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LATINO EDUCATIONAL NEGLECT: THE RESULT BESPEAKS DISCRIMINATION

LUPE S. SALINAS*

The result [of the absence of a Latino on a grand or petit jury over a twenty-five year period] bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner. *Hernandez v. Texas*, 347 U.S. 475, 482 (1954).

I. INTRODUCTION—IF “NO CHILD LEFT BEHIND”¹ IS NATIONAL POLICY, WHAT HAPPENED TO MY KIDS?

This question faces many Latino parents as they see more concerted efforts in schools, from both the state and the national levels of government, yet they see insufficient, inadequate results in their own children. Latino parents are generally not well-equipped to answer this question. Many, like my parents, did not receive formal

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1. The *No Child Left Behind* (NCLB) program is the most sweeping reform of the Elementary and Secondary Education Act (ESEA) (also known as the “Title I” program) since it was enacted in 1965. The NCLB redefines the federal role in K-12 education to help improve the academic achievement of all Americans. A very critical aspect of the NCLB is its focus on helping limited English proficient students learn English through scientifically based teaching methods. More information is available at <http://www.ed.gov/nclb/overview/intro/factsheet.html>. The NCLB effort ran into some negative publicity when investigators from the Government Accountability Office reported that the Bush administration had violated the law by purchasing news coverage of President Bush’s education policies, making payments to conservative commentator Armstrong Williams, and hiring a public relations company to analyze media perceptions of the Republican Party. Robert Pear, ‘*No Child*’ *Effort Called Propaganda*, HOUS. CHRON., Oct. 1, 2005, at A14.

education in the United States. My father never even saw one day in an American public school.² Latino parents send their children to school so that teachers and other experts in the public schools can address their children's needs and provide them with a more affordable education.

Contrary to a few who espouse the idea of natural differences and deficiencies among the various ethnic groups, one cannot realistically state that there exists an ethnic intellectual divide. The purpose of this article is to address the unique educational needs of the Latino/a³ child and to determine if *Brown v. Board of Education*⁴ and *Hernandez v. Texas*,⁵ products of the Warren Court, continue to be legally relevant in the new millennium. I will also review the United States Supreme Court's Equal Protection purposeful intent test as set forth in *Washington v. Davis*,⁶ and its progeny.⁷ I take the position that *Brown* and *Hernandez* are alive and well. Their promise for a race-neutral America, free of debilitating discrimination, remains not only a worthy goal but also a challenging undertaking. I argue that the Court must adjust to the realities of the subtle, and sometimes ingenuous acts, of discrimination that plague our society. In other words, the evidence of Latino educational neglect and the current progressiveness in our jurisprudence should prompt the Court to alleviate the burdens imposed by the *Davis* purposeful intent principle, particularly in the field of public education. I recommend in educational equality cases the application of the deliberate or callous indifference standard announced by the Court in *Estelle v. Gamble*,⁸ a

2. Interview with Arnulfo Garcia Salinas, author's father, in Galveston, Texas (May 18, 2005). I dedicate this article to my mother Benita Lopez Salinas (1922-2005) and to my 84-year-old father who, notwithstanding the devastating effects of age on his memory, still recalls the bitterness caused by his exclusion from a public school education in Texas from 1927 through 1933. Mama always corrected my Spanish, and this only motivated me to learn more in both languages. Papi cried tears of joy every time he heard of one his children or grandchildren succeeding in school. I am happy for all I did to fulfill their dreams of life in America. Con cariño les dedico a mis queridos padres este artículo.

3. The term "Latino/a" generically refers to all persons, regardless of gender, who identify themselves as of Latin American or Hispanic descent. More specifically, this group includes persons of Mexican, Puerto Rican, Cuban, Colombian, Dominican, Salvadoran, Guatemalan or other South or Central American descent. I will hereafter use the term "Latino" to refer to any and all of these classifications or where the term "Latino/a" would be appropriate.

4. 347 U.S. 483 (1954).

5. 347 U.S. 475 (1954).

6. 426 U.S. 229 (1976).

7. *E.g.*, *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).

8. 429 U.S. 97 (1976).

case involving an inmate claiming a violation of his Eighth Amendment rights.

In order to better appreciate and understand the status of the Latino American in our society, I address the historical foundations that led to today's ever-increasing Latino population. I then discuss the sad state of affairs in the early days of education for Latino children. It was an era marked chronologically by total exclusion, by segregation in totally ethnically separate schools or in classrooms in schools attended by both Anglos and Latinos, and finally by educational practices that failed to address the unique educational needs of Latino children and that resulted in the Latino scholastics being "pushed out" of the public schools.

II. THE HISTORY AND DEMOGRAPHICS OF THE LATINO POPULATION

The development and growth of the Latino American population should assist in an understanding of the issues covered in this article. The United States began as a confederation of colonies in the 1600s, primarily comprised of English settlers and African slaves. The closest geographic influence of Latinos (Spaniards)⁹ existed in Florida¹⁰ and Louisiana, but that population did not yet affect the original thirteen colonies. Approximately two-thirds of New Spain, later known as the Mexican Empire, continued north of the Rio Grande into the current states of Texas, New Mexico, Colorado, Arizona and California. This is the area that Spanish conquistadors visited and inhabited in the name of the Spanish Crown.¹¹ These explorers provided the Latino names to the cities and rivers and valleys in California and throughout the Southwest United States.¹² In 1565, Spain founded St. Augustine in present-day Florida under the lead of

9. Few are aware of the role played by Spaniards under General Bernardo De Galvez, as allies to the colonists, in the defeat of British forces at sea during the American Revolutionary War. See DAVID J. WEBER, *THE SPANISH FRONTIER IN NORTH AMERICA* 267-70 (1992).

10. Susana H. O'Mara, *The Hispanic Presence*, BALTIMORE SUN, Nov. 8, 1979, at A23 (referring to the Spanish as the first colonizers of what is today the territory of the United States).

11. See *THE WORLD ALMANAC AND BOOK OF FACTS* 538 (Erik C. Gopel ed., World Almanac 2005) [hereinafter 2005 WORLD ALMANAC]. In 1540, Francisco Vasquez de Coronado explored the Southwest United States north of the Rio Grande River.

12. E.g., Juan Ponce de Leon explored the Florida coast in 1513 and then Hernando de Soto landed in Florida in 1539, setting the stage for the founding of St. Augustine. 2005 WORLD ALMANAC, *supra* note 11, at 538.

Pedro Menendez.¹³ This act precedes by almost two generations the arrival of the Pilgrims on the East Coast of the United States.¹⁴

The real test of Anglo-Latino relations began in the 1820s when Mexico began to allow and encourage the migration of Anglos to Mexican Texas. In a relatively short period of time, the racial-cultural conflict began to surface in Mexican Texas. From 1821 to 1835, Anglo settlers became disenchanted with the Mexican leadership. There were four areas in which conflict developed. First, there developed a racial conflict.¹⁵ Anglos encountered a group of Mexicans comprised in small part of European-Spaniard blood but in larger part of pure Indian and *mestizo* blood.¹⁶ Second, Anglos encountered a Catholic population, which clashed with their predominant Protestant preference.¹⁷ Third, the 1824 Mexican Constitution, reacting to the historical use of Indians as slaves by the Spaniards, repealed slavery. On the other hand, most of the Anglo settlers migrated from Southern states that utilized slavery as an economic way of life and they brought slaves with them.¹⁸ Fourth, language became a point of major conflict. The newly-adopted Mexican nation frustrated English-speaking Anglos by not only governing but also educating Anglo and Mexican children in Spanish.¹⁹

The accumulation of these conflicts inevitably led to the call for Texas Independence and eventually The Battle of the Alamo.

13. *Id.* In 1565 Spain founded St. Augustine, "the oldest continuously occupied European settlement in the continental United States." WEBER, *supra* note 9, at 1, 77.

14. *Id.* The Pilgrims, Puritan separatists, left Plymouth, England in September and arrived on December 26, 1620 at Plymouth Rock, New England. The first book devoted entirely to North America, Cabeza de Baca's account of his journey from Florida to the Pacific slope, appeared in Spain in 1542. *Id.* at 6. Another book, *Historia de la Nuevo Mexico*, about the conquest and settlement of New Mexico in 1598, was written by Gaspar Perez de Villagra, and published in 1610 in Spain. *Id.* Juan de Onate founded San Gabriel in what is today New Mexico in 1598 and moved his colonists to a more defensible location in present day Santa Fe. *Id.* at 77-78. The first recorded contact of Spaniards with what is today Texas occurred in 1528 when two small craft carrying members of the Panfilo de Narvaez expedition landed to the west of Galveston Island. These men and other Spaniards from the Cabeza de Vaca boat are believed to have been the first non-Indians in Texas. DONALD E. CHIPMAN, *SPANISH TEXAS, 1519-1821* 11, 29 (1992).

15. See SAMUEL HARMAN LOWRIE, *CULTURE CONFLICT IN TEXAS, 1821-1835* 59-60 (1967).

16. The Mexican population is currently listed as being sixty percent *mestizo* and thirty percent Indian. 2005 *WORLD ALMANAC*, *supra* note 11, at 802. See generally, In re Rodriguez, 81 F. 337 (W.D. Tex. 1897) (The applicant for citizenship has a "chocolate brown" skin color, but he qualifies for "White" under the naturalization law).

17. See LOWRIE, *supra* note 15, at 52, 132.

18. *Id.* at 47-51, 125, 130-31.

19. See *id.* at 120-21, 123-24.

During battles at the Alamo and at Goliad, Mexican troops slaughtered all rebels, both Anglo and Mexican, who took up the fight for independence.²⁰ The battle cry, "Remember the Alamo," became symbolic of the stereotypical view of all Mexicans as a vicious and savage group of people and of anti-Latino racial prejudice.²¹ Latinos who attended grade school in Texas in the 1950s experienced the humiliating sting of that infamous battle cry.²²

In April 1836, with the loss of the Mexican Army at San Jacinto, located near Houston, General Sam Houston negotiated a treaty allowing Texas to become an independent nation. General Santa Anna signed the treaty and gave up Texas to save his life, but once back in Mexico City he proceeded to disavow the concept of a "Free Texas."²³ Thereafter, efforts began in the United States Congress for the annexation of Texas. The United States leadership in the Congress decided to manifest their destiny in 1845 into what is now the United States Southwest.²⁴ Over the vociferous protests of South Carolina Senator John C. Calhoun that America was adding a "colored race," Mexicans became an integral part of the post-1848 United States.²⁵ President James K. Polk accomplished the annexation by sending the American army into Texas and then into Mexico by crossing the Rio Grande River. The Mexican-American War of 1846-

20. See HUBERT HERRING, *A HISTORY OF LATIN AMERICA* 317 (1966).

21. *Id.* Racial restrictive covenants in Texas, discovered during litigation in school desegregation and real estate cases, often read: "This property shall not be conveyed to any person of the African or Mexican Race." See generally, *Matthews v. Andrade*, 198 P.2d 66 (Cal. 1948) ("No person or persons of the Mexican race or other than the Caucasian race shall use or occupy any buildings or any lot."); *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App.—San Antonio 1948) (Pursuant to *Shelley v. Kraemer*, 334 U.S. 1 (1948), a state court unconstitutionally engages in state action when it seeks to enforce racially discriminatory deeds or covenants).

22. I suffered through attendance at primary and middle schools named Sam Houston, Alamo, Goliad, San Jacinto and Stephen F. Austin, all heroes or locations involved in the Texas Revolution from Mexico. These school names reminded me of the alleged savage nature of the Mexican soldiers who killed traitors in a civil war. Not surprisingly, when my ninth grade history teacher asked the class individually for our nationality, I recall reluctantly stating that I was "Mexican, I guess." All my classmates were Anglo. And they giggled. Thanks to my parents, and my bilingual, bicultural education, I do not have any hesitation now of proudly being an American of Mexican descent.

23. HERRING, *supra* note 20, at 318.

24. *Id.* at 320, 322.

25. DAVID J. WEBER, *FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS* 137 (1973), quoting CONG. GLOBE, 30th Cong., 1st Sess. 98-99 (1847). The highly respected Calhoun stated, "Ours, sir, is the Government of a white race. The greatest misfortunes of Spanish America are to be traced to the fatal error of placing *these colored races* on an equality with the white race." *Id.* at 135 (emphasis added).

48 resulted in the loss of half of Mexico's national domain.²⁶ Approximately 75,000 persons of Mexican descent opted to remain in the territory they had lived on and harvested and ranched for several generations and become American citizens.²⁷

At the time of the passage of the Fourteenth Amendment in the 1860s, Latinos, primarily of Mexican descent, suffered discriminatory treatment in various phases of life. When Mexicans became Americans officially in 1848, they came in as a conquered people.²⁸ At that time, national leaders warned against letting these "colored" people join White America.²⁹ Latinos in Texas and other parts of the Southwest suffered abuses in the criminal justice system during the 1850s and 1860s. For example, in 1859 in Brownsville, Texas, Juan Nepumeceno "Cheno" Cortina, a man of means, observed the town constable pistol-whipping an intoxicated Latino. Upon recognizing the Latino as one of his mother's workers, Cortina offered to assume responsibility for the man. The constable replied: "What is it to you, you damned Mexican."³⁰ Cortina, tired of the abuses his people suffered, wounded the officer, rescued the Latino, and began a crusade against abusive Anglo officials in the Brownsville area.

Around the same time that Cortina fought his battles, the murder case of the State of Texas versus Chipita Rodriguez occurred in San Patricio County.³¹ Much controversy surrounded the prosecution of the first woman ever executed in Texas.³² First, a grand jury was formed on October 6, 1863.³³ Second, the same grand jury on October 7 indicted Chipita Rodriguez for a murder alleged to have occurred on August 25, 1863.³⁴ On October 9, the court selected the trial jury and the trial began. Evidence began that same day. The jury heard arguments late that afternoon and returned a finding of murder that same evening. On Saturday, October 10, the trial judge ordered that Chipita Rodriguez be "securely confined until Friday, the

26. HERRING, *supra* note 21, at 323. The Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo] formally ended the war. The United States paid \$15,000,000 to Mexico and obtained Texas and the territory that later became California, New Mexico, Arizona, Nevada, Utah, and part of Colorado. *Id.*

27. CAREY McWILLIAMS, *NORTH FROM MEXICO* 52 (1948).

28. See RODOLFO ACUNA, *OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION* 9 (1972).

29. DAVID J. WEBER, *FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS* 137 (1973).

30. ACUNA, *supra* note 28, at 47.

31. See VERNON SMYLLIE, *A NOOSE FOR CHIPITA* (1970).

32. *Id.* at 3.

33. *Id.* at 24.

34. *Id.* at 25-26.

thirteenth day of November, A.D., one thousand eight hundred and sixty three, when she will be taken to the place of execution and there . . . be executed according to law by hanging by the neck until she is dead.”³⁵

Shortly after the speedy trial and execution of Chipita Rodriguez, and at the approximate time of the enactment of the Fourteenth Amendment, Latinos continued to experience various abuses that impacted their quality of life. They were treated after the Texas annexation and war as a conquered people.³⁶ The Treaty of Guadalupe Hidalgo contained land guarantees protecting “all prior and pending titles to property of every description.”³⁷ However, the United States Senate deleted that section.³⁸ The American government’s response in a Statement of Protocol reads:

The American government by suppressing the Xth article of the Treaty of Guadalupe Hidalgo did not in any way intend to annul the grants of land made by Mexico in the ceded territories. These grants . . . preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.³⁹

Assisted by the language providing for acknowledgments of titles before American courts, Anglo newcomers to previously Mexican territory were given an incentive to seize land. One group, The Santa Fe Ring, led by a lawyer named Thomas Catron, took Latino lands, resulting in land battles that have lasted several generations.⁴⁰

This type of disrespect of Latino rights also carried over into a person’s right not to be deprived of liberty without due process of

35. *Id.* at 28-29. Since Chipita was executed without an appeal, the Texas Legislature in 1985 passed a resolution on behalf of Chipita. The resolution expressed sympathy to Chipita’s descendants, stating “Chipita Rodriguez...may have been wrongfully convicted of the crime for which she was executed.”

36. JACK D. FORBES, *AZTECAS DEL NORTE: THE CHICANOS OF AZTLAN* 91 (1973).

37. Treaty of Guadalupe Hidalgo, *supra* note 26, at Art. X.

38. ACUNA, *supra* note 28, at 29.

39. *Id.* at 30, quoting U.S. GOV’T PRINTING OFF., *COMPILATION OF TREATIES IN FORCE* 402 (1899).

40. *Id.* at 66-67. Altogether, through land grant litigation and by purchases, Catron acquired more than one million acres of land. *Id.* at 67, citing WILLIAM A. KELEHER, *THE MAXWELL GRANT* 152 (1942). For cases involving land grant issues, see, for example, *United States v. Sandoval*, 167 U.S. 278 (1897); *Botiller v. Dominguez*, 130 U.S. 238 (1889); *Arguello v. United States*, 59 U.S. 539 (1855).

law.⁴¹ In 1854, in California, “the Spanish-speaking of Los Angeles felt oppressed by a double standard of justice.”⁴² In addition, “[e]very important lynch-law episode and most minor ones involved the Spanish-speaking.”⁴³ In Texas, early tales of Anglo-Mexican relations reveal horrific violence against persons of Mexican descent.⁴⁴ The controversies often centered on Anglo desires to acquire land, cattle and other livestock.⁴⁵ Other controversies focused on law enforcement brutality. The Texas Rangers were notorious among the police outlaws.⁴⁶ Known derogatorily among Mexican Latinos as *rinches*, the Rangers developed a reputation for shooting first and determining later if the Mexican was armed.⁴⁷ At times, the Rangers, in an apparent effort to terrorize the Latino population, eliminated innocent people in a case of “revenge by proxy.”⁴⁸

Conditions for Latino workers in the 1860s compared to slavery and involuntary servitude. Even though slavery involving African Americans was barred by the Thirteenth Amendment,⁴⁹ the practice continued *de facto* as to both the newly-emancipated slaves and others, like Mexican and Chinese workers, who were victims of labor abuses.⁵⁰ The condition known as Mexican peonage was of such concern that it was mentioned by the United States Supreme Court as a reality⁵¹ and was addressed by the League of United Latin American

41. U.S. CONST. amend. XIV.

42. LEONARD PITT, *THE DECLINE OF THE CALIFORNIOS: A SOCIAL HISTORY OF THE SPANISH SPEAKING CALIFORNIANS, 1846-1890* 160 (1968).

43. *Id.* at 154.

44. *See, e.g.*, DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986* 26-37 (1999).

45. Latinos have lost nearly four million acres of land. Valdez, *Insurrection in New Mexico*, 1 *EL GRITO* 14 (1967). Article VIII of the Treaty of Guadalupe Hidalgo provides: “[t]he present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.” Treaty of Guadalupe Hidalgo, *supra* note 26 at 929-30. It has obviously become another ignored treaty provision.

46. For a detailed account of the history and work of this police group, see WALTER PRESCOTT WEBB, *THE TEXAS RANGERS* (1935).

47. *See generally* AMERICO PAREDES, *WITH HIS PISTOL IN HIS HAND* 23-32 (1958).

48. *Id.* at 26. The lynchings continued to such an extent that in 1919, Texas State Representative J.T. Canales filed a complaint and commenced hearings in the Texas Legislature on how to modernize and train the Texas Rangers. *See* David McLemore, *The Forgotten Carnage Between Hispanics, Rangers*, *DALLAS MORNING NEWS*, Nov. 25, 2004, at A5. For more documentation of the violence against Latinos, see *Mexican Rights in the United States*, 115 *THE NATION* 51-53 (1922).

49. U.S. CONST. amend. XIII.

50. ACUNA, *supra* note 28, at 86; *see generally* *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896).

51. *Plessy*, 163 U.S. at 542.

Citizens (LULAC) in 1929, at its founding, as a major concern.⁵² Peonage⁵³ allowed an Anglo creditor to bind a Latino debtor until the debt was satisfied.⁵⁴ The other facet of this new form of servitude involved the differential pay scales for Latinos. The double wage standard providing for a much lower pay for Latinos became known as “peon’s wages.”⁵⁵ The company store extended credit, but the store also marked up items as much as 300%.⁵⁶

Over 100 years later, the plight of some Latino workers continues to convey vestiges of the days of slavery.⁵⁷ I personally handled a case involving Latino peonage in the early 1980s.⁵⁸ Ben Nelson, an Anglo seafood company owner, preferred workers who would work long hours at low wages. Immigration agents discovered that Nelson encouraged Nicolas Martinez-Delgado to supply illegal workers for his business located on Galveston Bay. Nelson would pay the *coyote*⁵⁹ \$100 per person. He would then deduct that amount from the ten dollars a day he paid the aliens. The aliens never knew up front that they had a built-in debt when they went to work for Nelson.⁶⁰ Three days of working in a stench-filled setting prompted two of the men to seek payment so they could leave. Nelson shocked them when he told them through an interpreter that the two of them still owed him seven days labor to settle the \$100 charge, a debt they never knew they

52. See discussion of the LULAC Charter, *infra*, at Part III.A.

53. “Peon” is a derogatory word derived from “peonage.” Unfortunately, it has been used loosely in the Southwest United States to relate to Latinos. I witnessed the term in 1967 when an Anglo student addressed a Latino and called him a “peon.” The Latino dropped his books and angrily ran after the rather speedy Anglo.

54. Professor Paul Taylor’s study in Nueces County, Texas documented Latino labor and peonage-type conditions in 1929. See PAUL S. TAYLOR, AN AMERICAN MEXICAN FRONTIER 147-57 (1934).

55. ACUNA, *supra* note 28, at 87.

56. *Id.* at 88.

57. The Latino worker continues to lead the nation in occupational deaths. L. M. Sixel, *Hispanics Suffer More Deaths on Job*, HOUS. CHRON., Mar. 26, 2002, at B1 (Hispanics accounted for a disproportionate number of workplace fatalities in 2000).

58. *United States v. Nelson*, *aff’d*, No. 81-2105 (5th Cir. 1981). Steve Olafson, *Anahuac Man Fined, Gets 3 Years’ Probation in Alien Slavery Case*, HOUS. POST, Mar. 18, 1981, at A13. The Supreme Court addressed the involuntary servitude statute for the first time in *United States v. Kozminski*, 487 U.S. 931, 944-45 (1988). The *Kozminski* Court acknowledged the viability of the 1871 conspiracy statute and of the involuntary servitude statute, finding support for both of them in the Thirteenth and Fourteenth Amendments to the United States Constitution. *Id.*

59. This is the Spanish term literally meaning “wolf,” but figuratively and in slang meaning the primary transporter of undocumented aliens.

60. Appellant’s Original Brief at 12, *United States v. Nelson*, brief on file with author, (No. 81-2105), [hereinafter Appellant’s Original Brief]. Nelson was convicted of both sets of charges.

had. They later saw a van carrying Latino house painters. The driver agreed to transport these two disgruntled workers to Houston. Nelson and his son appeared alongside the van and ordered them to stop. Since Nelson and his son carried firearms, the two aliens who still owed money for the transporting fee returned to the property.⁶¹ A federal grand jury indicted Nelson for peonage,⁶² kidnapping and carrying away a person with the intent to hold that person as a slave.⁶³ The grand jury also indicted Nelson for aiding and abetting the *coyote* in the transportation of unauthorized aliens.⁶⁴

The Latino population in the United States reached 39,900,000 by 2003.⁶⁵ This growth resulted from many events, including two Mexican revolutions, an open border through the 1930s, a higher than average birth rate, economic troubles in Mexico and economic needs in the United States. These last two factors—the economic problems in Mexico and the American economic needs—operate as push-pull dynamics between the United States and Mexico and the other Latin American countries.⁶⁶

To put this growth in perspective, data released by the Census Bureau showed that the total United States' population roughly doubled (a 2.2 increase) from 131.7 million in 1940 to 290.8 million in 2003.⁶⁷ During this same time period, the Latino population increased from about 1,400,000 to 39,900,000 (an increase of 28.5).⁶⁸ This population growth has occurred in spite of the Washington-sanctioned efforts known respectively as Operation Repatriation and Operation Wetback in the 1930s and the 1950s,⁶⁹ as well as the Minuteman Project along the Arizona-Mexico border in 2005.⁷⁰ The growth has continued notwithstanding similar efforts to rid the country of "illegals" during the 1974 recession and the 1994 Congressional elections in which issues involving aliens accented the political

61. Appellant's Original Brief, *supra* note 60, at 5.

62. 18 U.S.C. § 1581(a) (2005).

63. *Id.*

64. 8 U.S.C. § 1324(a)(2) (2005).

65. Louis Kincannon, *U.S. Census Bureau Takes the Nation's Socioeconomic Pulse*, in 2005 WORLD ALMANAC, *supra* note 11, at 619.

66. See generally JULIAN SAMORA, LOS MOJADOS: THE WETBACK STORY 33-34, 38-40 (1971); U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 10-12 (1980).

67. 2005 WORLD ALMANAC, *supra* note 11, at 8.

68. *Id.*

69. See SAMORA, *supra* note 66, at 51-53.

70. See Ioan Grillo, *Minutemen Aside, Some Migrants Undeterred*, HOUS. CHRON., Apr. 3, 2005, at A29.

landscape.⁷¹ Census demographers predict that by the year 2050 Latinos will increase to 67,000,000, or twenty-four percent of the population of the United States.⁷²

Historically, other events involving Puerto Rico, Cuba, Central America and more recently South America, resulted in an increase in the ethnic and linguistic diversity of the United States. The adoption by the United States of Puerto Rico as a Commonwealth presents an even more perplexing historical anomaly. Pursuant to the Treaty of Paris, which ended the Spanish-American War of 1898, Spain ceded the territory today known as Puerto Rico to the United States.⁷³ Congress later enacted a law that Puerto Ricans, even if born outside the continental United States—for example, in Puerto Rico—would be United States citizens.⁷⁴ Puerto Ricans enjoy the privilege of continuing the use of Spanish along with English as their official languages.⁷⁵

The Cuban migrations of the 1960s and the 1980s brought more Latinos. The United States attracted and welcomed refugees from Fidel Castro's Communist regime beginning in 1959. Humanitarian concerns then forced the United States to accept thousands of Cubans who left the Port of Mariel in June 1980. The Castro regime released *Los Marielitos*, as they became known in the Spanish language media,⁷⁶ because these Cubanos allegedly suffered

71. For example, in 1996 Congress enacted harsh legislation aimed at ridding the country of aliens who had committed so-called "aggravated felonies" at any time, even prior to the effective date of the new legislation. See 8 U.S.C. § 1101(a)(43)(F) (2000) (defining an aggravated felony). See Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 251 (2004) (critically assessing the constitutionality of this extremely punitive legislation).

72. 2005 WORLD ALMANAC, *supra* note 11, at 629.

73. *Id.* at 442.

74. Congress declared that persons born in Puerto Rico between 1899 and 1941, and residing in Puerto Rico or other United States territory, would be citizens of the United States, adding that all others born after January 13, 1941 would be citizens at birth. 8 U.S.C. § 1402 (2005).

75. 2005 WORLD ALMANAC, *supra* note 11, at 441. During the summer of 2003, I conducted a professional visit to the state and federal courts in San Juan, Puerto Rico. I found that state courts conduct every proceeding in Spanish while the United States district courts conduct all their official business in English, thus extensively utilizing the services of interpreters.

76. While serving during 1980 as Special Assistant to Attorney General Benjamin R. Civiletti, I had the responsibility of advising Attorney General Civiletti on matters of civil rights and immigration policy. The duties included serving as the Spanish-speaking voice for the office and commenting about the boatlift from Mariel, Cuba and our government's humanitarian response to Castro's drastic action.

from mental and psychopathic problems.⁷⁷ Cubans continue to come, albeit more slowly, taking advantage of their special legislative status that allows them to seek asylum if they reach American soil.⁷⁸

In addition to the Cuban refugee migration, the United States, through the exercise of its foreign policy, aided, abetted, enticed and otherwise encouraged Latinos from Central America to migrate to Mexico and then to the United States in order to avoid tyrannical abuses of leaders supported by different factions of our government from the State Department to the Central Intelligence Agency.⁷⁹ During the 1980s, this foreign policy thus magnetically brought more Spanish-speaking peoples to large urban centers like New York, Los Angeles, Houston, Chicago and Washington, D.C. Additionally, the Narco Wars in Colombia forced thousands of *Colombianos* to seek a new and safe life in America.⁸⁰

III. THE EDUCATIONAL HISTORY OF THE LATINO POPULATION

A. *Unequal Educational Opportunities for Latino Students*

“Education is our freedom and freedom should be everybody’s business.” With that slogan, Dr. Hector P. Garcia founded the American GI Forum, a Latino civil rights organization, in 1948. Dr. Garcia heard complaints of, and witnessed, the school segregation of Latino children and the mistreatment of Latino veterans returning from

77. See *Benitez v. Wallis*, 337 F.3d 1289, 1290 (11th Cir. 2003) (many of these refugees were dissidents, criminals or individuals with mental illness). See generally *Clark v. Martinez*, 543 U.S. 371 (2005); *Fernandez-Roque v. Smith*, 599 F. Supp. 1103, 1106 (N.D. Ga. 1984) (the Cubans who left the Port of Mariel were considered scum by their government).

78. See THOMAS ALEXANDER ALEINKOFF, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1173 (4th ed. 1998).

79. The United States was deeply involved in armed conflicts in El Salvador, Guatemala and Nicaragua, usually supporting the military governments in those countries. See Thomas Kleven, *Why International Law Favors Emigration over Immigration*, 33 U. MIAMI INTER-AM. L. REV. 69, 85 n.49 (2002); HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES: 1492-PRESENT* 572 (Perennial Ed. 2005) (references to the financial support that President Jimmy Carter extended to back the military junta in El Salvador and the support for the Somoza family dictatorship in Nicaragua); KENNETH C. DAVIS, *DON’T KNOW MUCH ABOUT HISTORY* 520 (Perennial Ed. 2004) (reference to CIA Chief Casey’s encouragement for Nicaragua’s military).

80. 2005 *WORLD ALMANAC*, *supra* note 11, at 765, 850 (as of December 31, 2003, approximately 233,600 Colombians sought refuge in other countries).

World War II.⁸¹ The earliest battles that Latino political and social groups fought centered on education.⁸² In 1929, Latinos formed their first civil rights group in Corpus Christi, Texas, the League of United Latin American Citizens (LULAC), as a result of educational deficits in public education.⁸³

Viewing the LULAC charter in more detail, we find the following principles adopted by the leadership as they relate to education:

3. To use all the legal means at our command to the end that all citizens in our country may enjoy equal rights, the equal protection of the laws of the land and equal opportunities and privileges.

4. The acquisition of the English language, which is the official language of our country, being necessary for the enjoyment of our rights and privileges, we declare it to be the official language of this Organization, and we pledge ourselves to learn, and speak and teach same to our children.

....

6. To assume complete responsibility for the education of our children as to their rights and duties and the language and customs of this country; the latter, in so far as they may be good customs.

81. See PATRICK J. CARROLL, FELIX LONGORIA'S WAKE 54-65 (2003) (describing Three Rivers, Texas funeral home's refusal to handle the services for Felix Longoria, an Army private killed in action in the Pacific Theater during World War II).

82. E.g., *Independent Sch. Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930), cert. denied, 284 U.S. 580 (1931). One should not be surprised that the Court did not see a legal problem with the *Salvatierra* ruling when it denied the petition for certiorari. A few years earlier, the Court decided that the exclusion of a Chinese-descent American was appropriate under the edict of the Mississippi constitution that provided for separate schools for the "colored" students of the state. The message was that if you were not Caucasian, then you were "colored." *Gong Lum v. Rice*, 275 U.S. 78, 86-7 (1927).

83. See TAYLOR, *supra* note 54, at 243-44. The newest civil rights group in the fight for Latino educational equality came into existence in 1968. Aided by a Ford Foundation grant, a group of Latino civil rights leaders formed the Mexican American Legal Defense and Educational Fund (MALDEF). See Guadalupe Salinas, Comment, *Mexican Americans and the Desegregation of Schools in the Southwest*, 8 HOUS. L. REV. 929, 932-33 (1971). MALDEF's battles have concentrated on educational equality on behalf of Latinos. See, e.g., *Zamora v. New Braunfels Ind. School Dist.*, 519 F.2d 1084 (5th Cir. 1975), rev'g 362 F. Supp. 552 (W.D. Tex. 1973); *Arvizu v. Waco Ind. School Dist.*, 495 F.2d 499 (5th Cir. 1974), rev'g in part and remanding in part, 373 F. Supp. 1264 (W.D. Tex. 1973); *Ross v. Eckels*, 434 F.2d 1140 (5th Cir. 1970); *Keyes v. School Dist. No. One, Denver*, 413 U.S. 189 (1973). The Puerto Rican Legal Defense and Educational Fund (PRLDF) serves a similar role in the Northeast.

.....
 8. Secretly and openly, by all lawful means at our command, we shall assist in the education and guidance of Latin-Americans and we shall protect and defend their lives and interest whenever necessary.

.....
 11. We shall create a fund for our mutual protection, for the defense of those of us who may be unjustly persecuted and for the education and culture of our people . . .

.....
 20. We shall encourage the creation of educational institutions for Latin-Americans and we shall lend our support to those already in existence.

.....
 22. We shall denounce every act of peonage and mistreatment as well as the employment of our minor children, of scholastic age.

.....
 24. We shall oppose any tendency to separate our children in the schools of this country.⁸⁴

LULAC delivered on its pledges. In 1930, the group assisted in the fight to end school segregation in Del Rio.⁸⁵ As I will later discuss in more detail, LULAC addressed the concerns of the exemption of Latino scholastics from the Compulsory School Attendance Act.⁸⁶ In the 1940s and 1950s, the group supported litigation efforts in *Delgado v. Bastrop Independent School District*⁸⁷ and *Hernandez v. Texas*.⁸⁸

Census figures report that our nation's schools have failed Latinos. A 2003 study of the educational attainment of Americans twenty-five years of age or older reveals that Latinos find themselves at the bottom of the educational ladder.⁸⁹ Non-Hispanic whites

84. TAYLOR, *supra* note 54, at 243-44.

85. *Salvatierra*, 33 S.W.2d 790.

86. Attendance laws generally mandate that a child who is at least six years of age and who has not completed the academic year in which the child's 17th birthday occurs shall attend school. See TEX. EDUC. CODE ANN. § 25.085 (1995). At the time LULAC began, the compulsory attendance law covered only children between eight and fourteen. TAYLOR, *supra* note 54, at 194.

87. Civil No. 388 (W.D. Tex. June 15, 1948).

88. 347 U.S. 475 (1954).

89. 2005 WORLD ALMANAC, *supra* note 11, at 10.

(Anglos) have the following educational attainments: Thirty percent have a college degree or beyond while over eighty-nine percent have a high school education.⁹⁰ On the other hand, Latinos average only eleven percent with a college degree and only fifty-seven percent have a high school education.⁹¹

Dr. Angela Valenzuela, an educational expert who conducted an ethnographic study of an inner-city high school in Houston, found that Mexican-descent students feel uncared for by teachers and other personnel who uphold an approach to schooling, pedagogy and caring that subtracts students' cultural resources and identities, thereby compromising students' abilities and desires to enter into productive learning relationships with adults.⁹² Dr. Valenzuela criticizes current schooling methods because "[i]t's more like trying to make all children into replicas of Anglo children. It's a process that doesn't value what a student can offer in terms of a dual culture or bilingualism."⁹³ A professor at the University of Texas, Dr. Valenzuela firmly believes that dual language education programs hold the most promise in the success of Latino education.⁹⁴ Furthermore, dual language programs benefit not only the student but also the nation, because globalization is the future. Expanded business with Mexico and Latin America will necessitate that all professions, whether in education, public health, science or computer technology, incorporate a greater demand for bilingual, bicultural and bi-literate language skills.⁹⁵

Another concern in Dr. Valenzuela's studies involves the Texas Assessment of Knowledge and Skills (TAKS) reading test.⁹⁶ Texas third-graders have to pass this test in order to be promoted. Failure by even one point retains the child. She argues against placing all the emphasis on this one test since it is not a complete picture of the child's competency: "What we should do is implement multiple criteria. It's not just the test, but also grades, teacher

90. *Id.*

91. *Id.*

92. Henry T. Trubea, *Pushing Boundaries: Language and Culture in a Mexicano Community*, 27 ANTHROPOLOGY & EDUC. Q. 3 (1996) (book review).

93. Ivan Chavez, *Paving the Way for the Equality and Justice in Education*, HISP. J. (May-June 2003), available at http://www.hispanicjournal.com/journal/2003/may_june/angela_valenzuela.htm.

94. *Id.* (proposing that dual language programs turn immigrant children into assets rather than problems to deal with).

95. *Id.*

96. In a related matter, a federal district court in Texas ruled that the Texas Assessment of Academic Skills examination does not discriminate against minority students or perpetuate prior educational discrimination. *G I Forum v. Texas Educ. Agency*, 87 F. Supp. 2d 667, 684 (W.D. Tex. 2000).

recommendations, even other test information that really tells the story about a child's competency. Some children just can't show it on an exam."⁹⁷

According to Dr. Valenzuela, "retaining a child once in grade results in a 50 percent chance that they will be dropouts. Retain them twice and it's a virtual certainty (90 percent)."⁹⁸ She sees a sinister and devious twist by lawmakers to promote standardized tests:

When you attach standards that can't possibly be met, the public school system gets discredited and the path to vouchers get[s] paved. For certain powerful business and economic interests, I think that's the ultimate goal. There is a hidden agenda to discredit public school systems.⁹⁹

The general view is that education correlates to employment opportunities and to income. In the first quarter of 2004, the unemployment rate for Latinos was 8.1% while that for non-Hispanic whites reached only 5.8%.¹⁰⁰ That meant that Latinos took home weekly wages of \$502 while Anglos averaged \$702.¹⁰¹ It should not shock the public to find that the Latinos' share of the poverty level exceeds twenty-one percent of the population as opposed to only less than eight percent of non-Hispanic whites.¹⁰² The statistics support the sad thesis of educational neglect.¹⁰³

How we educate our children will determine our economic future. Businesses and growth depend on an educated population, and a primary portion of that population that must be educated is Latino. According to Dr. Stephen Klineberg of Rice University, who has studied the economy of Houston, Texas for over twenty years,

97. Chavez, *supra* note 93. Some adults taking the Law School Admissions Test (LSAT) have trouble with these exams as well.

98. *Id.* (describing the test process as abusive to the children who struggle with their fear of failure or the threat of retention as they take the exam).

99. *Id.* See also *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that the Establishment Clause does not bar Cleveland, Ohio a financial assistance program, sometimes called vouchers, which would allow public school students to transfer to a private school, whether it is religious or not).

100. Trubea, *supra* note 92.

101. *Id.*

102. *Id.*

103. See generally THOMAS P. CARTER, A HISTORY OF EDUCATIONAL NEGLECT (1970) (documenting discriminatory practices against Latino students). Dr. Carter served as one of the experts on Latino educational needs that my co-counsel and I presented in *Arvizu v. Waco Ind. Sch. Dist.*, 373 F. Supp. 1264 (W.D. Tex. 1973).

Houston will not attain a successful status unless it offers its Latino community special educational programs and scholarships for the children of immigrants.¹⁰⁴ By 2030, nearly one-fourth of the United States' labor work force will be children of Latino immigrants.¹⁰⁵ Due to the large number of Latino immigrants and their high birth rate, there is now a new generation of Latino youth with a median age of thirteen.¹⁰⁶ In 2003, the Census Bureau reported that Latinos had surpassed African Americans as the nation's largest minority group.¹⁰⁷ The population growth of Latinos can only continue in numbers that exceed that of other racial groups.¹⁰⁸ The largest impact of this growth will first be felt in the nation's schools and then in the economy.¹⁰⁹

In the late 1960s, the United States Commission on Civil Rights conducted research on the crisis of Latino educational attainment. This study is now known as the Mexican American Education Study. The account most pertinent to this article is *The Excluded Student* report on the educational neglect that describes the Latino experience.¹¹⁰ The report examines the way the public school systems deal with the unique linguistic and cultural background of Latino students.¹¹¹ The basic finding is that public school systems of the Southwest have not recognized the rich culture and tradition among Latino students and have not adopted policies that would enable them to participate fully in the benefits of the educational process.¹¹² The report also criticized the exclusionary practices which deny Latinos the use of the Spanish language and a pride in their heritage.¹¹³ The commission found that a significant number of the school districts enforced a "No Spanish Rule" by either discouraging the speaking of Spanish on school grounds or actually imposing a discipline on the offender.¹¹⁴ Finally, the report addressed the exclusion of the Latino history and heritage of the Southwest, noting

104. Galia Garcia-Palafox, *Urge Educar a Inmigrantes Hispanos [Urgent that Latino Immigrants be Educated]*, RUMBO DE HOUSTON, 9 de mayo 2005, at 3.

105. Robert Suro, *A Growing Minority*, in 2005 WORLD ALMANAC, *supra* note 11, at 7.

106. *Id.*

107. *Id.*

108. *See Id.*

109. *Id.*

110. U.S. COMM'N ON CIVIL RIGHTS, REPORT III: THE EXCLUDED STUDENT 3 (1972) (hereinafter THE EXCLUDED STUDENT) (examining the denial of equal opportunity by exclusionary practices).

111. *Id.* at 5. The focus of the study primarily concerned Mexican American students.

112. *Id.* at 48.

113. *Id.*

114. *Id.* One-third of the school districts admitted to the harsh measure of castigating Spanish speakers at school.

that only slightly more than seven percent of the surveyed schools included a Latino history course in their curricula.¹¹⁵

In order to assimilate Latinos, the school system must recognize the history of the Latino population in the United States and the geographic proximity of Mexico, Central America and other nations where Spanish is the predominant language. First, the United States went into Mexico and conquered Texas and other parts of the Southwest. Thus, many Latinos, even generations later, were made to feel like strangers in their own land.¹¹⁶ Second, the mother country for many Latino immigrants is quite close, in contrast to the European immigrants who cut off ties with their homeland. In addition, the more recent Latino immigrants find so much cultural support when they arrive, they realize that much of what they left behind they can now find in cities like Los Angeles and Houston.¹¹⁷ Finally, due to Latinos having a substantial amount of Indian blood, the darker skin features prompt Anglos to think of Latinos as “colored” people¹¹⁸ and to label Mexican Latinos as being members of the “Mexican race.”¹¹⁹

The greatest damage to the Latino student probably occurs when school administrators and teachers degrade his culture, particularly his Spanish language. That in itself is an attack on the student’s ethnicity. Language is an integral part of an ethnic

115. THE EXCLUDED STUDENT, *supra* note 110, at 49 (finding almost a quarter of a century of educational efforts did not provide any improvement in the state of Latino education). Another governmental report found the lack of adequate responses to the educational needs of Latino children. PRESIDENT’S ADV. COMM’N ON EDUC’L EXCELLENCE FOR HISPANIC AMERICANS, OUR NATION ON THE FAULT LINE: HISPANIC AMERICAN EDUCATION (1996), available at <http://www.ed.gov/pubs/FaultLine/cover.html>.

116. See U.S. COMM’N ON CIVIL RIGHTS, STRANGER IN ONE’S LAND 3 (1970) (an account prepared by journalist Ruben Salazar, formerly of the Los Angeles Times, of a hearing held by the Civil Rights Commission in San Antonio, Texas).

117. Both cities have Latino leadership. On May 17, 2005, Los Angeles elected its first Latino mayor in over 133 years. In early 2004, Mayor Bill White appointed Arturo Michel as City Attorney for Houston. In addition, each city has extensive culinary, entertainment and media avenues to make Latinos feel as if they were “at home.”

118. FOREIGNERS IN THEIR NATIVE LAND, *supra* note 29, at 137.

119. See, e.g., Clifton v. Puente, 218 S.W.2d 272, 273 (Tex. Civ. App.—San Antonio 1948) (prohibiting deed through a restrictive covenant the sale or lease of real property to persons of “Mexican descent”); Hernandez v. Driscoll Consol. Sch. Dist., 2 Race Rel. L. Rep. 329 (S.D. Tex. 1957) (holding that using the inability to speak English as a pretext is unreasonable race discrimination where the segregated child could speak not a word of Spanish). See also In re Rodriguez, 81 F. 337 (W.D. Tex. 1897) (struggling with the question whether the applicant for citizenship was a white person and thus eligible; the applicant had “chocolate brown skin”).

minority's being.¹²⁰ It is the means of communication with family and friends. It is an area where schools should be rewarding rather than ridiculing the child. The so-called "No Spanish Rule" castigated innocent children who merely carried out a family value.¹²¹ If the child is in fact not speaking either language correctly, then where is the school's responsibility for this fact? The Commission on Civil Rights states: "The Mexican culture and the Spanish language were native to the country for hundreds of years before the Anglo's arrival. They are not easy to uproot."¹²²

One of the primary missions of a school district is to serve as a means to assimilate children of diverse ethnic backgrounds into the American melting pot. A school's actions, however, should never result in the following all too common emotion among Latinos: "Schools try to brainwash Chicanos. They try to make us forget our history, to be ashamed of being Chicanos Mexicans, of speaking Spanish. They succeed in making us feel empty, and angry inside."¹²³

B. Compulsory School Attendance and the Exclusion of Latino Scholastics

Proof that the Latino child has been a victim of exclusion from public education can be traced to the early 1920s when the Latino population in Texas began to grow in correlation with the practice of farmers who cultivated more crops. My paternal grandfather migrated north in 1920 from his home in Nuevo Leon, Mexico, to Nueces County, Texas. He worked the farms as a sharecropper until October 1933 when the word spread that *La Migra*¹²⁴ was on the hunt for undocumented aliens (derogatorily called Wetbacks). Based on

120. THEODORE EISENBERG, CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW 58 (1996) ("The primary language of an individual is often an essential national origin characteristic.").

121. Violation of the Spanish prohibition usually led to scolding, detention or punishment, e.g., by having to write 500 times "I will not speak Spanish on school grounds." My brother earned this writing assignment after being caught speaking our parent's primary language at Sam Houston Elementary in McAllen, Texas in the 1950s. Interview with Reynol Salinas, Houston, Texas, May 30, 2005. The rule probably derived from Tex. Laws 1933, ch. 125, section 1, at 325 (repealed 1969), which required all school business to be conducted in English. Violation could result in criminal prosecution and loss of the teacher's certification. For other forms of punishment, see THE EXCLUDED STUDENT, *supra* note 110, at 18-20.

122. THE EXCLUDED STUDENT, *supra* note 110, at 11.

123. *Id.* (citing a statement by Maggie Alvarado, a student at St. Mary's University, San Antonio, Texas).

124. This is slang terminology for immigration enforcement agents. The United States Government referred to the 1950s roundup of aliens as Operation Wetback.

interviews with my father, I learned that from 1927 (age six) until his return to Mexico in 1933 (age twelve), neither he nor any of his American-born brothers ever saw the inside of a Texas school.¹²⁵ I mention this fact because in the early Twentieth Century, Texas joined many other states in the enactment of compulsory school attendance legislation, the one in Texas effective as early as 1915.¹²⁶ The current statute provides that “a child who is at least six years of age . . . and who has not completed the academic year in which the child’s 17th birthday occurred shall attend school.”¹²⁷

The critical focus should be on the actual practice of the State of Texas and other Southwestern border states with regards to the children of these workers. The answer to educational neglect might actually be found in the concerted State-imposed policy of immunizing Latino kids from the mandatory compulsory school attendance law.¹²⁸ Field studies conducted in 1929 in Texas demonstrate that Latino students received exemptions not authorized by legislative law.¹²⁹ I distinguish “legislative” law from the “executive” decisions made by school boards. Both have the force of law for purposes of the Fourteenth Amendment’s Equal Protection Clause.¹³⁰

Educationally independent members of the community historically filled the boards in Texas. Those board members were white men who owned the ranches and had an interest in the crops being picked timely. An “American farmer” gave his opinion on the best worker for his crops:

If I wanted a [Mexican] I would want one of the more ignorant ones—possibly one who could read and write and weigh his own cotton. The educated

125. Interview with Arnulfo Garcia Salinas, Galveston, Texas, May 18, 2005. My father, who yearned for a chance to go to school, recognized that his father was at fault as well. *See, e.g.*, TAYLOR *supra* note 54, at 206 (the poor Mexican parents rely on the labor of their children). His father needed help from the boys (all US citizens born in Texas) to work the crops on the ranches near Robstown, Victoria, Bloomington, and Edna (home of Hernandez v. Texas, 347 U.S. 475 (1954)).

126. TEX. EDUC. CODE ANN. § 25.085 (1995). The statute lists certain exemptions, such as the child attending a private or parochial school, having a physical or mental impediment, being expelled, or attending a high school equivalency program. TEX. EDUC. CODE § 25.086 (1995). None applied to my father.

127. *Id.*

128. *See* TAYLOR, *supra* note 54, at 194-200.

129. *Id.*

130. U.S. CONST. amend. XIV. *E.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that state judicial enforcement of agreements that bar persons from ownership of real property on racial grounds constitutes state action and violates the Equal Protection Clause).

Mexicans are the hardest to handle. Educate them? We have to do that under the law of the state. It is right; they pay taxes. It is all right to educate them no higher than we educate them here in these little towns. I will be frank; they would make more desirable citizens if they would stop about the seventh grade. *The Mexican parents don't send their children. Some children near here have never been to school.*¹³¹

Another reason for non-enforcement of the Compulsory School Attendance Act seems to center on the financial impact. The farmers needed all the labor, even children. LULAC's concern with the employment of underage children¹³² proves it was a serious problem in 1929, the same year that Berkeley Professor Paul S. Taylor conducted his study of Nueces County, where Corpus Christi and Robstown are located.¹³³ Taylor quoted an unnamed school superintendent about the Nueces County educational system:

A man from the University of Texas came here with the idea of doing something for the Mexicans. He said after his experience: "But they don't appreciate it, and the more you do for them, the less they do for themselves. . . ." To run the Mexican school longer is a waste of money. I have run a Mexican school two months with only two children, with a teacher at \$90 a month. *As long as the attitude of the people who control Mexican labor controls the schools, little will be done, not until a few generations come and then demand it White folks don't want the Mexicans to do anything but ignorant common labor. They are not going to do what they think is not to their interest [i.e., to educate the Mexicans].*¹³⁴

131. TAYLOR, *supra* note 54, at 310-11 (emphasis added).

132. *Id.* at 244.

133. *See id.* at 1, 3, 4, 143, 213-14.

134. *Id.* at 214 (emphasis added). Professor Taylor, from an unnamed "professional man," also learned: "Reasons for the inferiority of Mexicans? In the first place there's color—color and race; a Negro even as white as you couldn't get social recognition. He's different inside. So is a Mexican. He's a mixture of Latin and Indian. A white man just naturally looks down on those who are not white." *Id.* at 303. The 1930 Census defined "Mexicans" for its purposes as: ". . . all persons born in Mexico, or having parents born in Mexico, who are not definitely white, Negro, Indian, Chinese, or Japanese." *Id.*

During the 1920s there was no attempt to enforce the compulsory attendance requirements on Mexicans. The Superintendent of Public Instruction, in his 1928-1929 report, acknowledged this fact when he questioned the payment of funds to local districts for scholastics who do not attend school and who "are not really wanted since there are practically no efforts being made in such districts to enforce the compulsory attendance law."¹³⁵ Superintendents in four small towns explained that "[t]he board won't let me enforce compulsory attendance. When I come to a new school I always ask the board if they want the Mexicans in school. Here they told me to leave them alone If I got 150 Mexicans ready for school I would be out of a job." Another one stated, "The trustees say . . . [d]on't build up any more Mexican enrollment. We have more than we can handle now; we would have to have a new building and three or four teachers."

However, the most prominent reason for non-enforcement outside of Corpus Christi was the attitude of the farmers, many of whom are themselves on the boards of education.¹³⁶ "In general, the farmers of Nueces County, and the rural townfolk do not want the Mexicans to receive much education . . . the danger [being] that if educated they will advance economically and migrate to the cities."¹³⁷ A school official added, "It would seriously jeopardize the entire system and particularly the American [Anglo] part of it if I enforced the compulsory attendance law."¹³⁸ Another concern to educating Latinos was that school authorities feared the Latino kids would get educated and leave the agricultural work or worse, in the Anglo's mind, they would get sociable with the white girls.¹³⁹

Others, clearly the minority, supported the education of the Latino children, explaining, "[s]chooling Mexicans won't ruin the country. If they go to school, the machine is coming. There is no question it is coming."¹⁴⁰ However, those districts that registered Latinos in their schools and received additional money from the state took "the money out of the Mexican allotment and use[d] it for the whites."¹⁴¹ Is this discriminatory treatment or is it discriminatory

135. *Id.* at 201 n.14.

136. TAYLOR, *supra* note 54, at 195.

137. *Id.*

138. *Id.* at 200.

139. *Id.* at 195, 219.

140. *Id.* at 199.

141. *Id.* at 200; Jorge C. Rangel & Carlos Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 317 (1972).

impact? Either way you slice it, it is still a harmful denial of equal protection.

C. The Separate Classes for the Language “Challenged”

Another early educational policy as to Latinos involved segregation into “language handicap” schools or classrooms within an Anglo dominated school.¹⁴² In *Independent School District v. Salvatierra*,¹⁴³ the Latino plaintiffs complained of the school district’s practice of segregation of the Latino children from the Anglos.¹⁴⁴ The court agreed that the school officials did not have the power to segregate Latino students “merely or solely because they are Mexican.”¹⁴⁵ But the court concluded that the children’s language deficiencies justified their separate schooling for educational purposes.¹⁴⁶

Was the alleged Spanish language dominance of the Latino student a subterfuge for racial discrimination? In *Hernandez v. Driscoll Consolidated School District*,¹⁴⁷ a federal court judge determined that the language justification was in fact a pretext for segregation. School officials in Driscoll, Texas, abandoned the racially-based separate schools for Mexicans and Anglos and required that a majority of Latino children spend three years in the first grade to learn English well.¹⁴⁸ However, the segregated student in *Driscoll* could only speak English and not speak a word of Spanish. As a result, the district court judge criticized the district for engaging in “unreasonable race discrimination.”¹⁴⁹

142. See *Independent Sch. Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930) (involving the schools in Del Rio, Texas), *cert. denied*, 284 U.S. 580 (1931).

143. *Id.*

144. *Id.* LULAC fought a citizen-approved bond that included an addition to the two-room “Mexican school.” *Id.* at 791.

145. *Id.* at 795.

146. *Id.* The superintendent admitted that “generally the best way to learn a language is to be associated with the people who speak that language.” *Id.* at 793. A Nueces County, Texas study revealed that Latino scholastics wanted to go to school with Anglos so they could learn English more quickly. TAYLOR, *supra* note 54, at 223.

147. 2 Race Rel. L. Rep. 329 (S.D. Tex. 1957).

148. *Id.* at 331. The three-year separation requirement violated a federal court consent decree that provided for only one year for language needs. See *Delgado v. Bastrop Ind. Sch. Dist.*, Civil No. 388 (W.D. Tex. June 15, 1948).

149. 2 Race Rel. L. Rep. 329, 331-32 (S.D. Tex. 1957). The district justified the separation of the Latino students since they could not speak English; the child plaintiff spoke English only and no Spanish. *Id.* Further proof that the Mexican language handicap was a deceptive means to segregate the Latino kids can be found in the fact that “Bohemian and

The Driscoll, Texas, schools were bound by state educational policy. Prior to the litigation in *Driscoll*, a federal court issued a consent decree in *Delgado v. Bastrop Independent School District*.¹⁵⁰ The 1948 consent decree in *Delgado* permanently enjoined not only Bastrop and the several other named school districts from “segregating pupils of Mexican or other Latin-American descent in separate schools or classes within the respective school districts,” but also the State Superintendent of Public Instruction “from in any manner, directly or indirectly, participating in the custom, usage or practice of segregating pupils of Mexican or other Latin-American descent in separate schools or classes.”¹⁵¹ By including the state Superintendent in the litigation, the decree had the potential of statewide relief for the impermissible segregation of Latinos.¹⁵² However, the final judgment lacked a directive that the court would retain jurisdiction in order to enforce the decree. In addition, the judgment lacked notice to offending districts as to what sanctions, such as contempt or loss of accreditation, the superintendents of the named districts or other future offending districts could expect if prohibited segregation were proved. To aggravate matters and setting the stage for a *Driscoll* language abuse, the decree continued by providing that “this injunction shall not prevent said defendant school districts or their trustees, officers and agents from providing for, and maintaining, *separate classes on the same campus in the first grade only*, and solely for instructional purposes, *for pupils* in their initial scholastic year in the first grade . . . *who . . . clearly demonstrate . . . that they do not possess a sufficient familiarity with the English language* to understand substantially classroom instruction in the first-grade subject matter.”¹⁵³

D. The Mexican School—De Jure, State-Imposed Segregated Schools

Assuming that a school district in Texas chose to obey the Compulsory School Attendance Act, that district faced a dilemma.

German and other non-English speaking children go to the American school, and some Mexicans want their children to go there.” TAYLOR, *supra* note 54, at 224.

150. *Delgado*, Civil No. 388. The full consent decree is published at Lupe S. Salinas, *Gus Garcia and Thurgood Marshall: Two Legal Giants Fighting for Justice*, 28 T. MARSHALL L. REV. 145, 166-68 (2003).

151. *Id.*

152. Contrary to the Texas constitution’s specific provision requiring the segregation of colored children, TEX. CONST. art. 7, § 7 (1876), the Bastrop Independent School District segregation of Latinos was based on “regulations, customs, usages, and practices.” *Delgado*, Civ. No. 388.

153. *Delgado v. Bastrop Ind. Sch. Dist.*, Civil No. 388 (W.D. Tex. June 15, 1948).

Once the board decided to accept the Latino child, the conflict arose: integrate them into the existing schools or construct a separate school for Latino children. The Latino segregation practices were rampant.¹⁵⁴ For example, one Nueces County school had a cornerstone that read: "Public school for Mexicans."¹⁵⁵ Other districts blatantly labeled the separate facilities as "Mexican Schools."¹⁵⁶ As in *Salvatierra*, the primary rationale for segregation was the Spanish language of the Latino child. However, an explanation other than language concerns might be found in the following quote from a rural superintendent: "Some Mexicans are very bright, but you can't compare their brightest with the *average* white children. They are an inferior race."¹⁵⁷ Anglo leadership in the schools worried that the Latino children would slow the learning process of their children¹⁵⁸ and believed that separation of the Latino children would be advantageous.¹⁵⁹ In addition, the color superiority complex played a major factor in the decisions to segregate. The farmers and ranchers used the following terminology in referring to Latinos: "The white class of people wants to stay white, and the brown to stay brown. It is human nature. I have raised two children with the idea they they (sic) are above the doggone Mexican nationality and I believe a man should."¹⁶⁰ In addition, another school executive stated, "It is desirable to carry segregation further for reasons of social equality. Then you will eliminate the *greaser*.¹⁶¹ The Spanish will get up, and you can equalize yourself with them

154. See generally Rangel & Alcalá, *supra* note 141, at 313-15, 333-42 (discussing the operation of Mexican schools). Both Rangel, my college roommate at the University of Houston, and I, attended a "Mexican School" in two separate parts of Texas for at least one year. We were fortunate to overcome the conditions, but many of our classmates and other segregated school students were not. The statistics of poor performance speak powerfully about inadequacies in Latino education. See, e.g., 2005 WORLD ALMANAC, *supra* note 11, at 10. A 2002 study did post positive news about an increase in the number of Latino immigrants completing high school and going to college, but it recognized that the education gap with native-born Americans remained wide. *More Latinos Completing College*, CNN, Dec. 5, 2002, available at <http://www.cnn.com/2002/EDUCATION/12/05/hispanic.education.ap/index.html>.

155. TAYLOR, *supra* note 54, at 246.

156. See, e.g., Rangel & Alcalá, *supra* note 141, at 313-15, 333-42.

157. TAYLOR, *supra* note 54, at 203.

158. *Id.* at 220. "The problem of protecting the educational progress of the American children from the lagging Mexicans." *Id.*

159. See generally TAYLOR, *supra* note 54, at 217 (stating that many who supported separation of Americans and Mexicans in schools asserted that separation would be advantageous to the Mexicans).

160. *Id.* at 219.

161. The term *greaser* derogatorily refers to persons of Mexican descent. WEBSTER'S NEW COLLEGIATE DICTIONARY 362 (1958).

Those [Spanish Latinos] who get up in school are blond with clear skin.”¹⁶²

E. The Kimball Report on the “Pushout” Rate in an Urban School System

Although this article discusses a national concern, the discussion includes quite an extensive number of cases and educational statistics from Texas, a state with a large Latino population.¹⁶³ Texas has been the scene of many battles for quality education.¹⁶⁴ Many educational opportunity encounters, such as equitable school financing, continue in Texas.¹⁶⁵ The question in this article centers on whether decisions and policies by public school systems incorporate the serious educational needs of all the students in the state. Society needs an objective answer or explanation for the poor educational attainment of Latino children in Texas and the rest of America.¹⁶⁶

162. TAYLOR, *supra* note 54, at 219.

163. Latinos comprise thirty-two percent of the Texas population making them the largest minority group. Latinos also rank first in the states of California and New Mexico. James Pinkerton, *More Than Half of Texans are Minorities*, HOUS. CHRON., Aug. 11, 2005, B1.

164. See, e.g., *United States v. State of Texas*, 509 F.2d 192 (5th Cir. 1975); *Delgado v. Bastrop Ind. Sch. Dist.*, Civ. No. 388 (W.D. Tex. June 15, 1948). For a full reading of the Consent Order in *Delgado*, see *Salinas*, *supra* note 150, at 166-68 (2003).

165. The Texas Legislature tackled, once again, the school financing issue during the session that began in January 2005. The effort, overcome with political bickering over lower taxes and higher educational costs, resulted in no education plan for Texas public school children. The Republican leadership did not appoint a single Democrat or minority to the conference committee charged with fine-tuning the bill. Jane Elliott, *Craddick Partisan on Conferee Picks*, HOUS. CHRON., May 14, 2005, at B1. The problems in funding vital programs are not limited to Texas; it seems that Washington has a thing for sacrificing educational needs in favor of congressional pet projects. See Steven Bodzin, *Pork Cleans Out Education Fund*, HOUS. CHRON., Sept. 26, 2005, at A16. Several special sessions of the Texas Legislature during the summer of 2005 failed to produce a plan. *School Finance: The Legislature is just Reflecting the Priorities of the Electorate: Low Taxes Over Adequate Education*, HOUS. CHRON., July 22, 2005, at B10. For previous battles in this so-called “Robin Hood” financing system, see *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), which held that the rational basis or minimal scrutiny test applies to the unequal impact of the locally levied ad valorem property tax, and see *Edgewood Ind. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989), which held that a funding plan that does not consider abilities of various school districts violates the demands of the Texas Constitution for an “efficient” education for all children.

166. The statistics for those who experience educational failure tell an incredible but real story: a higher incidence of prison confinement, low self image, functional illiteracy, unskilled, lower-paying jobs, drug and alcohol abuse, and early death. See Brief for the Mexican American Bar Association of Houston as Amicus Curiae at 3-11, *Plyler v. Doe*, 457 U.S. 202 (1982).

According to Texas educator, Dr. Robert H. Kimball,¹⁶⁷ Latino students are victims of a public education system that does not recognize their culture, language or goals.¹⁶⁸ Consequently, many Latinos become disillusioned and are forced to leave public schools. Dr. Kimball noted that several states reported to the Department of Education that the dropout rate for minorities was over fifty percent in 1998.¹⁶⁹ However, Dr. Kimball notes that in 2003, the Houston Independent School District (HISD) reported a dropout rate for Latino students at only 1.2%.¹⁷⁰ School board members, the Superintendent and community groups agreed that the dropout rate could not realistically be that low, but the district nevertheless sent a report to the state using those deflated, improbable figures.¹⁷¹

Dr. Kimball cites the language barrier as a reason for a high dropout rate.¹⁷² Many public schools have no Spanish speaking members on the staff and the non-Latino school counselors and administrators have preconceived attitudes that Latino students are not interested in obtaining an education.¹⁷³ In addition, many school staff members are not making an effort to learn Spanish or study Latino culture.¹⁷⁴ Dr. Kimball reports that forty percent of Latino students who are pushed out of school are not proficient in English, confirming a high correlation between language proficiency and school success.¹⁷⁵

167. Interview with Robert Kimball in CATHERINE CAPELLARO, BLOWING THE WHISTLE ON THE TEXAS MIRACLE, RETHINKING SCHOOLS (2004), available at http://www.rethinkingschools.org/special_reports/bushplan/tex191.shtml [hereinafter Kimball Interview]. Kimball is a former Houston Independent School District (HISD) vice principal at Sharpstown High School. After HISD reported a 1.5 percent dropout rate for the 2001-2002 school year and a zero percent dropout for his high school, he wrote his principal and exclaimed in disbelief, "We go from 1,000 freshmen to 300 seniors without no (sic) dropouts. Amazing!" Kimball, himself a dropout, prompted a state investigation that confirmed that the miraculous dropout rates were falsified by underreporting 2,999 students. He was removed from the high school and eventually ended up in closet-type office. His whistleblower lawsuit resulted in a settlement in his favor.

168. Dr. Robert H. Kimball, University of Houston/Clear-Lake, How Hispanics Are Pushed Out of Public Education (Feb. 16, 2005) (unpublished report, on file with author) [hereinafter Kimball Report].

169. *Id.* The Intercultural Development Research Association (2003) reported that the attrition rate for Latinos in public education was fifty percent in Texas. *Id.*

170. *Id.*

171. Kimball Interview, *supra* note 167. See Joshua Benton & Holly K. Hacker, *Poor Schools' TAKS Surges Raise Cheating Questions*, DALLAS MORNING NEWS, Dec. 30, 2004, available at <http://www.dallasnews.com/sharedcontent/dws/dn/education/stories/121904dnmet.cheating>.

172. Kimball Report, *supra* note 168.

173. *Id.*

174. *Id.*

175. *Id.*

HISD has elementary schools classified as bilingual programs but that in reality only provide instruction in Spanish. As a school administrator, Dr. Kimball was assigned to an elementary school in HISD where every student was Latino and fluent in Spanish. The teachers only taught in Spanish.¹⁷⁶ On a daily basis, Dr. Kimball visited these classrooms and never observed lessons being taught in English. This Spanish-only teaching method does not help students succeed and will only result in a higher dropout rate because of a lack of English proficiency.

Dr. Kimball asserts that Latino students are being pushed out by the policies and behavior of school administrators, teachers and board trustees. In many Texas schools, Latino students are being targeted by educational leaders for elimination because they are not likely to pass the state examinations that are used to rate schools and provide financial incentives to all employees.¹⁷⁷ In Texas, the school rating system thus discriminates against those school districts with large Latino populations. One side calls it a plan to hold schools accountable, but others label it a plan that encourages schools to push out low performing students and, in some cases, to help them cheat on state-mandated tests.¹⁷⁸ As a result, students are being systematically pushed out of the educational system.

Several strategies are being used by school districts to push out Latino students. In 2002, the HISD School Board adopted a policy of retaining students who did not pass one core course in high school. This policy had been in effect since 2000 at many of the high schools in Houston, because these schools had asked for a waiver on course requirements. When the waiver policy significantly increased scores on state-mandated tests, the board made it a district policy.¹⁷⁹ By making this policy change, they were able to keep low-performing Latino students from taking the Texas examinations at the tenth grade level where it counted for the school's rating. Under this policy, over 20,000 Latino youth in Houston were kept in the ninth grade for up to three years.¹⁸⁰ Latino youth became disillusioned at being retained and often quit. Statistically, students have a fifty percent chance of dropping out if they are retained one year and ninety percent if they

176. *Id.*

177. Kimball Report, *supra* note 168.

178. *See* Benton & Hacker, *supra* note 171.

179. Kimball Report, *supra* note 168.

180. *Id.*

are retained two years.¹⁸¹ After the national media addressed this issue, Houston changed its policy of requiring that students pass all subjects to be moved to the next grade level.¹⁸²

IV. THE LATINA/O QUEST FOR EQUITABLE EDUCATIONAL OPPORTUNITY

A. *Litigation Prior to Brown*

Assessing responsibility as to who or what is responsible for low educational attainment among Latinos probably depends on a person's political and/or social ideology. Republicans and Democrats differ on the means to the end. Rich and poor disagree as to the relevance of financial support insofar as the educational ladder one can climb.¹⁸³ I have heard extensively that the major responsibility rests with the family. I agree the family can make a difference. However, I realize that a very small percentage of Latino families have a college-educated head of the household to guide the student with college potential.¹⁸⁴ While Latino families strongly support the value of an education, they encounter limits to the promotion of a quality education.¹⁸⁵ I have also heard that too many students prefer to work to buy a car or have nice clothes, thus either attaining less success or dropping out of school to satisfy and overcome their debts. Others drop out to help the family with finances, particularly if the family was left without a head of the household. Some parents can afford and do enroll their children in a private school. Those are admirable sacrifices. However, the focus of this article is on public school systems and the needs of a large and growing Latino population that

181. *Id.* Kimball notes that there are many high schools that begin with a freshman class of over 1000 students and in four years graduate less than 200 of them. *Id.*

182. *Id.*

183. See generally *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that education is not an implicit fundamental right and the poor do not constitute a suspect class).

184. From personal experience, I realize that many students make it to college even though their parents lacked even a high school education.

185. See Katherine S. Mangan, *Professor's Comments on Affirmative Action Inflammate a Campus*, CHRONICLE OF HIGHER EDUCATION, 1997, available at <http://chronicle.com/che-data/articles.dir/art-44.dir/issue-05.dir/05a03301.htm>; The Sociology of Race and Ethnicity, available at <http://www.trinity.edu/~mkearl/race.html>. I vehemently disagree with University of Texas Law Professor Lino Graglia, who gratuitously declared himself a sociological expert and stated that Black and Latino students perform poorly in college because they come from cultures that do not value education and that accept failure more readily than Caucasians.

pays taxes and expects a fair, equitable and effective public education for their children.¹⁸⁶

Attaining equal or equitable educational opportunity for Latino children who are socially, culturally and linguistically different from Anglo children has been an almost insurmountable goal. The parents of Latino children merely ask for a fair chance. These parents do not desire a situation where their children face the educational competition with one hand tied behind their back. The struggle against segregation and unequal educational opportunity in the public schools has not been easy. Chronologically, the official battles for a non-discriminatory educational opportunity began in the mid-1920s in Arizona and in the early 1930s in California and Texas.

In 1925, in *Romo v. Laird*,¹⁸⁷ a Mexican American rancher near Phoenix, Arizona, sued to have his four children attend a school with certified teachers. The Tempe board of trustees had designated the Tenth Street School for “children of the white race” and the Eighth Street School for children of Spanish American or Mexican American descent.¹⁸⁸ The board had designated the Eighth Street School as a student teacher training facility.¹⁸⁹ Tempe considered Latinos so culturally different as to require separate placement. The court rationalized the segregation on the basis of the *Plessy v. Ferguson*¹⁹⁰ “separate but equal” doctrine.¹⁹¹ In an odd twist, the court granted the Romo children the relief they sought—attendance at the school with certified teachers. However, as to all other Latino children, the board of trustees ordered the hiring of certified teachers in the “Mexican School,” a decision that allowed Latino segregation to continue until the 1950s.¹⁹²

186. Aaron Zitner, *Census Shows Illegal Immigrants Filled Need for Workers*, L.A. TIMES, Mar. 10, 2001, at A2. I do not include undocumented Latino children in my arguments for educational rights. However, it should be noted that experts recognize that the undocumented worker contributes to the American economy. In addition, in some circumstances, undocumented children have protected constitutional rights. See *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that heightened scrutiny protected undocumented children since they, unlike their parents, lacked responsibility).

187. James A. Ferg-Cadima, *Black, White and Brown: Latino School Desegregation in the Pre- and Post-Brown v. Board of Education Era*, MALDEF, May 2004, App. A at 35, citing No. 21617 (Maricopa County Super. Ct. 1925) (on file with author).

188. *Id.*

189. *Id.*

190. 163 U.S. 537 (1896).

191. *Id.* at 540. The Court addressed a Louisiana statute that provided “equal but separate” accommodations for the white and colored races. *Id.*

192. Ferg-Cadima, *supra* note 187. See also *Gonzales v. Sheeley*, 96 F. Supp. 1004, 1009 (D. Ariz. 1951) (stating that segregation created a stamp of inferiority on Latinos).

California was the setting for *Alvarez v. Owen*,¹⁹³ known more popularly as the Lemon Grove incident. The all-white Lemon Grove school board decided in July 1930 to build a separate school for Latino students. The principal of the grammar school stood at the door and directed the Latino children to go to a new facility, a wooden two-room structure. The parents organized a boycott and hired lawyers to sue the district and enjoin the segregation. The school defended the separate school as a good Americanization process where the Latino kids could be instructed more to their capabilities.¹⁹⁴

Independent School District v. Salvatierra,¹⁹⁵ the first Latino school case which sought to end segregation in Texas public schools, involved a setback to equal educational opportunity when the school officials successfully asserted that the children's language deficiencies warranted their separate education.¹⁹⁶ When LULAC and the Salvatierra family petitioned the Supreme Court of the United States to give meaning to the Equal Protection Clause, the Court denied the petition for certiorari.¹⁹⁷ One should not be surprised that the Court did not see a legal problem with the *Salvatierra* ruling. A few years earlier, the Court had decided in *Gong Lum v. Rice* that the exclusion of a Chinese descent American was appropriate under the edict of the Mississippi constitution that provided for separate schools for the "colored" students of the state.¹⁹⁸ The message was that if you were not Caucasian, then you were "colored," even though in the United States the term "colored" socially and historically described persons of African descent.¹⁹⁹

Other eventful litigation occurred in California where a large number of Latino families sued the Westminster schools in Orange County. In *Mendez v. Westminster School District*,²⁰⁰ a suit brought under the civil rights statute,²⁰¹ the district court held that equal

193. Ferg-Cadima, *surpa* note 187, at App. C at 39, citing No. 66625 (San Diego County Super. Ct. Mar. 30, 1931) (on file with author).

194. *Id.*

195. 33 S.W.2d 790 (Tex. Civ. App. 1930), *cert. denied*, 284 US 580 (1931).

196. *Id.* at 793. The Texas Attorney General later added legal support for this policy by issuing an opinion allowing the separation of linguistically challenged Latinos. Tex. Att'y Gen. Op., No. V-128 (1947).

197. *Salvatierra v. Independent Sch. Dist.*, 284 US 580 (1931).

198. *Gong Lum v. Rice*, 275 U.S. 78, 87 (1927).

199. TAYLOR, *supra* note 54, at 202. Recall that the 1930 census defined "Mexicans" for its purposes as: "... all persons born in Mexico, or having parents born in Mexico, who are not definitely white, Negro, Indian, Chinese, or Japanese" *Id.*

200. 64 F. Supp. 544 (S.D. Cal. 1946).

201. 42 U.S.C. § 1983 provides:

protection is not met by providing “separate schools [with] the same technical facilities.”²⁰² The court added that segregation fosters “antagonisms in the children and suggest[s] inferiority among them where none exists.”²⁰³ These words sound strikingly similar to the United States Supreme Court holding in *Brown v. Board of Education* eight years later that “[s]eparate educational facilities are inherently unequal.”²⁰⁴

The school district appealed *Mendez*. The Ninth Circuit Court of Appeals affirmed the lower court, concluding that the segregation cases, which authorized schools to justify segregation so long as they provided equal facilities for black children, did not apply.²⁰⁵ The appellate court noted that the California statute limited segregation to Indians and certain Asiatics.²⁰⁶ The judge further reasoned that California law did not specifically include the segregation of school children because of their Mexican blood and that the state, by legislative action, allowed Mexican children, citizens of a foreign country, to attend public schools.²⁰⁷ The judge then stated:

It follows that the acts of [the school district] were and are entirely without authority of California law, notwithstanding their performance has been and is under color or pretense of California law By enforcing the segregation of school children of Mexican descent against their will and contrary to the laws of California, [the district has] violated the federal law as provided in the Fourteenth Amendment to the Federal Constitution by depriving them of liberty and property

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

202. *Mendez*, 64. F. Supp. at 549.

203. *Id.*

204. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

205. *See Plessy v. Ferguson*, 163 U.S. 537 (1896).

206. *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 780 (9th Cir. 1947). The court held that English language deficiencies of some children as they enter elementary public school may justify differentiation by public school authorities as to the pedagogical methods of instruction to be pursued with different pupils, and foreign language handicaps may be to such a degree among elementary students as to require separate treatment in separate classrooms. *Id.* at 784 (Denman, J., concurring).

207. *Id.* at 780.

without due process of law and by denying to them the equal protection of the laws.²⁰⁸

Since the California segregation statute did not expressly include Latinos, their segregation violated due process and equal protection of the laws.²⁰⁹

Following the major victory expressly on behalf of Latinos, and implicitly on behalf of African Americans in *Mendez*, the legal battle moved to Texas. In April 1947, Texas Attorney General Price Daniel issued an opinion in which he expressed that segregation or linguistic classification could not be based solely upon "Latin-American or Mexican descent."²¹⁰ Gus Garcia thereafter filed *Delgado v. Bastrop Independent School District*.²¹¹ *Delgado* gave the Latino community hope that segregated education would end, but the forces of segregation prevailed.²¹² In response to *Delgado*, the Texas Superintendent of Public Instruction advised public school districts that there had never been any requirement or authority to segregate Latino children. However, he did not present a plan for the integration of Latino students into the more modern and better equipped white schools.²¹³ Thus, the *Delgado* consent decree provided hope, but the lack of specificity allowed school districts to continue their segregation practices.²¹⁴ One superficial victory involved the fact that the 1948-49 public school directory listed only one Mexican school for the entire state of Texas.²¹⁵ In reality, however, hundreds continued to exist.

208. *Id.* at 780-81. The Ninth Circuit opinion also resorts to the use of a Latin maxim, *Expressio Unius Est Exclusio Alterius*, i.e., that which is not expressly stated is implicitly not intended. *Id.* at 781. This term is a canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative. For example, if the law states that a citizen is entitled to vote, then it means that a non-citizen is not entitled to vote. REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 234-35 (1975).

209. *Westminster Sch. Dist.*, 161 F.2d at 781.

210. *Independent Sch. Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930), cert. denied, 284 U.S. 580 (1931); Tex. Att'y Gen. Op. No. V-128 (1947).

211. Salinas, *supra* note 150.

212. See, e.g., *Hernandez v. Driscoll Consol. Ind. Sch. Dist.*, 2 Race Rel. L. Rep. 329 (S. D. Tex. 1957).

213. See Rangel & Alcalá, *supra* note 141, at 312 n.35, 316 n.52. In 1949, Supt. Woods canceled Del Rio's accreditation (the same district as in *Salvatierra* in 1930) since they continued to segregate Latino children and the district declined to assign Latino teachers to the Anglo school. *Id.* at 338 nn.183-84. Incredibly, this same school district re-appears for sanctions in *United States v. Texas*, 342 F.Supp. 24 (E.D. Tex. 1971).

214. For a copy of the consent decree, see Salinas, *supra* note 150, at 166-68.

215. Rangel & Alcalá, *supra* note 141, at 316 n.57.

B. *Brown v. Board of Education*

Brown v. Board of Education involved four consolidated cases from Kansas, South Carolina, Virginia and Delaware. In all these cases, Thurgood Marshall and his team argued and presented proof that the state-imposed segregation in public schools was inherently harmful and unequal. The argument required taking the position that *Plessy v. Ferguson*'s separate-but-equal doctrine was inapplicable to public education since it was inherently unequal. Three states denied relief, adhering to *Plessy*; the other, Delaware, held that the segregated schools were inferior, thus failing the *Plessy* standard, and ordered that black schools integrate with white schools.²¹⁶

The United States Supreme Court in *Brown* described the issue before them as follows: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? The Court held that such segregation violates the Equal Protection Clause even though the physical and other facilities may be equal, concluding that in the field of public education "[s]eparate educational facilities are inherently unequal."²¹⁷ Chief Justice Warren elaborated:

Today, education is perhaps the most important function of state and local governments. *Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.* It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an*

216. *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954). The *Plessy* "separate-but-equal" doctrine, involving equality in transportation facilities, provided that blacks and whites could be segregated so long as the separate facilities were substantially equal. See *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896).

217. *Brown*, 347 U.S. at 495.

*opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*²¹⁸

The Court had expressly reserved decision in *Sweatt v. Painter*²¹⁹ on the question of whether *Plessy* should be held inapplicable to public education. However, when the issue was squarely presented in *Brown v. Board of Education*, the Court utilized the following language from *Sweatt*: “In finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on ‘those qualities which are incapable of objective measurement but which make for greatness in a law school.’”²²⁰ The Court also considered intangibles such as one’s “ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession”²²¹ and stated that “[s]uch considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²²²

C. Hernandez v. Texas

In *Hernandez v. Texas*,²²³ the United States Supreme Court declared that certain groups other than African Americans qualified for coverage under the Equal Protection Clause of the Fourteenth Amendment.²²⁴ The Texas Court of Criminal Appeals had taken an

218. *Id.* at 493. This language led several civil rights attorneys in the early 1970s to conclude erroneously that the fundamental rights concept implicitly included education. See *Rodriguez*, 411 U.S. at 35.

219. 339 U.S. 629, 634 (1950).

220. *Id.*

221. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950).

222. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). The first Supreme Court case to address the standing and treatment of Latino students is *Keyes v. School Dist. No. One, Denver*, 413 U.S. 189, 196-97 (1973) (holding that Blacks and Latinos should not be placed in the same category to establish the segregated character of a school since Latinos constitute an identifiable class for purposes of the Fourteenth Amendment).

223. *Hernandez v. Texas*, 347 U.S. 475 (1954), *rev'g Hernandez v. State*, 160 Tex. Crim. 72, 251 S. W. 2d 531 (Tex. Crim. App. 1952). Carlos C. Cadena and Gus C. Garcia argued the cause for Hernandez. With them on the brief were Maury Maverick, Sr. and John J. Herrera. *Id.*

224. U.S. CONST. amend. XIV, after initially referring to the rights of citizens of the United States, provides: “[N]or shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection

opposite position.²²⁵ The state's highest court for criminal matters labeled Hernandez as a "Mexican, or Latin American."²²⁶ Hernandez alleged that he was discriminated against because members of the Mexican nationality were deliberately, systematically and willfully excluded from the grand jury that found and returned the indictment and from the petit jury that tried the case, thus depriving him of equal protection.²²⁷ Hernandez took the position that the so-called "rule of exclusion" applied to him.²²⁸ The Court ruled that the long and continued failure to call African Americans for jury service, where it is shown that members of that race were available and qualified for jury service, grand or petit, constitutes a violation of due process and equal protection against members of that race.²²⁹ Texas cases historically classified Latinos as members of the white race²³⁰ and reasoned that the Fourteenth Amendment Equal Protection Clause knew only two classes: one white and one black.²³¹

Hernandez began in Edna, Texas, about 100 miles south of Houston. The accused believed he had a better chance at justice if some members of his community participated in hearing the evidence. However, Jackson County had not had a Latino serve on any jury, grand or petit, in over twenty-five years.²³² In order to prove Latinos were treated as other than whites, Gus Garcia and John J. Herrera proved at the trial court that the dominant attitude in Jackson County was that Latinos are "Mexican" and not white. The Court specifically noted that the Latino's initial burden in substantiating the claim of

of the laws." (emphasis added) One does not have to be a United States citizen to receive constitutional protections.

225. See *Hernandez*, 347 U.S. at 475.

226. *Id.* at 532.

227. *Id.* The State stipulated that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County." *Id.* at 533. A witness estimated that fifteen percent of the county population was "Mexican." *Id.*

228. The rule appears to have been first announced in *Norris v. Alabama*, 294 U.S. 587 (1935).

229. *Hernandez*, 347 U.S. at 532.

230. "Mexicans are white people, and are entitled at the hands of the state to all the rights, privileges, and immunities guaranteed under the Fourteenth Amendment." *Id.* See also *Sanchez v. Texas*, 243 S.W.2d 700 (Tex. Crim. App. 1951) ("Mexican people are not a separate race but are white people of Spanish descent."). Carlos Cadena, the primary brief writer, and Gus Garcia, the orator, had to convince the High Court to do the politically correct thing, i.e., conclude that Latinos are an identifiable ethnic minority group within the white race but yet distinct from other whites.

231. See e.g., *Hernandez*, 347 U.S. at 475; *Sanchez*, 243 S.W.2d at 700; *Bustillos v. State*, 213 S.W.2d 837 (Tex. Crim. App. 1948); *Salazar v. State*, 193 S.W.2d 211 (Tex. Crim. App. 1946); *Sanchez v. State*, 181 S.W.2d 87, 90 (Tex. Crim. App. 1944).

232. *Hernandez*, 347 U.S. at 482.

group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from “whites.” The lawyers offered proof at the trial level that residents of the community distinguished between “white” and “Mexican.” The participation of persons of Mexican descent in business and community groups was shown to be slight. Until shortly before the trial, children of Mexican descent were assigned to a segregated school for the first four grades.²³³ At least one restaurant in town prominently displayed a sign announcing “No Mexicans Served.” On the courthouse grounds at the time of the hearing, there were two men’s toilets, one unmarked, and the other marked “Colored Men” and “Hombres Aqui” (Spanish for “Men Here”).²³⁴ Thus, the Court had little trouble concluding that Latinos received separate treatment socially, educationally and politically.

Chief Justice Earl Warren authored the unanimous opinion recognizing Latinos as a unique group distinct from other whites. The Court stated:

Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.²³⁵

Chief Justice Warren then expressed doubts that no Latino in 6,000 had unintentionally been selected for jury participation in a twenty-five year period, stating, “The result bespeaks discrimination,

233. See TAYLOR, *supra* note 54, at 203, 215-25 (Mexicans are an inferior race; section on school separation, i.e., the Mexican Schools).

234. *Hernandez*, 347 U.S. at 479-80.

235. *Id.* at 478.

whether or not it was a conscious decision on the part of any individual jury commissioner.”²³⁶

D. Discriminatory Purpose Verses Discriminatory Effect

One of the earliest cases to address the unique educational needs of Latino students as a constitutional violation was *Arvizu v. Waco Independent School District*.²³⁷ United States District Court Judge Jack Roberts, who also presided over *United States v. Texas Education Agency*²³⁸ (Austin Independent School District), found *de jure* segregation of Blacks in Waco.²³⁹ Among other inadequate remedies, Judge Roberts found that a “neighborhood school” system, appearing on its face to be neutral, is unacceptable where it fails to “counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation.”²⁴⁰

As to the Latino students, Judge Roberts noted that the formulation of an appropriate legal framework for analyzing their status is a task not free of difficulty.²⁴¹ Five schools in the Waco School system had disproportionately large numbers of Mexican American students. Indisputably, this concentration of Mexican Americans in certain schools resulted from residential housing patterns. *Arvizu* did not seriously contend that state action created the pattern of residential concentration of Mexican Americans.²⁴² In addition, *Arvizu* conceded that no history of statutorily-imposed segregation of Mexican Americans could be shown. However, this did not cause Judge Roberts to stop the inquiry on the educational needs of Latino students. Absent a Waco history of state-imposed Latino

236. *Id.* at 482.

237. 373 F.Supp. 1264 (W.D. Tex. 1973), *rev'd in part*, 495 F.2d 499 (5th Cir. 1974). At the time of the *Arvizu* litigation, I was a staff attorney for the Mexican American Legal Defense and Educational Fund (MALDEF). I participated as one of the two trial lawyers for Pedro Arvizu and the other Latino parents and children in W-71-CA-56. The Black plaintiffs litigated their action under *Baisey v. Board of Trustees of the Waco Ind. School Dist.*, No. W-71-CA-72.

238. 467 F.2d 848 (5th Cir. 1972).

239. *Arvizu*, 373 F.Supp. at 1266, 1268.

240. *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1, 28 (1971).

241. *Arvizu*, 373 F.Supp. at 1268.

242. This comment, applicable to Waco, should not suggest that residential segregation of Latinos in Texas and other parts of the Southwest did not result from official state action. See *Clifton v. Puente*, 218 S.W.2d 272, 273 (Tex. Civ. App.—San Antonio 1948) (deed prohibited, through a restrictive covenant, the sale or lease of real property to persons of “Mexican descent”).

segregation, the presumption of discrimination disappears, and each case involving alleged discrimination against Latinos must be determined on an *ad hoc* basis. The court in *Arvizu* emphasized that *Brown's* declaration that "separate educational facilities are inherently unequal"²⁴³ was made in the context of a history of decades of official discrimination against Blacks.²⁴⁴

Although Judge Roberts found that the concentration of Mexican American students in certain schools was not the result of state action, he declared:

Our obligation to assure to the Mexican American Plaintiffs in this case the equal protection of the laws does not end with our finding that such segregation of Mexican Americans as does exist in Waco is not the result of state action. Mexican Americans in Waco constitute an identifiable ethnic minority, recognizable by their numbers, concentration, cultural uniqueness, and common special needs and problems. We find that Mexican American students in Waco constitute "an identifiable, ethnic-minority class entitled to the equal protection guarantee of the Fourteenth Amendment." As such, Mexican American students are entitled to proper implementation of steps necessary to assure them the equal protection of the laws and an equal educational opportunity.²⁴⁵

The court noted that since Mexican Americans in Waco are an identifiable ethnic class with special educational needs, the Waco Independent School District had an affirmative obligation to assure that Mexican American students are assured the equal protection of the laws in the future.²⁴⁶ The court specifically noted that, among other remedies, Mexican Americans in the Waco Independent School District are entitled to "[i]mplementation of a curriculum and special educational programs, such as bilingual education, necessary to provide equal educational opportunities for Mexican American students as a group."²⁴⁷ Judge Roberts rationalized that this approach

243. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

244. *Arvizu*, 373 F.Supp. at 1269.

245. *Id.*

246. *Id.*

247. *Id.* at 1269-70.

would protect Latinos against future discrimination occurring after recognition of their new legal status in *Cisneros* as an identifiable ethnic minority group.²⁴⁸

Judge Roberts added future failure of school officials to provide the required affirmative relief “should be regarded as *state action with a foreseeable discriminatory effect*.”²⁴⁹ Applying the teachings of *Brown*, the court concluded:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. . . . Development of a curriculum and special programs to assure that Mexican-American students will receive an equal opportunity for a quality education is both an educational and a legal obligation of the school district.²⁵⁰

Judge Roberts’s discriminatory impact approach in *Arvizu* has been effectively overruled by subsequent Court cases adopting the discriminatory intent test for proving violations of the Equal Protection Clause.

The Burger Court in 1976 resolved the equal protection standard of proof when it decided *Washington v. Davis*.²⁵¹ *Davis* involved a suit by African American police officers and applicants who were denied promotion or hiring on the basis of the results of a written personnel test that was applied across the board to all. A disproportionately large number of African Americans failed the test administered by the District of Columbia’s police department. The

248. See generally *Salinas, supra*, note 83.

249. *Arvizu*, 373 F.Supp. at 1270 (emphasis added).

250. *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). The trial court ordered that for the 1973-74 school year, Waco will implement a more sophisticated bilingual, bicultural program, utilizing available Mexican American educational consultants and continually reevaluating the bilingual program. *Id.* at 1280. Based on my personal knowledge of the trial evidence, the classes for the Educable Mentally Retarded (EMR) disproportionately included eighty-five percent Black and Latino students in a school district that had slightly over forty percent minority. When my co-counsel repeatedly asked the director of elementary education to explain the incredible imbalance, after initially stated she did not know, she startled everyone and stated, “Well, maybe that’s the way God made them!” The Latino plaintiffs made their point, and, like any good lawyer should do, my co-counsel passed the witness.

251. *Washington v. Davis*, 426 U.S. 229 (1976).

plaintiffs alleged that the examination violated the equal protection aspect of the Due Process Clause of the Fifth Amendment.²⁵² Since the litigation involved an employment discrimination issue, the District of Columbia Circuit Court of Appeals utilized the discriminatory impact test announced in *Griggs v. Duke Power Co.*²⁵³

Griggs, which involved a private employer whose actions were reviewed under Title VII of the 1964 Civil Rights Act,²⁵⁴ held that proof of disproportionate impact sufficed to establish a rebuttable case of race discrimination.²⁵⁵ The *Davis* appellate court held that, pursuant to *Griggs*, the District of Columbia police department had unconstitutionally discriminated since it used an examination that had not been shown to be an adequate measure of job performance as a police officer. However, the Court reversed the District of Columbia Circuit, holding that it had erroneously applied standards developed for Title VII of the 1964 Civil Rights Act to the Constitution.²⁵⁶ The Court discarded the disproportionate impact avenue as sufficient alone to make a case of unconstitutional racial discrimination. Instead, the Court held that only actions involving purposeful intent to discriminate on the basis of race reach the requirements of the Equal Protection Clause.²⁵⁷

However, the Court left the door open to circumstances where proof of discriminatory impact would be relevant. The Court specifically held that proof of discriminatory or purposeful intent could be inferred from the totality of the pertinent facts, including the very fact of the disproportionate impact.²⁵⁸ As to the fact that many more African Americans than whites failed the test, the Court found the test neutral on its face and rationally related to a legitimate governmental purpose, *i.e.*, the modest improvement of the communicative skills of the police officers.²⁵⁹ Under the totality of the circumstances, which included affirmative efforts to recruit officers of color and the improved minority numbers in the recruit classes, the

252. See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (The discriminatory actions of the District of Columbia school system are subject to the equal protection component of the Due Process Clause of the Fifth Amendment.).

253. 401 U.S. 424 (1971).

254. 42 U.S.C. § 2000(e).

255. *Griggs*, 401 U.S. at 432.

256. *Davis*, 426 U.S. at 238-39.

257. *Id.* at 241-42.

258. *Id.* at 242; see also *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).

259. *Davis*, 426 U.S. at 245-46.

Court determined that the evidence negated any inference of intentional racial discrimination.²⁶⁰

Shortly after *Davis*, the Court decided *Castaneda v. Partida*,²⁶¹ a grand jury discrimination case. The Court reviewed proof that the population of the county in question was 79.1% Latino, but that, over an eleven-year period, only thirty-nine percent of the persons summoned for grand jury service were Latino.²⁶² Where a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process.²⁶³ Recent cases have established that an official act is not unconstitutional *solely* because it has a racially disproportionate impact.²⁶⁴ Nevertheless, as the Court has recognized that “[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”²⁶⁵

In *Personnel Administrator of Massachusetts v. Feeney*,²⁶⁶ the appellee, a female, alleged that she was denied equal protection since veterans were given preference by a state employment statute and, even though she had high test scores, she lost civil service positions to male veterans since she was not a veteran.²⁶⁷ The Court rejected the claim, following the teachings of *Washington v. Davis*.²⁶⁸ The Court concluded instead that the disproportionate impact must be *traced to a purpose to discriminate on the basis of race*.²⁶⁹ The Court repeated

260. *Id.* at 246.

261. 430 U.S. 482 (1977).

262. *Id.* at 495.

263. *Id.* at 496, 501.

264. *See, e.g., Davis*, 426 U.S. at 239; *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977).

265. *Arlington Heights*, 429 U.S. 252, 266 (1977).

266. *Personnel Administrator v. Feeney*, 442 U.S. 256, 259 (1979) (preference operates overwhelmingly to the advantage of males).

267. On the 1973 examination, Ms. Feeney was placed in a position on the list for appointment behind 12 male veterans, 11 of whom had lower scores. *Id.* at 264.

268. *Davis*, 426 U.S. 229.

269. *Feeney*, 442 U.S. at 260. *See Davis*, 426 U.S. at 238-44. A central theme of this article is precisely that the discrimination is *traced to a purpose to discriminate on the basis of race*: The States of Arizona, California, and Texas, particularly, have engaged in *de jure* segregation and in other discriminatory practices against persons of Latino descent. As a result, these school districts are not in position to argue *de facto* or inadvertent segregation or disparate impact issues as a defense to state action under the Fourteenth Amendment. *See, e.g., Romo v. Laird*, No. 21617 (Maricopa Co. Super. Ct. 1925); *Mendez v. Westminster Sch. Dist.*, 64 F.Supp. 544 (S.D. Cal. 1946); *Delgado v. Bastrop Ind. Sch. Dist.*, Civil No. 388 (W.D. Tex. June 15, 1948); *Cisneros v. Corpus Christi Ind. Sch. Dist.*, 324 F.Supp. 599 (S.D. Tex. 1970).

this standard later in the opinion, stating even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.²⁷⁰ Just as there are cases in which impact alone can unmask an invidious classification,²⁷¹ there are others, notwithstanding impact, in which the legitimate non-invidious purposes of a law cannot be missed.

Feeney's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions. The concurring opinion in the trial court stated, "But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme—as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?"²⁷²

The Court recognized that it would be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.²⁷³ However, the Court stressed that the discriminatory purpose concept implies more than intent as volition or intent as awareness of consequences.²⁷⁴ Instead, it implies that the decision-maker, a state legislature in *Feeney*, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.²⁷⁵ This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an

270. *Feeney*, 442 U.S. at 272.

271. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The distinction made by the Massachusetts statute is between veterans and nonveterans, not between men and women. *Feeney*, 442 U.S. at 275.

272. *Id.* at 278 (citing *Feeney v. Commonwealth of Mass.*, 451 F.Supp. 144, 151 (D. Mass. 1978)).

273. *Id.*

274. *Id.* at 279.

275. *Id.* *Feeney* further stated that when the impact is essentially an unavoidable consequence of a legislative policy that has historically been deemed to be legitimate, the inference of discrimination simply fails to ripen into proof. *Id.* The same cannot be said of the historical policy involving Latino education where the courts have found educational discrimination. *See, e.g.*, *Keyes v. School Dist. No. One, Denver*, 413 U.S. 189 (1973); *Arvizu v. Waco Ind. Sch. Dist.*, 373 F.Supp. 1264 (W.D. Tex. 1973); *Cisneros v. Corpus Christi Ind. Sch. Dist.*, 324 F.Supp. 599 (S.D. Tex. 1970); *Hernandez v. Driscoll Consol. Sch. Dist.*, 2 Race Rel. L. Rep. 329 (S.D. Tex. 1957); *Delgado v. Bastrop Ind. Sch. Dist.*, Civil No. 388 (W.D. Tex. June 15, 1948); *Mendez v. Westminster Sch. Dist.*, 64 F.Supp. 544 (S.D. Cal. 1946); *Romo v. Laird*, No. 21617 (Maricopa Co. Super. Ct. 1925).

identifiable group are as inevitable as the gender-based consequences of the state law, a strong inference that the adverse effects were desired can reasonably be drawn.²⁷⁶

V. AN APPROPRIATE STANDARD FOR PROVING UNEQUAL EDUCATIONAL OPPORTUNITY

A. *The Need for an Equal Protection Standard That is Not Unequal or Arbitrary*

Gone are the days when racists will document with impunity that they need to build another Mexican school to contain the growing Latino population.²⁷⁷ Or that they do not serve Mexicans in the restaurant intended for whites only.²⁷⁸ Or include in their restrictive covenants that this property shall not be conveyed to persons of the "African or Mexican Race."²⁷⁹ Or that the business community wants to continue to have a workforce that will do the dirty, dangerous jobs at dismally low wages.²⁸⁰ The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."²⁸¹ The language is simple, but the courts, including the Supreme Court, have complicated matters by superimposing a burden of proof that practically defeats the promise of equal protection.

The language of the Equal Protection Clause does not explicitly or implicitly provide that the discriminatory action has to be consciously taken, i.e., to deprive one of equal treatment because the person is African American or Latino. In that regard, the language lacks guidance. If the action or policy discriminates, and the burden of the action or policy falls more on the Latino community, then why can

276. *Feeney*, 442 U.S. at 279 n.25.

277. *Rangel & Alcala*, *supra* note 141, at 313 n.41.

278. This occurred to Sgt. Macario Garcia in Richmond, Texas, while in uniform, two months after being awarded the Congressional Medal of Honor by President Harry S Truman. See ALONSO S. PERALES, *ARE WE GOOD NEIGHBORS?* 156-57 (1948).

279. See generally *Mathews v. Andrade*, 198 P.2d 66 (Cal. Dist. Ct. App. 1948) ("No person or persons of the Mexican race, or other than the Caucasian race shall use or occupy any buildings or any lot, except that this covenant shall not prevent occupying by domestic servants of a different race domiciled with an owner, tenant, or occupant thereof."); *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App.—San Antonio 1948). See also TAYLOR, *supra* note 54, at 226.

280. See TAYLOR, *supra* note 54, at 195.

281. U.S. CONST. amend. XIV.

that not be classified as a violation of “equal protection”? The Court needs to adopt a true historical interpretation that provides the ammunition to make the purpose of the Equal Protection Clause meaningful. By passing the Fourteenth Amendment, the nation took the drastic action to eradicate the discrimination previously practiced against African Americans. However, the Justices who controlled the majority provided their own reading of history behind the amendment.²⁸² Supreme Court historian Leonard W. Levy has stated:

Two centuries of Court history should bring us to understand what really is a notorious fact: the Court has flunked history. The Justices stand censured for abusing historical evidence in a way that reflects adversely on their intellectual rectitude as well as on their historical competence. . . . The Court artfully selects historical facts from one side only, ignoring contrary data, in order to support, rationalize, or give the appearance of respectability to judgments resting on other grounds.²⁸³

Levy emphasizes the words of George Orwell: “Who controls the past controls the future; who controls the present, controls the past.”²⁸⁴ Professor Levy concludes, “We might be better off if judges were cabined and contained by those words [of the United States Constitution], rather than deciding on the basis of their own agendas.”²⁸⁵

The jurisprudence of original intent relies completely upon history.²⁸⁶ The problem arises when Justices of the Court “think along lines that members of the bench and bar tend to share as people trained in the adversarial process.”²⁸⁷ A “scholar who has no stake in the

282. Justices on the Supreme Court have read the Fourteenth Amendment and other parts of the Constitution to conclude disputes in fashions that have shocked historians in the justices’ misuse of history. See, e.g., LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 310-21 (1988). Some of the cases Levy mentions include *Scott v. Sanford*, 60 U.S. 393 (1857), the *Slaughterhouse Cases*, 83 U.S. 36 (1873), the *Civil Rights Cases*, 109 U.S. 3 (1883) and *Plessy v. Ferguson*, 163 U.S. 537 (1896).

283. LEVY, *supra* note 282, at 300.

284. *Id.* at 320, citing GEORGE ORWELL, 1984, at 35 (1949).

285. *Id.* America faces an “agenda” battle in the United States Senate since as of September 11, 2005, the Supreme Court had two vacancies with the resignation of Justice Sandra Day O’Connor and the death of Chief Justice William Rehnquist.

286. LEVY, *supra* note 282, at 310.

287. *Id.* at 310-11.

outcome of a question is more likely to answer it correctly . . . than the advocate. The adversarial system . . . invites the manipulation of evidence and distorted interpretations.”²⁸⁸ Pointing to *Brown v. Board of Education*, Professor Levy criticized the Court for allowing distorted perspectives to be promoted from both the NAACP and the school districts and thus avoiding an ultimate decision based on original intent.²⁸⁹ He concludes that the Supreme Court in *Brown* “could have easily held, in conformance with the preponderance of evidence, that the framers of the Fourteenth Amendment and the state legislatures that ratified it, intended the amendment to establish the principle of racial equality before the law.”²⁹⁰ I recognize that the segregation factors in *Brown* explicitly established an equal protection violation. On the other hand, I argue that practices and policies that inevitably result (discriminatory impact) in inequality implicitly violate the principle of racial equality that the Fourteenth Amendment intended to promote as a means of ending discrimination.

The case that *Brown* effectively reversed, *Plessy v. Ferguson*,²⁹¹ displays the Court’s disastrous use of history.²⁹² In *Plessy*, the Court upheld the constitutionality of state Jim Crow laws that provided for “equal but separate accommodations for the white and colored races” in railroad cars.²⁹³ The Court shockingly concluded that the amendment could not have intended distinctions based upon color²⁹⁴ and that laws requiring segregation “do not necessarily imply the inferiority of either race to the other.”²⁹⁵ “The Court ignored massive evidence heard in the trumpeting of white racists from the pulpits, the press and public platforms, that the purpose of Jim Crow laws was to uphold white supremacy and keep the blacks in their places of inferiority.”²⁹⁶

288. *Id.* at 311.

289. *Id.* at 312.

290. *Id.*

291. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

292. LEVY, *supra* note 282, at 317.

293. *Plessy*, 163 U.S. at 550-51.

294. *Id.* at 544.

295. *Id.*

296. LEVY, *supra* note 282, at 318.

B. *The Inadequacy of the Purposeful Intent Test*

The Purposeful Intent Test²⁹⁷ is unreasonable in that it requires litigants to prove almost the impossible in order to make the Equal Protection Clause a Constitutional reality. The standard effectively prevents jurors from drawing conclusions from evidence and actions as we all do on a daily basis. The Purposeful Intent Test requires a burden of proof²⁹⁸ that effectively adds the element of specific intent.²⁹⁹ The Purposeful Intent standard forces the victim of ethnic discrimination to play the role of a prosecutor and establish that the accused acted with the specific intent to put the Latino "in his place."³⁰⁰ Racism in American law has caused substantial damage to victims. As a result, efforts to ameliorate that damage and to heal the psychological wounds are critical to healthy present-day racial interactions.³⁰¹

As a former state prosecutor and criminal court judge, I conducted and presided over *voir dire* of jury panels. I often established the concept of "intent" even where there was no eyewitness who heard the defendant say, e.g., "I am going to kill you."³⁰² Whether the accused acted with specific intent to kill or he

297. I refer to the requirement found in *Washington v. Davis*, 426 U.S. 229, 239 (1976). *Davis* held that only actions involving *purposeful intent* to discriminate on the basis of race reach the requirements of the Equal Protection Clause. *Id.* (emphasis added). *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979), undermined the hopes of suspect classes when the Court stated that "discriminatory purpose" implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

298. The burden of proof includes the burden of persuasion (e.g., beyond a reasonable doubt) and the burden of production. BRYAN A. GARNER, *A HANDBOOK OF CRIMINAL LAW TERMS* 79 (2000).

299. Specific intent is the "intent to accomplish the *precise* criminal act that one is later charged with." General intent is the state of mind required for other than specific intent crimes and usually takes the form of recklessness (involving *actual awareness* of a risk and the culpable taking of that risk). *Id.* at 354.

300. An example of a specific intent crime is burglary, traditionally proved by alleging the entry (general intent) of a habitation with the intent to commit theft or a felony (specific intent).

301. See ERIC YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 83 (1999).

302. Civil rights litigants rarely possess the admission of a racist attitude in seeking to prove their case. Seldom will we have the frank comment of one's racist thoughts as that made recently by William Bennett, former Secretary of Education for the United States. Bennett suggested that aborting black children would reduce crime, but he immediately stated such a policy would be an "impossible, ridiculous and morally reprehensible thing to do." Michael A. Fletcher & Brian Faler, *Bennett Defends Abortion Comment as 'Thought*

acted with the intent to commit an act clearly dangerous to human life does not really matter. A high awareness of an outcome can also establish a general intent. These methods of proof are allowed in criminal cases where the burden of proof is beyond a reasonable doubt.³⁰³ However, in constitutional civil rights cases, where the standard is theoretically by a preponderance of the evidence, the requirements imposed by *Davis* and *Feeney* seem to have commandeered the civil preponderance of the evidence³⁰⁴ test and substituted the criminal case standard of beyond a reasonable doubt. There is no logical explanation other than judicial legislation for this outcome.³⁰⁵

Latinos, an ethnic language minority, can establish that a particular rule, such as a “No Spanish Rule,” will have a disproportionately adverse impact. The rule will have a high probability of unequal treatment against Latinos. It defies reality to conclude that the discriminatory outcome is acceptable since the action was allegedly taken to improve the English language abilities of Latinos. An equal or greater number of people will vigorously counter that the action delays the English language skills of the Latino children.³⁰⁶ Legal standards traditionally allow the fact-finder the opportunity to draw certain conclusions as to an awareness or high probability of a result. The mental state required for this effort can be either knowledge or recklessness. One who acts knowingly acts consciously or deliberately; the circumstances indicate that the actor is

Experiment,’ HOUS. CHRON., Oct. 1, 2005, at A3. If Bennett is being honest, then why utter such racially insensitive words?

303. GARNER, *supra* note 298, at 574.

304. *Id.* at 78.

305. For example, when Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, was first interpreted, the courts concluded that Congress created a results test. *E.g.*, *Lau v. Nichols*, 414 U.S. 563 (1974). The federal regulations provided, “Discrimination is barred which has that effect even though no purposeful design is present.” 45 C.F.R. § 80.3(b)(2). However, the Court later ruled that compensatory relief should not be awarded to private plaintiffs in the absence of discriminatory intent while primarily holding declaratory and limited injunctive relief is available where a disparate impact can be shown by a private party. *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 584 (1983). Congress had a chance to change the administrative interpretation of Title VI, but the House in 1966 defeated a proposal to bar only intentional discrimination. It never received action in the Senate. *Id.* at 620 (Marshall, J., dissenting). More recently, the Supreme Court concluded that there is no private cause of action to enforce regulations promulgated under Title VI. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

306. *See Independent Sch. Dist. v. Salvatierra*, 33 S.W.2d 790, 793 (Tex. Civ. App. 1930) (concession by Superintendent that the best way for a child to learn another language is to be in the company of the children who speak the other language).

aware and well-informed.³⁰⁷ A person acts recklessly if his conduct is “[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk.”³⁰⁸

Regardless of whether a person, agency or school district acted purposely, knowingly, or recklessly, the result is the same: The target of the disparate treatment or disparate impact knowingly suffers unequal educational opportunity or recklessly ends up in a life of inadequate educational attainment. Where the state continues an unsuccessful practice or policy, a practice or policy that has continuously been shown to be ineffective, the state proceeds knowingly in reckless disregard or callous indifference to the student’s serious educational needs. In other words, to continue providing the same futile remedy to the ailment in full awareness of its ineffectiveness constitutes poor, inadequate educational medicine. In summary, the state’s actions can only be described as constituting a knowingly callous, insensitive disregard to the serious educational needs of Latinos, America’s largest and still growing language minority group.³⁰⁹

How can discriminatory purpose or intent be shown? In a very few circumstances, a statute will clearly create a suspect classification and target the group for adverse action.³¹⁰ Another circumstance involves a facially neutral statute or ordinance that discriminates in its application.³¹¹ The Court in *Davis* even stated that disparate impact could be relevant to determine if, in the totality of the circumstances, illegal discrimination exists.³¹² It is my opinion that a school district is guilty of discrimination on the basis of ethnicity if, knowing the totality of the circumstances, that district makes or enforces a decision that has an outcome that disadvantages or harms a suspect class.³¹³

307. GARNER, *supra* note 298, at 395-96.

308. *Id.* at 576. The mental state of recklessness also connotes a circumstance where one foresees the harmful consequence and consciously takes the risk. *Id.* at 577.

309. Not every single Latino speaks Spanish. However, the article addresses the needs of those Latinos whose educational opportunities are impacted by their cultural characteristics, which include the use of the Spanish language.

310. *E.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982).

311. *E.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

312. *Washington v. Davis*, 426 U.S. 229, 242 (1976). Justice John Paul Stevens, concurring, stated that “the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court’s opinion might assume.” *Id.* at 254 (Stevens, J., concurring).

313. The Court has concluded that Latinos constitute a suspect class under the Equal Protection Clause. *Hernandez v. Texas*, 347 U.S. 475 (1954); *see Keyes v. School Dist. No. One, Denver, Colorado*, 413 U.S. 189 (1973).

C. *The Hernandez* “Result Bespeaks Discrimination” Test

The *Hernandez* and *Brown* cases send different signals as to the Court’s rationale for finding a Fourteenth Amendment violation. *Brown* epitomizes the disparate treatment case. *Hernandez*, on the other hand, appears to represent the disparate impact case. *Hernandez* lacks the smoking gun direct proof of racism that *Brown* abundantly possesses. However, the *Hernandez* Court found the circumstantial evidence to be quite compelling. In *Hernandez*, the state argued that the exclusion of Latinos from juries occurred not on the basis of Latino ancestry but on the fact that few Latinos qualified for jury duty. The Court found something strangely wrong when, during a period of twenty-five years, a county with a fourteen percent Latino population could not find even one Latino to serve on a jury. The statistics alone seem to pave the road to the Court’s language that the “result bespeaks discrimination.”

The *Hernandez* lawyers also proved that the Jackson County community had an ethnic animosity against Latinos in schools, restaurants and even the courthouse restroom that had the notorious sign that read “Colored Men; Hombres Aqui.”³¹⁴ While *Hernandez* leaves room to argue that discriminatory impact evidence suffices to prove a violation of equal protection, precedents like *Davis* and *Feeney* bring civil rights attorneys and their clients back to a pessimistic reality that they need the smoking gun of an overt racist in order to prove their equal protection claim.³¹⁵ The school districts in *Brown* overtly classified Black students for segregated education. On the other hand, in *Hernandez*, Jackson County covertly justified the exclusion of Latinos from grand and petit juries by suggesting that the number of qualified venire candidates from the Latino community was low.³¹⁶

314. *Hernandez*, 347 U.S. at 479-80. The Spanish term “Hombres Aqui” obviously conveyed the message that the “colored” restroom was to be shared with Latinos in that community.

315. *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

316. *See generally Hernandez*, 347 U.S. at 480-81.

D. The Deliberate or Callous Indifference to Serious Educational Needs Test

Why should the Equal Protection Clause be restricted to circumstances where only overt racism is proved? This should not be the case. Professor Levy has taken issue with the twisted nature of Supreme Court reasoning.³¹⁷ Since the Court is not likely to change the equal protection precedents previously discussed, lower courts need to assess another avenue for relief. *Estelle v. Gamble*³¹⁸ provides optimism for those of us who feel "excluded" from the American dream of equal opportunity.

Estelle holds that a prison official violates one's civil rights when that official engages in deliberate indifference to a prisoner's serious medical needs.³¹⁹ Gamble, an inmate in the Texas prison system, sued the prison doctor and other officials and alleged cruel and unusual punishment in violation of the Eighth Amendment's provision that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."³²⁰ The Court concluded that these elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. The inmate has no choice but to rely on prison authorities to treat his medical needs.³²¹ If the authorities fail to respond to his medical problems, those needs will not be met. The Court noted that a failure to react may actually produce physical "torture or a lingering death," the evils of most immediate concern to the drafters of the Eighth Amendment.³²² The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common law view that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."³²³

By analogy, a school system violates a student's civil rights when that system, operated by school boards, principals and teachers,

317. See, e.g., LEVY, *supra* note 282, at 310-21.

318. 429 U.S. 97 (1976).

319. *Id.* at 104 (finding that such indifference constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment).

320. U.S. CONST. amend. VIII.

321. *Estelle*, 429 U.S. at 103.

322. *Id.* at 103.

323. *Id.* at 104.

is consciously and thus deliberately indifferent to a student's serious educational needs. The Purposeful Intent Test is too unyielding and obstructive to a full enforcement of the goals of the Fourteenth Amendment. The *Hernandez* results test, in my opinion, constitutes a practical and enforceable standard for the Fourteenth Amendment.³²⁴ The public school student depends on the state to provide an education, and compulsory attendance school laws mandate that the child appear in the school. The untrained student, like the inmate in *Gamble*, has no choice but to rely on school authorities to meet his serious educational needs. If the authorities fail to do so, those scholastic needs will not be met. In the worst cases, such a failure to meet these academic needs may actually produce an illiterate population of Latinos or at least one that is barely capable of competing in our highly competitive and technological world. To quote pertinent language from *Brown*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . Today it is a principal instrument in . . . preparing [the child] for later professional training. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*³²⁵

The Latino student in the public school system is like the inmate in prison: "[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."³²⁶ Students who are linguistically or educationally disadvantaged are not at liberty and do not have the means to care for

324. As an alternative, the Eighth Amendment's deliberate indifference standard would aid in the assessment of the equal educational opportunity needs of the Latino child.

325. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added). This language led several civil rights attorneys in the early 1970s to conclude erroneously that the fundamental rights concept implicitly included education. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

326. *Estelle*, 429 U.S. at 104.

their serious educational needs. Those students need trained instructors to pave the way to educational freedom.

VI. CONCLUSION

As previously described, this article seeks to address the unique educational needs of the Latino child and to determine if *Brown* and *Hernandez* continue to possess legal relevance in this millennium. The Equal Protection Purposeful Intent Test as set forth in *Washington v. Davis* and its progeny must give way to a more realistic test that recognizes the devious forms in which discrimination can surface. It is my contention that *Brown* and *Hernandez* present continuing avenues for relief from discriminatory practices. The promise of *Brown* and *Hernandez* for a race-neutral America, free of debilitating discrimination, remains not only a worthy goal but also a challenging undertaking. Will twenty-five years suffice to remove these vestiges of discrimination, as Justice O'Connor targeted in *Grutter v. Bollinger*?³²⁷ I petition the Court to adjust to the realities of the covert and ingenious acts of intolerance that our society experiences.³²⁸ In other words, the Court should alleviate the burdens imposed by the *Davis* purposeful intent principle, particularly in the public school system.

It is my position that the state acts in the educational arena when a governmental agent (principal, superintendent) or authority (school board) decides a course of action that will lead to a burdensome, harmful or an unequal result. In the case of the Latino child with racial, ethnic, cultural and/or linguistic differences from the majority Anglo population, the imposition of a pedagogical approach that clashes with or excludes the Latino child can only be described as being the product of state action in violation of the Due Process³²⁹ or

327. 539 U.S. 306, 343 (2003). "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.*

328. A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly. *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

329. *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947), *rev'g* 64 F. Supp. 544 (S.D. Cal. 1946).

Equal Protection Clauses of the Fourteenth Amendment³³⁰ (state matters) or of governmental action in violation of the Due Process Clause of the Fifth Amendment (federal matters).³³¹ Justice Powell closed his opinion in *Keyes* with the following words:

It is well to remember that the course we are running is a long one and the goal sought in the end—so often overlooked—is the best possible educational opportunity for all children. Communities deserve the freedom and the incentive to turn their attention and energies to this goal of quality education, free from protracted and debilitating battles over court-ordered student transportation.³³²

By the same token, parents of all students, regardless of ethnic ancestry, deserve to have a school leadership focused on programs that deliver a quality and effective education, one free from the need to find purposeful intent to discriminate before remedial action can be taken by school officials.

Where a Latino child's educational program is one that has been failing for years, the continued utilization of those failed programs is egregious and capricious. One ignores reality to argue that the results are not the product of state action. Whether the policy is purposefully implemented at the expense of the Latino child or it is callously indifferent to the serious educational needs of the Latino children, the result of educational neglect is the same: It is unfair, unjust, inequitable, unreasonable, undeserved, arbitrary, capricious, dishonorable, biased and just plain wrong. We must remember the words of wisdom expressed over half a century ago by Justice Felix Frankfurter, one of our leading jurists: "It was a wise man who said that there is no greater inequality than the equal treatment of unequals."³³³

More has to be done to level the playing field of educational opportunity. We should heed the words of wisdom expressed in *Plyler v. Doe*³³⁴ where the Court, almost ten years after declaring that education is neither an explicit nor an implicit fundamental

330. *Brown*, 347 U.S. 483.

331. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the District of Columbia school segregation violated the Fifth Amendment Due Process Clause).

332. *Keyes v. School Dist. No. One, Denver*, 413 U.S. 189, 253 (Burger, J., concurring).

333. *Dennis v. United States*, 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting).

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

constitutional right,³³⁵ made the following comments regarding the need for fair and equitable educational opportunities in our society:

Public education is not a “right” granted to individuals by the Constitution. . . . But neither is it merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. . . . “[As] . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” . . . [I]n addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.³³⁶

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.³³⁷

The Court must clear the air in order to save another generation of innocent students whose unique educational needs are not being addressed. The fact that Latinos constitute our nation’s largest ethnic minority group alone warrants drastic action from all three branches of our government. Otherwise a substantial portion of the American population will be left in a state of educational distress. Do the arguments presented by ranchers in 1929 to keep the Latino population uneducated still have vitality in 2005? Does the dominant white

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

336. *Plyler*, 457 U.S. at 221.

337. *Id.* at 221-22.

population act through government decisions to preserve and protect the wealth they have accumulated over the 400 years they have dominated the territory that is the United States? Unless legislatures and courts take immediate action to address the educational neglect of America's Latino population, the answers to these two questions appear to be "yes."