor people's interests. Thus, paradoxically, the more successful and visible the organization becomes, the greater are the expectations. Simultaneously, the more successful Mexican Americans become in society, the less likely they are to see MALDEF or civil rights litigation as central to their lives or salient to their interests. Demography may be destiny, but litigation is its likely travel companion.

tory Attorney's Fees in Illinois, 73 ILL. B.J. 266 *passim* (1985). In addition, there are nearly 100 state statutes that allow attorney's fees. See Andrea Saltzman, *A Practical Guide to the Recovery of Attorney's Fees*, 74 ILL. B.J. 124, 124 (1985).

225. Olivas, *IMMIGRATION STORIES*, *supra* note 39, at 203; cf. Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247 *passim* (2001).